Human Security and Non-Citizens

Law, Policy and International Affairs

Edited by Alice Edwards and Carla Ferstman

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HUMAN SECURITY AND NON-CITIZENS

The past decades have seen enormous changes in our perceptions of 'security', the causes of insecurity and the measures adopted to address them. Threats of terrorism and the impacts of globalisation and mass migration have shaped our identities, politics and world views.

This volume of essays analyses these shifts in thinking and, in particular, critically engages with the concept of 'human security' from legal, international relations and human rights perspectives. Contributors consider the special circumstances of non-citizens, such as refugees, migrants, and displaced and stateless persons, and assess whether, conceptually and practically, 'human security' helps to address the multiple challenges they face.

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CARLA FERSTMAN is the Director of REDRESS, an international non-governmental organisation which provides legal support to survivors of torture and related crimes. She has worked as a criminal defence lawyer in Canada and written and lectured extensively on international criminal law and human rights.

HUMAN SECURITY AND NON-CITIZENS

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Edited by
ALICE EDWARDS
CARLA FERSTMAN

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CONTENTS

About the editors viii
About the contributors x
Preface xix
Acknowledgements xxvi

PART I **Human security, human rights and human dignity** 1

1 Humanising non-citizens: the convergence of human rights and human security 3
ALICE EDWARDS AND CARLA FERSTMAN

PART II **Physical and legal security, armed conflict and refuge** 47

2 The value of the human security framework in addressing statelessness 49
MARK MANLY AND LAURA VAN WAAS

3 Protection and empowerment: strategies to strengthen refugees' human security 82
FRANCES NICHOLSON

4 From here to where? Refugees living in protracted situations in Africa 125
EDWIN ODHIAMBO ABUYA

5 Once we were warriors: critical reflections on refugee and IDP militarisation and human security 166
ROBERT MUGGAH

6 Human security and protection from *refoulement* in the maritime context 195
BARBARA MILTNER

PART III **Migration, development and environment** 225

7 Empowering migrants: human security, human rights and policy 227
PIA OBEROI

8 Labour migration management and the rights of migrant workers 273
RYSZARD CHOLEWINSKI

9 Socio-economic rights, human security and survival migrants: Whose rights? Whose security? 314
EVE LESTER

10 An insecure climate for human security? Climate-induced displacement and international law 357
JANE MCADAM AND BEN SAUL

11 Human security and trafficking of human beings: the myth and the reality 404
RYSZARD PIOTROWICZ

PART IV **National security and the 'war on terror'** 419

12 A distinction with a legal difference: the consequences of non-citizenship in the 'war on terror' 421
CRAIG FORCESE

13 Immigration law enforcement after 9/11 and human rights 459
DANIEL MOECKLI

14 Protection of non-citizens against removal under international human rights law 495
VESSELINA VANDOVA

15 The human security framework and counter-terrorism: examining the rhetoric relating to 'extraordinary renditions' 532
CARLA FERSTMAN

16 Legal routes to restoring individual rights at Guantanamo Bay: the effectiveness of *habeas corpus* applications and efforts to obtain diplomatic protection 560
LORNA MCGREGOR

Index 589

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PREFACE

In 1994, the United Nations Development Programme (UNDP) stated that the concept of security had been too narrowly construed for too long as security of territory from external aggression, as protection of national interest in foreign policy, or as global security from the threat of a nuclear holocaust.[1] Arguing that it is time to move beyond the narrow concept of national security to 'an all-encompassing concept'[2] of 'human security', the UNDP identified two main components of this new approach:

> It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life.[3]

In 2003, the UN Commission on Human Security issued its final report in which it concluded that:

> Human security means protecting vital freedoms. It means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations. It also means creating systems that give people the building blocks of survival, dignity and livelihood. Human security connects different types of freedoms – freedom from want, freedom from fear and freedom to take action on one's own behalf. To achieve human security, it offers two general strategies: protection and empowerment.[4]

The framework aims to treat human security, human rights and human development as mutually reinforcing goals. The new framework centres directly and specifically on *people*, allowing them to live in safety and

[1] UNDP, *Human Development Report: New Dimensions of Human Security*, 1994, ch. 2, 22.
[2] *Ibid.*, 24.
[3] *Ibid.*, 25.
[4] UN Commission on Human Security, *Human Security Now,* New York, 2003, available at: www.humansecurity-chs.org/finalreport/English/FinalReport.pdf (last accessed 10 Jan. 2009).

dignity and to earn a livelihood, rather than on the state and its security or sovereignty. The 2004 report of the UN Secretary-General's High Level Panel on Threats, Challenges and Change focused largely on traditional ideas of security, although it too acknowledged that global security is about state as well as human security.[5]

This new framework of human security causes one to consider the safety and security of individuals irrespective of their attachment to, or status within, a state. However, the prevailing emphasis in international law and affairs on state sovereignty and the promotion of state interests remains, bolstered by the state-centric security initiatives in the post-September 11, 2001 (9/11) security environment.

The lack of attachment to and citizenship of an adopted or asylum state often places non-citizens in a situation different to that of nationals. The experience of non-citizens is frequently characterised by discrimination, xenophobia, criminalisation, poverty, humanitarian fatigue, lack of empowerment, dependency and uncertainty. Non-citizens face particular threats to their human security and they do not always benefit from national security initiatives because of their immigration status (or lack of status).

The international refugee protection regime, with few exceptions, grants rights according to status within the territory. In fact, in the context of mass influx, refugees and asylum-seekers have been seen as threats to national security, or even to international peace and security.[6] International human rights law contains some key exceptions for non-nationals, especially in relation to political participation and economic rights; and there remains no global international migration legal framework, although there is a human rights treaty regime for protecting migrant workers and their families.

States are increasingly adopting restrictive migration policies that aim to prevent entry to their territories, which impact on long-established asylum obligations. Suffering from humanitarian fatigue, the refugee protection regime has been undermined by state action aimed at circumventing legal obligations through the introduction of policies such as 'safe third country', off-shore or extraterritorial processing, and interception measures. These measures are often made in the name of sovereignty and security. The ancient rescue at sea regime has been

[5] UN, Report of the Secretary-General High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004.

[6] See, e.g. UN Security Council resolutions 688 (1991) on Iraq; 841 (1993) on Haiti; 1199 (1998) on Kosovo.

threatened by the refusal of states to allow the disembarkation of rescued individuals on their territories for fear that they may apply for asylum or the state might be otherwise unable to return them. The failure to resolve armed conflicts in many parts of the world maintains long-term and protracted refugee camps, in which several generations live as refugees with indefinite futures. Such camps can provide fertile recruitment grounds for rebel groups and, with limited hope, many refugees, especially young men, take off on migratory journeys that may last many years, passing through several countries in search of better protection. Meanwhile, other countries, yet to ratify the 1951 Convention relating to the Status of Refugees,[7] as amended by its 1967 Protocol,[8] or an equivalent regional instrument, keep such persons outside protection space and at risk of *refoulement* or expulsion.

Many states continue to maintain constitutional or other legal frameworks that leave individuals in situations of statelessness. Non-citizens have yet to benefit fully from the Millennium Development Goals and other development initiatives. Environmental degradation is set to increase the numbers of non-citizens crossing international borders, whether permanently or temporarily, who typically fall outside of existing legal agreements. Irregular migration has tested the commitment of states to respect human rights standards, and it has been listed by some governments alongside terrorism as one of the current key threats to national security. Moreover, the post-9/11 security environment has provided a platform for governments to reassert the discourse on national borders and state sovereignty as a way to undermine human rights guarantees, usually with a disproportionate impact on non-citizens.

The human security framework has not been fully integrated within the international system, nor have its implications for non-citizens or existing protection regimes been comprehensively studied. International lawyers have also been on the sidelines of what has largely been an international relations' discourse. This book aims to explore the impact and dimensions of a range of aspects of human security, as understood in its broadest sense, on non-citizens. With its particular emphasis on citizenship and the state, this book does not look at other areas of forced displacement or voluntary or involuntary migration occurring

[7] Convention relating to the Status of Refugees 1951, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

[8] Protocol relating to the Status of Refugees 1967, GA res. 2198 (XXI), 16 Dec. 1966, 606 UNTS 267; entered into force 4 Oct. 1967.

within the boundaries of states, except in so far as that dialogue is complementary to or interlinked with non-citizens. We are particularly interested in what the lack of citizenship or status means for the human security of individuals outside their country of nationality or origin, or those who remain in their state of origin or habitual residence but who do not enjoy the citizenship of that state. Such an analysis has not been undertaken in this way elsewhere.

Other books that have attempted to tackle security issues affecting non-citizens have concentrated on refugees and internal displacement, without making the link to issues of attachment and citizenship and therefore to a wider group of non-citizens. They have also tended to consider security through its traditional lens without a specific focus on human security. This book also challenges international lawyers to think about the effects of a new conceptual framework derived from and set within a policy agenda, rather than within a legal one. This has been a challenge in and of itself, with some legal commentators in this volume concerned that an emphasis on international relations theories and state and security interests will detract from binding international legal obligations. Certainly, none of the existing edited collections or books on refugees or migrants tackle directly the concept of human security or make it their primary focus; nor do they canvass the question of lack of citizenship in its broadest sense, rather than in relation to specific groups, and then it has been mostly limited to refugees.

In addition, this book purposefully combines the expertise of contributors from both academia and practice, with the latter drawn from experienced practitioners working on policy and advocacy in non-government organisations, international organisations (the United Nations High Commissioner for Refugees) and specialised agencies (the International Organization for Migration). In this way, the book is not limited to a theoretical analysis, but attempts to combine theory with a practical examination of the impact of laws and policies on the lives and security of those affected. It aims to develop a fruitful interchange between theory and practice.

The book is especially interested in certain groups of non-citizens that face particular security or protection challenges, namely asylum-seekers, refugees, stateless persons, trafficked individuals, dual nationals[9] and

[9] Though dual nationals are not non-citizens, they have faced similar challenges to non-citizens, particularly in the post-9/11 security environment and are considered in this book in this context.

irregular migrants, although it is noted that long-term and regular migrants can be particularly affected by counter-terrorism measures. Adopting a broad view of human security, we combine both traditional security issues and their impact/intersection with non-citizens (e.g. terrorism and armed conflict) with issues that have not been traditionally seen within a security framework (e.g. development, poverty, and the environment). This book canvasses both what this new human security framework offers non-citizens in terms of human rights, human development, and human dignity; as well as how existing protection regimes fit within or respond to human security issues and their capacity to tackle the human security of (or current threats or challenges facing) non-citizens.

The book is divided into four parts. Our chapter in Part I provides an overview of the human security framework generally, as it has been developed by the UN, and sets out some of its over-arching themes and critiques, before moving to consider more specifically what it may mean for the rights of non-citizens.

Part II of this book identifies some current challenges to the human security and international protection of refugees, asylum-seekers, and stateless persons, in the particular context of physical and legal security, armed conflict and refuge. This part has chapters on human security and statelessness (Mark Manly and Laura van Waas); human security and the international refugee protection and the former's dual strategies of protection and empowerment (Frances Nicholson); human security and protracted refugee situations in Africa (Edwin Abuya); human security and the militarisation of camps of refugees and internally displaced persons (Robert Muggah); and protection from *refoulement* in the maritime context (Barbara Miltner).

Part III of this book explores issues relevant to the inter-linkages between human security and migration, environment and development, with chapters dedicated to migrants' rights and concepts of empowerment (Pia Oberoi); labour migration management and the rights of migrant workers (Ryszard Cholewinski); survival migration and socio-economic rights, in particular judicial responses to HIV/AIDS (Eve Lester); climate-induced displacement (Jane McAdam and Ben Saul); and trafficking in human beings (Ryszard Piotrowicz).

The final part of this book (Part IV) then turns to the issue of security of non-citizens within the context of the so-called 'war on terror' or under counter-terrorism measures. In light of the fact that national security agendas have not disappeared or (yet) been replaced by the

human security framework, this part tackles some of the pressing security challenges facing states and individuals since 9/11 and is located within the traditional ambit of security discourse. Chapters cover immigration law enforcement measures adopted after 9/11 and the issue of discrimination (Daniel Moeckli); the consequences of non-citizenship in the 'war on terror', including the militarisation of anti-terrorism measures, the legal apparatus established by the United States in relation to 'enemy combatants', and questions concerning the interrogation of non-nationals (Craig Forcese); human rights protections against *refoulement* and expulsion within the same context (Vesselina Vandova); the legal framework relating to renditions (Carla Ferstman); and legal routes to restoring individual rights at Guantanamo Bay, including through *habeas corpus* applications and appeal to diplomatic protection (Lorna McGregor).

Almost all chapters are challenged by the vague and unwieldy notion of 'human security'. This is evidenced more in the chapters by international lawyers, than in those by international relations specialists, as the latter appear more comfortable with policy and conceptual frameworks that sit outside the strict confines of law. Concerns range from the human security framework having the potential to undermine or replace existing human rights doctrine and instruments, or to divert attention away from binding obligations to political manoeuvring or abuse, although such concerns have yet to be made out in practice. Rather, states promoting a human security agenda claim a number of human rights successes under its name, including the establishment of the International Criminal Court and the signing of an anti-personnel land mines convention.

Ultimately, it seems to us that there are conceptual benefits for non-citizens in a framework that situates the individual human being at the centre of its discourse, irrespective of their attachment to the state. At a minimum, the framework deserves further exploration and discussion, for which this book is a contribution. Under the national security paradigm in contrast, in which notions of sovereignty, border controls and citizenship are of primary importance, the non-citizen is usually the first to be excluded, neglected or treated with suspicion as threats to the security of the state emerge. Moreover, there remain gaps in the international legal framework for the protection of non-citizens, especially for the regulation of international migration. In exploring whether the human security framework has the potential to fill existing gaps in this legal landscape, we conclude that as long as the international legal and

political system is state-based and national security interests prevail, the notion of human security, although an improvement upon the state-centric national security paradigm, will be at a minimum a rhetorical impetus to joint action. At best, it may plug some of the protection gaps in international law on either an *ad hoc* or temporary basis, offer new ways to think about and to conceptualise protection concerns and solutions, and potentially it may be a step towards recognition of a legal right to human security, the latter satisfying what seems to be an unremitting need by some international lawyers to pin down the notion of human security into legal language.

Alice Edwards and Carla Ferstman

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I would like to thank my husband Des for his ever-present support, love and faith in me; and to my dad for always encouraging me to think through many of the issues discussed in this book.

A.E.

PART I

Human security, human rights and human dignity

1

Humanising non-citizens: the convergence of human rights and human security

ALICE EDWARDS AND CARLA FERSTMAN*

I. Introduction

Some of the most heated debates on security relate to presuppositions about what security is, what is being secured, the causes of insecurity, and how best to address insecurity.[1] International relations theorists and policy experts have varying perspectives on these questions, which have evolved and have had changing levels of acceptance over time. Realists and neo-realists[2] emphasise the state as the central referent of security, both as the lens through which security is understood, as well as the tool by which security is best maintained or restored. Liberal theorists[3] recognise a wider set of values embedded in the concept of the state and state security, in the methods and means to address insecurity, and the actors involved. More critical constructivist scholars[4] understand that the interests and identities of states are themselves constructed by the distribution of ideas and interests within the state-based system and this shapes a state's security interests and how these are conceived, and in turn impacts upon the actions necessary to ensure security. Feminists argue that traditional security discourse is flawed to the extent

* We wish to thank Hélène Lambert and Theo Farrell for their comments on an earlier draft of this chapter.

[1] W. McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (Cambridge: Cambridge University Press, 1999), 1.

[2] See H. Morgenthau and K. Thompson, *Politics Among Nations*, 6th edn (New York: McGraw-Hill, 1985); K. Waltz, *Theory of International Politics* (New York: McGraw-Hill/Addison Wesley, 1979).

[3] See R. Keohane and J. S. Nye, Jr., *Power and Interdependence: World Politics in Transition*, 3rd edn (New York: Little, Brown, 2001).

[4] See, e.g., A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); T. Hopf, 'The promise of constructivism in IR theory', *International Security*, 41 (1987), 171–200.

that it excludes women and other marginalised groups. Theorists belonging to the school of Critical Security Studies (CSS) have argued, moreover, that people, and not states, must be the referent objects of security and, as such, this school provides the closest theoretical underpinning for the human security paradigm.[5]

Legal theorists have had equally varying perspectives on security, ranging similarly from the more traditionalist views placing the protection of the state and state sovereignty as fundamental goals and determinants of security to a number of broader and diverging conceptions. Legal theorists have an added hurdle of considering the role of law in addressing insecurity. Recurring debates on the relationship of law to politics play in the background, such as whether law is a constraining force on state action or itself a consequence of state interests. In particular, legal scholars grapple with the extent to which law is a tool, or indeed the principal tool, to ensure security. Lawyers are most comfortable within the certainty and predictability of a rules-based system, but are typically frustrated when, at the moments of greatest political tension, the rules appear flawed or lack the requisite force. This underscores law's interconnectedness to politics, and as will be explored later in this chapter and elsewhere in this book, the need for multidisciplinary approaches to multidisciplinary challenges.

As the first chapter in our edited collection on human security and non-citizens, this chapter provides a basic overview of some of the evolving theoretical debates on security, as well as the inter-linkages between citizenship and sovereignty, before turning to consider the emergence and development of the concept of 'human security'. It provides an overview of the origins and varying definitions of human security, and evaluates the myriad critiques of the concept. It then assesses the relevance of this concept to non-citizens, especially in the context of modern security threats and given the gaps in existing legal frameworks.

We argue in this chapter that there are conceptual benefits for non-citizens in a framework that situates the individual human being at the centre of its discourse, irrespective of his or her attachment to or status within the state. Under other security paradigms, in contrast, notions of sovereignty, border control and citizenship are of primary importance, and the non-citizen is usually the first to be excluded, neglected or treated with suspicion as threats to the security of the state surface. By definition,

[5] See McSweeney, *Security, Identity and Interests*. See also K. Booth (ed.), *New Thinking about Strategy and International Security* (London: HarperCollins, 1991).

non-citizens typically fall outside the remit of a state's national interests, except in so far as they represent threats to a state's security or a geo-political pawn to be used to enhance a state's interest in the name of national security.

We conclude that the notion of human security will be at a minimum a rhetorical impetus to joint action. At the same time however, we acknowledge that on a practical level the human security framework will not displace traditional notions of security and these differing policy discourses will operate alongside one another. At best, the human security framework may offer new ways to think about and to conceptualise protection concerns as well as the perceptions of non-citizens, may strengthen strategies of protection and empowerment, and in turn reinforce the foundational principles of international human rights law of dignity, equality and justice for all.

II. Citizenship and sovereignty

Legal citizenship refers to the formal status of membership in a state, or nationality as it is understood under international law. The rights common to legal citizenship in virtually all countries include the unconditional right to enter and reside permanently in the territory and to return to it from abroad, the right to receive protection from the state of nationality within and outside of the territory, including access to consular assistance and diplomatic protection, the variety of political rights pertaining to active and full membership of the state, and rights to economic, social and cultural protection.[6] As a citizen, the individual is recognised as a full member of the state, with the overriding right to enjoy membership in the state with all its attendant rights and obligations in full equality and without discrimination. It not only gives rise to protection *by* the state, but also protection *from* the state. Nationality or citizenship has been classified as the ultimate right, or 'the right to have rights'.[7]

By non-citizens, in contrast, we refer to 'anyone who is not a citizen of the country in which he or she presently resides'.[8] The term is used interchangeably with 'non-nationals', 'aliens' and 'exiles'. The term 'non-citizen' carries

[6] A. Macklin, 'Who is the citizen's other? Considering the heft of citizenship', *Theoretical Inquiries in Law,* 8 (2007), 333, 334. See also D. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008).

[7] H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace & Co., 1st edn, 1951; 1979), as referred to in Macklin, 'Who is the citizen's other?, 335.

[8] Weissbrodt, *The Human Rights of Non-Citizens*, 2.

no meaning under international law and is an artificial construct. It is defined not by what it is but rather by what it is not. That is, non-citizens are *not* citizens or nationals of the countries in which they live, work and reside; they may, however, be citizens of other countries. It thus feeds into the 'insiders' and 'outsiders' dialogue and this non-status label renders individuals who are so classified vulnerable to abuse, exploitation and political manipulation, often not being able to exercise an individual or collective voice. By being labelled as *non-citizens*, they are often treated as *non-persons*, outside the interests and concerns of the state and outside the scope of human rights.[9] Some groups of non-citizens have, however, been defined and had their status and rights regulated by specific legal provisions or treaties under international law, such as refugees,[10] stateless persons[11] and migrant workers.[12] These specific legal regimes operate as brakes on the discretion of states in this field.

The decision regarding who is recognised as a national (or consequently who is considered a non-national) of a particular country rests on national, rather than international, standards. Despite a sizeable number of provisions in international human rights law that 'everyone

[9] An analogy is drawn here between discussions of non-state actors under international law, describing them in opposition to state actors. Likewise, the terminology of non-citizens is simply the opposite of being a citizen: P. Alston, 'The "not-a-cat" syndrome: can the International Human Rights Regime accommodate non-state actors?', in P. Alston (ed.), *Non-State Actors and Human Rights System* (Oxford: Oxford University Press, 2005), 3.

[10] Defined as any person '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 . . .', per Art. 1A(2) of the Convention relating to the Status of Refugees 1951 (28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954) (1951 Refugee Convention), as amended by 1967 Protocol (GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967). See, also, regional instruments relating to refugees that contain broader definitions: e.g., Organisation of African Unity (now African Union) Convention governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), 1000 UNTS 45; entered into force 20 Jun. 1974.

[11] Defined as 'any person who is not considered as a national by any State under the operation of its law', per Art. 1, Convention relating to the Status of Stateless Persons 1954 (28 Sept. 1954, 360 UNTS 1171; entered into force 6 Jun. 1960) (1954 Statelessness Convention).

[12] Defined as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national', per Art. 2, International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990 (GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003).

has the right to a nationality' and that 'no one shall be arbitrarily deprived of his [or her] nationality',[13] as well as two statelessness conventions,[14] the modalities for determining who is to be granted nationality and who is not is determined by domestic laws and policy. Similarly, even though there is a specific legal regime relating to 'the right to seek and enjoy asylum from persecution in other countries',[15] which provides for the status and rights of refugees, there is no right to be granted asylum.[16]

The right to grant citizenship is one of the closely guarded attributes of state sovereignty and territoriality. State sovereignty is traditionally conceived of as the right to defend territory and territorial boundaries, including by exercising rights over the admission and exclusion of aliens.[17] It is increasingly accepted that this notion of state sovereignty is, however, subject to a number of limitations under international law, including, *inter alia*, the human right of everyone to leave any territory, including one's own,[18] and the prohibition on *refoulement* or return to where an individual faces a real risk of being persecuted, tortured or subjected to inhuman or degrading treatment, the latter prohibition having attained the status of customary international law.[19]

Furthermore, states parties to international human rights law instruments are obligated to afford human rights protections to all persons within their jurisdiction, citizens and non-citizens alike. That is, human rights are intended to transcend distinctions, including nationality-based

[13] See, e.g., Art. 16, Universal Declaration of Human Rights 1948, GA res. 217A (III), 10 Dec. 1948 (UDHR); Art. 24, International Covenant on Civil and Political Rights 1966, GA res. 2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976 (ICCPR); Arts. 7 and 8, UN Convention on the Rights of the Child 1989, GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990 (CRC).

[14] 1954 Statelessness Convention; Convention on the Reduction of Statelessness 1961, 30 Aug. 1961, 989 UNTS 175; entered into force 13 Dec. For more on statelessness and human security, see ch. 2 by M. Manly and L. van Waas in this book.

[15] Art. 14(1), UDHR.

[16] See A. Edwards, 'Human rights, refugees and the right to "enjoy" asylum', *International Journal of Refugee Law,* 17 (2005), 297–330.

[17] On the background to state sovereignty and the right to exclude aliens, and a counter-position, see J. A. R. Nafziger, 'The general admission of aliens under international law', *American Journal of International Law,* 77 (1983), 804.

[18] See, too, C. Harvey and R. P. Barnidge, Jr., 'Human rights, free movement, and the right to leave in international law', *International Journal of Refugee Law,* 19 (2007), 1–21.

[19] See E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 149–64.

ones. The Universal Declaration of Human Rights 1948 (UDHR), for example, '[recognises] the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world'.[20] The protection of non-citizens by international human rights law, and its shortcomings, is dealt with in more detail later in this chapter.

III. Theoretical background to security studies

There are a number of security theories that have emerged and evolved with shifting international and national priorities and as a result of key events.[21] These theories are not static; each has its variations and permutations. Likewise, each theory is to some extent reductive and essentialist, relying upon assumptions about the nature of the world we live in. While there has been an evolution in security discourse, it is not strictly linear or time-specific but one in which some theories have had greater prevalence at certain times and with particular actors. Equally, there are differing perspectives as to where we are along this evolving continuum. Below we outline some of the central theories that have shaped security discourse by way of background to the emergence of the 'human security' concept.

Realism and neo-realism

The concept of 'security' is traditionally associated with the protection of the territorial integrity and political sovereignty of the state.[22] The origins of this conception of security lie in the Treaty of Westphalia,[23] according to which the sovereign state was understood as the sole protector of its citizens. This view emphasises security of the nation-state from external military threats. Under this traditional Westphalian paradigm, such threats are to be abated by the amassing by states of military capability.[24]

[20] Preambular para. 1, UDHR.

[21] It is acknowledged that there are additional theories of international relations and of security, as well as sub-categories, than those described here.

[22] Art. 2(4), UN Charter 1945, GA res. 26 Jun. 1945, 993 UNTS 3; entered into force 24 Oct. 1945.

[23] Peace treaty between the Holy Roman Emperor and the King of France and their respective allies, 24 Oct. 1648, Munster.

[24] H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1973).

The establishment of the United Nations in 1945 provided impetus to reshape the traditional Westphalian conception of security; however, the onset of the Cold War ensured that the emphasis of any collective action to be taken by this new body in the name of peace and security was to protect states from external military threats.[25] In reality, international security under this system is achieved by the regulation and distribution of power between states and is maintained by the careful preservation of power balances. The UN Charter of 1948 is built upon principles of the sovereign equality of states, mutual coexistence, the maintenance of international peace and security through collective action, and non-interference in the internal affairs of other states.[26] Realist discourse plays down other central features of the UN Charter, such as human rights, including economic and social rights, non-discrimination and international cooperation.[27]

[25] Ch. VII, UN Charter 1945. It is concerned with the maintenance or restoration of *international* peace and security, and traditionally focused on external threats. For an analysis of the early approach of the Security Council, see J. Schott, 'Chapter VII as exception: Security Council action and the regulative ideal of emergency', *Northwestern Journal of International Human Rights*, 6 (Fall 2007), 24–80. Contrast this with its increasing characterisation of mainly internal conflicts as threats to international peace and security (often owing to the consequences for regional stability and peace), see, *inter alia*: SC Res. 417 (1977) (South Africa); SC Res. 733, UN Doc. S/RES/733 (1992) (Somalia). The Security Council has even more broadly recognised that '[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security' (President of the Security Council, *Note by the President of the Security Council,* at 3, *delivered to the Security Council,* UN Doc. S/23500 (31 Jan. 1992)). It has further recognised 'with concern the incidents of humanitarian crises, including mass displacements of population becoming or aggravating threats to international peace and security', expressing the understanding 'that humanitarian assistance should help establish the basis for enhanced stability through rehabilitation and development' (Note by the President of the Security Council, S/25344, 26 Feb. 1993), referred to in numerous subsequent Security Council resolutions.

[26] See, UN Charter Arts. 2(1) (sovereign equality); 1(2) and (4) (international cooperation and harmonisation); 1(1) and 2(6) (maintenance of international peace and security, and see further Chs. VI and VII); 2(4) (prohibition on use of force, subject to individual or collective self-defence (Art. 51) or Security Council action (Chs. VI and VII). On traditional security discourse, see A. Wolfers, 'National security as an ambiguous symbol', in A. Wolfers, *Discord and Collaboration: Essays in International Politics* (Baltimore: Johns Hopkins Press, 1962).

[27] UN Charter, Arts. 1(3), 13 and 55 (human rights) and 1(1) and Chs. VI and VII (collective measures and cooperation).

The Cold War further provides some explanation for the authority vested in the UN Security Council and the privileged position of its permanent members, expressed in the right of veto. Although the rule of law is also an important characteristic of the collective security system espoused by the UN Charter, as evidenced by the legal regulation of the Security Council's enforcement powers under Chapter VII, the linkage between these powers and the veto power of the permanent members is a reminder of the pre-eminence of the interests of the most powerful states. This realist outlook dominated international relations at least until the end of the Cold War, whereby the primary function of the UN and its subsidiary bodies was to help to maintain or restore the balance of power between states and ensure that any attempts to solve problems of international peace and security did not impinge on another's sovereignty.

Liberalism

Liberal conceptions of security likewise understand the preservation of the nation-state as important to the achievement of security; however, they consider multilateralism as a way of promoting state interests. Liberalism recognises the role of a plurality of actors, including the state, governmental and non-governmental organisations, and individual actors in contributing to security. Liberal theorists also believe that international relations is not limited only to the 'high politics' of security but also to economic, social and cultural exchanges and interdependence.[28] They further believe in the legitimating force of law and the strength of international institutions. Recognising the interdependence of states on many levels, cooperation through international institutions and multilateralism provide opportunities to achieve and maintain security.

Constructivism

Constructivist and other critical analyses of security[29] challenge the essentialist anarchic state of affairs of realism and neo-realism, which is used by realists and neo-realists to explain how states behave and how

[28] See Keohane and Nye, Jr., *Power and Interdependence*.

[29] A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); T. Hopf. 'The promise of constructivism in IR theory'; E. Newman, 'Human security and constructivism', *International Studies Perspectives*, 2 (2001), 239–51.

they are confined to certain pre-determined behaviours. The realist and neo-realist premise that an essentially anarchical system forces states into recurrent competition over security. The constructivist perspective is less concerned with the relative distribution of power and is more interested in the way ideas, interests and international relations are socially constructed and arise from social processes and interactions. This frees up constructivists to theorise international relations and security from a fresh perspective, incorporating importantly the ideas and interests of a range of actors. Consequently, society's diverse beliefs about the relative merit of objectives will help shape each state's actual interests. Like realists and some liberals, certain constructivists also see states as the primary actors. However, this constructivist position understands the state as a more diffuse entity with a range of diverging interests.[30]

Feminism

A fourth school of thought worth setting out here for its importance in representing marginalised groups is feminism. Feminist scholars are generally critical of theories of international relations that focus solely or predominantly on the state. They argue that this is problematic on a number of grounds. First, like the constructivist perspective, the idea that a state represents a unified community is questionable, especially for women and other marginalised groups (for our purposes, refugees and other non-citizens) who have generally been excluded from full citizenship within borders. Second, it assumes that protecting state security results in more secure conditions for citizens in general and this fails to take account of the many people living in conditions of insecurity within sovereign state borders.[31] Feminist theorists are specifically concerned with the ways in which women are affected by conflict and other security threats. It has been asserted, however, that feminist theory, whether of law or international relations, may have significance for all disempowered persons.[32] It has also been asserted that the approach may benefit men as well as women.[33]

[30] Wendt, *Social Theory of International Politics*, 113–35.
[31] See A. Orford, 'The politics of collective security', *Michigan Journal of International Law,* 17 (1995–1996), 373–411.
[32] G. Binion, 'Human rights: a feminist perspective', *Human Rights Quarterly,* 17 (1995), 509–26, 512.
[33] *Ibid.*, 514.

Critical Security Studies

Finally, the school of Critical Security Studies (CSS) provides the closest theoretical underpinning for the shift to the language of human security, albeit building upon other critical theories outlined above. CSS recognises that 'the bifurcation of security into the material world "out there" and the inner world of human relationship, reflected in the nominative and adjectival forms of the word, exaggerates the gap between the two images'.[34] McSweeney argues that:

> ... the assumption of security studies which ignores the human dimension is contradicted by the practical dependence of policy-makers and theorists alike on the human individual as the ultimate referent, or subject, of security. Thus the individual is ignored in conceptualizing the idea of security at the state level, only to be reinstated as its basic rationale – as it must be – in order to make sense of, and legitimize, the policy derived.[35]

For security to make sense at the international level, critical security theorists argue that it must make sense at the basic level of the individual.

IV. Transition in security discourse

With the end of the Cold War and the collapse of bipolar politics, the dynamics of international relations have changed. The politics of the Cold War were dominated by realist paradigms of territorial sovereignty, national interest and military force kept in check by careful balances of power. At the end of this period, the emergence of a single superpower with the capacity to act unilaterally sent worrying signals internationally, made worse by the American-sponsored invasions of Iraq and Afghanistan and American interventionist responses to the September 11, 2001 (9/11) terrorist attacks. Realist responses to a rising superpower would seek a re-balancing of power through the building of alternative power blocs, e.g. configuring a new bi-polarism.[36] Alternative, more liberal,

[34] McSweeney, *Security, Identity and Interests*, 16.

[35] *Ibid.*

[36] See K. Waltz, 'Intimations of multipolarity', in B. Hansen and B. Heurlin (eds.), *The New World Order: Contrasting Theories* (London: Macmillan, 2000), 14. Waltz posits that: 'the response of other countries to one among them seeking or gaining preponderant power is to try to balance against it. Hegemony leads to balance, which is easy to see historically and easy to understand theoretically. That is now happening, but haltingly so because the

responses are to strengthen multilateral systems of restraint on the exercise of power, though this would depend on the superpower agreeing to be bound, and, if seen from a realist perspective, would arguably prove more effective in areas it deems least central to its national interests. For example, the Bush administration strongly resisted multilateral rules and the encroachment of international institutions it perceived as most threatening to its sovereignty, such as its rejection of the International Criminal Court and the Kyoto Protocol, and its actions in bypassing the UN in respect of its invasion of Iraq.

Yet, many of the challenges posed by the post-Cold War era – trans-border threats such as poverty, globalisation and environmental disasters, internal armed conflicts and international terrorism – have failed to be resolved by traditionalist realist responses,[37] and have difficulty in being considered through such lenses. Interdependent and transnational economies, mass media and communications, and permeable borders make the increasingly globalised world marked by transnational threats, which call for transnational solutions and responses. The centrality of the state as the referent object of security is less relevant where the threats are characterised by their transnational and non-state character. The shaping of identities has also shifted, with many individuals holding multiple allegiances that transcend state boundaries. Although states remain the principal actors in the system of international law and international relations, they are increasingly disaggregated and share space with civil society, international organisations, and the private sphere.[38]

Moreover, these non-military threats have been increasingly recognised as of equal seriousness as – and as connected to – military threats, not only as precursors to violent conflict and underlying sources of instability but as security concerns in and of themselves. A call was thus made to conceive of many non-military issues as security concerns[39] in order to put them on the international agenda. In 1992, the UN Security

United States still has benefits to offer and many other countries have become accustomed to their easy lives with the United States bearing many of their burdens.'

[37] B. Buzan, 'Rethinking security after the Cold War', *Cooperation and Conflict,* 32 (1997), 5–28.

[38] S. Tadjbakhsh and A. M. Chenoy, *Human Security: Concepts and Implications* (London: Routledge, 2007), 1.

[39] R. H. Ullman, 'Redefining security', *International Security,* 8 (1983), 129–53; J. T. Mathews, 'Redefining security', *Foreign Affairs,* 68 (1989), 162–77; J. T. Mathews, 'The environmental and international security', in M. T. Klare and D. C. Thomas (eds.), *World Security: Challenges for a New Century,* 2nd edn (New York: St Martin's Press, 1994).

Council formally recognised that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[40]

These changes in the political and social landscape all pointed towards the need for increased multilateral and layered approaches and responses. But more than just a recognition of the existence of a multitude of factors and policy actors that need to be involved in international relations, it was considered that policies must be reoriented to address the changing landscape of globalisation. This has been said to include a resort to both 'soft power' suasion and 'hard power' coercion strategies.[41]

In the post-9/11 context and in the face of threats to territorial integrity posed by non-state groups, militarism and unilateralism have arguably replaced multilateralism. The American-sponsored invasions of Afghanistan and Iraq evidenced a preoccupation under the leadership of US President George W. Bush with realist security agendas, including nuclear war, which was cited by the then US administration as a reason for the invasion of Iraq. Unilateralism, too, is evident in discussions at the UN in relation to countering terrorism, even though on the surface, counter-terrorism measures are cloaked with consensual language of the need to work collectively to restore liberalist democratic ideals. The post-9/11 context heightens concerns of international lawyers that the sanctity of law can be undermined by 'high politics'. Former UN Secretary-General, Kofi Annan, stated after the US invasion of Iraq that it was contrary to the UN Charter and therefore illegal under international law,[42] even though the US administration had spent considerable effort developing and articulating legal arguments.

By the end of 2008, a number of key events had provided some impetus towards a new multi-polar re-configuration of international relations and one in which the fundamentals of the human security framework may become more rather than less important. These include the world financial crisis triggered in large measure by US lending

[40] President of the Security Council, *Note by the President of the Security Council,* 3, delivered to the Security Council, UN Doc. S/23500, 31 Jan. 1992.

[41] L. Klarevas, 'Political realism: a culprit for the 9/11 attacks', *Harvard International Review*, 26 (2004), 18–23. The use of both 'hard' and 'soft' approaches has been rephrased as 'smart power' by the incoming Obama administration. See, P. Naughton, 'Hillary Clinton says "Smart Power" will restore American leadership', *The Times Online*, 13 Jan. 2009.

[42] 'Iraq war illegal, says Annan', *BBC News,* 16 Sept. 2004, available at http://news.bbc.co.uk/1/ hi/world/middle_east/3661134.stm (last accessed 10 Jan. 2009).

practices and with worldwide reverberations, as well as the international condemnation of US unilateralism in the so-called 'war on terror'. The latter has been epitomised by its 'kidnap' and 'rendition' of individuals without regard to rules of international law, and its detention facility at Guantanamo Bay and the resultant legal vacuum in which many terror suspects have found themselves.[43] Arguably of most significance is the election of Barack Obama as US President, a liberal-minded lawyer/academic whose early policy statements have focused on re-examining US foreign policy. His vision of leadership in this new era begins with the recognition that 'the security and well-being of each and every American is tied to the security and well-being of those who live beyond [its] borders'.[44] He has indicated that the role of the US is to provide global leadership 'grounded in the understanding that the world shares a common security and a common humanity'.[45] Although not directly quoting the language of human security, his early foreign policy statements share many of its central tenets.

V. Security discourse and non-citizens

Security discourse has impacted upon the treatment and perception of non-citizens in many ways. Throughout the Cold War, security terminology was applied in many ways, for example in favour of refugees and asylum-seekers as they sought refuge from the East to the West. Although the establishment of the modern refugee protection regime was built on the compassion evoked by the horrors of World War II, it was clear that, by 1950, refugees had also become important figures in the geopolitical interests of states and were viewed as justifiably fleeing from belligerent and politically unfriendly states.[46]

With the growth in international migration, including refugee movements from the global South towards the global North and the changing

[43] See ch. 15 by C. Ferstman in this book.

[44] See, e.g., remarks of Senator Barack Obama, *A World that Stands as One*, Berlin, Germany, 24 Jul. 2008, available at www.barackobama.com/2008/07/24/ remarks_of_senator_barack_obam_97.php (last accessed 10 Jan. 2009); Barack Obama, *Strengthening Our Common Security by Investing in Our Common Humanity*, Campaign Document, Jul. 2007, available at www.cgdev.org/doc/blog/obama_strengthen_security.pdf (last accessed 10 Jan. 2009).

[45] Obama, *Strenthening Our Common Humanity*, *ibid.*

[46] See, G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001, reprinted 2006) and G. Loescher, *Beyond Charity: International Co-Operation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993), 32–55.

nature of conflicts from international to internal in character in the 1990s, refugees, asylum-seekers as well as irregular migrants have become viewed by receiving states as threats to national borders and security, perceived as criminals and terrorists and, collectively, as threats to international peace and security.[47] Refugees no longer offer the same geopolitical benefits to the strengthening of state interests as they did during the Cold War. The Declaration of States Parties to the Convention Relating to the Status of Refugees 1951 (1951 Refugee Convention) issued at the conclusion of the Global Consultations on International Protection held in the 50th anniversary year of the Convention in 2001, recognised:

> [the] complex features of the evolving environment in which refugee protection has to be provided, including the nature of armed conflict, ongoing violations of human rights and international humanitarian law, current patterns of displacement, mixed population flows, the high costs of hosting large numbers of refugees and asylum-seekers and of maintaining asylum systems, the growth of associated trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding and returning those not entitled to or in need of international protection, as well as the lack of resolution of long-standing refugee situations.[48]

In fact, some refugees (i.e. those refugees who mattered to the interests of states) arguably fared better within the superpower rivalry that characterised the Cold War.[49] Paradoxically, the Cold War was responsible for many of these individuals becoming refugees. Furthermore, this system did not accommodate all those in need of protection; and border controls were geared towards preventing departures rather than, as today, where they are erected to prohibit entry.

The UNHCR noted that during the 1990s the problem of forced displacement had become larger, more complex and geographically more widespread.[50] Refugee movements and other forms of population

[47] See, e.g., UN Security Council resolutions 688 (1991) on Iraq; 841 (1993) on Haiti; 1199 (1998) on Kosovo.

[48] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Ministerial Meeting, Geneva, 12–13 Sept. 2001, para. 2 (also available at UN Doc. HCR/MMSP/2001/09, Jan. 16, 2002), para. 6.

[49] See, further, Loescher, *The UNHCR and World Politics* and Loescher, *Beyond Charity*.

[50] UNHCR, *State of the World's Refugees 1997: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), ch. 1 (first page) (no page numbers), available online at www.unhcr.org.

displacement had also assumed a new degree of political importance, largely because of their impact upon national and regional stability. Noting that '[t]he security of people and the security of states are in that sense intimately linked', the UNHCR recognised the limitations of its 'humanitarian agenda'.[51] The nation-state system in this latter context has witnessed the overall diminution of asylum space by the erection of toughened border controls and other deterrence measures, such as carrier sanctions, administrative detention, and reductions in economic and social rights, extraterritorial processing and 'safe third country' arrangements, restrictive interpretations of the definition of a refugee, and the setting up of lesser protection statuses in replacement of asylum.[52]

The climate of fear arising since the terrorist attacks on the United States on 9/11 has also seen the conflation of issues of irregular migration and state security. 'Illegal immigration', in particular, has been singled out as a security issue.[53] According to the UNHCR, 'the movement of people from one country and continent to another has grown significantly in scale and scope'.[54] This has been disputed, however, by some writers who suggest that the size and scale of the phenomenon has been exaggerated and that migration is a natural phenomenon, or even 'the oldest action against poverty'.[55] Refugees and asylum-seekers have been caught up in this discourse to the extent that they may travel on the same routes or use the same smuggling networks; and they have collectively been identified as 'irregular migrants'. The UN High Commissioner for Refugee's 2007 Dialogue on Protection was dedicated to the challenge relating to the relationship between refugee protection and international migration.[56] Within this context, UNHCR has recognised that:

> As recent experience has demonstrated, the people involved in such flows, irrespective of their legal status, often find themselves in distress and are

[51] *Ibid.*

[52] On lesser statuses, see E. Roxström and M. Gibney, 'The legal and ethical obligations of UNHCR: the case of temporary protection in Western Europe', in N. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees, and Human Rights* (Oxford: Oxford University Press, 2003), 37.

[53] See, e.g., ch. 7 by P. Oberoi and ch. 9 by E. Lester in this book.

[54] See UNHCR, *Discussion Paper: Refugee Protection and Durable Solutions in the Context of International Migration*, UN Doc. UNHCR/DPC/2007/Doc.2, 19 Nov. 2007, para. 1.

[55] See J. K. Galbraith, *The Nature of Mass Poverty* (Cambridge, MA: Harvard University Press, 1979), 136, as quoted by Lester in ch. 9 in this book.

[56] UNHCR, *Refugee Protection and Durable Solutions in the Context of International Migration.*

> subject to the same hazards and human rights violations. These include detention and imprisonment; destitution and exploitation; trafficking and smuggling; physical abuse and harassment; racial or ethnic discrimination; interception, abandonment and drowning at sea; as well as return or transfer to remote and dangerous locations. People on the move who lose or who have destroyed their travel and identity documents may also find it very difficult to establish their nationality and become effectively stateless.[57]

Irregular migrants, alongside refugees, asylum-seekers and stateless persons, are targeted by government policies to combat large-scale migration. International migration, at least in its irregular form, is framed within the realist paradigms of threats to national security and territorial borders. As a field of government action dominated by national interests and national laws, the absence of an international legal framework to order and regulate the movement of people between states has been viewed, by the Commission on Human Security (CHS), as 'remarkable, since it affects the security of people and of states'.[58] Immigration and border controls have been the principal ways in which states have tackled non-citizens and the 'problem'[59] of migration. By controlling access to their territories and the rights of non-citizens to entry, states have sought to 'contain' the threat posed by such persons.[60] But such policies, in addition to fuelling underground trafficking and smuggling networks, fail to address the causes of migration or displacement or to stem the flow of migrants or refugees. Further still, they fail to tackle the issue of integration of migrants into host communities, despite the perception that isolated migrant communities contribute to insecurity.

Immigration controls have also been on the frontline of actions taken in the so-called 'war on terror'.[61] Refugees and asylum-seekers have also

[57] *Ibid*., para. 17.

[58] Commission on Human Security, *Human Security Now* (New York, 2003), available at www.humansecurity-chs.org/finalreport/English/FinalReport.pdf (last accessed 30 Dec. 2008), 45.

[59] Whilst migration is often euphemistically referred to as a 'problem', the CHS in its final report reminds us of its many positives. It notes that: '[t]he movement of people across borders reinforces the interdependence of countries and communities and enhances diversity. It facilitates the transfer of skills and knowledge. It stimulates economic growth and development. And for the majority of people, whether they are migrating temporarily or permanently, it creates new opportunities for pleasure or business.' UN Commission on Human Security, *Human Security Now,* 41.

[60] See, B. S. Chimni, 'Globalization, humanitarianism and the erosion of refugee protection', *International Journal of Refugee Studies,* 13 (2000), 243–63, 244.

[61] See, further, ch. 12 by C. Forcese and ch. 13 by D. Moeckli in this book.

featured in security debates in the post-9/11 context. The UN Security Council emphasised the need to '[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts'.[62] There are references to refugees and asylum-seekers, for example, in most of the UN resolutions on terrorism,[63] and links between the individual refugee and the threat of terrorism has marked much of their treatment by states in the post-9/11 context. As Goodwin-Gill observes:

> ... the already restrictive, hostile and generally repressive measures which States were already taking towards refugees and asylum-seekers – such as mandatory detention, denial of support, denial of access to procedures, to legal advice and representation and to appeals, and government-to-government agreements on removals – have been given spurious justification by the terrorism agenda. For some States (or rather, for some governments), that has been the opportunity to introduce yet more stringent laws and policies, often in the aftermath of a terrorist incident, but also generally under a carefully constructed cloud of fear.[64]

Yet, today, the largest single group of refugees is the Iraqi caseload, having fled the unilateral invasion of Iraq by the US and its allies and subsequent occupation, which was justified in part on anti-terrorism grounds.[65]

Measures adopted by states in this context have included recourse to arbitrary and indefinite detentions, targeted deportations, renditions, torture, and the creation of legal fictions such as 'enemy combatants' to avoid international legal obligations. Non-citizens have been disproportionately affected by such measures. As noted by Moeckli in this book:

> The 'securitisation' of migration and refugee policy permeates both the international and national level, manifesting itself in the tightening of immigration laws, the rigorous enforcement of these laws, and the subordination of the immigration machinery to national security agencies. Automatically associating foreign nationals with the terrorist threat, these

[62] SC res. 1373 (2001).

[63] See G. Goodwin-Gill, 'Refugees, rights and security', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 1–18, who traces the UN's approaches to security and references to refugees and asylum-seekers.

[64] *Ibid.*, 7.

[65] UNHCR estimates that 4.7 million persons have been displaced arising from the Iraq conflict (2.7 million internally; 2 million externally): www.unhcr.org/iraq.html (last accessed 10 Jan. 2009).

> changes have profound impacts for the human rights of immigrants in Western [and non-Western] states.[66]

The 'exceptionalism' of the so-called 'war on terror' has, for example, allowed governments to justify politically motivated policies and laws which undermine some fundamental human rights guarantees.[67] Refugees, for example, are re-labelled from being allies in the Cold War to 'queue jumpers', 'bogus refugees' or 'terrorists' in modern times.[68] International migrants have also been cast as a burden on states and a threat to their territorial integrity and cultural cohesion; rather than as part and parcel of economic growth and stability for both receiving and sending countries and beneficial for overall international development.[69] Increasingly, international migration can be seen as an indicator of gross global inequalities; just as '[r]efugee movements and other forms of forced displacement provide a useful (if imprecise) barometer of human security and insecurity'.[70]

The post-Cold War context has also seen an increase in the scale and size of the problems of statelessness and internal displacement. With the dissolution of many states following the Cold War came ethnically based conflicts, internal and external displacement or irregular migration, and statelessness.[71] The UNHCR estimated that there were 12 million stateless persons worldwide in 2007; individuals internally displaced by reason of conflict was estimated to be 26 million at the end of 2007, and far exceeded those seeking international protection as refugees (11.4 million).[72] Lacking the nationality of any state, including their country

[66] Ch. 13 by D. Moeckli in this book.

[67] See, e.g., UK House of Lords' decision in *A* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (the Belmarsh Detainees case), in which the indefinite detention of nine foreign citizens suspected of being engaged in terrorist activities was found to be unlawful as both disproportionate and therefore arbitrary detention, as well as discriminatory.

[68] 'Immigration Minister Calls for Changes in "Outdated" Geneva Convention', *The Guardian,* 10 Jan. 2009, which outlines proposals by the French and British governments to revise the 1951 Refugee Convention.

[69] See, further, ch. 7 by P. Oberoi in this book.

[70] UNHCR, The State of the World's Refugees 1997: A Humanitarian Agenda (no page numbers).

[71] UNHCR, *The State of the World's Refugees 1997*. See, also, *Slovenia*, Amnesty International's Briefing to the UN Committee on Economic, Social and Cultural Rights 35th Session, Nov. 2005, AI Index: 68/002/2005 and *Left Behind: Stateless Russians search for Equality in Estonia*, Refugees International, 12 Aug. 2004.

[72] UNHCR, *2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva, Jun. 2008), 2.

of origin, stateless persons are outside of the protection of national law as non-persons; and they face double difficulties because they have no other state to which to appeal for assistance. Similarly, internally displaced persons, while enjoying the citizenship of their country *de jure*, may lack the enjoyment of an 'effective nationality'.[73] Statelessness and internal displacement are two further issues that fall through the cracks of security dialogue that focuses primarily on state interests.[74]

In general, the question of non-citizens is never far from realist discussions on security. In these discussions, non-citizens are largely treated as commodities that feature in a cost benefit analysis of international relations. Policy discussions centre on economic, security and political interests of the state and how non-citizens may foster or undermine those national interests. There is limited concern for their rights, dignity or welfare. This leads us to ask whether the human security framework, with its focus on individuals and their rights and security rather than on the state and its security or sovereignty, would provide any benefits to non-citizens?

VI. The human security framework

The concept of 'human security', whilst without an agreed definition, refers to the reorientation of the concept of security from the state to the individual and communities, and the broadening of the nature of security threats of concern beyond purely military ones. The United Nations Development Programme (UNDP) first articulated the concept in its 1994 Human Development Report.[75] The UNDP predicted that the 'idea of human security … is likely to revolutionize society in the 21st century'.[76] However, in the post-9/11 context in which realist security agendas have reasserted themselves, this prediction has not been realised.

[73] A right to an effective nationality was expressed by the UNHCR, in UNHCR, *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, UN Doc. EC/57/SC/CRP.6, 14 Feb. 2006. For more on statelessness generally, see D. Weissbrodt and C. Clay, 'The human rights of stateless persons' (2006) 28 *Human Rights Quarterly* 245; C. A. Batchelor, 'Stateless persons: some gaps in international protection' (1995) 7 *International Journal of Refugee Law* 232–59.

[74] See, further, ch. 2 by M. Manly and L. van Waas in this book.

[75] There are some references to human security in its 1993 Human Development Report, but the concept is normally traced to the 1994 Human Development Report: B. von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Oxford: Hart Publishing, 2007).

[76] UNDP, *Human Development Report: New Dimensions of Human Security*, 1994, 22.

But recent shifts towards a multi-polar configuration of global politics, as outlined above, offer some new impetus towards the acceptance of the still contested human security framework.

A. Development of human security discourse

The UNDP stated in its 1994 report that the concept of security had been too narrowly construed for too long as security of territory from external aggression, as protection of national interest in foreign policy, or as global security from the threat of a nuclear holocaust.[77] Arguing that it is time to move beyond the narrow concept of national security to 'an all-encompassing concept'[78] of 'human security', the UNDP posited that '[t]he concept of security must thus change urgently in two basic ways:

- From an exclusive stress on territorial security to a much greater stress on people's security.
- From security through armaments to security through sustainable human development.'[79]

It identified two main components of this new approach:

> It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life.[80]

The UNDP report was lauded as ground-breaking and innovative, though, as has been noted by some academics, the ideas behind human security, in particular the need to re-orient the referent object of security to the individual and to significantly broaden the category of threats to security, had been around for some time.[81]

[77] *Ibid.*, 22.
[78] *Ibid.*, 24.
[79] *Ibid.*
[80] *Ibid.*, 23.
[81] Already in 1980, the Brandt Commission reports stressed that 'security must be reconceived with people foremost in mind. The purely defensive concept of security should be enlarged to include hunger, disease, poverty, environmental stress, repression, and terrorism, all of which endanger human security as much as any military provocation. To that end, the international community has the responsibility to eliminate any social conditions that pose threats to the protection and dignity of people, before they erupt into armed conflict.' J. B. Quilligan, 'The Brandt Equation: 21st century blueprint for the new global economy', *Brandt 21 Forum*, 13 (2002), available at www.brandt21forum.info/BrandtEquation-19Sept04.pdf (last accessed 10 Jan. 2009). In 1987, the Brundtland

Since the release of the UNDP report, the human security concept has featured variously within the UN system. In 1999, a Trust Fund for Human Security was established which finances projects carried out by organisations in the UN system and, when appropriate, in partnership with non-UN entities, to advance the operational impact of the human security concept.[82] This Trust Fund is managed by the Human Security Unit, a body which works to integrate human security in all UN activities and now operates as a formal structure within the UN system.[83] Human security was also prominently highlighted in the then UN Secretary-General's Millennium Report, in which he noted:

> In the wake of these [internal] conflicts, a new understanding of the concept of security is evolving. Once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence.
>
> The need for a more human-centred approach to security is reinforced by the continuing dangers that weapons of mass destruction, most notably nuclear weapons, pose to humanity: their very name reveals their scope and their intended objective, if they were ever used.[84]

Commission report noted that: '[a] comprehensive approach to international and national security must transcend the traditional emphasis on military power and armed competition. The real sources of insecurity also encompass unsustainable development, and its effects can become intertwined with traditional forms of conflict in a manner that can extend and deepen the latter.' *Report of the World Commission on Environment and Development: Our Common Future*, Annex to UN Doc. A/RES/42/187, 2 Aug. 1987. For antecedents in international relations theory, see, S. Tadjbakhsh, 'Human security in international relations: blessing or scourge', *Human Security Journal*, 4 (2007), 9, in which she notes that: '[the] idea had been part of academic debates since the early nineteen eighties, where expanding and deepening security studies revolved around Barry Buzan and others' Copenhagen School scholars in international relations theories. If Buzan's movement emphasized on [sic] the social aspects of security, the constructivist, critical and feminist theories in international relations had further brought the unit of analysis, and the referent object and "subject" of security down to the level of individuals.'

[82] An initial contribution of 500 million yen was donated by the Government of Japan to set up the Trust Fund. Further information on the Trust Fund is available on its website at http://ochaonline.un.org/TrustFund/tabid/2107/Default.aspx (last accessed 30 Dec. 2008).

[83] See the website of the Unit at http://ochaonline.un.org/HumanSecurityUnit/tabid/2212/language/en-US/Default.aspx (last accessed 30 Dec. 2008).

[84] K. Annan. *We the Peoples: The Role of the United Nations in the Twenty-first Century*, Millennium Report of the Secretary-General, UN Doc. A/54/2000, presented to the General Assembly on 3 Apr. 2000, Ch. 3, 43–44.

The launch in 2001 of the CHS,[85] co-chaired by Sadako Ogata and Amartya Sen, gave the concept of human security added currency. The idea for the establishment of this independent Commission was launched at the UN Millennium Summit on the initiative of the Government of Japan. The goal for its two-year mandate was to develop practical applications for human security, and has been characterised as:

> [p]romoting public understanding, engagement and support of human security and its underlying imperatives; [d]eveloping the concept of human security as an operational tool for policy formulation and implementation; [p]roposing a concrete programme of action to address critical and pervasive threats to human security.[86]

In 2003, the CHS issued its final report in which it identified two strategies needed to achieve human security: protection and empowerment.[87] The report also recognises the interdependence of state and human security, setting out that '[h]uman security and state security are mutually reinforcing and dependent on each other'.[88] The CHS concluded that:

> Human security means protecting vital freedoms. It means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations. It also means creating systems that give people the building blocks of survival, dignity and livelihood. Human security connects different types of freedoms – freedom from want, freedom from fear and freedom to take action on one's own behalf.[89]

In terms of the subject-matter of this edited volume, the report included a chapter on 'People on the Move'. Many of the other chapters in the report are equally relevant to non-citizens.[90] Here, it catalogues the various contexts of and motivations for migration, recognising the links between migration and development and poverty reduction agendas. It further outlines a range of threats facing both state and human security engendered by migration, but it also emphasises that the movement of persons across borders reinforces the interdependence of countries and

[85] The website of the CHS is located at www.humansecurity-chs.org (last accessed 30 Dec. 2008).
[86] UN Commission on Human Security, *Human Security Now,* 153.
[87] *Ibid.,* 10–12.
[88] *Ibid.*, 6.
[89] *Ibid.*, 4.
[90] See, e.g., for refugees and asylum-seekers and IDPs in particular, chs. 3 (*People caught up in violent conflict*), 4 (*Recovering from violent conflict*) and 5 (*Economic security*), *ibid.*

communities.[91] In addressing international migration, the CHS recommends multilateral approaches in which the 'sovereignty and security of states would be balanced by the human security of people'.[92] The report notes that there are gaps in both the normative and institutional frameworks relating to the various contexts of migration, providing:

> From a human security perspective, the movement of people should be looked at comprehensively, taking into account the political, civil, security, economic and social dimensions affecting peoples' decision to move. It cannot be approached solely from the perspectives of the countries of origin, transit or destination. It must also be approached from the perspective of the different stages and motivations for displacement – for many people, migration is the only option. Today's policies, norms and institutions are not doing this, leaving major gaps.[93]

Emphasising that '[f]rom a human security perspective, managing migration has to go beyond coordinating restrictive policies among states',[94] the report makes reference to the importance of regularising the status of illegal or irregular migrants, and proposes the creation of an international migration framework.[95]

The report also notes gaps in the protection regime for refugees, fostered in part by '[a] narrow state-centric understanding of persecution and protection [which] fails to address the needs of people who have fallen victim to rebel groups and criminal triads – and whom the state fails to protect'.[96] The report encourages measures aimed at empowering refugees to attain self-sufficiency and restore livelihoods and dignity, and advocates for stronger measures to ensure refugee security through stronger institutional arrangements. Equally, it notes the importance of the Guiding Principles on Internal Displacement[97] in the absence of a single binding legal framework, and encourages states to incorporate the principles into domestic law.

[91] *Ibid.*, 41.
[92] *Ibid.*, 52.
[93] *Ibid.*, 45.
[94] *Ibid.*, 47.
[95] *Ibid.*
[96] *Ibid.*, 48. See, also, ch. 3 by F. Nicholson in this book and A. Edwards, 'Human security, human rights and refugee protection: transcending territorial and disciplinary borders', *Michigan Journal of International Law*, 30 (2009), 763–807.
[97] *Guiding Principles on Internal Displacement*, presented to the 2005 World Summit, which unanimously recognised them as an 'important international framework for the protection of internally displaced persons'. (UN GA res. A/60/L.1 para. 132).

The 2003 CHS report was followed by the report of the then Secretary-General's High Level Panel on Threats, Challenges and Change in 2004.[98] This report saw some endorsement for the principle of 'responsibility to protect' (R2P), and led to the creation of a Peacebuilding Commission, a new inter-governmental advisory body to the UN, and related Peacebuilding Support Office located within the UN Secretariat.[99] The report takes an integrated and broad approach to multiple security threats, and recognises the risk they pose to both state and human security. Nevertheless, the report has been said to exhibit a certain conservatism in its recommendations for UN reform, particularly as regards the UN system of collective security.[100]

At the World Summit in 2005 that followed, the concept of human security was formally acknowledged, and a commitment was made to discussing and defining the notion of human security in the General Assembly.[101] In March 2008, the UN General Assembly held its first thematic debate on human security, in recognition of the growing number of states using or referring to the concept. At this meeting, human security was characterised as a framework to further the principles of the UN Charter of 1945.[102] Human security was described as 'the glue' to bring together the range of threats to security – from hunger, poverty, armed conflict, human trafficking, environmental degradation, international terrorism and human rights violations – and to understand and address them 'in their totality and interconnectedness'.[103]

Although the human security framework has gained considerable momentum and remains firmly on the international security agenda, it arguably suffered a set-back in the aftermath of the terrorist attacks on the United States on 9/11. The CHS was, for instance, established prior to the attacks, but operated within a rapidly changing security environment in which state security, militarisation and unilateralism

[98] K. Annan, *A More Secure World: Our Shared Responsibility,* Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 Dec. 2004.

[99] GA res. 60/180 and 1645 (2005), 20 Dec. 2005.

[100] K. M. Manusama, 'The High Level Panel Report on threats, challenges and change and the future role of the United Nations Security Council', *Leiden Journal of International Law*, 18 (2005), 605–20, 619.

[101] UN General Assembly (60th Session), *2005 World Summit Outcome*, UN Doc. A/60/L.1 (20 Sept. 2005), para. 143.

[102] Concluding Remarks, Srgian Kerim, President of the General Assembly, to the Thematic Debate on Human Security, UN Headquarters, New York, 22 May 2008.

[103] Statement, Srgian Kerim, President of the General Assembly, to the Thematic Debate on Human Security, UN Headquarters, New York, 22 May 2008.

again rose to the forefront of national security agendas. Its report was issued in the same year as the US and its allies went to war in Iraq, without a UN mandate.

In addition to its use by the UN, human security has further featured in regional inter-governmental and non-governmental declarations, reports, and studies.[104] Also, a number of academic institutions and centres have been established to study the concept and the wide range of threats it covers, and academic publications on the subject have proliferated.[105]

Human security has also been incorporated into the foreign policies of a number of governments, most notably Canada, Norway and Japan. Canada has applied the human security concept to reframe issues such as transnational crime, anti-personnel landmines, international criminal justice, and the protection of civilians in armed conflict, as issues of human as well as national security.[106] Canada has not, however, abandoned the state-centric components of security,

[104] See, e.g., Organisation of American States, *Declaration on Security in the Americas,* OAS Doc. OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, adopted at the third plenary session of 28 Oct. 2003; African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 Jul. 2002; the work of the Institute for Security Studies' African Human Security Initiative, available at www.africanreview.org (last accessed 30 Dec. 2008); United Nations Office of the Special Adviser on Africa (OSAA), *Human Security in Africa*, Dec. 2005, available at www.un.org/africa/osaa/reports/Human%20Security%20in%20Africa%20FINAL.pdf (last accessed 30 Dec. 2008); Study Group on Europe's Security Capabilities, *A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities*, Barcelona, 15 Sept. 2004, available at www.lse.ac.uk/Depts/global/Publications/HumanSecurityDoctrine.pdf (last accessed: 30 Dec. 2008); M. H. Kaldor, M. E. Martin and S. Selchow, 'Human security: a new strategic narrative for Europe', *International Affairs*, 83 (2007), 273–88.

[105] See, e.g., Centre for Human Security, University of British Columbia (www.ligi.ubc.ca/page165.htm); Institute for Human Security, The Fletcher School, Tufts University (http://fletcher.tufts.edu/humansecurity/); Ford Institute for Human Security, University of Pittsburgh (www.fordinstitute.pitt.edu); Centre for Peace and Human Security, Sciences Po (www.peacecenter.sciences-po.fr); Centre for Research on Inequality, Human Security and Ethnicity, Oxford University (www.crise.ox.ac.uk/); Centre for the Study of Global Governance, London School of Economics (www.lse.ac.uk/Depts/global/researchhumansecurity.htm); Human Security Report Project, Simon Fraser University (www.hsrgroup.org); The Applied Research Centre in Human Security at the University of Coventry (www.coventry.ac.uk/researchnet/archs). All websites last accessed 30 Dec. 2008.

[106] Canada, Department of Foreign Affairs and Trade (DFAT), *Freedom from Fear: Canada's Foreign Policy for Human Security*, 2nd edn (Ottawa: DFAT, 2002).

but instead considers the two frameworks to be complementary, rather than contradictory.[107] For Canada, genuine security can only be achieved through respect for human rights.[108] In 1998, Norway and Canada formed a partnership,[109] which subsequently evolved into the Human Security Network, an informal coalition of states committed to working together to strengthen human security. As at September 2008, members of the Network included Austria, Canada, Chile, Costa Rica, Greece, Ireland, Jordan, Mali, the Netherlands, Norway, Slovenia, Switzerland and Thailand;[110] South Africa participates as an observer. In addition, the 'Friends of Human Security' was established by Japan as an unofficial, open-ended forum at the UN for governments to discuss human security from all angles. It held its first meeting in October 2006.[111] Among the successes attributed to human security by these governments include the establishment of the International Criminal Court[112] and the agreement of the anti-personnel land mine ban treaty.[113]

B. *The meaning of human security: its breadth and scope*

Human security is a contested concept. Its main opponents criticise it for being vague,[114] conceptually weak and analytically valueless,[115]

[107] *Ibid.*, 3.

[108] See, *ibid.*; Canada, DFAT, *Human Security: Safety for People in a Changing World* (Ottawa: DFAT, 1999).

[109] Canada, DFAT, 'Canada and Norway Form New Partnership on Human Security', News Release No. 117, 11 May 1998.

[110] On Thailand, see P. M. Evans, 'Human security and East Asia: in the beginning', *Journal of East Asian Studies,* 4 (2004), 263, referred to in von Tigerstrom, *Human Security and International Law*, 22.

[111] Reference to the Friends of Human Security is available on the website of the Ministry of Foreign Affairs of Japan: www.mofa.go.jp/policy/human_secu/friends/index.html (last accessed 30 Dec. 2008).

[112] Rome Statute of the International Criminal Court 1998, Doc. A/CONF.183/9, 17 Jul. 1998; entered into force 1 Jul. 2002.

[113] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on their Destruction 1997, 2056 UNTS 241; entered into force on 1 Mar. 1999.

[114] R. Paris, 'Human security: paradigm shift or hot air?', *International Security*, 26 (2001), 87–102.

[115] B. Buzan (2004), 'A reductionist, idealistic notion that adds little analytical value', *Security Dialogue* 35 (2004), 369–70.

and for failing to prioritise.[116] At the same time, it has been praised for its breadth.[117]

One of the challenges for sceptics of human security is the lack of clarity as to what human security entails. Is it a paradigm shift,[118] a goal or rallying cry, a template to assess policy and practice, an agenda for change, or a foreign policy construct? The original conception has been termed a 'universal public policy, concerned with global justice and equity'.[119] It has arguably evolved also into a foreign policy tool, which has worried certain writers. As Tadjbakhsh has said: '[t]he capture by some states and regional organizations has decidedly metamorphosed the concept to a toolbox which serves specific external relations purposes.'[120]

The 1994 UNDP report does not offer a definition of human security, but rather states that it is like other fundamental concepts, such as human freedom, which are identifiable more by their absence than their presence; people seem to know instinctively what it is.[121] However, the UNDP did identify four fundamental characteristics of human security:

1. Human Security is a *universal* concern, relevant to people in all nations;
2. Issues of human security are *interdependent* and threats to human security in one part to the world affect persons in other parts;
3. Human security is easier to guarantee through *early prevention* than later intervention; and
4. Human security is *people-centred.*[122]

The CHS report also does not define the concept. Ogata and Cels clarify that the Commission's treatment of human security is 'suggestive rather than comprehensive; it serves as a catalyst for further thinking and practical applications'.[123]

[116] Y. Foong Khong, 'Human security: a shotgun approach to alleviating human misery?', *Global Governance,* 7 (2001), 231–36.

[117] R. Thakur, 'What is "Human Security"? Comments by 21 authors', *Security Dialogue,* 35 (2004), 347–87.

[118] Tadjbakhsh and Chenoy, *Human Security: Concepts and Implications*, 19–21.

[119] S. Tadjbakhsh, 'Human security in international organizations: blessing or scourge?' 9–10 referring to the writings of M. Ul Haq, *Reflections on Human Development* (New York: Oxford University Press, 1995).

[120] *Ibid.*

[121] UNDP, *Human Development Report 1994*, 23.

[122] *Ibid.*, 22–3.

[123] S. Ogata and J. Cels, 'Human security – protecting and empowering the people', *Global Governance,* 9 (2003), 273–83, 274.

A number of academics have also offered definitions of human security.[124] Uvin, for example, has noted an 'urgent need for insights and strategies about the overlaps and interactions between the fields of humanitarianism, development, human rights and conflict resolutions'.[125] It is this field of intersection that he calls 'human security'.[126] At least one author has suggested that it is a new way to describe the work of the UN.[127] As the then UN Secretary-General, Kofi Annan, stated: 'Ensuring human security is, in the broadest sense, the United Nations' cardinal mission.'[128]

From an international law or policy perspective, the failure to elaborate a definition of human security seems at first unsatisfactory. Leaving the concept undefined causes consternation for many scholars, in particular international lawyers, including some in this volume. But the lack of clear definition should not lead one to dismiss the framework out of hand. Arguably, there are enough parameters to give it meaning and to lead to action, without needing to reduce it to a narrow, compromised concept that defeats its original purpose.

1. What is secured (definitions of insecurity)

Many of the debates on human security focus on the nature of the threats, challenges and concepts to be included in the framework. There is general agreement that at its base, human security goes well beyond the traditional realist focus on protecting the territorial integrity and sovereignty of the state. Ullman has stated that the reasons for the shift 'proceeds from the assumption that defining national security merely (or even primarily) in military terms conveys a profoundly false image of reality'.[129] This in turn gives rise to two problems:

> First, it causes states to concentrate on military threats and to ignore other and perhaps even more harmful dangers. Thus it reduces their total security. And second, it contributes to a pervasive militarization of

[124] See, Paris, 'Human security – paradigm shift or hot air', 91–2.
[125] P. Ulvin, 'What is "Human Security"? Comments by 21 Authors'.
[126] *Ibid.*
[127] D. Newman, 'A human security council? applying a "Human Security" agenda to Security Council Reform', *Ottawa Law Review,* 31 (1999–2000), 213–41.
[128] K. Annan, in a statement delivered to the Foreign Affairs Committee of the Chinese People's Political Consultative Conference, Apr. 1998, as cited in G. Oberleitner, 'Human security: a challenge to international law?', *Global Governance,* 11 (2005), 185–203, 188.
[129] R. H. Ullman, 'Redefining security', 129.

> international relations that in the long run can only increase global insecurity.[130]

This narrow focus on external military threats further presupposes that threats arising from outside a state are somehow more dangerous to the state's security than threats that arise within it.[131]

Despite the general consensus that human security concerns more than militarised threats against the state, the nature and breadth of the threats it is said to cover is the subject of extensive debate.

Oberleitner has identified three 'rough categories' from the range of available possibilities:

> [A] narrow approach that relies on natural rights and the rule of law anchored in basic human rights; a humanitarian approach that understands human security as a tool for deepening and strengthening efforts to tackle issues such as war crimes or genocide and finally preparing the ground for humanitarian intervention; and a broad approach that links human security with the state of the global economy, development, and globalization.[132]

Of the two main state proponents of the human security framework, different emphases of human security are also evident. Canada, for instance, has conceptualised human security as 'freedom from pervasive threats to people's rights, safety or lives'.[133] That is, Canada has limited its dialogue with human security to what it perceives as the most serious security threats, which it presently identifies as public safety from cross-border threats such as terrorism, drug trafficking, and organised crime; protection of civilians in armed conflict; conflict prevention; governance and accountability; and peace support operations.[134] Given Canada's emphasis on the protection of civilians in armed conflict, it has also shown support to the related principle of humanitarian intervention.[135]

Japan, on the other hand, adopts the broader, all-encompassing approach of the UNDP and the CHS,[136] as was indicated in the 1994 UNDP Human Development Report:

> For most people today, a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event.

[130] *Ibid.*
[131] *Ibid.*, 133.
[132] Oberleitner, 'Human security: a challenge to international law?', 187–8.
[133] Canada, DFAT, *Freedom from Fear: Canada's Foreign Policy for Human Security*, 3.
[134] *Ibid.*
[135] *Ibid.*
[136] UNDP, *Human Development Report 1994.*

> Job Security, income security, health, environmental security, security from crime – these are emerging concerns of human security all over the world.[137]

Japan has stated that the concept of human security:

> comprehensively covers all the measures that threaten human survival, daily life, and dignity – for example, environmental degradation, violations of human rights, transnational organized crime, illicit drugs, refugees, poverty, anti-personnel landmines and … infectious diseases such as AIDS – and strengthens efforts to confront these threats.[138]

2. Objects of security

The idea of the new security framework is that it focuses directly and specifically on individuals and communities, as opposed to states. The traditional realist approach is not indifferent to individuals (or citizens) for whom the state is charged with protecting; however, individuals are passive in that framework. There was concern that state protection had often been pursued at the expense of individuals' personal security.[139]

3. Security providers

An important aspect of the human security framework is its recognition that the providers of security extend beyond the state. Security providers are said to include states, inter-governmental and non-governmental organisations, and the affected individuals and communities themselves. This position is likened to the liberal institutionalist position which recognises the critical role of organisations (particularly the UN) in addressing transnational and international challenges.[140] Yet proponents of human security go further, understanding that, even in purely domestic contexts, there is a need for a multiplicity of actors.[141]

[137] *Ibid.*, 3.

[138] Japanese Ministry of Foreign Affairs, *Diplomatic Bluebook*, 1999, ch. 2, Sec. 3. See, also, Statement by Director-General Yuko Takasu at the International Conference on Human Security in a Globalized World, Ulan Bator, 8 May 2000, available at www.mofa.go.jp (last accessed 10 Jan. 2009).

[139] von Tigerstrom, *Human Security and International Law*, 12, referring to M. Sheehan, *International Security: An Analytical Survey* (Boulder, CO: Lynne Rienner, 2005), ch. 2; and B. Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd edn (New York: Harvester Wheatsheaf, 1991), 22 and 37–8.

[140] See, e.g., R. O. Keohane and L. L. Martin. 'The promise of institutionalist theory', *International Security*, 20 (1995), 39–51.

[141] Tadjbakhsh, 'Human security in international organizations', 10.

The state is still recognised as a primary provider of security, though this role is now intertwined with other actors, regardless of the nature of the security challenge to be addressed. This recognises, crucially, that states can and often have posed the greatest threats to individuals' security.

Human security embraces the individual on two levels: as the subject and aim of security, as well as a means by which security can be achieved. As recognised in the final report of the CHS, empowerment of individuals is a vital aspect of human security:

> People's ability to act on their own behalf – and on behalf of others – is the second key to human security. Fostering that ability differentiates human security from state security, from humanitarian work and even from much development work. Empowerment is important because people develop their potential as individuals and as communities. Strengthening peoples' abilities to act on their own behalf is also instrumental to human security. People empowered can demand respect for their dignity when it is violated. They can create new opportunities for work and address many problems locally. And they can mobilize for the security of others – say, by publicizing food shortages early, preventing famines or protesting human rights violations by states.[142]

Before turning to consider the benefits of the human security framework to non-citizens, we first describe the legal protection system for non-citizens. Before the human security framework can be considered on the basis of its non-legal and therefore non-binding character, it is necessary to examine whether there are gaps in the existing legal framework, into which policy discourse, including security discourse, may step as an important player.

VII. Rights protection and non-citizens

The issue of the rights of non-citizens is one of the most controversial areas of contemporary international law. As Lillich put it:

> In few areas of public international law is there more precedent but less consensus than in that governing the treatment of aliens … because controversies involving aliens strike at the very heart of the system of traditional international law [and international relations] established

[142] CHS, *Human Security Now,* 11. For more on empowerment in the context of refugees, see ch. 4 by F. Nicholson in this book.

> by the Peace of Westphalia, with its dogmatic orientation towards the institutions of the nation-State.[143]

The early elaboration of rights relating to aliens was geared towards the protection of a state's own nationals abroad (i.e. diplomatic protection): 'If a state committed a wrong against an individual who was an alien, then that wrong, if unaddressed, was translated into a wrong against the alien's State of nationality.'[144] The problem with this approach was that states became increasingly reluctant to intervene to protect the rights of their nationals abroad unless it was a major violation and coincided with other interests. Lillich attributes this to the changed character of the alien from 'exploitative capitalists' to 'migrant workers';[145] the former being of more interest to the nation-state than the latter. With globalisation, economic interdependence and interconnectedness between states has increased. This increased interdependence and interconnectedness on an economic level may result in a greater reluctance of states to intervene politically or militarily in other states with whom they have economic connections, whether to protect their own nationals abroad or, moreover, to protect the nationals of other countries.

The emergence of international human rights law has changed this early orientation of international law relating to non-citizens, such that citizens and non-citizens alike have become direct beneficiaries of rights as rights-holders. Refugee protection, too, was initially conceived as 'diplomatic protection'[146] but has now shifted to being seen as an issue of rights protection.[147]

As specified by the 1966 International Covenant on Civil and Political Rights (ICCPR), each state party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'.[148] This is underscored by the UN Human Rights Committee's General

[143] R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984), 1.

[144] *Ibid.*, 3, referring to L. Oppenheim, *International Law* (8th edn, H. Lauterpacht (ed.), 1955), 639.

[145] *Ibid.*

[146] See A. Fortin, 'The meaning of "protection" in the refugee definition', *International Journal of Refugee Law,* 12 (2000), 548–76.

[147] See A. Edwards, 'Crossing legal borders: the interface between refugee law, human rights law and humanitarian law in the "International Protection" of refugees', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden/Boston: Brill, 2008), 421.

[148] Art. 2(1), ICCPR.

Comment No. 15, which recognises that the rights 'apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.[149] Whilst it is understood that some rights under the ICCPR apply in particular to citizens,[150] the denial of other rights to non-citizens must be justifiable and cannot proceed on a discriminatory basis.[151] As has been indicated in relation to the 1969 International Convention on the Elimination of All Forms of Racial Discrimination:[152]

> differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[153]

Similarly, the obligations of states to afford human rights in line with international law obligations extends to individuals beyond the territory of the state to the extent that it can be said that the state concerned has effective control over the individuals concerned.[154]

Despite these over-arching aims of the international human rights system, non-citizens are excluded – in both practice and in law – from the enjoyment of rights. Despite statements to the contrary by the UN that human rights are universal, indivisible and non-hierarchical,[155] the legal reality is quite different. Rights have been ranked in importance, evidenced by the idea of derogability of some rights in times of public emergency,[156]

[149] HRC, *General Comment No. 15: The Position of Aliens under the Covenant*, UN Doc. CCPR/C/21/Rev.1 (19 May 1989), para. 1.

[150] See, e.g., Art. 25, ICCPR (rights to political and public participation).

[151] HRC, General Comment No. 15, paras. 5–8.

[152] International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), GA res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969.

[153] Committee on the Elimination of Racial Discrimination, *General Recommendation No. XI: Non-Citizens*, UN Doc. A/46/18 (19 Mar. 1993), para. I(4).

[154] See, e.g., *Al-Skeini* v. *Secretary of State for Defence* (Consolidated Appeals), [2007] UKHL 26.

[155] See, e.g., statement at World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 Jul. 1993, para. 5: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' On the hierarchy of rights idea, see, e.g., T. van Boven, 'Distinguishing criteria of human rights', in K. Vasak and P. Alston (eds.), *The International Dimensions of Human Rights* (Westport, CT: Greenwood Press, 1982), 43.

[156] These issues are further discussed in relation to specific rights in later chapters of this book.

the failure to recognise the justiciability of specific types of rights,[157] and ideas of immediate versus progressive implementation.[158] Human rights law, too, reflects minimum, rather than maximum, standards. Except for the most fundamental of rights, such as the prohibition on torture, the human rights system permits states to enter reservations against particular rights, derogate from or suspend their obligations in times of public emergency, or qualify or limit the implementation of particular rights in the interests of public order, national security, health or morality. The latter is particularly true for the so-called fundamental freedoms, that is, the freedoms of religion or belief, expression and speech, and association and assembly, as well as freedom of movement.[159] Moreover, restrictions can be imposed on the enjoyment of economic rights by non-nationals in developing countries, subject to human rights and the economy.[160] Meanwhile, very few rights are of a non-derogable and absolute nature, and even these are subject to so far unsuccessful challenges by states parties.[161] The right to be protected from arbitrary detention and the right to liberty and security of the person as they appear in international and regional human rights instruments are not part of the privileged group of absolute rights.[162] Forms of discrimination (or distinction) may also be permitted if justified on 'reasonable and objective criteria'.[163] Exceptions to rights protection for groups of non-citizens based on national economic or security interests have been generally accepted, although a detailed examination of a country's resources and their allocation would be in order.[164]

[157] The initial failure to agree an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), GA res. 2200A (XXI), Dec. 16, 1966, 993 UNTS 3; entered into force Jan. 3, 1976 (ICESCR), for example, was based on the belief that economic, social and cultural rights are non-justiciable.

[158] Early views of states parties and the treaty bodies that ICCPR rights are 'immediately enforceable' and ICESCR rights are 'to be realised progressively'. It is now clear that some rights of the ICESCR are immediately enforceable (e.g., non-discrimination): see, CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3)* (2004), UN Doc. E/C.12/2005/3, para. 3.

[159] Arts. 18, 19, 22, and 12, ICCPR respectively.

[160] See, A. Edwards, 'Human rights, refugees and the right to "enjoy" asylum', *International Journal of Refugee Law*, 17 (2005), 297–330.

[161] See, e.g., *Saadi* v. *Italy*, App. No. 37201/06, Feb. 28, 2008; *Ramzy* v. *The Netherlands*, App. No. 25424/05 (pending before the Grand Chamber).

[162] Art. 9, ICCPR.

[163] See, HRC, *General Comment No. 18: Non-discrimination*, (1989) para. 13. See, also, *A* v. *Secretary of State for the Home Department* [2004] UKHL 56.

[164] See, A. Edwards, 'Refugees, human rights, and the right to "enjoy" asylum'.

The international human rights system also provides for exceptions to the enjoyment of human rights that relate specifically to security concerns. As Goodwin-Gill observes, 'in drafting the various treaties covering the field, States have never been blind to the need to protect essential interests . . .',[165] including security interests. The 'right to seek and enjoy asylum from persecution in other countries' in Article 14 of the UDHR 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.[166] Similarly, the prohibition on *refoulement* or return to threats to life of freedom in Article 33(1) of the 1951 Refugee Convention is qualified by Article 33(2), which provides that the protection will not apply to those who are considered to be a threat to national security or having been convicted of a particularly serious crime by final judgment is a danger to the community. None of the human rights prohibitions on *refoulement* to torture or inhuman or degrading treatment or punishment are so qualified, however.[167] The OAU Convention governing Specific Aspects of Refugee Problems in Africa 1969 contains specific provisions regarding the outlawing of political and subversive activities of refugees, in light of concerns by states of the political activity of refugees and the impact of this on the security of the host state.[168] National security is also a valid ground for exception to many fundamental rights, as noted above.

These limitations should not, however, be read as suggesting that the human rights system is worthless, or that states are free to disregard their human rights obligations without consequences. There are many legal checks on the actions of governments in their attempts to restrict human rights. Suspension of rights in a state of emergency, for example, must threaten the life of the nation, be officially proclaimed, and the measures taken must be strictly required by the exigencies of the situation and they must not be inconsistent with the state's other obligations under international law.[169] Measures that discriminate against non-citizens are also

[165] G. Goodwin-Gill, 'Refugees, rights and security', 3.
[166] Art. 14(2), UDHR.
[167] See, further on *non-refoulement*, ch. 14 by V. Vandova in this book.
[168] Pmbl para. 5 and Art. 3, OAU Refugee Convention.
[169] See, further, Sir N. S. Rodley, 'International human rights law and machinery for monitoring its implementation in acute crisis', in M. Kapila and N. S. Rodley (eds.), *Report of the Conference on the Promotion and Protection of Human Rights in Acute Crisis* (1998).

not permitted.[170] Appeal to arguments such as national security to limit fundamental freedoms is also judged according to legal criteria of strict legality, necessity, reasonableness and proportionality.[171] Moreover, reservations must be compatible with the object and purpose of the treaty;[172] and international obligations must be interpreted and implemented in good faith.[173] However, despite these legal safeguards, the treatment of non-citizens is often 'exceptionalised' in times of crisis and appeal to the language of national security threats can give public space for governments to introduce discriminatory or unnecessary restrictions on non-citizens.

A further weakness of the human rights system is its enforceability. Whilst regional human rights systems in Europe and the Americas produce binding decisions for state violators, enforcement still depends on the will of states.[174] The UN human rights system revolves around quasi-judicial decision-making on individual petitions and monitoring through state party reporting, and other political processes aimed at 'naming and shaming' governments into compliance.[175] The proliferation of treaties has also been criticised for weakening rights protection, as well as for detracting attention away from ensuring implementation to writing new rules.[176] The collective enforcement system envisaged in the UN Charter and customary rules relating to humanitarian intervention have been controversial, both when they have been activated (e.g., Somalia, Bosnia and Herzegovina, Kosovo) and when they have not (e.g., Rwanda).[177]

[170] See, *A* v. *Secretary of State for the Home Department* [2004] UKHL 56.

[171] See, e.g., M. Eissen, 'The principle of proportionality in the case-law of the European Convention of Human Rights', in R. St. J. MacDonald, F. Matscher and H. Petzond (eds.), *The European System for the Protection of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1993) 125–37.

[172] Art. 19(c), Vienna Convention on the Law of Treaties 1969 (VCLT), 23 May 1969, 1155 UNTS 331; entered into force 27 Jan. 1990.

[173] Arts. 31 and 26, VCLT respectively.

[174] See, REDRESS, *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006, available at www.redress.org/publications/master_enforcement%2030%20May%202006.pdf (last accessed 18 Jan. 2009).

[175] The international human rights system is, however, being strengthened all the time, such as through fact-finding and inquiry procedures: see, e.g., A. Edwards, 'The Optional Protocol to the Convention against Torture and the detention of refugees', *International and Comparative Law Quarterly*, 4 (2008), 789–825.

[176] See, Special Edition on UN Reform, *Human Rights Law Review*, 7 (2007).

[177] UNHCR, *The State of the World's Refugees 1997*.

In reality, non-citizens are particularly vulnerable to human rights abuses and lack of access to or limited enjoyment of, human rights. Non-citizens have often been marginalised by the societies in which they now reside and are afforded fewer rights and entitlements as compared to citizens. Non-citizens regularly have reduced access to land, labour and trade within the state, made worse by inadequate or non-existent access to justice, rights to associate, or to participate politically. Vulnerable migrants, such as children, irregular or undocumented migrants, refugees and asylum-seekers, those working in sectors not covered by labour laws, are at greatest risk. Minority groups tend to be feared and consequently are regular targets for repression, racial profiling and selective sanction. Special rules are employed to exempt non-citizens from the civil liberty standards applicable to other inhabitants of the state; they are investigated, indefinitely detained and regularly *refouled* – all in the name of difference. This pushes them further from the dominant discourse, contributes to their further marginalisation and isolation, and thus discourages commonality or understanding.

It is at this juncture that one is pushed to consider whether the concept of human security can step in to bolster these gaps and weaknesses in the human rights framework for non-citizens?

VIII. Human security and non-citizens: what it could mean

A. People-centred – humanising non-citizens

The *people-centred* focus of human security, irrespective of one's attachment or allegiance to the state, is conceptually powerful for non-citizens. It is also powerful because the application of international human rights law has at times been bogged down in distinctions between nationals and non-nationals, with the latter rarely enjoying the same level of human rights protection as the former. Specific legal regimes, too, such as the 1951 Refugee Convention, grant rights incrementally on the basis of attachment to the state, which can delay the full implementation of rights. The people-centred approach to security follows the same trend in relation to *human* development,[178] *human* rights, and the people-oriented planning policies of the UNHCR in relation to refugees.

[178] Amartya Sen has praised, for example, the shift in development indicators from growth in gross national product to the enhancement of people's living conditions: see, A. Sen, *Identity and Violence: The Illusion of Destiny* (London: Penguin Books, 2006), 74.

It is thus a closer relation to human rights than traditional security discourse.

A second benefit of people-centred security initiatives is the focus on all peoples, citizens and non-citizens alike. It aims to treat the security concerns of each individual as equally valid and mutually dependent. Non-citizens are not viewed as non-persons or 'outsiders' as they are under the state-centric system of international relations, but as equal citizens in the global community facing interdependent and universally relevant threats.

B. The language of security

The use of 'security' language is a double-edged sword. On the one hand, it can label the subjects of this security discourse as threats to security, rather than being victims or at risk of insecurity. The process of 'normalising' the language of security can hide from view the real agendas at play and permit the erosion of fundamental rights as states feel justified reducing or removing rights in situations of 'exception' or 'crisis'.[179] As a collective discourse, there is concern that individuals can become voiceless[180] or that the term may be misappropriated and misused to justify state-centric responses to the movement of people.[181] This is not an uncommon response to migrants, asylum-seekers and refugees who have been increasingly portrayed as security threats, rather than as individuals fleeing human rights violations, persecution or deprivations of human security. Thus there is concern in framing such issues within 'security' terms.

On the other hand, however, security and human rights have been concurrent aims of the UN Charter since 1945. Most threats to human security can be formulated as human rights violations. However, the added value of the language of security is that it 'can be used in social contexts where the language of human rights would meet entrenched opposition'.[182]

[179] Chimni, 'Globalization, humanitarianism and the erosion of refugee protection', 252.

[180] G. Noll, 'Securitizing sovereignty? States, refugees and the regionalization of international law', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations University, 2003) 277, 280.

[181] See, e.g., M. Ibrahim, 'The securitization of migration: a racial discourse', *International Migration,* 43 (2005), 163–87, 173–8.

[182] S. Alkire, *A Conceptual Framework for Human Security,* Centre for Research on Inequality, Human Security and Ethnicity, Queen Elizabeth House, Oxford University, 2003, 39; von Tigerstrom, *Human Security and International Law*, 30–40.

That is, human security language can be useful in situations where human rights language fails; additionally, the 'humanisation' of security discourse can provide entry points for human rights advocates to enter the debate.[183] As Ramcharan has noted, 'international human rights norms are crucial to the definition of human security and … human rights strategies are essential for its realization'.[184] Conversely, strategies to bring about secure conditions within countries of origin, transit and destination are also essential for the realisation of human rights. It is a symbiotic, rather than an antagonistic, relationship. Tadjbakshsh and Chenoy argue that the added value of the concept lies in the new questions it poses regarding security: 'security of whom?', 'security from what?', and 'security by what means?'[185] It has also been suggested that:

> Securitization can also be performed with an emancipatory interest. Given the capacity of security language to prioritize questions and to mobilize people, one can employ it as a tactical device to give human rights questions a higher visibility, for example.[186]

Any concerns over state manipulation of the 'securitisation' of refugee or migration issues ought not to be blamed on the concept of human security itself, but rather it reflects the *real politik* of its application. The language of security – whether 'national' or 'human' – is antithetical neither to the aims and purposes of the UN, nor to those of human rights. Lester reminds us in her chapter in this book of the risk of failing to engage in either the definitional or operational debate that surrounds the notion of 'human security'.[187] She urges us to explore what possibilities there might be for applying the human security concept in a manner that yields constructive and protective outcomes. She argues that if the concept of human security can be brought to bear on a refugee or migration 'problem' normatively, it may have the effect of bringing the legal frameworks of international refugee and human rights law, and indeed humanitarian law where relevant, into sharper relief. In this way,

[183] Newman, 'A Human Security Council? Applying a "Human Security" agenda to Security Council reform', 215.

[184] B. G. Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff Publishers, 2002), 231.

[185] Tadjbakhsh and Chenoy, *Human Security: Concepts and Implications*, 13.

[186] J. Huysmans, 'Defining social constructivism in security studies: the normative dilemma of writing security', *Alternative: Global, Local, Political*, 27 (2002), 41–63, 59; S. Taylor, 'Migration and human security in the Asia-Pacific region', *Global Change, Peace & Security*, 19 (2007), 171–74, 172.

[187] See, ch. 9 by E. Lester in this book.

she argues that it may serve a constructive purpose which cannot be achieved by resort to existing legal frameworks alone;[188] as we have also outlined above.

C. *Multilateralism, international cooperation and interdependence*

The human security framework embraces *multilateralism, international cooperation* and *interdependence,* recognising rightly that threats to human security in one part of the world affect persons in other parts and that this needs to be taken into account in designing solutions and responses. Today's internally displaced persons can quickly become tomorrow's refugees if the factors causing their human insecurity are not resolved. Today's refugees living in protracted camps may become tomorrow's irregular migrants,[189] or they may be recruited by non-state armed groups or the state military and paramilitary groups and prolong armed conflict.[190] As noted above, refugees are a litmus test for the state of human security worldwide. Causes of displacement are no longer limited to international conflicts, but include, *inter alia*, human rights violations, civil conflicts, environmental degradation, poverty and underdevelopment. Situations of displacement in turn can foster other issues of insecurity – for national borders as well as individuals – including drug and people trafficking, and irregular migration. The human security framework acknowledges these inter-linkages and thereby expands the ways in which displacement can be addressed.[191] The Iraq war and subsequent occupation is proof of the dangers of unilateralism in an interconnected world. Apart from being an unlawful act under international law,[192] unilateral military action taken against another state which is not exercised in individual or collective self-defence or otherwise authorised by the Security Council,[193] is itself

[188] *Ibid.*
[189] See, further, ch. 4 by E. Abuya in this book.
[190] See, further, ch. 5 by R. Muggah in this book.
[191] It is noted, too, that the UNHCR has been increasingly linking issues of displacement with development: see, UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern,* Geneva, 2003, available at www.unhcr.org/partners/PARTNERS/3f1408764.pdf (last accessed 10 Jan. 2009).
[192] Art. 2(4), UN Charter.
[193] Art. 51 and Chs. VI and VII, UN Charter.

a serious threat to human security; one of the results of which has been massive displacement.[194]

D. Prevention and responsibility

The system of international legal protection is generally reactive in nature rather than *preventive*. The human security framework, in contrast, is geared towards early action. The failure to deal with the human security issues of individuals and refugees can impact on national or even regional or global security and hence should be framed as a universal concern requiring early intervention. Alongside the human security framework is the emerging doctrine of R2P, which has as its central tenet that the responsibility to protect one's citizens lies with the state but if it is unable or unwilling to do so, the responsibility must be borne by the broader community of states. R2P is not limited to military action, however. The International Commission on Intervention and State Sovereignty (ICISS) noted:

> The debate on military intervention for human protection purposes was ignited in the international community essentially because of the critical gap between, on the one hand, the needs and distress being felt, and seen to be felt, in the real world, and on the other hand the codified instruments and modalities for managing world order.[195]

The notion of R2P, which the human security concept entails or supports (it is not clear which) is a move away from a right of military intervention on humanitarian grounds to a *responsibility* to prevent, a *responsibility* to react, including militarily in the most serious cases of human insecurity, and a *responsibility* to rebuild. Alternative options under R2P may include humanitarian operations, monitoring missions and diplomatic pressure.[196] As António Guterres, UN High Commissioner for Refugees, stated in his address to the UN Security Council in January 2009:

[194] See, also, in relation to Kosovo, H. Charlesworth, 'International law: a discipline in crisis', *Modern Law Review,* 65 (2002), 372–92.

[195] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect,* Dec. 2001, 15.

[196] Presentation by Erika Feller, Director, Department of International Protection, UNHCR, 'The Responsibility to Protect – Closing the Gaps in the International Protection Regime and the New EXCOM Conclusion on Complementary Forms of Protection', to the 'Moving On: Forced Migration and Human Rights' Conference, NSW Parliament House, Sydney, Australia, 22 Nov. 2005.

> Effective prevention [of displacement] will require a carefully balanced, coordinated and targeted combination of measures in the political, diplomatic, developmental, environmental and humanitarian domains. Effective prevention will require action to be taken by a wide range of different stakeholders, including states, UN entities, regional bodies, international financial organisations and non-state actors. And in our increasingly interconnected and interdependent world, effective prevention will require new networks and coalitions to be formed, linking those who are working to promote Human Security at the level of the local community to those who are striving to attain the same objective on a national, regional and global basis.[197]

R2P gives human security some enforcement teeth, especially its focus on early prevention. The Peacebuilding Commission, mentioned above, is also part of the new preventative vision of the UN.

E. Protection and empowerment strategies

With the dual aims of *protection and empowerment,* human security too aims to foster long-term solutions to refugee and migration 'problems'. Whilst protection strategies are not new to the international community's efforts to tackle forced displacement for example, such as offering immediate sanctuary and protection to refugees, human dignity requires also that non-citizens are respected as human beings capable of being active and contributing members of the communities in which they live, rather than passive recipients of aid or relegated to the status of 'outsider'.[198] Protection and empowerment are dual strategies that aid in the operationalisation of the concept of human security; the benefits of empowerment for refugees in this sense cannot be overstated, but so too for other non-citizens. Empowerment also implies that migrants be permitted to associate and organise to represent their shared interests, to form trade unions, to represent the rights of themselves and their families, and to speak up against fraud, abuse and exploitation.

F. Convergence of human rights, human development and human security

Finally, the concern that human security may undermine hard-won legal gains is tied to the vagueness of the concept in giving scope to states to

[197] Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, to the United Nations Security Council, New York, 8 Jan. 2009.

[198] See UNHCR, *Self-Reliance Handbook* (2005). See, further, ch. 3 by F. Nicholson in this book.

avoid any legal imperatives to act. The concern is that rights-discourse will be replaced by security-discourse, the former having the backing of a system of international law, the latter only a system of international relations constructed around state interests.[199] This view, however, tends to over-state the role international law plays in state compliance with international obligations; or it posits the law as being a near perfect system without recognising the myriad gaps in that framework that permit states to side-step even their existing legal obligations, some of which have been outlined in this chapter.

The human security framework, as elaborated by the UN or by state proponents, is not intended to replace or usurp existing legal frameworks, but rather to support and to strengthen them. Ogata and Cels argue that human security embraces both legal duties and obligations and also recognises ethical and political implications.[200] Human security in this sense refers to the rights, well-being, safety and dignity of individuals.[201] It may be a useful tool to re-think and re-conceptualise security issues as well as to deal with those issues that fall outside existing legal parameters, with a view to moving towards accepted standards and consensus.

It has also been argued that the human security framework draws upon and is linked to the international right to liberty and security of person contained in a range of international and regional human rights instruments.[202] That is, it has been posited that there is an emerging right to human security.[203] So far, however, the right to liberty and security of person has primarily been used in the narrow context of arbitrary arrest and detention.[204] At a minimum, the language of rights should be used as the floor but not the ceiling for what is possible under a re-imagined system of security and international relations.

[199] See concerns raised in particular by J. McAdam and B. Saul in ch. 10 of this book.

[200] S. Ogata and J. Cels, 'Human security – protecting and empowering the people', 275.

[201] Oberleitner, 'Human security: a challenge to international law?', 190.

[202] See, e.g., Art. 9(1), ICCPR; Art. 6, African Charter on Human and Peoples' Rights 1981, 27 Jun. 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM 58 (1982), entered into force 21 Oct. 1986; Art. 7, American Convention on Human Rights 1984, 22 Nov. 1969, OAS Treaty Series No. 36, 1144 UNTS 23, entered into force 18 Jul. 1978.

[203] See L. E Fielding, 'Taking a closer look at threats to the peace: the power of the Security Council to address humanitarian crises', *University of Detroit Mercy Law Review,* 73 (1996), 551–68, 568; Newman, 'A human security council? Applying a "human security" agenda to Security Council reform', 215.

[204] See S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004).

In our view, human rights, human development and human security have much in common. Human rights provides benchmark standards against which the actions of states can be judged and to which non-citizens and their advocates can appeal. Yet, the deprivation of the rights of non-citizens is an ongoing concern, if not an increasing one, in part because of the limited reach of international law and in part because of wider political factors. Human development is tied to the right to live and work in dignity and parallels the empowerment tenets of human security. Human underdevelopment is also closely tied to root causes of conflict, displacement and migration. Human security offers, therefore, a new vocabulary of appeal to states that complements human rights and human development agendas, but can also serve to plug some of the gaps in those frameworks, including in particular in relation to problems of enforceability of human rights guarantees.

IX. Conclusion

The concept of human security is not the panacea to the gaps in the international legal framework for non-citizens, nor is it likely to replace fully realist national security objectives. However, it is conceptually powerful for non-citizens in so far as it represents a shift away from traditional security paradigms that focus on the state and its territorial security and sovereignty, and towards placing the individual and communities – citizens and non-citizens alike – as the primary referent objects of security. Its broad, all-encompassing framework which takes account of a multitude of threats and a multitude of actors must resonate with elements within liberalism, constructivism, feminism and critical security studies; each school of thought attempting to reflect a more realistic, multifarious and nuanced vision of international relations. In offering new ways to re-think and to re-conceptualise modern security threats, the human security framework has the potential to deal with security concerns that fall outside existing legal frameworks, to activate collective and multilateral responses to those threats, and to act early rather than when it is too late. It also has the capacity to reinforce and elevate the human rights aims of the UN Charter of 1945 in recognition of our shared humanity. At the same time, the perception of non-citizens may also be modified within security discourse from 'non-persons' or 'outsiders' to being full and equal human beings; a shift that can only be positive for their protection and empowerment.

PART II

Physical and legal security, armed conflict and refuge

2

The value of the human security framework in addressing statelessness

MARK MANLY AND LAURA VAN WAAS[1]

I. Introduction

Looking at an old problem from a new angle can often be a fruitful exercise and statelessness is certainly one of those old problems that could benefit from a fresh perspective. While the problem of statelessness is currently relatively little discussed in the field of international relations, it has been a concern of the international community since the advent of the League of Nations and was one of the first issues tackled by the United Nations.[2] Despite a number of major advances in recent years – in countries such as Sri Lanka, Ukraine and Nepal[3] – the incidence of statelessness and the severity of the plight of some stateless populations is as much a cause for concern now as it was in the period following World War II, when the issue first featured prominently on the agenda of the international community. This chapter discusses how the international response to statelessness has developed since the advent of the United Nations, considering what contribution the tailor-made statelessness conventions of 1954[4] and 1961[5] and the development of human rights law have made in this respect. What are the strengths of

[1] The views expressed herein are those of the authors and do not necessarily reflect those of UNHCR or of the United Nations. All URLs were last accessed on 25 Oct. 2008.

[2] The Economic and Social Council requested a study of the matter in 1948 which was published by the UN Secretariat in 1949 as *A Study on Statelessness*. The International Law Commission identified statelessness as a priority topic in international law for codification. See, the ILC *Analytical Guide*, available at http://untreaty.un.org/ilc/guide/6_1.htm.

[3] See UNHCR, *The Excluded: The Strange Hidden World of the Stateless*, Refugees Magazine Special Report, Issue No. 147, Geneva, 2007.

[4] UN Convention relating to the Status of Stateless Persons 1954, 360 UNTS 117; entered into force 6 Jun. 1960.

[5] UN Convention on the Reduction of Statelessness 1961, 30 Aug. 1961, 989 UNTS 175; entered into force 13 Dec. 1975.

these respective frameworks and what questions do they leave unanswered? Thereafter, it examines whether the emerging human security debate offers the desired 'fresh perspective' and thus to what extent it consolidates, expands upon or endangers previously existing arrangements for addressing statelessness.

Despite the global impact of statelessness and its relevance for human security, the interrelationship between the two has been relatively little explored. To some degree this is not surprising, as there is relatively little writing on statelessness generally as compared to, for example, refugees and internal displacement. Additional study and writing is in order. Examination of the situation of stateless persons and populations reveals that there is a clear link between possession of a nationality and human security, or lack of nationality and human insecurity. Statelessness leads to risks to an individual's human security and, if left without a legal status, one's enjoyment of basic human rights and security of residence.

II. The human dimension of statelessness

Even among audiences well versed in international affairs, there tend to be surprised reactions when the global magnitude of statelessness is mentioned. The United Nations High Commissioner for Refugees (UNHCR) estimated that there were 12 million stateless persons worldwide in 2007. Moreover, the estimated number of stateless persons has risen in recent years as new stateless populations have been identified. At present, there are significant stateless populations (including populations of undetermined nationality) in countries as diverse as Côte d'Ivoire, the Democratic Republic of the Congo, the Dominican Republic, Estonia, Iraq, Kuwait, Latvia, Myanmar, Nepal, the Syrian Arab Republic and Thailand.[6]

More than focusing on the magnitude of statelessness, though, understanding the gravity of the phenomenon requires looking at the impact on individuals.

As will be discussed in section IV below, in principle, stateless people are to enjoy broad protection under international human rights law. However, in practice, they often face many obstacles to the full enjoyment of their rights. In other words, statelessness presents a risk to human security.

[6] The states listed have stateless populations close to or greater than 100,000 persons. See UNHCR, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, available at www.unhcr.org/statistics/STATISTICS/4852366f2.pdf.

An examination of the impact of statelessness on the enjoyment of specific human rights illustrates the human dimension of the problem. Most stateless persons around the world live in the country in which they were born, yet because they are not citizens they are frequently denied enjoyment of a broad range of human rights.[7] Most obviously, stateless persons almost never enjoy political rights, thereby precluding one more formal means of empowerment. Similarly, the right to purchase property, the ability to enter into other types of contracts, or to access social programmes or micro-credit are frequently reserved for nationals. Legal employment may be impossible. As evidenced by the testimony of a bidoon in the United Arab Emirates, denial of enjoyment of basic human rights cements the feeling of not belonging frequently found among stateless populations: 'We can't get regular jobs, we can't move, we are like boats without ports. Access to education and healthcare are also problems. I couldn't finish high school or go to college. I can only see a doctor in a private hospital, not in the government ones.'[8]

If a stateless person has travelled beyond the borders of their country of residence (for work or family reasons), they may be denied readmission there. Unable to return to their country, many stateless individuals have been detained for prolonged periods, sometimes indefinitely.[9] As a result of these privations, stateless persons are typically relegated to the fringes of society. Needless to say, international human rights law is not silent on these issues. The point, however, is that in practice, statelessness often leads to human rights violations. Put differently, statelessness threatens one's human security.

These risks are compounded when stateless persons lack birth registration or have no valid identity documents, as is often the case. In human rights terms, the lack of key identity documents means that

[7] It should be emphasised that a number of states have established regimes which foresee a status for stateless persons and a minimum set of rights, in some cases including rights normally guaranteed only to nationals.

[8] Cited in UNHCR/Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians* (Geneva: UNHCR, 2005), 17.

[9] UNHCR, *Stateless Persons: A Discussion Note,* UN Doc. EC/1992/SCP/CRP.4, Geneva, 1 Apr. 1992; D. Weissbrodt and C. Collins, 'The human rights of stateless persons', *Human Rights Quarterly,* 28 (2006), 267; Refugees International, *Refugee Voices: Detained Stateless People in Kuwait*, 24 Sept. 2007; S. Grant, 'The legal protection of stranded migrants', in R. Cholewinski, R. Perruchoud and E. MacDonald (eds.), *International Migration Law* (The Hague: TMS Asser Press, 2007), 29–47.

an individual does not enjoy recognition as a person before the law.[10] As a result, they are 'legal ghosts'.[11] The very fact that a person is stateless may prevent them from being able to register their children at birth, thereby perpetuating the cycle of invisibility. More dramatic still, failure to produce documents may result in deportation from the country where a person has always lived.

The impact on human rights and human security may be yet more serious, however. As highlighted by the UN General Assembly: 'statelessness, including the inability to establish one's nationality, may result in displacement, and stressing, in this regard, that the prevention and reduction of statelessness and the protection of stateless persons are important also in the prevention of potential refugee situations.'[12] There have been numerous cases where arbitrary deprivation of nationality resulted in statelessness and refugee flows. These include the Feili Kurds, who were deprived of Iraqi nationality under Saddam Hussein and expelled[13] and Black Mauritanians who were deprived of nationality and who fled to neighbouring Senegal and Mali.[14] The arbitrary deprivation of Zairian nationality of the Banyarwanda minority by Mobutu Sese Seko is generally viewed as one of the causes of the conflict that engulfed what is now the Democratic Republic of the Congo in 1996.[15]

[10] Recognised at the universal level in Art. 16 of the International Covenant on Civil and Political Rights 1966, GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976 (ICCPR).

[11] See Council of Europe Commissioner of Human Rights, Viewpoint, 'No one should have to be stateless in today's Europe', 9 Jun. 2008, available at www.coe.int/t/commissioner/Viewpoints/080609_en.asp.

[12] Preamble of UN General Assembly res. A/RES/50/152, 9 Feb. 1996.

[13] See UNHCR News Story, 'Feili Kurds in Iran seek way out of identity impasse', available at www.unhcr.org/news/NEWS/483d60872.html.

[14] As explained in UNHCR's *State of the World's Refugees*, reacquisition of nationality plays a central role in resolving such situations: 'For some refugee groups such as Black Mauritanians, or Feili Kurds from Iraq, arbitrary deprivation of nationality had been the main reason they have been recognized as refugees. The implementation of reintegration programmes in Mauritania and voluntary repatriation programmes in Iraq guaranteed refugees' right to recover nationality upon return.' UNHCR, *The State of the World's Refugees 2006* (Geneva: UNHCR, 2006), ch. 1, Current dynamics of displacement: Box 1.4 Prevention and Reduction of Statelessness, available at www.unhcr.org/publ/PUBL/4444d3c128.html.

[15] A. Makombo, 'Civil conflict in the Great Lakes region: the issue of nationality of the Banyarwanda in the Democratic Republic of the Congo', *African Yearbook of International Law*, 5 (1997), 49.

In sum, behind the legal term 'statelessness' lies the reality of very large numbers of individuals who are denied enjoyment of a broad range of human rights. The risks to human security wrought by statelessness are most dramatically illustrated when arbitrary deprivation of nationality leads to armed conflict, mass forced displacement, and threats to international peace and security. Yet most stateless persons are not affected by armed conflict and are not displaced but still experience a range of deprivations and risks to their human security as a result of their nationality status. As discussed in the following sections of this chapter, many of these problems could be avoided through the application of existing international standards.

III. Addressing statelessness through the specialised rules set out in the 1954 and 1961 Conventions

The 1948 Universal Declaration of Human Rights (UDHR) recognises the right of everyone to a nationality.[16] The corollary is that statelessness is to be avoided. At the time of drafting of the UDHR, however, UN member states faced the reality that millions of people were already stateless. The challenge was therefore to guarantee these persons a dignified existence until solutions were found for them. Most of these individuals were stateless refugees so the UN first adopted the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), which applies to persons who have fled their country of nationality (or, for those who are stateless, their country of former habitual residence) and who have a well-founded fear of being persecuted for reasons of one or more of five Convention grounds.[17] Originally, the drafters of the 1951 Refugee Convention had intended to adopt a protocol addressing the situation of stateless persons but in the end this was left until 1954, when the Convention relating to the Status of Stateless Persons was adopted (1954 Statelessness Convention). The 1954 Statelessness Convention extends protection to *non-refugee stateless persons,* thereby complementing the 1951 Refugee Convention. Subsequently, the UN adopted the 1961 Convention on the Reduction of Statelessness (1961 Convention).

[16] Art. 14, UDHR, GA res. 217A (III), 10 Dec. 1948.

[17] Art. 1A(2), 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

The 1954 Statelessness Convention establishes a specific legal status and accompanying rights for stateless persons. It is the only international treaty which does so. The Convention defines a stateless person thus:

> For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

It is important to note that this is a strictly legal definition, which is limited to whether a person possesses a nationality or not. Hence, the definition found in the 1954 Statelessness Convention refers to what are often described as *de jure* stateless persons. There are, however, persons who *formally* possess a nationality but who cannot exercise the rights which flow from it. A typical example of this, or at least one which can readily be identified, is where a person who is outside of her (only) country of nationality is refused a passport or denied the right to return and to reside in that country. In such a situation, the nationality is deemed to be ineffective and the persons concerned may be referred to as *de facto* stateless.[18] Such persons are not explicitly covered by the 1954 Statelessness Convention, however, and therefore present a challenge that needs to be addressed through other means, commonly by recourse to international human rights standards.

As with the 1951 Refugee Convention, the definition of a 'stateless person' is accompanied by a series of clauses which exclude persons from the benefits of the Convention in a range of circumstances.[19]

[18] See 1961 Convention, Final Act.

[19] Article 1(2) establishes that the 1954 Statelessness Convention does not apply to three broad categories of people:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(iii) To persons with respect to whom there are serious reasons for considering that:
  (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
  (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
  (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

The catalogue of rights established by the 1954 Statelessness Convention is almost identical to that found in the 1951 Refugee Convention.[20] As noted in UNHCR's Information and Accession Package on the Statelessness Conventions:

> These rights include access to courts, property rights and freedom to practice their religion. Obligations include conformity to the laws and regulations of the country. The Convention further addresses a variety of matters which have an important effect on day-to-day life such as gainful employment, public education, public relief, labour legislation and social security. Contracting States are encouraged to accord stateless persons lawfully resident on their territory a standard of treatment comparable, in some instances, to that accorded to nationals of the State and, in other instances, to that accorded to nationals of a foreign country or aliens generally in the same circumstances.[21]

The difficulties faced by stateless persons in proving identity and exercising legal personality mean that the obligation of states parties to issue identity documents is of particular importance. Article 27 establishes that the state 'shall issue identity papers to any stateless person in their territory who does not possess a valid travel document'. Moreover, states have an obligation to issue a Convention Travel Document[22] for the purposes of international travel, albeit only to stateless persons 'lawfully staying in their territory'.

The 1954 Statelessness Convention establishes a status for stateless persons and accompanying rights in international law and it follows that states parties must establish procedures at the national level to determine who is to be recognised as stateless because they fall under the definition. Recognition as a stateless person under the 1954 Statelessness Convention and respecting and guaranteeing the rights of all stateless persons under that Convention as well as under human rights law is fundamental, as it guarantees a dignified life and a degree of stability. The regime established

[20] Notable exceptions are that: (1) the 1954 Statelessness Convention does not prohibit *refoulement*; because stateless persons who face persecution in their country of former habitual residence would generally be protected as refugees under the 1951 Convention; and (2) the 1954 Statelessness Convention does not provide for non-penalisation for illegal entry or presence, again because stateless non-refugees do not face persecution which would justify unlawful entry and stay.

[21] UNHCR, *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (Geneva, revised 1999), para. 39, available at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3350&page=search.

[22] This obligation is similar to that found in Art. 28 of the 1951 Refugee Convention.

by the 1954 Statelessness Convention is, therefore, an important guarantor of human security for those individuals who benefit from it.

Nonetheless, three caveats are in order. The first is that in order for the 1954 Statelessness Convention regime to come into play, a person must first have been recognised as stateless. Many states parties to the 1954 Statelessness Convention do not have specific procedures to determine statelessness.[23] The 1954 Statelessness Convention does not offer guidance as to the procedures to be used to determine statelessness and there have not been sufficient efforts to implement a harmonised approach by states.[24] Those states that do have procedures may apply restrictive criteria. These failures impede recognition of stateless persons and, as a result, the effective enjoyment of the rights emanating from the 1954 Statelessness Convention. Second, those national determination procedures that do exist deal principally with *de jure* stateless persons who arrived from another state, a minority of the world's stateless population.[25] Third, even if a person is recognised as stateless, the full range of Convention rights will not necessarily apply to them because many rights are granted only to persons 'lawfully staying in their territory'[26] and recognition does not necessarily give rise to 'lawful stay'. Even if a person is lawfully staying, in some cases the Convention requires only that she enjoy rights 'not less favourable' than those enjoyed by other non-citizens in the same circumstances.

Status as a stateless person should be transitory and should not be viewed as a substitute for acquisition or reacquisition of nationality by stateless persons. The importance of Article 32 of the 1954 Statelessness Convention is that it requires that states 'shall as far as possible facilitate the assimilation and naturalization of stateless persons' and 'shall in

[23] UNHCR, *Final Report Concerning the Questionnaire on Statelessness pursuant to the Agenda for Protection* (Geneva: UNHCR, 2004), 26–27. For a survey of practice in the European Union that further explores this deficiency, see C. Batchelor, 'The 1954 Convention relating to the Status of Stateless Persons: implementation within the European Union member states and recommendations for harmonization', *Refuge*, 22 (Winter 2005), 31–58.

[24] Batchelor, *ibid.*, 33.

[25] On the other hand, as noted above, independent of the 1954 Statelessness Convention regime, some states have granted a specific status under their national law to large numbers of stateless persons, together with a package of rights. Estonia and Latvia are perhaps the most prominent examples.

[26] Rights to association, employment, and housing, freedom of movement and the obligation of states to issue a Convention Travel Document (for international travel) are limited to stateless persons who are lawfully staying.

particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings'.

To address the reality that statelessness may occur despite the general state obligations set out in human rights treaties,[27] appeal may be made to the explicit rules set down in the 1961 Convention. The 1961 Convention is designed to address the principal causes of statelessness, focusing mainly on the prevention of statelessness at birth and statelessness resulting from renunciation, loss or deprivation of nationality.

The 1961 Convention is drafted in technical language that is intended primarily to guide the drafting of nationality legislation and its implementation. For example, it establishes a safeguard whereby a state party 'shall grant its nationality to a person born in its territory who would otherwise be stateless'. States may opt for this to occur automatically at birth or by application that may be lodged 'during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years'. The second option signifies, then, that the child may remain stateless for a number of years; indeed, until adulthood. This approach gives rise to concerns given the potential impact on the individual. However, as described below, human rights law now recognises the right of every child to acquire a nationality, suggesting that allowing statelessness throughout childhood has become unacceptable.

The most common cause of new cases of statelessness in the past two decades has been state succession, specifically the emergence of new states following the dissolution of the Union of Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia, and Czechoslovakia. The 1961 Convention provides that treaties governing the transfer of territory between contracting states 'shall include provisions designed to secure that no person shall become stateless as a result of the transfer'.

[27] UNHCR's Executive Committee noted in Conclusion No. 106 on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons of 2006 that statelessness: 'may arise as a result of restrictions applied to parents in passing on nationality to their children; denial of a woman's ability to pass on nationality; renunciation without having secured another nationality; automatic loss of citizenship from prolonged residence abroad; deprivation of nationality owing to failure to perform military or alternative civil service; loss of nationality due to a person's marriage to an alien or due to a change in nationality of a spouse during marriage; and deprivation of nationality resulting from discriminatory practices.' Available at: www.unhcr.org/statelessness. Causes of statelessness are further discussed in, e.g., UNHCR, *Information and Accession Package*; J. Goldston, 'Holes in the rights framework: racial discrimination, citizenship, and the rights of non-citizens', *Ethics and International Affairs*, 20 (2006), 321.

It further requires that, 'in the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition'.

Given the complexities that may arise in applying the 1961 Convention to specific situations, the Convention made provision for the establishment of a body to which individuals who claim the benefit of the Convention may apply for the examination of their claims and for assistance in presenting them to the authorities of the relevant states party (or parties).[28] The UN General Assembly assigned this role to UNHCR in 1974.[29] Subsequently, in 1996, UNHCR was given a global mandate over the prevention and reduction of statelessness and the protection of stateless persons.[30]

There is recognition that additional standards are required to develop and supplement those contained in the 1954 and 1961 Conventions. Evidence of this is to be found in the work of the International Law Commission (ILC). Most prominently,[31] in 1999 the ILC adopted a detailed set of rules that supplement the 1961 Convention's bare-bones approach to state succession: the Draft Articles on Nationality of Natural Persons in relation to Succession of States.[32] In addition, soft law standards have been developed through conclusions on international protection adopted by UNHCR's Executive Committee.[33] As new statelessness challenges arise, additional complementary standards will be necessary. For example, an international arrangement may well become necessary to prevent statelessness from occurring as a result of the disappearance of small island states due to rising sea levels.

[28] Art. 11, 1961 Convention.

[29] GA res. A/RES/3274 of 10 Dec. 1974 assigned this responsibility on a provisional basis and GA res. A/RES/31/36 of 30 Nov. 1976 extended this mandate indefinitely.

[30] This mandate is not limited to states parties to one or the other of the conventions: GA res. A/RES/50/152, 9 Feb. 1996 reiterated in res. A/RES/61/137, 25 Jan. Details of the work undertaken by UNHCR pursuant to this mandate is contained in progress reports posted at www.unhcr.org/statelessness.

[31] The ILC has also sought progressive development of the law with regard to the diplomatic protection of stateless persons, see Draft Articles on Diplomatic Protection adopted in 2006, Official Records of the General Assembly, Sixty – First Session, Supp. No. 10 (A/61/10) (2006), GA res. 62/67, 6 Dec. 2007.

[32] See, GA res. A/RES/55/153, 30 Jan. 2001. This issue has also been addressed at the regional level in Europe in the form of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession 2006, text available at www.unhcr.org/statelessness.

[33] See, e.g., EXCOM Conclusion No. 106 (2006).

The specialised rules contained in the 1954 and 1961 Conventions make them key elements in the international regime to address statelessness. However, they are only part of the global regime and read or applied in isolation, they have quite clear limitations. Nonetheless, one of the greatest impediments to global efforts to address statelessness relates not to the *content* of these two instruments but to *which states* are bound to observe the rules they contain.

Given the importance of establishing common rules among states in this area, the UN General Assembly has encouraged states that have not done so to give consideration to acceding.[34] Similarly, UNHCR's Executive Committee has 'encouraged' states to give consideration to acceding to both instruments and, in regard to states parties, to consider lifting reservations.[35] The UN Human Rights Council has also called upon states to consider accession.[36] As of 1 September 2008, there were only sixty-three states parties to the 1954 Statelessness Convention and thirty-five states parties to the 1961 Convention.[37] Moreover, a disproportionate number of those states which are parties are located in Europe and, as a result, the two Conventions have had less impact in those regions where the largest numbers of stateless persons are to be found. Having noted this, the number of accessions has accelerated in recent years. As a result of the resolutions adopted by various UN bodies and the rising number of states parties to these treaties, it is, therefore, becoming increasingly difficult to argue that the 1954 and 1961 Conventions lack relevance.

IV. Addressing statelessness through human rights law

For several decades following the adoption of the 1954 and 1961 Statelessness Conventions, the two instruments lay virtually forgotten, while the international community turned its attention elsewhere. As explained above, the initially slow pace of accessions limited the effectiveness of the Conventions in addressing the challenges of statelessness. Over the same period, however, other areas of international law continued to advance rapidly. In particular, within the field of human

[34] GA res. A/RES/61/137, 25 Jan. 2007.

[35] EXCOM Conclusion No. 106 (2006), paras. (n) and (s).

[36] UN Human Rights Council (HRC) res. 7/10, Human Rights and Arbitrary Deprivation of Nationality, 27 Mar. 2008.

[37] For status of ratifications and accessions, Status of Multilateral Treaties Deposited with the Secretary-General, available at http://untreaty.un.org or www.unhcr.org/statelessness. Alternatively, see www.unhcr.org/statelessness.

rights law a number of instruments were adopted in quick succession at both universal and regional levels to address a wide range of issues relevant to statelessness. Numerous bodies and institutions were also established and these helped to further elucidate and develop the relevant norms. So, by the time statelessness had reclaimed its position on the international community's agenda in the mid-1990s, the international legal setting had changed dramatically. Alongside the tools offered by the 1954 and 1961 Statelessness Conventions, exciting new opportunities for addressing statelessness can now be identified within the modern human rights framework.

Arguably, the principal norm relating to statelessness to be found in the field of human rights is the *right to a nationality,* first enunciated in 1948 in Article 15 of the UDHR. This provision provided an important impetus for the adoption of the statelessness conventions – in particular the 1961 Convention that was designed to be a concretisation of the norm. The same article also inspired the inclusion of the right to a nationality in many more human rights instruments at international and regional levels,[38] as well as the elaboration of several other documents that focus on specific nationality questions.[39] These manifold reaffirmations of the right to a nationality in both universal and regional instruments – and thereby the increasingly widespread acceptance of this right as a human right – is prime evidence of an international consensus

[38] E.g., Art. 24, ICCPR and Art. 7 of the Convention on the Rights of the Child, GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990, both of which recognise the right of every child to acquire a nationality; Art. 29 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families 1990, GA res. 45/148, 18 Dec. 1990, 2200 UNTS 93; entered into force 1 Jul. 2003; Art. 9 of the Convention on the Elimination of All Forms of Discrimination Against Women 1979, GA res. 34/180, 18 Dec. 1979, 1249 UNTS 13; entered into force 3 Sept. 1981; Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination 1965, GA res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969; Art. 18 of the Convention on the Rights of Persons with Disabilities 2006, GA res. 61/106, 13 Dec. 2006; entered into force 3 May 2008; Art. 20 of the American Convention on Human Rights 1969, 22 Nov. 1969, OAS Treaty Series No. 36, 1144 UNTS 123; entered into force 18 Jul. 1978; Art. 6 of the African Charter on the Rights and Welfare of the Child 1990, OAU Doc. CAB/LEG/24.9/49 (1990); entered into force 29 Nov. 1999; and Art. 7 of the Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep.Final.

[39] Such as the UN Convention on the Nationality of Married Women, GA res. 1040 (XI), 29 Jan. 1957; entered into force 11 Aug. 1958; the European Convention on Nationality, ETS No. 166; the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, ETS No. 200 (2008); and the ILC's Draft Articles on Nationality of Natural Persons in relation to the Succession of States.

that statelessness is unacceptable. Although the attribution of nationality is still, in principle, the sovereign concern of states, human rights law places a clear onus on state authorities to refrain from implementing nationality policies that would contribute to the creation or perpetuation of statelessness.[40]

In seeking to prevent, reduce, and ultimately eliminate statelessness – to promote the realisation of the right to a nationality – three more specific human rights norms are of great relevance. The first relates to the avoidance of statelessness at birth. Human rights law calls for states parties to:

> adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born.[41]

Indeed, in a bid to ensure fully that every newborn is attributed a nationality, several human rights and human rights-inspired instruments define what measures are appropriate by identifying *which* state should confer citizenship when statelessness threatens. Thus, according to the terms of the American Convention on Human Rights 1969 and other instruments, a child who would otherwise be stateless is entitled to the nationality of the state in which he or she was born (*jus soli* citizenship).[42] Human rights law thereby offers a clear and widely accepted safeguard against statelessness at birth which complements that found in the 1961 Convention.[43]

[40] See, e.g., UN HRC res. 7/10, 27 Mar. 2008; UN Commission on Human Rights res. 2005/45, *Resolution on Human Rights and Arbitrary Deprivation of Nationality,* 19 Apr. 2005. See, also, J. Chan, 'The right to a nationality as a human right – the current trend towards recognition', *Human Rights Law Journal,* 12 (1991), 11; Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness,* Nov. 2005, 6–7.

[41] UN Human Rights Committee, *General Comment No. 17: Rights of the Child (Art. 24)*, 7 Apr. 1989, para. 8. See, e.g., Art. 24(3), ICCPR and Art. 7(2), CRC.

[42] Art. 20(2), American Convention on Human Rights; Art. 6(4), the African Charter on the Rights and Welfare of the Child; Art. 6(2), the European Convention on Nationality; Art. 13 of the ILC's Draft Articles on Nationality of Natural Persons in relation to the Succession of States; and Art. 10 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

[43] The attribution of nationality *jus soli* to a child who would otherwise be stateless is increasingly considered to enjoy universal acceptance as a general principle of international law. The combined geographical reach of the regional instruments in which the norm can be found and the recent firm reiterations in documents dealing with

The second specific tool for the prevention of statelessness to be found within the human rights framework is also relevant to the avoidance of statelessness at birth. It is the child's right to have his or her birth registered.[44] Through the act of birth registration, basic facts surrounding the child's birth are formally acknowledged and recorded by a state's authorities.[45] This record – and the accompanying birth certificate that should be issued at the moment of, or shortly following, registration – amounts to permanent, official and visible evidence of a state's legal recognition of his or her existence as a member of society.[46] When registration fails to take place, evidence of the child's position under the relevant nationality laws is lost and even the question of which nationality laws are relevant cannot necessarily be answered satisfactorily. Without proof of the decisive facts – place and date of birth,[47] and parentage – these details can be contested and, with them, the applicability of any particular nationality act. In addition, the very fall-back clauses that have been designed to secure the avoidance of statelessness at birth may become ineffective where a child's birth has not been registered because it is difficult to prove that the child would 'otherwise be stateless'. Moreover, the act of birth registration provides a point of

statelessness in the context of state succession lend weight to this point of view. See, for a discussion of the status of this norm, R. Donner, *The Regulation of Nationality in International Law* (New York: Transnational Publishers, 1994), 230; Chan, 'The right to a nationality as a human right'; D. Weissbrodt, *Final Report on Prevention of Discrimination – The Rights of Non-Citizens,* UN Doc. E/CN.4/Sub.2/2003/23, 26 May 2003, 6; D. Weissbrodt and C. Collins, 'The human rights of stateless persons', *Human Rights Quarterly,* 28 (2006), 256; and J. Doek, 'The CRC and the right to acquire and preserve a nationality', *Refugee Survey Quarterly,* 25 (2006), 26.

[44] This right can be found in Art. 24, ICCPR; Art. 7 CRC; Art. 6, African Charter on the Rights and Welfare of the Child; and Art. 7, Covenant on the Rights of the Child in Islam. It is also implicit in Art. 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended (dealing with the right to respect for family life) and Art. 18 of the American Convention on Human Rights (dealing with the right to a name).

[45] J. Todres, 'Birth registration: an essential first step toward ensuring the rights of all children', *Human Rights Brief,* 10 (2003), 32.

[46] Plan International, *Universal Birth Registration – A Universal Responsibility* (2005), 11.

[47] Date of birth can be critical to ascertaining which nationality law was in force at the time of the child's birth and is therefore applicable for the purposes of attribution of nationality.

contact between the child and the state, offering an opportunity for the state to assess the situation of the child and implement a remedy if statelessness threatens. With this in mind, the UN General Assembly has reminded states that there should be a system in place that is designed to ensure the child's right to a nationality, coupled to the birth registration process.[48] The recognition of the right to birth registration under human rights law is therefore an invaluable tool in tackling statelessness and redresses a gap left by the 1961 Convention.[49]

The third important human rights standard in tackling the existence of statelessness is the prohibition of arbitrary deprivation of nationality.[50] The scope of this norm rests on the interpretation of the concepts of *arbitrariness* and of *deprivation of nationality.* The latter refers to situations of denationalisation (or withdrawal of citizenship), but it has also been interpreted as applying to denial of access to nationality (or refusal to confer citizenship).[51] Thus, this norm can be relevant to the avoidance of statelessness at birth, the prevention of statelessness in later life, and even to the resolution of cases of statelessness. The question of when the norm comes into play is also dependent on the definition of arbitrariness – a familiar notion in the human rights context which encompasses, yet goes beyond, mere

[48] GA res. A/RES/S-27/2, *A World Fit for Children,* Twenty-Seventh Special Session, New York, 11 Oct. 2002, para. 44(1).

[49] This instrument does not address the need for birth registration in any of its provisions but birth registration is necessary to give effect to some of its provisions, e.g., to document the place of birth of a child who would otherwise be stateless unless he or she acquires the nationality of the country of birth (Art. 1 of the 1961 Convention).

[50] The prohibition of arbitrary deprivation of nationality is explicitly included in Art. 15 of the UDHR and Art. 20 of the American Convention on Human Rights. It can also be found in Art. 4 of the European Convention on Nationality; Art. 15 and 16 of the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States; para. 55 of Chapter VI on The Human Dimension of the Concluding Document of Helsinki, Conference for Security and Cooperation in Europe, 1992; para. 19 of the Charter for European Security of the Organization for Security and Cooperation in Europe, 1999. The norm is also the implicit counterpart to the right to a nationality which can be found in many more documents.

[51] E.g., the Inter-American Court on Human Rights found a violation of the prohibition of arbitrary deprivation of nationality in a case involving the discriminatory refusal to grant nationality at birth. See Inter-American Court on Human Rights, *Yean and Bosico* v. *Dominican Republic,* Series C, Case 130, 8 Sept. 2005, para. 174. For a contrary view, see M. Adjami and J. Harrington, 'The scope and content of Article 15 of the Universal Declaration of Human Rights', *Refugee Survey Quarterly,* 27 (2008), 93–109.

unlawfulness.[52] Nationality policy may also be arbitrary if it is in breach of the fundamental principle of equal treatment or non-discrimination,[53] or if it does not allow for 'procedural due process, including review or appeal'.[54] In prohibiting *discriminatory* deprivation of nationality, human rights law provides that a state may not withhold or withdraw nationality from an individual on the basis of a distinction that is deemed unreasonable or untenable, such as on the grounds of race or sex/gender.[55] This is a highly significant norm for the fight against statelessness, since many cases of statelessness around the world involve minority groups who can trace the origin of their plight back to a discriminatory policy or decision of some kind.[56] The human rights framework also does not tolerate general policies such as *jus sanguinis* laws whereby nationality can only be transmitted from father to child (and not from mother to child)[57] – a policy that is

[52] See, e.g., Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* 8 Apr. 1988, para. 4 and Human Rights Committee, *Van Alphen* v. *The Netherlands,* Comm. No. 305/1988, 23 Jul. 1990, para. 5.8.

[53] Note that the principle of non-discrimination enjoys the status of customary international law and that the prohibition of *racial* discrimination – covering distinctions on the grounds of race, colour, descent, or national or ethnic origin – is a *jus cogens* norm.

[54] Open Society Justice Initiative, *Racial Discrimination and the Rights of Non-Citizens. Submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of its 64th Session* (New York: Open Society Justice Initiative, 2004); Adjami and Harrington, 'The scope and content of Article 15 of the Universal Declaration of Human Rights'; Human Rights Committee, *A* v. *Australia*, HRC 5560/93. The principle of due process and the right to an effective remedy are both relevant in this context: see, e.g., Art. 2(3), ICCPR.

[55] For a full consideration of the prohibited grounds encapsulated in the term arbitrary deprivation of nationality, see UN Human Rights Commission, *Resolutions on Human Rights and Arbitrary Deprivation of Nationality,* Nos. 1997/36, 11 Apr. 1997; 1998/48, 17 Apr. 1998; 1999/28, 26 Apr. 1999; 2005/45, 19 Apr. 2005; 7/10, 27 Mar. 2008; and 10/13, 26 Mar. 2009.

[56] The situation of the stateless Kurds in the Syrian Arab Republic and the Rohingya in Myanmar are two such examples. See, more generally, A. Eide, *Citizenship and the Minority Rights of Non-Citizens*, Working Paper prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.3, 15 Apr. 1999; G. McDougall, *Report of the Independent Expert on Minority Issues*, UN Doc. A/HRC/7/23, 28 Feb. 2008; Goldston, 'Holes in the rights framework'.

[57] This comes to the fore in, e.g., Human Rights Committee, Concluding Observations on Jordan, UN Doc. A/49/40 Vol. I, 1994, para. 232; Libyan Arab Jamahiriya, UN Doc. A/54/40 Vol. I, 1999, para. 137; Monaco, UN Doc. A/56/40 vol. I, 2001, para. 84; Egypt, UN Doc. A/58/40 Vol. I, 2003, para. 77(10); Morocco, UN Doc. A/60/40 vol. I, 2005, para. 32; Committee on the Rights of the Child, Concluding Observations on Iraq, UN Doc. CRC/C/80, 1998, para. 76; Saudi Arabia, UN Doc. CRC/C/103, 2001, para. 397; Bhutan, UN Doc.

known to severely heighten the risk of statelessness for the child.[58] Furthermore, the principle of non-discrimination carries such weight that it even impacts upon the freedom of states to set their own rules regarding naturalisation, a key mechanism in the reduction of statelessness. States may not, for instance, block access to naturalisation for particular racial or ethnic groups,[59] nor may they generally impose 'unreasonable impediments' to the acquisition of nationality by naturalisation.[60] Here, again, human rights law deals with an area of the fight against statelessness that was overlooked by the 1961 Convention. Meanwhile, by requiring nationality policy to take into account considerations of due process and of access to an effective remedy, the human rights regime asks states to put the necessary procedural guarantees in place to ensure that decisions on the attribution of nationality are not taken unlawfully or on discriminatory grounds. In fact, the most recent human rights-inspired instruments adopted to deal with nationality questions, such as the European Convention on Nationality, elaborate a series of precise procedural protections, including the provision that decisions relating to nationality be motivated in writing and subject to an

CRC/C/108, 2001, para. 459; Brunei Darussalam, UN Doc. CRC/C/133, 2003, paras. 359–60; Togo, UN Doc. CRC/C/146, 2005, para. 547; Committee on Economic, Social and Cultural Rights, Concluding Observations on Jordan, UN Doc. E/2001/22, 2000, para. 234; Nepal, UN Doc. E/2002/22, 2001, para. 533.

[58] For an overview, see International Law Association, Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law*, available at: www.unhcr.org/statelessness. For country-specific examples, see Collective for Research and Training on Development – Action, *Denial of Nationality: the Case of Arab Women, Summary of Regional Research*, Feb. 2004.

[59] The Committee on the Elimination of Racial Discrimination has, on several occasions, expressed its concern at instances of racial discrimination in laws and regulations on naturalisation and their implementation. See CERD, Concluding Observations on Croatia, UN Doc. A/50/18, 1995, paras. 173 and 175; Republic of Korea, UN Doc. A/51/18, 1996, para. 328; and Switzerland, UN Doc. A/57/18, 2002, para. 251. So too has the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. See, e.g., D. Diène, *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum – Summary of Cases transmitted to Governments and Replies Received,* UN Doc. A/HRC/4/19/Add.1, 5 Jun. 2007, paras. 65–67 and D. Diène, *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum – Mission to the Russian Federation,* UN Doc. A/HRC/4/19/Add.3, 30 May 2007.

[60] Human Rights Committee, *Capena* v. *Canada,* Comm. 558/1993, UN Doc. A/52/40, vol. II, 3 Apr. 1997, para. 11.3. Note that the scope of what would amount to 'unreasonable impediments' may be different for the stateless than for other groups of non-nationals, since their statelessness can present particular obstacles when seeking naturalisation.

administrative or judicial review.[61] These procedural guarantees help to ensure that there is a real opportunity to overturn unlawful, unreasonable or discriminatory decisions as well as to (re)consider the position of the individual concerned in view of any potential threat of statelessness.

It is, therefore, evident that there are multiple avenues through which contemporary human rights law can contribute to the prevention and resolution of statelessness. But this is not all that the human rights framework has to offer in addressing statelessness – there is also great scope for the protection of stateless persons through reliance on the broad catalogue of human rights norms that now exist. The advent and progressive development of human rights law has heralded a change in the position of the individual under international law. Whereas once it was held that *nationality* was the ticket to rights and protection,[62] *humanity* or *human dignity* are now the basis for the enjoyment of most human rights. As explained by Judge Cançado Trindade of the Inter-American Court on Human Rights:

> [W]ith the passage of time, it became evident that the nationality regime was not always sufficient to provide protection under any and every circumstance … throughout the twentieth century and to date, international human rights law has sought to remedy this deficiency or vacuum, by denationalising protection (and thus including every individual, even stateless persons).[63]

The norms enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) 'apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness',[64] as do those

[61] Chapter IV of the European Convention on Nationality is devoted to 'Procedures relating to Nationality'. See, also, Art. 17 of the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States and Art. 12 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

[62] In 1958, in a much cited case before the US Supreme Court, nationality was declared to be the 'right to have rights' and the revocation of citizenship (resulting in statelessness), tantamount to 'the total destruction of an individual's status in organised society': *Trop* v. *Dulles, Secretary of State et al.*, 356 US 86, 1958.

[63] Separate opinion of Judge A.A. Cançado Trindade, Inter-American Court on Human Rights, *Yean and Bosico* v. *Dominican Republic,* Series C, Case 130, 8 Sept. 2005.

[64] Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, 11 Apr. 1986. See, also, Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

elaborated in other instruments.[65] The relevance of these obligations for the protection of the human rights of stateless persons is underlined by the high number of states parties to these instruments – 162 states parties in the case of the ICCPR.[66]

Citizenship has not, however, become an entirely irrelevant factor in the enjoyment of fundamental rights. Human rights law continues to admit the possibility that non-nationals be treated differently to nationals. On the one hand, there are a number of human rights norms that are better described as the rights *of nationals*, since they are guaranteed only in relation to the country of nationality. Article 25 of the ICCPR, for instance, provides for the right to participate in government (to vote, stand for election and work in public service) – but it addresses itself to 'every citizen' as opposed to 'everyone'. The stateless, lacking any nationality, are unable to exercise this right. On the other hand, a tinge of uncertainty surrounds the exact treatment owed to stateless persons with respect to specific human rights, due to the finding that distinctions between citizens and non-citizens are not necessarily prohibited under the principles of equality and non-discrimination.[67] As the Special Rapporteur on the Rights of Non-Citizens of the former Sub-Commission on the Promotion and Protection of Human Rights explained:

> [T]he architecture of human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights *unless* exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.[68]

[65] See, e.g., Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-citizens*, 1 Oct. 2004; Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties Obligations*, 14 Dec. 1990; and Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept. 2005.

[66] As at 22 Oct. 2008. See list of states parties at www2.ohchr.org/english/bodies/ratification/4.htm.

[67] The International Convention on the Elimination of All Forms of Racial Discrimination 1965, for instance, explicitly declares that it does not cover 'distinctions, exclusions, restrictions or preferences … between citizens and non-citizens' (Art. 1(2)).

[68] D. Weissbrodt, *Final Report on Prevention of Discrimination – The Rights of Non-Citizens, UN Doc.* E/CN.4/Sub.2/2003/23, 26 May 2003, para. 6. Emphasis added.

He provides an indication of the significance of this by listing those rights which are to be enjoyed by non-citizens, stating that:

> For example, non-citizens should have freedom from arbitrary killing, inhuman treatment, slavery, forced labour, child labour, arbitrary arrest, unfair trial, invasions of privacy, *refoulement*, forced labour, child labour, and violations of humanitarian law. They also have the right to marry; protection as minors; peaceful association and assembly; equality; freedom of religion and belief; social, cultural, and economic rights in general; labour rights (for example, as to collective bargaining, workers' compensation, social security, working conditions and environment, etc.); and consular protection. While all human beings are entitled to equality in dignity and rights, States may narrowly draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement.[69]

Whether a distinction based on citizenship would pass muster or not therefore depends on the specific right at issue and the circumstances at hand. As such, the enjoyment of specific rights by stateless persons may be problematic in some situations.[70]

Nevertheless, modern human rights law does present a fresh perspective for the protection of stateless persons, augmenting the guarantees found in the 1954 Statelessness Convention and providing new opportunities for promoting their enjoyment of fundamental rights. A good illustration of this development is the fact that, for many years now, human rights supervisory bodies have taken an interest in the plight of stateless populations around the world and have called upon the relevant states to remedy any human rights concerns that have been uncovered – be they related to the freedom of movement, freedom of religion, the right to education or the right to health.[71] In addition, there are already

[69] Weissbrodt, *Final Report on Prevention of Discrimination – The Rights of Non-Citizens*, Executive Summary.

[70] Note that, with this in mind, those provisions of the 1954 Statelessness Convention that guarantee stateless persons treatment on a par with nationals may still be of particular value, even in the modern human rights environment.

[71] There are many examples of this phenomenon, at both the universal and regional levels. For instance, in a 2007 report, the UN Special Rapporteur on Contemporary Forms of Racism expressed concern at the situation of the stateless Rohingya in Myanmar in D. Diène, *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance,* para. 126; the Committee on the Rights of the Child called for equal access to education for all children, including stateless children, in Iran in Committee on the Rights of the Child, Concluding Observations on Iran, UN Doc. CRC/C/146 (2005) 88, para. 496; and the Inter-American Commission on

numerous cases in which stateless persons have taken advantage of individual complaints procedures within the human rights system to seek redress for a specific violation that they have suffered.[72]

There is no denying that, today, the 1954 and 1961 Statelessness Conventions form only one cog in the international machinery that exists for addressing statelessness. The broader human rights framework encompasses norms that are more current, more widely accepted and cover a greater range of issues than the statelessness instruments. Yet, despite the many relevant human rights obligations that are in place, new cases of statelessness continue to surface, there has been too little progress in resolving existing cases, and stateless individuals continue to be exposed to very poor treatment in countries around the world. The moral and normative value of human rights norms is, of itself, insufficient to ensure compliance. There remains, it would seem, a problem of implementation and enforcement. The human rights supervisory mechanisms are frequently unable to compel states to act in conformity with their international legal obligations. And, at times, the implementation of those legal standards is impeded by the lack of clarity as to their scope and application in the specific context of (a threat of) statelessness, as well as by the absence of guidelines for the identification of cases of (potential) statelessness. The challenge that remains is, therefore, to find ways to unlock the enormous potential that the human rights regime has for tackling statelessness – effectively to utilise this legal framework to prevent and reduce statelessness and to protect stateless persons.

Human Rights discussed in depth its concerns at the situation of stateless Haitian-Dominicans in the Dominican Republic in Inter-American Commission on Human Rights, 'Chapter IX: Situation of Haitian Migrant Workers and their Families in the Dominican Republic', in *Report on the Situation of Human Rights in the Dominican Republic,* Doc. OEA/Ser.L/V/II.104, 7 Oct. 1999.

[72] In particular, over the past decade, the European Court of Human Rights has seen numerous procedures brought before it by stateless persons against different states. See, e.g., *Slavov* v. *Sweden,* Applic. No. 44828/98, 29 Jun. 1999; *Okonkwo* v. *Austria,* Applic. No. 35117/97, 22 May 2001; *Al-Nashif* v. *Bulgaria,* Applic. No. 50963/99, 20 Jun. 2002. In each of these cases, the court opened the description of the facts by noting that the applicant was a stateless person. This finding clearly has no direct influence on the admissibility of the claim since it is the jurisdiction of the state – not nationality – that is relevant.

V. Addressing statelessness through the human security framework

As other contributions to this volume demonstrate, there has been some academic debate surrounding a number of issues relating to human security and non-citizens. The same cannot be said of human security and statelessness, however. The report of the UN Commission on Human Security focused on the importance of citizenship and the risks implied by denial of citizenship, albeit principally by linking statelessness to consequences such as armed conflict and forced displacement.[73] Earlier, when UNHCR used human security as a framework for its 1997 edition of *The State of World's Refugees*, there was more detailed analysis of the relationship between statelessness and human security.[74] Following these preliminary examinations of the issue, however, little has been written on statelessness and human security.[75]

Just as the progressive development of human rights law opened important new avenues for addressing statelessness, so too may the emergence of the human security debate herald an innovative, fresh perspective for tackling the issue. In fact, there are a number of ways in which the human security framework may make a positive contribution to the international response to statelessness. First, the notion of *human* security lays bare the link between statelessness and *national* security. As explained in *Human Security Now*: '[d]eprivation and unequal treatment may not generate an immediate revolt, but they can remain in people's memory and influence the course of events much later.'[76] Indeed, a number of states have viewed the presence of large numbers of stateless persons among their populations from precisely this angle.[77] *Human Security Now* goes further, though, linking citizenship

[73] Commission on Human Security, *Human Security Now* (New York, 2003).

[74] See, ch. 6 of UNHCR, *State of the World's Refugees: A Humanitarian Agenda*, 1997, available at www.unhcr.org/publ/PUBL/3eb7bb534.pdf.

[75] One exception is a relatively short report prepared for the Advisory Board on Human Security by C. Sokoloff, *Denial of Citizenship: A Challenge to Human Security* (2005).

[76] Commission on Human Security, *Human Security Now*, 7.

[77] The relevance of this in the Thai context is explored in some detail in L.E. Van Waas, *Is Permanent Illegality Unavoidable?: The Challenges of Ensuring Birth Registration and the Right to a Nationality for the Children of Irregular Migrants: Thailand and the Dominican Republic* (Woking, United Kingdom: Plan International, 2006). The issue has also arisen in the context of the United Arab Emirates with regard to the Bidoon population, see Business Intelligence Middle East, 'UAE sets panel to close file of stateless persons', 2 Sept. 2008, which quotes a government spokesperson as referring to statelessness as a challenge to 'social stability', available at www.bi-me.com/main.php?id=23879&t=1&c=33&cg=4&mset=

and human security to international peace and security. The report explores the link with statelessness, arguing that the 'wilful denial of citizenship for whole communities has major implications for other states, due to the potential large scale population movements and the spread of conflict and poverty'.[78] Within the human security discourse there is room to step beyond the moral and legal reasoning that is involved in discussing statelessness as a rights issue (see above discussion). The individual is still centre-stage and the objective – protection against and in statelessness – is the same. The difference is that the human security framework is ever mindful of the broader repercussions of a lapse in protection and in human security, reminding states that:

> to achieve peace and stability in today's interdependent world, preventing and mitigating the impact of internal violent conflicts are not sufficient. Also important are upholding human rights, pursuing inclusive and equitable development and respecting human dignity and diversity.[79]

Thus, where statelessness has been discussed through the lens of human security, attention has also been paid to the way in which the issue has contributed to (or stood in the way of resolving) tensions at the domestic and international levels.[80] Since affirmative action to address statelessness remains plainly unforthcoming in so many cases, in spite of the moral arguments that can readily be conjured and the legal obligations that states have entered into, there is a clear need to find further tools of persuasion. The illumination of the connection between statelessness and national security concerns, through the human security framework, may be the extra push that is needed to induce states to act.

[78] Commission on Human Security, *Human Security Now,* 32.

[79] *Ibid.,* 5.

[80] A prime example is a report prepared for the Advisory Board on Human Security, which discusses at some length the way in which nationality disputes and statelessness can or have contributed to communal tensions, forced displacement and conflict: Sokoloff, *Denial of Citizenship: A Challenge to Human Security.* Other accounts also discuss the importance of addressing statelessness in preventing displacement or conflict as well as in promoting the successful return of refugees and contributing to post-conflict peace-building. See, e.g., UNHCR, 'Statelessness and Citizenship', in *The State of the World's Refugees – A Humanitarian Agenda*; B.S. Chimni, 'Post-conflict peace-building and the return of refugees: concepts, practices and institutions', in E. Newman, and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (London: United Nations University Press, 2003), 210; and G. McDougall, *Report of the Independent Expert on Minority Issues*, UN Doc. A/HRC/7/23, 28 Feb. 2008, paras. 47–48.

A second way in which the human security discourse may give a welcome fresh impulse to the response to statelessness around the globe is by firmly anchoring the notions of interdependence and shared sovereignty to the debate. Statelessness is one of the many problems that the international community encounters which unquestionably calls for a multilateral response. The identification, prevention and reduction of statelessness are all tasks that typically call for some form of international cooperation. Information from different sources (i.e. relevant nationality laws and practices) and the opportunity to consult, or even negotiate, can all be vital in order to ascertain that an individual does not hold any nationality, to determine that a safeguard clause against statelessness should be applied in a particular instance, or to decide which state will take responsibility for resolving a case. Moreover, the interdependence of states also plays a critical role in the protection of stateless persons. A straightforward example is the need for multilateral cooperation to enable a stateless person to travel internationally: a special regime was agreed, under the 1954 Statelessness Convention, whereby a stateless person travel document can be issued by one state and is subsequently recognised as valid for the purposes of international travel by other contracting parties.[81] While the very existence of the 1954 and 1961 Statelessness Conventions is a nod to the notion of shared sovereignty in relation to statelessness – and the aforementioned example of travel documents is a very concrete example of efforts to regulate the interdependence of states in this context[82] – they do not establish a full range of supervisory machinery to guarantee full cooperation of each state party.[83] Meanwhile, human rights law has arguably taken the interdependence of states into greater account by prescribing procedures[84] and

[81] See, Art. 28 (including the Schedule), 1954 Statelessness Convention.

[82] Another relevant example is the call in Art. 10 of the 1961 Convention for states to negotiate a strategy for the prevention of statelessness, through bilateral or multilateral treaties, in the event of state succession.

[83] The 1961 Convention establishes a role for a UN body to work with individuals and states to resolve specific cases and the 1954 Statelessness Convention has a reporting requirement. The idea of creating an international tribunal to decide upon individual claims on the basis of the 1961 Convention was thrown out during the drafting process. P. Weis, *Nationality and Statelessness in International Law* (Dordrecht: Kluwer Academic Publishers Group, 1979), 255.

[84] The most recent human rights-inspired instruments relating to nationality matters even explicitly call on states to cooperate and to exchange information in order to implement an effective response to statelessness. See, e.g., Arts. 23 and 24 of the European Convention on Nationality.

establishing mechanisms[85] that acknowledge this shared sovereignty. The human security discourse and the central focus given to the notion of shared sovereignty may provide an opportunity to assess critically the existing commitment to multilateralism and to identify ways in which this could be further strengthened and consolidated.[86]

The foundations for this approach already appear to be in place. A number of states have made human security a central element in their foreign policy. Were there greater understanding of the human security implications of statelessness, it is likely that human security could be used to rally a more effective international response to statelessness. In particular, states committed to human security could well be more inclined to maintain the issue on the agenda of international fora such as the UN General Assembly, to seek multilateral arrangements where appropriate, to lobby states with protracted situations to resolve them, and to provide such states with support in doing so. States such as Japan and Norway have identified human security as a central concern in the context of UNHCR's governing body, its Executive Committee.[87] However, they have tended to link human security to general issues relating to the implementation of UNHCR's broader mandate of refugee protection. Statelessness is increasingly an issue raised by states in the Executive Committee. It may be just a question of time before states begin to link it to human security just as they have with refugee protection.

The dualistic approach that the human security framework takes to the position of the individual – *human security* being measured in terms of both *protection* and *empowerment* – also offers a new way to frame the discussion on statelessness. Whereas the human rights regime is largely focused on protection, on guaranteeing the enjoyment of certain rights and freedoms, the human security discourse also places great emphasis on empowerment:

> People's ability to act on their own behalf – and on behalf of others – is the second key to human security. Fostering that ability differentiates human security from state security, from humanitarian work and even from much development work.[88]

[85] Consider the individual complaints mechanisms within the UN treaty bodies and the various regional human rights courts and commissions, the jurisprudence of which includes successful petitions by stateless persons.

[86] Commission on Human Security, *Human Security Now,* 12.

[87] Statements delivered by delegations of Japan and Norway at the 59th Session of the Executive Committee of the High Commissioner's Programme, 6 Oct. 2008.

[88] Commission on Human Security, *Human Security Now,* 11.

Showing concern for empowerment alongside protection can be greatly beneficial in successfully addressing statelessness. On the one hand, citizenship is still a precondition for certain forms of empowerment, in particular the ability to participate in a state's formal political processes.[89] By addressing statelessness through the human security framework, it is clear at all times that the mere protection of stateless persons is an inadequate response and that the prevention and reduction of statelessness is the only complete and sustainable answer. On the other hand, the broad view that is taken of empowerment within the human security discourse goes far beyond the formal political domain and allows many other routes to be explored to empower stateless populations.[90] Current reports of the situation of stateless groups often portray them as living on the margins of society. By adopting the human security perspective, it may be possible to put inclusion – not just toleration or protection – on the agenda.

Finally, the human security notion of *protection* is also relevant. Here, human security expands upon the doctrines of human rights and human development by concerning itself not just with the (improved) enjoyment of rights and freedoms, but with putting in place the necessary safeguards to avert 'the dangers of sudden deprivation'.[91] The idea is that, when faced with a dramatic scenario such as a major economic downturn or an environmental disaster, the necessary protective and empowerment mechanisms should already be in place to ensure that these hazards do not disproportionately affect particular vulnerable groups or suddenly expose people to a severe depletion in human security. Applying this approach in the context of statelessness can have an impact on strategies for the prevention and reduction of statelessness as well as the protection of stateless persons. For example, with regard to prevention, this may mean crafting guarantees against the spontaneous denationalisation of individuals or segments of the population in response to an economic crisis.[92] These could be legal guarantees

[89] See also Sokoloff, *Denial of Citizenship: A Challenge to Human Security,* 6.

[90] Promoting people's empowerment also means, for example, 'providing education and information so that they can scrutinise social arrangements and take collective action [and] building a public space that tolerates opposition, encourages leadership and cultivates public discussion'. UN Commission on Human Security, *Human Security Now,* 11.

[91] Commission on Human Security, *Human Security Now,* 8.

[92] This is not a purely theoretical scenario, as evidenced by experiences in Côte d'Ivoire in the 1990s where 'a burgeoning economic crisis led to friction between plantation workers of foreign origin and local villagers who had sold or leased them land. The fragile ethnic balance began to splinter and references to ethnicity became a central element of

(for example, the prohibition of arbitrary denationalisation), procedural guarantees (for example, the opportunity to seek to overturn a decision denying or depriving nationality before a court), or guarantees relating to information (e.g., ensuring that all sectors of the population are fully informed of their rights and are in a position to act, individually or collectively, to address their plight). Similarly, where the protection of stateless persons is concerned, the human security framework calls for measures to make sure that the negative effects of any threat – economic or otherwise – do not disproportionately burden a state's stateless population. Again, this requires forethought and a selection of tools relating to both protection and empowerment.

In sum, a number of the themes which emerge in the human security debate are relevant for addressing statelessness. The value of the approach becomes clearer when we take into account that there are gaps in the web of international norms relating to statelessness including gaps in the norms themselves, in their implementation, and as a result of low numbers of states parties to key treaties, in particular the 1954 and 1961 Conventions. As a result, successfully addressing statelessness continues to depend to a large degree on political will at the national level. Progress in addressing major protracted statelessness situations in recent years has usually resulted from a range of factors. In reality, domestic considerations have tended to overshadow international law and many of the states concerned, such as Sri Lanka or Nepal, have not been party to the statelessness conventions. This tends to suggest that human security could provide additional motivation to address statelessness. Rather than focusing on relatively complex international legal rules, the starting point is the impact of statelessness on the individual and, by extension, the community. Once the predicament of the individual and impact on society is understood, attention can turn to the role of international law in preventing and resolving such situations. At the same time, it is important to be aware of the potential pitfalls of utilising the human security concept as a framework for addressing statelessness.

First, for many practitioners of international law, the human security concept appears vague and lacking in content. Indeed, a review of

the political debate, revolving around fundamental questions such as "Who is a real Ivorian?" and "Who is entitled to vote in elections or run for office?" Matters began to come to a head when Alassane Ouattara, a northern Muslim of Burkina Faso descent and one of the main political figures, was barred from running for the presidency.' C. Pouilly, 'Africa's Hidden Problem', *Refugees Magazine,* 147 (2007), 29.

relevant academic writing reveals that human security remains contested.[93] There may be a danger in endorsing such a concept, before its purpose or scope has been more fully agreed. When there is already a detailed set of international norms, these should be further developed and enforced, not cast aside in the rush to attack the issue from a new angle.[94] With further exploration of the links between statelessness and human security, the latter may become a valuable complement to international law. It cannot, however, become a substitute.

Secondly, human security does not necessarily provide a convincing answer to the sovereignty arguments which tend to arise when nationality is at issue. Possession of nationality is, in essence, *legal* recognition of membership in a society. As a consequence, states have often been loath to cede sovereignty over questions relating to nationality. The human security discourse, although seeming to add a new dimension alongside the human rights perspective to the need to tackle statelessness, actually does a poorer job of addressing the sovereignty argument than human rights. While there may be persuasive force to framing statelessness as a human security issue, there is no legal force to it. Moreover, in the past, human security has been challenged on grounds of national sovereignty.[95] In contrast, human rights law is grounded in binding obligations between states whereby those same states can, in principle, no longer invoke their sovereignty as a reason for failing to uphold the rights of individuals. Human rights legal obligations are recognised as imposing consensual limits on a state's sovereignty. The policy paradigm of human security has not achieved the same level of acceptance.

Thirdly, a great deal of the writing on human security tends to focus on armed conflict, refugee movements and migration. While the framework itself is certainly flexible, as noted above, the report of the Commission on Human Security focuses on a rather narrow range

[93] S. Tadjbakhsh and A. Chenoy, *Human Security: Concepts and Implications* (London: Routledge, 2006), ch. 2.

[94] The international regime for addressing statelessness is not as developed as that which exists for refugee protection and solutions, but Suhrke's criticism of human security in the refugee context would also hold for statelessness: 'for refugee advocacy purposes, the 1951 Convention and [the] related body of human rights law seem a more suitable weapon of choice than fuzzy and potentially negative symbols like "human security".' A. Suhrke, 'Human security and the protection of refugees', in Newman and van Selm (eds.), *Refugees and Forced Displacement*, 104.

[95] Tadjbakhsh and Chenoy, *Human Security: Concepts and Implications*, 36.

of issues, principally citizenship as it relates to prevention of conflict and potential forced displacement. Yet most stateless populations are not displaced or caught up in armed conflict. Also, human security may not necessarily be representative of the problems encountered across the full spectrum of statelessness cases. Additional study of statelessness using the human security framework is therefore in order, in particular to explore the full range of risks faced by stateless populations. This is most evident for those individuals and populations who possess a specific status in the countries in which they reside and enjoy a broad range of rights, including rights sometimes limited to nationals.

Finally, in specific cases it may prove to be counterproductive to affix a 'security' label to statelessness, be it human security or otherwise. Indeed, it may actually set off further alarm bells, leading to the qualification of people already viewed as 'outsiders'[96] as security risks. Criticism levelled at human security in the refugee context is also relevant here: 'Applying a "security" perspective to examine the needs of "outsiders" and their relationship with the community typically involves assumptions of antagonistic relations and non-tradable interests.'[97] The consequence of this approach when applied at the national level may be to diminish any public support that exists for resolving the plight of stateless persons, another 'outsider' population.

VI. Concluding observations

The existence of statelessness has troubled the international community for many decades. Statelessness stands at odds with the way the world – its territories and its peoples – is generally organised. Individuals are meant to belong and to be legally attached to one state or another. When they do not, this is a cause for concern. Attention to the issue of statelessness has not, however, been constant; it has ebbed and flowed over time in reflection of the broader developments in international relations. For instance, following World War II, the identification of massive numbers of disconnected and unprotected persons provided the immediate impetus for the elaboration of the two Statelessness

[96] For an exploration of stateless persons as outsiders from a historian's perspective, see L. Kerber, 'Statelessness as the citizen's other: a view from the United States', *The American Historical Review*, 112 (2003), 69–107.

[97] Suhrke, 'Human security and the protection of refugees', 106.

Conventions discussed in this chapter. This was succeeded by a period during which the plight of those who found themselves without a nationality was largely neglected, and the international instruments forgotten, while other concerns took priority. As a result, the international response to statelessness is a story of stops and starts, rather than linear progression. Moreover, these changing circumstances have influenced not only the degree of interest in tackling statelessness but also the terms in which discussions have been framed: statelessness as an issue of *state sovereignty*, to a *human rights* issue and now, potentially, a *human security* issue. So, as statelessness resurfaces onto the international agenda in the twenty-first century, it is prudent to consider how these different perspectives of the same issue can contribute to the development of an appropriate and effective response.

As this chapter has shown, before discussing the technicalities of how statelessness occurs and how it can be resolved, it is important to understand the impact of the phenomenon on people. It hampers their daily lives with varying degrees of severity – from obstructing their ability to purchase property to exposing them to the threat of detention or deportation. The international community readily acknowledged that, without the legal bond of nationality, a person is left unprotected and at risk. Whatever the strengths and weaknesses of the instruments that were developed in response, the underlying concern as to the human impact of statelessness is still a relevant and highly persuasive tool for tackling the issue today. It is simply not morally tenable for individuals to be denied membership of each and every state; nor is it morally tenable for persons to be treated in the undignified manner in which they frequently are as a result of their statelessness. While this is, perhaps, a somewhat primitive argument, it remains a valuable and forceful one. Furthermore, a thorough understanding of the human dimension of the problem of statelessness is indispensable to positioning statelessness within contemporary debate on *human security*.

The international community's early response to the problem was to recognise the right to a nationality in the UDHR and to develop a legal regime to deal specifically with the causes and human rights consequences of statelessness. With the adoption of the 1954 and 1961 Statelessness Conventions, statelessness became a *rights* issue. The moral arguments for tackling the problem now gained legal force. Upon accession to these instruments, states parties are bound to take measures to ensure that statelessness is avoided and that individuals who nevertheless find themselves without any nationality enjoy certain minimum rights.

However, even with renewed interest in the issue in recent years, accessions have been too few and there are gaps in the protection offered by the two treaties, as well as in the provisions that are made for their enforcement. Importantly though, as this chapter makes clear, the two tailor-made Statelessness Conventions do not stand alone. With the development of human rights law, the Statelessness Conventions are complemented by a range of general human rights standards. When statelessness was put back on the international agenda in the 1990s, it was increasingly taken up in human rights fora. The right to a nationality offered new opportunities for individuals to assert protection against statelessness. Meanwhile, the very notion of human rights as – for the most part – independent of the bond of nationality meant that stateless persons can rely on human rights law for a minimum standard of treatment, or better. Human rights law thereby both reinforces the approach taken in the Statelessness Conventions and goes beyond the terms of these instruments by dealing with a broader range of statelessness-related problems and introducing some, albeit limited, enforcement mechanisms.

Yet statelessness endures, regardless of moral considerations and the increasingly sophisticated legal safeguards that have been put in place by the international community. So the question that arises is whether looking at statelessness through the new lens of *human security* can contribute to a more effective or complementary response to the issue. The answer is somewhat ambiguous. On the one hand, the human security perspective reinforces the necessity of tackling statelessness by linking the phenomenon with human insecurity and the potential for national or international instability – a consideration that may successfully induce states to act when moral or legal incentives have proven inadequate. In addition, human security also re-energises the discussion of the issue and the search for suitable responses by incorporating considerations such as shared sovereignty and the central role of empowerment alongside protection. On the other hand, there is reason to be wary of approaching statelessness as a human security concern. In particular, it was noted that raising statelessness as a human security issue may actually jeopardise a response or aggravate the situation by casting stateless populations in a negative light. Moreover, the general shortcomings of the human security framework – such as its vague and contested nature, its lack of legal force and its tendency to focus heavily on the *security* rather than the *human* aspect of a problem – make it an, as yet, imperfect tool for dealing with a sensitive subject like statelessness.

On the basis of these findings it would be fair to conclude that the human security discourse does not offer the immediate, full and effective 'solution' to statelessness that has proven so elusive to the international community for so long. This comes, in fact, as little surprise. Responding to statelessness remains, by and large, a challenge of political will. Yet each of the approaches to statelessness that has been discussed here – the *human rights* approach and the *human security* approach – undoubtedly has something to contribute to the generation of the required political will. Understanding statelessness in terms of legal rights is fundamental to channelling a response. States have already, through their ratification of human rights instruments and, in some cases, their accession to the Statelessness Conventions, made an unequivocal commitment to addressing issues of statelessness. This legal framework continues to offer the greatest scope for compelling states to act and provides detailed guidance as to where responsibilities lie and what should be done to tackle statelessness. The importance of promoting further accession, implementation, and enforcement should therefore not be underestimated. Nevertheless, the human security discourse can also be a helpful means of drawing states' attention to issues of statelessness within their borders. As discussed, although the human security viewpoint is centred on the individual, it also exposes the connection between human security concerns and broader, communal or national concerns. The comprehension of this connection may naturally translate into the required political will to address statelessness. Human security has already become a guiding principle in the foreign policy of a number of states and has figured prominently in discussions in the UN and other international fora. Applying the human security approach could therefore serve to build political will at the international level for intensified inter-state cooperation to address statelessness. The effectiveness of a human security discourse in this context could, however, benefit from further exploration of the interplay between statelessness and human security.

Thus, in the search for an appropriate tool for tackling statelessness, each of the perspectives discussed – including the human security approach – has been found to have added value. These different perspectives are not mutually exclusive, they are aspects of the same problem: statelessness is a human rights issue *and* a human security issue. In some instances, the *human rights* framework will offer the answer, while in other situations, *human security* considerations may be key to a solution. Armed with a thorough understanding of the

strengths and limitations of each approach it becomes possible to forge a strategy that is better suited to the specific circumstances at hand. Regardless of which blend of the two approaches makes sense in a given situation, the common denominator should be to build support for a response by focusing on the very real, human dimension of the problem.

3

Protection and empowerment: strategies to strengthen refugees' human security

FRANCES NICHOLSON*

I. Introduction

Today, armed conflicts within states are more frequent than those between nations, civilians are increasingly direct targets, and forced displacement within and beyond borders is often a defining feature. Phenomena such as globalisation, terrorism and climate change also present challenges which clearly transcend national borders. These developments have led to a reassessment in recent years of the concept of security, which has come to be understood as extending beyond national security interests to encompass the security of individuals – in other words, to include the concept of human security.

At the same time, there has been a growing recognition that threats to international, state and human security are interconnected and transnational in nature and that international cooperation must therefore be strengthened if responses to these threats are to be effective. International efforts to do this around the time of the millennium accordingly sought to reinforce collective efforts to strengthen peace and security, development and human rights as the three pillars of the United Nations. As the 2005 World Summit Outcome document acknowledged, these three pillars of the UN system are 'the foundations for collective security and well-being [and] are interlinked and mutually reinforcing'.[1]

* The views expressed are the personal views of the author and may not necessarily be shared by the United Nations or by UNHCR. With thanks to Jeff Crisp and Santhosh Persaud for their helpful comments on an earlier version of the chapter. All URLs were last accessed on 24 Oct. 2008.

[1] General Assembly resolution, 'World Summit Outcome', UN Doc. A/RES/60/1, 24 Oct. 2005, para. 9. See also, 'The Role of the United Nations in Promoting a New Global Human Order', UN Doc. A/RES/62/213, 7 Mar. 2008.

This chapter seeks to chart some of these developments as they relate to the protection of refugees fleeing conflict and persecution and to securing durable solutions for them. It sets out briefly the international framework for the protection of refugees, identifying also gaps in that framework, before going on to examine the relevance and usefulness of the human security concept in filling these gaps. In particular, the chapter examines how protection and empowerment – the two strategies to achieve human security identified by the Commission on Human Security – may be relevant to the situation of refugees. As the Commission's 2003 report *Human Security Now* indicates, achieving human security involves protecting 'the vital core of all human lives in ways that enhance human freedom and human fulfilment'. In the refugee context, this means not only protecting refugees from 'critical (severe) and pervasive (widespread) threats and situations', but also supporting their empowerment by 'using processes that build on [their] strengths and aspirations'.[2]

II. The international framework for the protection of refugees

Some 16 million people in the world today have been forced to flee conflict, persecution and human rights abuses in search of safety and security in another country.[3] Despite their large number and the often atrocious human rights violations they are fleeing, refugees have one advantage over other migrants: they are protected not only by international human rights law, which applies to everyone within the territory and jurisdiction of a particular country regardless of their status,[4]

[2] Commission on Human Security, *Human Security Now: Protecting and Empowering People* (New York, 2003), at www.humansecurity-chs.org/finalreport/index.html, 4. See also, S. Tadjbakhsh and A. Chenoy, *Human Security: Concepts and Implications* (London: Routledge, 2006), 28; G. Oberleitner, 'Porcupines in love: the intricate convergence of human rights and human security', *European Human Rights Law Review*, 6 (2005), 588–606, 600.

[3] See UNHCR, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, Jun. 2008, at www.unhcr.org/statistics/STATISTICS/4852366f2.pdf. Of the 16 million refugees worldwide, 11.4 million fall under UNHCR's mandate, while some 4.6 million Palestinian refugees are the responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Unless stated otherwise, displacement statistical data given in this chapter are from this report.

[4] While most human rights apply to everyone within a state's territory or jurisdiction, a few rights, such as the right to vote or stand for office, are reserved for citizens.

but also by a specific international legal regime. The 1951 Convention relating to the Status of Refugees (1951 Refugee Convention)[5] and the 1967 Protocol[6] to the Convention form the cornerstone of this regime and are buttressed by various regional instruments.[7] Indeed, protection from *refoulement*[8] and the grant of asylum are essential ways to assure the human security of refugees. There is also a UN organisation, the primary purpose of which is to support states in securing protection and solutions for refugees: the Office of the United Nations High Commissioner for Refugees (UNHCR).

Over the course of the twentieth century, the understanding of the international protection to which refugees are entitled evolved to become considerably more than as understood in the early years of that century. Even in 1948, when the Universal Declaration of Human Rights (UDHR), which includes the 'right to seek and enjoy asylum in other countries from persecution', was adopted, the international protection afforded by asylum was seen in relatively limited terms. Essentially, it was viewed as a surrogate for the consular or diplomatic protection normally provided by the country of origin to citizens abroad and as protection from extradition.[9]

By now, the concept has expanded to encompass broader notions of human rights protection, reflecting not only the protection afforded by

[5] Convention relating to the Status of Refugees 1951, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

[6] Protocol relating to the Status of Refugees 1967, GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967.

[7] Notably, Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (now African Union), 10 Sept. 1969, 1001 UNTS 45; entered into force 10 Jun. 1974; Cartagena Declaration on Refugees 1984, 22 Nov. 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, 190–93 (1984–85) (17 Apr. 1998); and the European Union Directives and Regulations forming the building blocks of the 'Common European Asylum System'.

[8] See, Art. 33, 1951 Refugee Convention; Art. 3, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 851; entered into force 26 Jun. 1987; Art. 7, International Covenant on Civil and Political Rights 1966 (ICCPR), GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976; various regional human rights treaties; and international customary international law.

[9] Art. 14, UDHR. See, S. Kapferer, 'Article 14(2) of the Universal Declaration of Human Rights and exclusion from international refugee protection', *Refugee Survey Quarterly*, 27 (2008), 53–75, providing an analysis of the drafting of what became Art. 14 of the UDHR, including in particular Art. 14(2). See, also, A. Edwards, 'Human rights, refugees, and the right "to enjoy" asylum', *International Journal of Refugee Law*, 17 (2005), 293–330.

the 1951 Refugee Convention but also by international human rights law.[10] Thus, in 2007, the General Assembly emphasised that the:

> international protection of refugees is a dynamic and action-oriented function that … includes … the promotion and facilitation of, inter alia, the admission, reception and treatment of refugees in accordance with internationally agreed standards and the ensuring of durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups and paying special attention to those with specific needs![11]

The refugee protection regime established and consolidated over the last half century or more is, like the international legal framework on which it rests, essentially state centric. It is states which have primary responsibility for ensuring respect for the human rights of those within their jurisdiction, whether they be citizens or not, and for assuring their protection. It is states which are obliged to uphold the principle of *non-refoulement*. In addition, states continue to assert, as an expression of their sovereignty, the right, within the limits of international law, to control the admission of non-citizens to their territory. The state can thus be seen as remaining the primary 'referent object' of the refugee protection regime rather than the individuals within it.

III. Post-Cold War changes and forced displacement

The profound changes in the international and political arena since the end of the Cold War have opened up unprecedented opportunities for growth and action. At the same time, they have posed numerous new challenges, notably to state sovereignty.

The world is no longer dominated by two superpowers, whose rivalries are fixed in the threat of mutually assured destruction and played out indirectly in 'proxy wars'. Instead, armed conflicts within states have proliferated, for instance, in the context of conflicts resulting from state

[10] See, e.g., V. Türk and F. Nicholson, 'Refugee protection in international law: an overall perspective', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 3–45, 37–8; V. Türk, 'Freedom from fear: refugees, the broader forced displacement context and the underlying international protection regime', in V. Chetail (ed.), *Globalization, Migration and Human Rights: International Law under Review*, vol. II (Brussels: Bruylant, 2007), 475–522, 492–5.

[11] UN Doc. A/RES/62/124, 18 Dec. 2007, para. 14. See also UNHCR, *Note on International Protection*, UN Doc. A/AC.96/930, 7 Jul. 2000, para. 4, and similarly worded GA resolutions on the Office of the United Nations High Commissioner for Refugees from 2001 onwards.

succession. Civilians are increasingly directly targeted, including as a result of ethnic cleansing and as a way of destroying societies. Non-state actors, among them paramilitaries and guerrilla groups, are increasingly involved and states, although bound by international humanitarian law, may be unwilling (in the case of the former) or unable (in the case of the latter) to control them. Small arms have proliferated, resulting amongst other things in increased use of children in armed conflict, while land mines and unexploded cluster munitions threaten the lives of civilians, including those seeking to flee violence or, post-conflict, to return. As the Secretary-General has noted: 'Displacement … continues to be one of the principal features of contemporary conflict and arguably the most significant humanitarian challenge that we face.'[12] It is thus both 'a cause and consequence of insecurity' and in itself a 'significant symptom of human insecurity'.[13]

The Security Council – no longer blocked in the same way as before – has recognised that mass displacement as a result of internal conflict and insecurity can threaten international peace and security. This has opened up scope for international UN-mandated interventions, including under Chapter VII of the UN Charter, in conflicts and situations causing significant forced displacement. Examples include the former Yugoslavia, Rwanda, Somalia, East Timor, Dafur (Sudan), Chad and the Democratic Republic of the Congo (DRC).[14] At the same time, the international response, especially to the genocides in Rwanda and Bosnia in the mid-1990s, but also more recently in Darfur (Sudan), has proved weak and ineffective.

The phenomenon of globalisation has resulted in the increased movement of goods, capital and people, the latter often moving for a complex combination of reasons including the search of better livelihoods and flight

[12] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2007/643, 28 Oct. 2007, para. 5.

[13] S. Ogata, 'Human Security: A Refugee Perspective', Keynote Speech, Ministerial Meeting on Human Security Issues of the 'Lysøen Process' group of governments, Bergen, Norway, 19 May 1999, at www.unhcr.org/admin/ADMIN/3ae68fc00.html. See, also, B. von Tigerstrom, *Human Security and International Law* (Oxford: Hart, 2007), 113.

[14] See, e.g., SC res. SC/RES/ 743 (1992) on the Socialist Federal Republic of Yugoslavia; SC res. SC/RES/751 (1992) on Somalia; SC res. SC/RES/929 (1994) on Rwanda; SC res. SC/RES/1199 (1998) and SC/RES/1239 (1999) on Kosovo; SC res. SC/RES/1264 (1999) on East Timor; SC res. SC/RES/1279 (1999) on DRC; SC res. SC/RES/1769 (2007) on Darfur; SC res. SC/RES/1778 (2007) on Chad and Central African Republic. See also, V. Gowland-Debbas, 'The link between security and international protection of refugees and migrants', in Chetail (ed.), *Globalization, Migration and Human Rights: International Law under Review*, 281–317, 290–2.

from conflict and human rights abuses. Restrictive immigration policies, interception and other obstacles to entry have meanwhile fostered significant growth in both smuggling and trafficking. Another effect of globalisation has been to fuel wars, for instance, through multinational deals with warring parties and funding of conflict by diaspora communities, which helps create war-based economies. At the same time, as former UN High Commissioner for Human Rights, Louise Arbour, has indicated, globalisation: 'has opened greater exchanges between different cultures, as well as increased economic integration … It has also provoked a new sense of entitlement, and a call for a more equitable distribution of the riches of this earth.'[15]

Other phenomena from climate change to disease, including HIV/AIDS and malaria, transcend borders and have the effect of undermining state authority. One predicted consequence of climate change is forced displacement. The conflict in Darfur has, for instance, been described as the first climate change war,[16] while the prospect of island states disappearing as a result of rising sea levels raises questions of both forced displacement and statelessness.[17] The HIV/AIDS pandemic imposes massive healthcare burdens on many states and has serious economic consequences because of the widespread deaths among adults in their most productive years, which mean that millions of children are orphaned or otherwise affected by the disease. This is having a serious impact on stability, security and governance in many countries, especially where many people are living in great poverty.

Security threats on a new scale have emerged, notably since the attacks in the United States of 9/11; many states have been anxious to block any potential access of terrorists to their territory, including through asylum channels. The 'war on terror' subsequently announced has itself brought new challenges to individual liberties.[18] Interventions in Afghanistan and Iraq using force for 'regime change' have had a highly

[15] L. Arbour, 'The right to life and the responsibility to protect in the modern world', address on the occasion of the 60th anniversary of the Nuremberg trials, Boston, 9 Dec. 2005. See also, Commission on Human Security, *Human Security Now*, iv.

[16] J. Borger, 'Scorched earth policy', *Guardian Weekly*, 18 May 2007, available at www.guardian.co.uk/world/2007/may/18/outlook.development.

[17] See ch. 10 by J. McAdam and B. Saul in this book and, generally, *Forced Migration Review*, issue 31, Oct. 2008, on climate change and displacement, available at www.fmreview.org/climatechange.htm. See, also, ch. 2 by M. Manly and L. van Waas on statelessness, and also in relation to refugees, see R. Freitas, 'Human security and refugee protection after September 11: a reassessment', *Refuge*, 20 (2002), 34–44.

[18] See Part IV of this book.

destructive backlash of violence, insurgency, and further terrorism, resulting in the displacement of nearly 2.4 million people within Iraq and of another 1.5 million to 2 million more to Jordan and Syria.[19]

These developments and their complex inter-linkages challenge state sovereignty. They point to the need for increased international cooperation to devise collective responses, if they are to be effectively tackled.

IV. Gaps in the international refugee protection framework

These developments also pose new dilemmas for the protection of refugees and of others in flight, who may need international protection. As UNHCR's Assistant High Commissioner – Protection, Erika Feller, has noted, the challenges to the international refugee protection regime are less normative than a result of 'inadequate adherence to proper practices, and implementation deficits as regards the principles'. At their heart are: 'misconceptions, deliberate or otherwise, which have come into play not least because refugee and asylum issues are so deeply mired in the broader issues of international security, irregular migration, transnational law and order, and crime.'[20]

Situations of mass influx, especially from armed conflict, continue to pose major problems. At the stage of admission, large numbers of people arriving may be refused entry or granted only temporary protection. In the country of asylum, cross-border incursions may result in attacks on refugees and camps, and combatants and civilians may become intermingled. Humanitarian assistance and access may be denied or rendered impossible because of increasingly insecure operating environments and the targeting of humanitarian and peace-keeping personnel. Where refugees are dispersed within urban communities, access and consequently the provision of protection may be difficult.

In countries with individual asylum procedures, restrictive measures introduced by many states in recent decades have increased the obstacles to reaching and accessing asylum, effectively contributing to the

[19] UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1053, 30 Jun. 2008, para. 5, and, more generally, Tadjbakhsh and Chenoy, *Human Security*, 12.

[20] E. Feller, 'The Responsibility to Protect: Closing the Gaps in the International Protection Regime', closing address at the 'Moving On: Forced Migration and Human Rights' conference, New South Wales Parliament House, Sydney, Australia, 22 Nov. 2005, in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford: Hart, 2008), 283–93. See also, N. Kelley, 'International refugee protection challenges and opportunities', *International Journal of Refugee Law*, 19 (2007), 401–39.

undermining of the principle of *non-refoulement*. As more and more people in flight are forced to use illegal means, they are exposed to great danger with the result, for instance, that respect for principles of international maritime law regarding rescue at sea is a growing concern.[21] The different types of displacement which may result from climate change form another area where it is important to allocate adequate responses and define more clearly the applicable legal framework. Where asylum-seekers are able to claim asylum, there is also a growing tendency to apply the refugee definition restrictively and to grant complementary forms of protection rather than refugee status which provide lower standards of protection, for instance, regarding stability of status and family reunification rights.[22]

Securing durable solutions, especially to protracted displacement situations where international attention and adequate funding may be lacking, is another area where protection gaps persist. Increasingly, there is pressure on refugee populations to return to less than secure situations, especially post-conflict. Returnees may as a result face continuing protection problems, which may ultimately challenge the sustainability of return. The 'relief to development gap' remains a significant problem.

In 2000–2002, UNHCR held a series of Global Consultations on International Protection to examine these challenges and agree on common approaches to address them. Issues not specifically covered by the 1951 Refugee Convention, which were discussed in the Executive Committee under the 'third track' of these Consultations,[23] are among those which may benefit particularly from examination through a human security lens. The process is in any case necessarily a continuing and ongoing one and UNHCR has followed up on the Consultations through initiatives including 'Convention Plus' and more recently the High Commissioner's Dialogue.[24]

[21] See, e.g., ch. 6 by B. Miltner in this book.

[22] In Poland, for instance, the number of people granted complementary/subsidiary protection outnumbers those with refugee status by nearly twenty. See UNHCR Regional Representation for Central Europe, *Being a Refugee: Age, Gender and Diversity Mainstreaming Report 2007*, 17, available at www.unhcr-budapest.org/images/stories/2008/agdm/UNHCR-AGDM_report_2007-ENfinal.pdf.

[23] See, *Refugee Survey Quarterly*, 22 (2003), 'Protection policy in the making: third track of the global consultations', with papers on the protection of refugees in mass influx situations and in the context of individual asylum systems, on the search for protection-based solutions and the protection of refugee women and children.

[24] Convention Plus was a UNHCR initiative from 2002 to 2005 to improve international protection worldwide and facilitate the resolution of refugee problems through

V. The emergence of the human security concept and its relevance for refugees

The radical opening up of international political relations and the challenges this posed from the early 1990s prompted a similarly fundamental reappraisal of certain core concepts including that of security. This came to be understood more broadly as extending beyond the security interests of states to encompass the security of individuals. It resulted in an examination of how the various aspects of security are inter-linked and may affect both state sovereignty and state responsibility.[25]

The United Nations played a central role in this process, which fed in turn into initiatives for broader UN reform led by former Secretary-General Kofi Annan and came to a head around the time of the millennium. The Commission on Human Security, launched by the Japanese Government at the 2000 Millennium Summit and co-chaired by former UN High Commissioner for Refugees, Sadako Ogata, and Nobel Prize laureate, Amartya Sen, also injected new ideas. Other initiatives by several countries, including notably middle-ranking states such as Canada, Japan and Norway, along with scholars, politicians and others, provided further impetus.[26]

As Louise Arbour, then UN High Commissioner for Human Rights, stated in 2005, where before '[d]eference to *national* security interests, narrowly conceived of, and a stubborn adherence to myopic visions of state sovereignty… trumped concerns for the *human* security interests of victims', more people now recognise that 'it is the security of its people – not

multilateral special agreements. The High Commissioner's Dialogue which succeeded it examines challenges and dilemmas linked to international protection in the areas of refugee protection, durable solutions and international migration and protracted refugee situations. For further information see www.unhcr.org/refworld/initiatives.html.

[25] See also, more generally, ch. 1 by A. Edwards and C. Ferstman in this book. The scope and content of the term 'human security' has been the subject of much analysis, but this chapter takes a broad view of the term (see also section VI.B. below). The concept began to emerge in the 1980s and is generally recognised as coming to prominence with the 1994 publication of the United Nations Development Programme (UNDP) *Human Development Report*. This section draws not least on UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), ch. 1, and UNHCR Memorandum from Soren Jessen-Petersen to Abu Zayd *et al.*, UNHCR Policy Committee meeting on 3 Aug. 1998, draft paper by Centre for Documentation and Research, 'The Concept of Human Security and its Relevance to UNHCR', AHC/98/219, 28 Jul. 1998, UNHCR archives.

[26] See S.N. MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Bloomington, IN: Indiana University Press, 2006), notably ch. 5; Tadjbakhsh and Chenoy, *Human Security*, 11 and 15–16.

just collectively but also, crucially, *individually* – that allows for the security of the state'.[27] She called for the 'implicit tension between states and their carefully guarded notions of state sovereignty, on the one hand, and the protection of individuals under international human rights law, on the other' to be resolved, affirming that '[w]e live in an evolving, globalized environment, one in which human security includes physical safety, economic and social well-being, respect for human dignity, and protection of human rights'.[28]

Three aspects of the human security concept are particularly relevant to forced displacement. In this context, it is worth noting also that a number of the analyses of the concept and its link with forced displacement focus primarily on the situation of internally displaced persons (IDPs),[29] not least because IDPs are not protected by a specific protection regime but must rely more broadly on international humanitarian and human rights law. This means, however, that these authors largely ignore the relevance of the concept to the protection of refugees. The situation of IDPs is beyond the scope of this book, but human security is relevant to refugees, as the following analysis brings out.

First, the process of reassessing the concept of security led to a broader and more holistic approach. It was recognised that security is affected not only by the military balance of power, but also by instability resulting from communal conflict, social violence, poverty, unemployment, organised crime, terrorism and environmental degradation, as well as by migratory movements and mass population displacement. Human security thus came to be seen as requiring the establishment of both 'safety from such chronic threats as hunger, disease and repression', and 'protection from sudden and hurtful disruptions in the patterns of daily life'.[30]

In the displacement context, the absence of either may cause flight, give rise to protection problems in asylum and/or block solutions. The human security concept thus has elements geared towards prevention of, response to, and solutions for displacement. By recognising a wider range of potential causes of insecurity and possible displacement and

[27] Arbour, 'The right to life and the responsibility to protect'.
[28] *Ibid.*
[29] See, e.g., MacFarlane and Yuen Foong Khong, *Human Security and the UN*, chs. 5 and 6; Tigerstrom, *Human Security and International Law*, ch. 5; Tadjbakhsh and Chenoy, *Human Security*.
[30] UNDP, *Human Development Report*, 1994, 23.

their complex consequences, as the human security concept does, prevention and response can also be enhanced. This broader analysis can thus be seen as enabling a stronger focus on humanitarian concerns and individual sources of insecurity in a given crisis. This may in turn help identify more appropriate responses, determine priorities in areas where there may be gaps in humanitarian protection, and address a fuller range of issues to secure sustainable solutions. A human security lens can thus be seen as helping raise awareness of, and the priority attached to, humanitarian issues on the international agenda, thereby making it an 'instrument in the policy battle for priorities'.[31]

Secondly, the reassessment of security as encompassing broader notions of human security has helped foster a growing recognition of the close relationship between the security of states and the welfare of those living within them. This has shifted the focus of security from the state towards the individual, helping to make him or her a 'referent object' of security, along with states. This shift is reflected in the December 2004 report of the High-level Panel on Threats, Challenges and Change, which affirms that the UN Charter 'seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens'.[32] Indeed, the most acute threats to human security of recent years have sometimes been in situations where the state has ceased to be able (as opposed to being unwilling) to protect its population. One clear example is Somalia, where the ongoing conflict and lack of effective government had, by the end of 2007, displaced some 1 million people within the country, often more than once, and obliged almost 500,000 to flee abroad.

A human security analysis of such situations helps recognise that failure to address a potentially wide range of causes of individual insecurity can ultimately undermine a state's security and indeed that of neighbouring states, for instance, where people are forced to flee across borders. Where they seek to flee their country in such numbers that they are perceived by receiving states as a threat to national security, this may result in border closures, as in Turkey to Kurds in 1991 or Kenya to Somalis in early 2007. People may alternatively become stuck in a 'no man's land' between borders, such as currently on the Iraqi borders with Syria and Jordan.

[31] MacFarlane and Yuen Foong Khong, *Human Security and the UN*, 236–37.

[32] *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565, 2 Dec. 2004, available at www.un.org/secureworld/report.pdf, para. 30.

A greater focus on the human security of the individuals concerned in these and other situations of mass influx could perhaps help find a better balance between national security interests of neighbouring states and the humanitarian crisis created by a conflict. It could help shift perceptions from refugees as being 'a risk' towards greater understanding of refugees as 'at risk'. Arguably, it could help strengthen respect for the principle that the grant of asylum is a 'humanitarian and non-political act'.[33] Alternatively, the human security concept could be manipulated in the national interest by governments arguing the need to protect the security of their citizens which they deem to be threatened by such an influx.[34] In such situations, the principle of *non-refoulement*, including admission at the frontier, is more strongly underpinned by states' obligations under international refugee and human rights law. A human security approach may nevertheless offer a complementary means to persuade states to uphold these legal obligations.

Thirdly, the evolution of the human security concept has been fuelled by the recognition that many threats are interconnected and transnational, that individual states cannot tackle them effectively alone, and therefore that international cooperation is necessary and must be enhanced. As the 2004 Report of the High-level Panel indicated: 'Today, more than ever before, threats are interrelated and a threat to one is a threat to all. The mutual vulnerability of weak and strong has never been clearer.'[35] The consequence, as Kofi Annan, then UN Secretary-General, urged three months later in his report 'In Larger Freedom', was a recognition of the 'imperative for collective action'. He argued:

> In a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States. Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others. This kind of cooperation not only advances everyone's interests but also recognizes our common humanity.[36]

[33] See, Art. 2(2), 1969 OAU Refugee Convention; 1984 Cartagena Declaration on Refugees, para. 4.

[34] S. Persaud, 'How should the human rights community strategically position itself towards the concept of human security?', *Human Security Journal*, 2 (2008), 23, 32 available at www.humsec.eu/cms/fileadmin/user_upload/humsec/Journal/Persaud.pdf.

[35] See *A More Secure World*, para. 17.

[36] *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005, 15 Mar. 2005, para. 18.

Indeed, in the UN context, the reform process of recent years can be seen as an attempt to overcome what Ogata and Cels have described as the 'compartmentalisation of security, humanitarian, human rights, and development strategies'.[37] Initiatives to ensure the UN is better able to 'deliver as one' and to improve the coordination of the international humanitarian response through the Inter-Agency Standing Committee (IASC) can thus be seen as efforts to ensure that UN agencies and the international community more broadly can respond to these inter-linked threats to international, national and human security in a more coordinated and effective manner. Arguably, the inclusive scope of human security can thus help overcome this 'compartmentalisation' of responses in some humanitarian emergencies and thereby promote the more coordinated engagement of the increasingly wide range of organisations, agencies, and other actors involved. Bringing out the inter-linkages between security risks and recognising the need for comprehensive and integrated responses may also help governmental and international actors bridge the gap between relief and development in some refugee situations.

In the displacement context, recognising the possible linkages between individual insecurity prompting flight and wider security concerns, potentially affecting other countries and regions, as the human security concept does, supports efforts to gather greater support for developing countries hosting the largest numbers of refugees. One relevant initiative reflecting this analysis was UNHCR's efforts during the Global Consultations to strengthen burden- and responsibility-sharing among states, which advocated the provision of enhanced financial assistance, technical support, and resettlement.[38]

These different aspects of the human security concept highlight some ways it can be relevant to refugees. Subsequent sections of this chapter identify more specifically how the strategic approaches identified by the Commission on Human Security can be applied to ensure protection and solutions for refugees.

[37] S. Ogata and J. Cels, 'Human security – protecting and empowering the people', *Global Governance*, 9 (2003), 273–82, 276.

[38] See Executive Committee Conclusion No. 100 (LV), 2004; UNHCR, *Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations*, UN Doc. EC/GC/01/7, 19 Feb. 2001. See also Commission on Human Security, *Human Security Now*, 48; Tigerstrom, *Human Security and International Law*, 128, 129.

VI. Strategies to enhance the human security of refugees

As already mentioned in the introduction to this chapter, the Commission on Human Security identified protection and empowerment as key strategies for achieving human security. This section examines how these two strategies are relevant to refugees' human security. A number of recent developments can be seen as fitting within the human security framework. They may not specifically mention the term, but they nevertheless operate to enhance the human security of refugees and indeed of others of concern to UNHCR. Protection has, of course, always been a central focus of UNHCR's and states' efforts vis-à-vis refugees. The realisation of the importance and value of empowerment is a more recent phenomenon with far reaching potential.

A. The strategy of protection

Turning first to protection, ensuring refugees are protected involves securing respect for their rights. The widely accepted definition of protection agreed by the IASC in 2000 defines protection as encompassing 'all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law'.[39] Protection, as Goodwin-Gill has noted, is 'soundly based in law. It may be wider than rights, but it begins with rights and rights permeate the whole'.[40]

The increased emphasis placed by the human security concept on a wider range of security threats than traditional military ones and in particular on threats to individual security allows a more comprehensive analysis of the risks to which refugees may be exposed and their rights

[39] This definition was developed over a series of workshops sponsored by the International Committee of the Red Cross (ICRC) involving some fifty humanitarian and human rights agencies. See www.humanitarianinfo.org/iasc/content/products/docs/FAQs.pdf. It was subsequently adopted by the IASC and applied to the protection of IDPs, but is relevant also to the protection of refugees. See inter-agency *Handbook for the Protection of Internally Displaced Persons*, provisional release, 2008, 5.

[40] G.S. Goodwin-Gill, 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform', paper presented at Refugee Studies Centre, Oxford, 24 Apr. 2006, as well as G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (Oxford: Oxford University Press. 2007), 9–12.

which may be violated. This can help identify more comprehensive protection strategies, including not only interventions to address more traditional security threats, such as the placing of refugee camps at a safe distance from the border, but other issues as well. They might, for instance, include the provision of individual documentation (not just to heads of households but to individual family members, who are thereby better able to access protection and services in their own right not just as dependants), livelihood projects designed to prevent refugee women and girls from being forced to resort to sex as a means of survival, and initiatives to ensure refugee children, especially foster children, are not separated from their (foster) families during repatriation.[41] A human security approach thus enables underlying problems, for instance, regarding documentation, economic self-reliance, health, or child protection, to be identified and tackled more effectively.

Further, by recognising a broader range of sources of insecurity, as the human security concept does, this helps identify and address insecurity resulting not only from state action (or inaction) but also from non-state actors, whether they be guerrillas, paramilitaries or members of the family. This mirrors the contemporary understanding under international refugee law that non-state actors may be agents of persecution as well as states, which has, for instance, enabled survivors of gender-related persecution to be recognised as falling within the refugee definition.[42]

At the stage of durable solutions, recognition of the wide range of factors affecting security, as inherent in the human security concept, helps highlight the need to tackle a fuller range of causes of displacement, including underlying social and economic causes, such as population growth, pressure on land, or climate change, as well as political ones. It helps emphasise the need for a comprehensive assessment of whether peace has been sufficiently strongly re-established and return is

[41] UNHCR, *Handbook for the Protection of Women and Girls*, Jan. 2008, chs. 4.2.1, 4.2.4, and 5.7; UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1038, 29 Jun. 2007, para. 60.

[42] UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, Apr. 2001, at www.unhcr.org/refworld/pdfid/3b20a3914.pdf, para. 19; Art. 6, EU Council Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, OJ L 304/12, 30 Sept. 2004; Oberleitner, 'Porcupines in love'.

safe and sustainable for the individual concerned.[43] As UNHCR has noted, the restoration of protection 'requires more than mere physical security or safety'. A 'functioning government and basic administrative structures' are needed, 'as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood'.[44]

In protracted displacement situations, various approaches may be needed to unlock solutions.[45] The focus of human security on a broad range of obstacles to durable solutions and the recognition of the role that can be played by different actors may help support comprehensive solutions by promoting the engagement of a range of actors, including donors, resettlement countries, countries of asylum and refugees themselves. Recent positive examples include comprehensive approaches in Thailand, Nepal and eastern Sudan.[46]

In other situations, there may, however, be disadvantages in linking protection as closely to security as human security does. This may appear to point towards militarised interventions, when a range of less dramatic diplomatic, mediatory and other approaches and interventions may be more appropriate. Indeed, military interventions have sometimes become part of the problem, in particular where refugees and others may be abused and exploited by peacekeepers or humanitarian staff. Where humanitarian and military actors are working in insecure situations and post-conflict settings, problems have also arisen and may undermine the perceived impartiality of humanitarian actors. This has especially been so where military forces are closely involved in securing the delivery of assistance and in dealing with humanitarian and human rights issues, as has been the case, for instance, in Bosnia and Herzegovina, Kosovo, Afghanistan and Iraq.[47]

[43] Executive Committee Conclusion No. 101 (LV), 2004, Legal Safety Issues in the Context of Voluntary Repatriation of Refugees.

[44] UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, HCR/GIP/03/03, 10 Feb. 2003, para. 15.

[45] On protracted refugee situations and human security, see ch. 4 by E.O. Abuya in this book.

[46] See UNHCR, Notes on International Protection, UN Doc.A/AC.96/1038, 29 Jun. 2007, para. 56, and UN Doc. A/AC.96/1053, 30 Jun. 2008, para. 51.

[47] Y. Hasegawa, 'Is a human security approach possible? Compatibility between the strategies of protection and empowerment', *Journal of Refugee Studies*, 20 (2007), 4, 12.

For her part, Suhrke sees a focus on human security as not beneficial to refugees, since the perception of refugees as 'the other' and as 'outsiders' by the host community is thereby strengthened. She sees the concept as having 'connotations of confrontation' and 'assumptions of antagonistic relations and non-tradable interests'. Rather, she favours 'vulnerability' as a concept lending itself to methodological and empirical elaboration.[48] Would it not be more effective, however, to move away from a focus on the vulnerability of refugees to one that recognises refugees as rights-holders and as agents of their own security and future, as envisaged by the Human Security Commission with its focus on empowerment?

This is the approach developed by UNHCR and partners and approved by the Executive Committee in its Conclusions Nos. 105 and 107, which establish a framework for assessing and responding to situations where persons of concern are 'at risk'.[49] This framework identifies risks, rather than presumed inherent vulnerability. It helps identify risk factors in the wider protection environment and individual risks which may, on their own or in combination, place someone at 'heightened risk', thus pointing to the source of the problem and hence to appropriate solutions. This approach not only allows for a more nuanced analysis of risks faced, but is more empowering, since it moves away from any presumption of refugees' inherent vulnerability to identify factors which need to be addressed.

B. The strategy of empowerment

Empowerment – the second strategy for human security identified by the Commission on Human Security – is described in its report as involving supporting 'people's ability to act on their own behalf – and on behalf of others'.[50] Too often refugees and asylum-seekers are portrayed and viewed as powerless and pathetic victims of violence and persecution. They may have no legal status in their country of asylum

[48] A. Suhrke, 'Human security and the protection of refugees', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo, New York and Paris: United Nations University, 2003), 106–7.

[49] Executive Committee Conclusions No. 105 (LVII), 2006, Women and Girls at Risk and No. 107 (LVIII), 2007, Children at Risk; *UNHCR Women and Girls Handbook*, ch. 3. See also, Women's Commission for Refugee Women and Children, *Displaced Women and Girls at Risk: Risk Factors, Protection Solutions and Resource Tools*, Feb. 2007, at www.womenscommission.org/pdf/WomRisk.pdf; and the work of the Centre for Refugee Research, University of New South Wales, Australia, at www.crr.unsw.edu.au/projects.html.

[50] Commission on Human Security, *Human Security Now*, 11.

and/or must depend on charity and humanitarian assistance for survival. The equal focus of human security on protection and empowerment helps counter this image and recognise refugees' resilience, resourcefulness and courage. Empowerment develops their potential and capacity to act on their own behalf to avoid some risks, demand improvements in their protection, create new opportunities and influence their own future.[51] Empowering refugee women and girls is especially critical. They generally have fewer opportunities, fewer resources, lower status and less power and influence than men and boys. Indeed, gender inequality is one cause of sexual and gender-based violence.[52]

Empowerment may involve:

> a range of activities from individual self-assertion to collective resistance, protest, and mobilization that challenge basic power relations. For individuals and groups where class, caste, ethnicity, and gender determine their access to resources and power, their empowerment begins when they not only recognize the systemic forces that oppress them, but act to change existing power relationships.[53]

Power relations are, however, about more than just who or what has 'power over' other people and resources. Rowlands has categorised power in four ways that have analytical and practical value.[54] If power is seen only as *power over*, or the ability to influence and coerce, this is likely to lead to a focus on participation, but does not involve changes to existing structures and may result in an approach that seeks to replace one form of power with another. A focus on *power to* organise and change existing hierarchies leads to an emphasis on access to and control over decision-making. *Power with* recognises that mobilisation and collective action can increase solidarity and strengthen the power of others. *Power from within* emphasises that empowerment must start with raising individuals' awareness of existing power relations, their rights, capacities and potential. Action is needed on all these fronts to

[51] *Ibid.*, 11–12.

[52] This section draws strongly on *UNHCR Women and Girls Handbook*, especially chs. 1 and 2.

[53] S. Batliwala, cited in L. Vene Klasen *et al.*, *Rights-based Approaches and Beyond: Challenges of Linking Rights and Participation*, Just Associates, Washington DC, IDS Working Paper 235, Dec. 2004, 9, available at www.ids.ac.uk/ids/bookshop/wp/wp235.pdf. See also *UNHCR Women and Girls Handbook*, 41.

[54] See J. Rowlands, *Questioning Empowerment: Working with Women in Honduras* (Oxford: Oxfam, 1997), cited in C. Luttrell *et al.*, 'Understanding and operationalising empowerment', Oct. 2007, available at www.poverty-wellbeing.net/document.php?itemID = 1547&langID = 1.

transform power relations towards greater equality and for empowerment for all to take root.

It can also be useful to distinguish between empowerment as a process with a resulting narrow focus on process, or as an outcome, which requires transformation. The former leads to a focus on organisational capacity-building and on increasing participation of previously excluded groups in decision-making, whether this relates to camp management or self-reliance programmes. The latter emphasises economic enhancement and increasing access to economic resources.[55] Elements of both are important and indeed evident in various UNHCR operations.

A number of improvements in this context have been made in UNHCR since the 2003 publication of the *Human Security Now* report. In 2004, the Office adopted and began implementing a strategy of age, gender and diversity mainstreaming (AGDM) and targeted actions for empowerment into its work. The aim of AGDM is to achieve gender equality and the enjoyment by refugees and others of concern to the Office of their rights, regardless of their age, sex, gender or other background. This has involved using participatory approaches to identify protection problems and appropriate responses, to adjust these responses in the light of feedback from the refugee community, and draw on refugees' own capacity to secure protection and solutions. AGDM has now been rolled out across UNHCR operations, with 109 country operations having set up multifunctional teams and conducted participatory assessments,[56] although it is of course an ongoing and continuing undertaking. The process is helping to identify concerns in refugee communities, such as domestic violence or child marriage, which might otherwise remain much less visible. There is also an increasing focus on livelihood initiatives to strengthen self-reliance and thereby empower refugee communities, including the women within them, as outlined in greater detail in section VII.A. below.

Exactly what empowerment involves in a given situation and how it is to be achieved may, however, be perceived in different ways by different actors, especially in large operations where many agencies and actors are engaged. For instance, Yuka Hasegawa points out in her analysis of the post-conflict transitional period in Afghanistan in 2002–3 that different actors adopted 'different methods of empowerment, with a variable focus' from those centred on rebuilding governance structures generally

[55] Luttrell *et al.*, 'Understanding and operationalising empowerment', 4.
[56] *Note on International Protection*, 2008, para. 10.

to community-based initiatives focused on gender issues.[57] This 'diversity of approaches' resulted in a 'difficulty in ascertaining which entities in fact represented the project-receiving community', while there was a 'lack of an overall strategy linking different empowerment methods to the state-building process'.[58] Hasegawa also found that empowerment initiatives in Afghanistan could not avoid being drawn into local politics and had a potential to be conflict inducing.

Many challenges remain from achieving a real change in understanding and attitudes to strengthening monitoring and evaluation of empowerment initiatives and securing practical results on the ground.[59] It is hard to determine the extent to which the human security focus on empowerment has added weight to these developments, but it can at least be seen as providing potentially significant conceptual support.

C. *The rationale for focusing on specific groups*

In analysing how human security may promote the protection of what they term 'vulnerable groups', MacFarlane and Foong Khong have noted 'an intrinsic tension between the universalistic underpinning of the human security agenda and the group-specific orientation of children and women in conflict and the displaced'. They affirm that 'the basis of human security is a claim that certain standards of treatment are universal' and argue that '[a]dvocacy and norm-building for specific groups may involve a claim that their concerns are more important [and] … may corrode the general principles'.[60]

This approach seems to miss the point. Without a detailed and nuanced assessment and understanding of the threats to which individuals – for instance, in a given refugee community – may be exposed, responses will not be sufficiently accurate or targeted and will necessarily be inadequate. The threats to which individual refugees may be exposed are often not only general – for example, because they share the ethnic or religious origin of others who have fled – but also quite specific. Refugee men may be attacked and killed as presumed guerrilla fighters or

[57] Hasegawa, 'Is a human security approach possible?', 15. See, e.g., *UNHCR Women and Girls Handbook*, 'Afghan protection strategy for women and girls at risk', 79–81.
[58] Hasegawa, 'Is a human security approach possible?', 15.
[59] See *UNHCR Women and Girls Handbook*, ch. 1.4. Refugee women, who may have assumed new roles in exile, may, for instance, find upon their return that they are pressured to resume their traditional roles, *ibid.*, 158–9.
[60] MacFarlane and Foong Khong, *Human Security and the UN*, ch. 6, 223.

sympathisers. Young refugee girls who are raped may be forced to marry the perpetrators of this crime if traditional justice systems are in operation in camps. Older refugees without family support may become isolated and unable to access the health services or other assistance they may need to survive.

It is thus not that the concerns of certain groups are more important when there is a focus on them, as MacFarlane and Foong Khong argue, but that a more nuanced approach is essential to effective interventions. If refugee girls are not recognised as also at risk of forced recruitment as child soldiers, as well as boys, they may well be unable to access disarmament, demobilisation and reintegration (DDR) programmes.[61] The same is true if men of a particular ethnicity or profession, such as barbers, in a given situation are not recognised as at risk of attack.[62] Similarly, if it is not recognised that men and women in a particular community are responsible for growing different crops, then the women run the risk of not receiving appropriate tools and seeds, thus undermining the community's self-sufficiency as well as the women's independence.[63]

A particular focus on threats faced by women, girls and boys is also necessary, because their voices are more rarely heard than those of men, and the threats to which they are exposed, for instance in conflict, have not been adequately recognised in the past. In other words, specific action is needed to address the threats faced by those who are particularly marginalised, whether because of age, sex, race, ethnicity, caste, religion, political opinion, health, disability, sexual orientation or any of the other numerous factors that make up each individual's identity. This is, indeed, what Executive Committee Conclusions No. 105 and No. 107 and the *UNHCR Handbook for the Protection of Women and Girls* seek to do in their focus on risks to which refugees and others of concern to UNHCR may be exposed.[64]

By mainstreaming the various aspects of age, gender and diversity, rather than adopting a generic approach that will inevitably fail to

[61] *UNHCR Women and Girls Handbook*, 235.

[62] In Afghanistan and Iraq, for instance, barbers have been targeted and killed, since by working they are contravening the moral values of certain Muslim fundamentalists.

[63] IASC, *Women, Girls, Boys and Men: Different Needs, Equal Opportunities*, 2006, at www.unhcr.org/refworld/pdfid/46978c842.pdf, 84.

[64] Executive Committee Conclusions Nos. 105 and 107; *UNHCR Women and Girls Handbook*, ch. 3; UNHCR, *Refugee Consultations – Bangladesh*, Mar. 2007, at www.unhcr.org/refworld/pdfid/472897160.pdf.

identify appropriate responses, a progressively more sophisticated analysis and response is possible. This can, for instance, help to bring greater focus on individuals with disabilities and on older persons, not less as MacFarlane and Foong Khong appear to argue. This greater focus can then help tackle the invisibility to which such individuals are often consigned and help devise appropriate responses to the risks to which they are exposed.[65] As Sen has highlighted, 'identities are robustly plural' and each individual has a 'plurality of diverse identities'.[66] This requires a sophisticated and nuanced analysis, understanding and response if challenges to an individual's human security are to be addressed effectively.

VII. Using these strategies to strengthen peace and security, development and human rights in refugee situations

Returning to the three pillars of the UN mentioned in the introduction to this chapter – peace and security, development and human rights – the sections which follow use these three issues as a framework through which to examine in more detail how the two strategies of protection and empowerment identified by the Commission on Human Security might be used to fill contemporary refugee protection gaps and strengthen refugees' human security.

This analysis brings out the inter-linkages between peace and security, development and human rights. It shows how approaches that focus on only one aspect run the risk of becoming skewed and ineffective and how comprehensive approaches have the potential to become mutually reinforcing. As the then Secretary-General Annan reported in 2005, 'unless all three causes are advanced, none will succeed'.[67] The analysis also shows that a broader assessment of the challenges to refugees' security is also evident, reflecting an expanded focus of analysis and efforts.

While the term 'human security' is not generally explicitly used, a human security approach is often implicit in the initiatives undertaken. Explicit and clear support for the consolidation of human security in

[65] As, for instance, brought by the Convention on the Rights of Persons with Disabilities 2006, GA res. 61/106, 13 Dec. 2006, UN Doc. A/61/49 (2006); entered into force 3 May 2008 or the 1991 UN Principles for Older Persons, GA Res. 46/91, U.N. GAOR, 46th Sess., 74th plen. mtg., Annex 1, UN Doc. A/RES/46/91 (1991).

[66] A. Sen, *Identity and Violence: The Illusion of Destiny* (London: Allen Lane, 2006), 9 and 166.

[67] *In Larger Freedom*, UN Doc. A/59/2005, para. 17.

numerous ways is evident, however, in the activities of the United Nations Trust Fund for Human Security (UNTFHS). Since its creation in 1999, it has invested in over 170 different projects in over sixty countries.[68] Several have a clear displacement focus, as for example in the projects to promote the integration of returning IDP/refugee women in community development in Afghanistan or to stabilise refugee hosting communities in northwestern Tanzania. Most recently, in August 2008, the Japanese Government announced a grant of over 5 million dollars through the UNTFHS to support an integrated community empowerment and peace-building support project in Ituri, eastern DRC, to be jointly implemented by several UN agencies, including UNHCR.[69]

A. Peace and security and human security

Peace and security – also described by the *In Larger Freedom* report as 'freedom from fear' – is often a central concern of efforts to protect refugees. This section focuses on initiatives to enhance the security of particular groups, amongst which there are often refugees. These concern the protection of civilians in armed conflict, of children in armed conflict, and efforts to tackle sexual and gender-based violence (SGBV). The section also shows how interventions to strengthen the establishment of sustainable peace are critical to successful voluntary repatriation in safety and dignity. In each of these areas, initiatives in recent years can be seen as having adopted a broader and more inclusive approach, although the term 'human security' is rarely used as such. Finally, it outlines briefly UN efforts to integrate a gender perspective into both peace and security concerns, notably through Security Council resolutions 1325 (2000) and 1820 (2008). It shows how a more comprehensive and inclusive approach is being taken when seeking to establish and

[68] See S. Kerim, President of the General Assembly, 'Opening Statement', General Assembly Thematic Debate on Human Security, 22 May 2008, available at www.un.org/ga/president/62/statements/humansecurity220508.shtml, with further details at http://ochaonline.un.org/TrustFund/ProjectProfiles/tabid/2110/language/en-US/Default.aspx.

[69] Government of Japan, 'Assistance by the United Nations Trust Fund for Human Security to the Project "Integrated Community Empowerment and Peace-Building Support Project in Ituri" in the Democratic Republic of the Congo', 4 Aug. 2008, available at www.reliefweb.int/rw/rwb.nsf/db900sid/KKAA-7H79LF?OpenDocument&rc = 1&cc =cod. For other UNTFHS-funded projects benefiting refugees, see 'Human Security-related Initiatives and Activities by Members of the Friends of Human Security', UN Doc. A/62/695, 15 Feb. 2008, 54–55.

consolidate peace and that empowerment is more widely recognised as critical to such efforts.

UN initiatives in recent years to strengthen the protection of civilians in armed conflict[70] are relevant not only to the protection of IDPs but also of refugees, as noted above. Although IDPs may well be more likely than refugees to find themselves caught up in armed conflict, armed conflict is a major cause of insecurity and flight for both refugees and IDPs. Refugees may also be intermingled with IDPs, as is, for instance, the case in Darfur (Sudan), Chad, the Central African Republic or the DRC.

Especially where refugees remain in border regions or where conflict and insecurity spill over into neighbouring countries, refugees risk becoming unintended 'collateral damage' or even direct targets in the very conflict they are seeking to flee. Camps may be raided by armed groups, or become controlled by combatants who have temporarily withdrawn from the conflict to recuperate. In such unstable situations, the delivery of humanitarian assistance may be deliberately obstructed and humanitarian access denied.[71] As the Secretary-General has noted, access to civilians in armed conflict 'is anything but safe, certainly not timely, and far from unhindered. The result is millions of people excluded from access to life-saving assistance and the minimal protection provided by the mere presence of humanitarian workers.'[72] Refugees may in consequence be forced to flee again, including to situations of greater danger.

Recognising these challenges to refugees' security, governments, which have the primary responsibility to ensure the civilian and humanitarian character of asylum, and UNHCR have, for instance, long worked to ensure that refugee camps are placed at a safe distance from the frontier.[73] Separating combatants from civilians – one of the fundamental principles of international humanitarian law – and ensuring refugee camps are secure nevertheless remain major challenges in both refugee

[70] SC/RES/1265 (1999); SC/RES/1296 (2000); SC/RES/1674 (2006); SC/RES/1738 (2006).

[71] See *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 Sept. 1999 and his most recent 2007 report with the same title, UN Doc. S/2007/643.

[72] UN Doc. S/2007/643, para. 33.

[73] See Art. 2(6), 1969 OAU Convention; Executive Committee Conclusions Nos. 84 (XLVII), 1997, para. (b)(i); 94 (LIII), 2002, paras. (a) and (c)(iv); and 99 (LV), para. (m). See also, Commission on Human Security, *Human Security Now*, 50; UNHCR, *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, 2006, available at www.unhcr.org/refworld/pdfid/452b9bca2.pdf.

and IDP situations, as recognised by the Security Council in various situations.[74] In September 2007, for instance, it approved a multidimensional peacekeeping presence in Chad and the Central African Republic with a mandate:

> to help create the security conditions conducive to a voluntary, secure and sustainable return of refugees and displaced persons, *inter alia* by contributing to the protection of refugees, displaced persons and civilians in danger, by facilitating the provision of humanitarian assistance in eastern Chad and the north-eastern Central African Republic and by creating favourable conditions for the reconstruction and economic and social development of those areas.[75]

Ongoing internal and cross-border hostilities have, however, meant that the security situation remains 'fragile and unpredictable'. Humanitarian workers have come under attack and this has in turn impeded humanitarian access to the 180,000 IDPs and over 290,000 refugees in eastern Chad.[76] It seems that, despite the broad mandate of the peace-keeping measures, which recognises a wide range of inter-linked elements requiring action, traditional security concerns have impeded greater progress on such issues as strengthening the rule of law and ending impunity and reconstruction which are prerequisites for durable solutions.

Another issue relevant to the human security of refugees on which UN and international efforts have focused has, since 1999, been that of children in armed conflict.[77] Displacement exacerbates the risk of girls and boys being recruited or used by armed forces or armed groups. Flight reduces their 'social protection and coping mechanisms', exposes them to discrimination, often because of 'perceived allegiance with a belligerent in the armed conflict', and curtails their 'economic, educational or other opportunities'.[78] Further, the proliferation and availability of small arms in recent years means that children, including refugee

[74] See, further, ch. 5 by R. Muggah in this book.
[75] SC res. SC/RES/1778 (2007).
[76] See *Report(s) of the Secretary-General on the United Nations Mission in the Central African Republic and Chad*, UN Doc. S/2008/444, 8 Jul. 2008 and UN Doc. S/2008/601, 12 Sept. 2008; *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict,* Radhika Coomaraswamy, UN Doc. A/HRC/9/3, 27 Jun. 2008.
[77] SC res. SC/RES/1261 (1999); SC res. SC/RES/1314 (2000); SC res. SC/RES/1379 (2001); SC res. SC/RES/1460 (2003); SC res. SC/RES /1539 (2004); SC res. SC/RES/1612 (2005).
[78] *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, Feb. 2007, available at www.unhcr.org/refworld/pdfid/465198442.pdf, 14.

children, are now widely recruited and involved in conflicts across Africa and elsewhere.[79]

Yet, as Radhika Coomaraswamy, the Special Representative of the Secretary-General for Children in Armed Conflict, has noted, the 'normative structure for the protection of children is both robust and comprehensive and enjoys an unprecedented consensus among member states of the UN'.[80] The International Criminal Court (ICC) and other tribunals have taken bold steps to bring those who recruit and use children in armed forces and groups to justice, while the Security Council has set up a mechanism to monitor grave violations against children in armed conflict through resolution 1612 (2005).[81] At the more operational level, UNICEF has pioneered, and UNHCR is supporting, the concept of 'child-friendly spaces' in emergencies which can go on to become a school or play area where educational, health and social support can be provided.[82] As the Special Representative also reports, however, 'the shocking reality [is] that in far too many situations of armed conflict children are routinely brutalized and their most fundamental rights contravened'.[83]

The broader view of security promoted by the human security concept and the latter's clearer focus on the individual also help raise the profile of efforts to prevent and respond to SGBV against refugees. In contemporary conflicts, where civilians are increasingly direct targets and displacement heightens the risk of attack, rape and sexual atrocities against women, girls, and (less frequently) boys and men, are often committed with impunity. As the Security Council has noted, sexual violence is used

[79] Coalition to Stop the Use of Child Soldiers, *Global Report 2008*, available at www.child-soldiers.org/library/global-reports.

[80] *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, A/363/227, 6 Aug. 2008, para. 22. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, GA res. A/RES/54/263, 25 May 2000; entered into force 12 Feb. 2002; and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, are but two recent leading examples.

[81] See, generally, UN Doc. A/363/227, 2008. In addition to forced recruitment, the *Report of the Secretary-General on Children and Armed Conflict*, UN Doc. A/59/695-S/2005/72, 9 Feb. 2005, para. 68, lists killing and maiming; abduction; sexual violence; attacks on schools and hospitals; and denial of humanitarian access as the six grave rights violations to which children in armed conflict, including refugee children, are exposed and which are now monitored under Security Council resolution 1612 (2005).

[82] See Executive Committee Conclusion No. 107, para. (h)(viii); *UNHCR Women and Girls Handbook*, 77.

[83] UN Doc. A/363/227, 2008, para. 22.

'as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group'. The Council has further reiterated its deep concern that such acts 'in some situations have become systematic and widespread, reaching appalling levels of brutality'.[84]

With access to refugees and IDPs severely restricted in many conflict zones, as outlined above in eastern Chad or in eastern DRC, the international community's response capacity is often limited and national authorities such as the police and judiciary are under-equipped or unwilling to respond to such attacks. Even if refugee women and girls have reached the relative security of a camp, they may be raped or attacked as they search for firewood or water outside camps,[85] or within the camp, if latrines are poorly sited or schools are not sufficiently safe. The focus brought to such issues in recent years reflects a broader perception of the security risks faced by refugees and has permitted a wide range of responses from fuel efficient stoves to improved lighting in camps. In Liberia, the posting in January 2007 of the first all-female 'Formed Police Unit' of Indian officers has offered clear role models for Liberian women and enabled a stronger focus on efforts to reduce impunity for sexual violence, although this is a rare example.

In peace-building and post-conflict situations, measures to strengthen human security are critical to establishing sustainable peace and conditions enabling refugees to repatriate in safety and dignity. Interventions by the UN and other members of the international community have become increasingly involved in humanitarian and human rights issues. DDR programmes, landmine clearance and measures to reduce the impact of cluster munitions[86] undertaken by peace-keeping missions are all critical to the restoration of conditions conducive to human security in post-conflict situations and to sustainable refugee repatriation. In addition, peace-keeping and, more recently, peace-building increasingly involve (re)establishing governance systems and the rule of law, supporting the holding of elections, monitoring refugee returns, establishing mechanisms to resolve housing, land and property disputes

[84] SC res. S/RES/1820 (2008).

[85] See, e.g., Women's Commission for Refugee Women and Children, *Beyond Firewood: Fuel Alternatives and Protection Strategies for Displaced Women and Girls*, Mar. 2006, available at www.womenscommission.org/pdf/fuel.pdf.

[86] UN Doc. S/2007/643, paras. 62–65, referring not least to negotiations for a Convention on Cluster Munitions, opened for signature in Dec. 2008.

equitably, initiating 'coexistence' programmes, rebuilding infrastructure, and supporting economic reconstruction.[87]

Re-establishing the rule of law is critical to establishing peace and the eventual ending of impunity for war crimes. In this respect, at the international level, judgments of the International Criminal Tribunals for the former Yugoslavia and for Rwanda have been groundbreaking in clearly identifying rape and other forms of SGBV committed during armed conflict as war crimes and crimes against humanity.[88] These developments can nevertheless present dilemmas between the need to bring leading figures to justice for such crimes and the potential to endanger the peace process which prosecution may bring. A recent example relating to the twenty-year war in northern Uganda concerns the refusal of Joseph Kony, the leader of the rebel Lord's Resistance Army, to sign a peace accord unless arrest warrants against him for crimes against humanity and war crimes, including sexual enslavement, rape, attacks on civilians, and enlistment of children, issued in 2005 by the ICC, are lifted. This deadlock is in effect prolonging the conflict, endangering the security of some 580,000 IDPs who returned during 2007 as a result of the improved security during the peace talks, and preventing the return of more than 20,000 refugees and 1.2 million IDPs who are still displaced.[89]

Security Council resolution 1325 (2000) on women, peace and security marks the first time the Council recognised that women and girls suffer disproportionately in conflict and are rarely engaged in conflict resolution. The resolution combines closely the two elements of

[87] *Ibid.*, paras. 52–9, mentioning, e.g., the provision by the Peacebuilding Fund of the Peacebuilding Commission of initial financial support through UNHCR to establish a national property claims mechanism in Burundi. See, also, *The Peacebuilding Fund: Report of the Secretary-General*, 4 Aug. 2008, UN Doc. A/63/218–S/2008/522, para. 20, which reads: 'The Peacebuilding Fund approach is based on the recognition that stable peace must be built on social, economic and political foundations that serve the needs of the population.' The report focuses on areas such as the rule of law, security sector reform, human rights, youth employment, addressing property disputes, refugee resettlement, and the promotion of inclusive national political dialogue.

[88] See, e.g., International Criminal Tribunal for Rwanda, *Prosecutor* v. *Akayesu*, ICTR-96–4-T, Sept. 1998; International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Furundzija*, IT-95–17/1, Dec. 1998.

[89] For statistics, see UNHCR, *2007 Global Trends*, accompanying annexes, Table 2. See also, D.F. Orentlicher, '"Settling accounts" revisited: reconciling global norms with local agency', *International Journal of Transitional Justice*, 1 (2007), 10–22; E.K. Baines, 'The haunting of Alice: local approaches to justice and reconciliation in northern Uganda', *International Journal of Transitional Justice*, 1 (2007), 91–114.

protection and empowerment. On the one hand, it calls on all parties to a conflict to take special measures to protect women and girls, including those who are refugees and IDPs, from gender-based violence in conflict and emphasises states' responsibility to end impunity for such violence.[90] On the other hand, it urges states to increase women's representation and participation in negotiating and implementing peace agreements and recognises the urgent need to incorporate a gender perspective into peacekeeping operations.[91] Despite the new ground broken by the resolution, it was recently characterised as a 'dream deferred', not least because it lacks monitoring, accountability and enforcement mechanisms. A 'change in mindset' is still also needed to recognise that 'a peace agreement that is "gender-neutral" is, by definition, discriminatory against women' and that the protection of women is not the 'soft-side' of peace-building but rather one of the hardest responsibilities in the peace-building agenda.[92]

Security Council resolution 1820 of June 2008 seeks to rectify some of these shortcomings. It clearly states that sexual violence used as a tactic of war against civilians 'can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security'.[93] The resolution affirms correspondingly that 'effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security'.[94] It reinforces the responsibility of security actors from UN peace-keepers to national forces to become fully engaged both in tackling the root causes of such violence and to strengthen women's participation in peace processes. Relevant UN agencies are specifically charged with developing, including through consultations with women and women-led organisations, 'effective mechanisms for providing protection from violence, including in particular sexual violence, to women and girls in and around UN managed refugee and internally displaced persons camps' as well as in all DDR processes.[95] Once again, the joint strategies of protection and empowerment are clearly evident.

[90] SC res. 1325 (2002), paras. 9–12.
[91] *Ibid.*, para. 8.
[92] D. Steinberg, 'Beyond victimhood: engaging women in the pursuit of peace', testimony to the US House of Representatives Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights and Oversight, International Crisis Group, 15 May 2008, available at www.crisisgroup.org/home/index.cfm?id = 5444&l = 1.
[93] SC res. 1820 (2008), para. 1.
[94] *Ibid.*
[95] *Ibid.*, para. 10. See most recently also, *Report of the Secretary-General pursuant to Security Council resolution 1820*, 15 July 2009, UN Doc. S/2009/362.

In conclusion to this section, a clear example of protection and empowerment as joint strategies for human security is provided by the international operation to re-establish peace and security in Afghanistan during the transitional period of 2002–3 following the US-led military intervention there. As Hasegawa points out, the UN Assistance Mission to Afghanistan (UNAMA) 'embodied a reference to human security and the explicit pursuit of the strategies of protection and empowerment'.[96] The challenge 'was to make progress in the transition from a war culture, in a way that did not worsen human security in the short term and which created a structure which ensured transformation of the conflict in the long term'.[97] In addition to the more evident aspects of the UNAMA mission to re-establish conditions of physical security in Afghanistan, capacity building and empowerment were integral elements of its mission. It was required, *inter alia*, 'to bolster Afghan capacity (both official and non-governmental), relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate "footprint"'.[98]

In her article, Hasegawa offers an insightful analysis of the tensions inherent in these two approaches in the highly politicised and militarised situation in Afghanistan, which sometimes made impartiality difficult to maintain. She summarises these tensions as follows:

> [W]hile protection implied the use of advocacy and the protection of rights in pursuing justice and equality, as well as the creation of a structure conducive to peace, empowerment emphasized that the process should be owned by the local actors. The latter's approach tended to try and resolve issues in the direction of the status quo and conflict settlement, whereas the former sought clear justice, based on the notion that rights issues are non-negotiable, which was potentially divisive. The case of Afghanistan demonstrated the possibility that the lack of an overview could lead the empowerment strategy towards partisanship, allowing impunity to prevail. On the other hand, the protection function undertaken by the UN could, in turn, become confrontational and might exacerbate the general insecurity.[99]

[96] Hasegawa, 'Is a human security approach possible?', 9.
[97] *Ibid.*, 6.
[98] *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, 18 Mar. 2002, UN Doc. A/56/875–S/2002/278, para. 98.
[99] Hasegawa, 'Is a human security approach possible?', 17–18.

She goes on to call for a broad analysis of the roles of internal and external actors, not because 'the compatibility of different roles is … a question of exclusivity', but so that 'different roles may be balanced and used strategically in a given context towards the overall aim of transformation of the conflict'.[100]

B. Development and human security

Some analysts of the human security concept have favoured a narrower definition of the term, which focuses on 'freedom from organized violence'[101] and does not encompass development or what the Secretary-General has termed 'freedom from want'. In the displacement context at least, it seems important, however, that the concept be taken to include development and security as regards economic and social rights. Doing so helps highlight the inter-linkages, for instance, between lack of development and displacement, and between refugees' lack of self-reliance and protection problems they may face in displacement, as well as an absence of solutions in protracted situations. By highlighting these inter-linkages, viewing refugee situations through a human security lens can perhaps help bridge the persistent gap between relief and development. In many situations, development initiatives and promotion of self-reliance can be an essential and practical tool to make protection, solutions, and thereby human security a reality for refugees. As the examples below show, it is an aspect of human security which the Government of Japan has stressed as particularly important.

When looking at the causes of mixed movements of people, it is useful to look at the complex mix of human insecurities which can combine to prompt flight, both of refugees and others.[102] By considering not only physical insecurity but also broader economic and social insecurities and lack of development, which may provoke flight, it becomes more possible to tackle these insecurities and reduce the pressure for further displacement. In Colombia, for instance, it is poor indigenous and black people who are disproportionately affected by the continuing conflict there and resulting forced displacement within and beyond the country's

[100] *Ibid.*

[101] See, e.g., MacFarlane and Foong Khong, *Human Security and the UN*, 243.

[102] J. Crisp, 'Beyond the Nexus: UNHCR's Evolving Perspective on Refugee Protection and International Migration', New Issues in Refugee Research, Research Paper No. 155, UNHCR, Apr. 2008, available at www.unhcr.org/research/RESEARCH/4818749a2.pdf, 5.

borders. In Kenya, it was not only election irregularities and ethnic tensions that provoked massive displacement in early 2007, but also increasing disparities in wealth, population growth and pressure on the land. In Zimbabwe, although the reasons for hundreds of thousands to leave became much more clearly political during the course of 2008, economic reasons were more prevalent before that. Failure to deal with underlying economic inequality, poverty, social exclusion and absence of opportunity is thus likely to fail to bring an end to social and political violence and resulting displacement of refugees and others.

Governments of industrialised countries now recognise these linkages. The development assistance they provide can partly be seen as intended to reduce migration pressures. Indeed, the European Union now overtly links development assistance to various migration control measures, including readmission agreements or the opening in October 2008 of an Information Centre for Migration Management in Bamako, Mali, funded by the EU. The EU's Regional Protection Programmes likewise seek to strengthen 'protection in the region' in eastern Europe (as transit countries) and sub-Saharan Africa, not least as a strategy to reduce onward movement of refugees and others to Europe.[103]

The Commission on Human Security's 2003 report suggested that the 'innovative approach in drafting the Guiding Principles [on Internal Displacement], led by Francis Deng [then Representative of the Secretary-General on IDPs], shows what might be done to develop norms for other human security issues'.[104] One way of enhancing protection in the mixed migration context could be to replicate this approach, for instance in relation to rescue-at-sea or, more broadly, to help identify the protection needs of irregular migrants, amongst whom there may well be asylum-seekers, refugees and others in need of international protection. Such Guiding Principles could draw on the different branches of law applicable, from international maritime law to international human rights law, including notably the 1951 Refugee Convention and the 1990 Convention on the Rights of All Migrant Workers and Members of their Families,[105] and related regional instruments.

[103] 'Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes', COM(2005) 388 final, 1 Sept. 2005, available at hhttp://europa.eu/scadplus/leg/en/lvb/l33222.htm.

[104] Commission on Human Security, *Human Security Now*, 49.

[105] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003.

They could provide guidance to the different actors involved, whether ship masters, border guards, immigration officials or humanitarian or NGO workers.[106]

Once displaced, support by humanitarian agencies and donor countries to strengthen the development and livelihoods of refugee communities can act as an important protection tool. Refugees' food security has, for instance, been especially affected by the recent dramatic rises in the price of basic foodstuffs as refugees are frequently dependent on humanitarian aid for survival.[107] Self-reliance and livelihoods initiatives under such situations can be essential to survival and help refugees regain a sense of purpose and dignity. They can also protect refugee women and girls from exploitation and abuse, including having to resort to 'survival sex'. Such initiatives and the education and training which they involve also help to empower refugee communities, including the women in those communities. As the Japanese delegate to UNHCR's June 2008 Standing Committee meeting stated: 'Japan places great importance on the empowerment of individuals under the concept of Human Security, and has been extending assistance in a comprehensive manner, including in the area of education and vocational training.'

Ensuring viable recovery and sustainability in return situations in countries emerging from conflict or seeking to consolidate peace, as for instance in Afghanistan, Sierra Leone or Liberia, is critical to re-establishing returnees' human security. Numerous projects in such situations seek to reconstruct social infrastructure, restore livelihoods and re-establish health, education and youth centres. Once again, empowerment is often a key component. In the Angolan repatriation operation, for instance, UNHCR, the Angolan Government, and civil society worked together to establish eight women's empowerment centres focused on returnee women's socio-economic empowerment, at the same

[106] See A. Betts, 'Towards a "Soft Law" Framework for the Protection of Vulnerable Migrants', UNHCR New Issues in Refugee Research, Paper No. 162, Aug. 2008, available at www.unhcr.org/research/RESEARCH/48b7f9642.pdf, proposing that any combination of UNHCR, the International Federation of the Red Cross and Red Crescent Societies, and the International Organization for Migration could be co-convened to facilitate the development of 'Guiding Principles on the Protection of Vulnerable Irregular Migrants'.

[107] UNHCR, 'UN Refugee Agency Chief Concerned about Global Food Shortages', 7 Apr. 2008, available at www.unhcr.org/news/NEWS/47fa2a262.html.

time as incorporating educational and health initiatives. Sustaining these projects has, however, proved a major challenge.[108]

Development and livelihood initiatives can also be critical to resolving protracted displacement situations. As Assistant High Commissioner Feller has argued:

> The reality of protracted situations is that they are so because return to countries of origin meets obstacles which cannot be surmounted in a reasonable period. Stay in countries of asylum is increasingly difficult the longer people are left without self sufficiency possibilities and the more their stay taxes the tolerance and infrastructure of local communities. Care and maintenance is not the solution over a longer period. Livelihood strategies which benefit host and refugee communities are a far more productive way forward for all concerned. Such strategies revolve around the creation of opportunities for people to lift themselves out of poverty or dependency, and base themselves on efforts to build existing refugee capacities through, not least, provision of loans and tools, as well as on income generation projects, agricultural development activities and vocational training programmes.[109]

Positive examples of initiatives in the displacement context to strengthen economic self-sufficiency include those undertaken as part of the 2004 Mexico Plan of Action. These have involved concrete actions under a 'cities of solidarity' programme to achieve self-sufficiency and local integration of refugees in Central and Latin American cities. A 'borders of solidarity' programme also stimulates social and economic development in areas bordering on Colombia to benefit both refugees and the local population. Designed to address the humanitarian needs of people fleeing the violence in Colombia, they include comprehensive programmes to assess the needs of refugees and of local host communities along with complementary humanitarian and development-oriented activities. Another example is UNHCR's 'Zambia initiative', which seeks to promote the local integration of remaining Angolan refugees in eastern Zambia by engaging a range of actors to strengthen the economic development of refugees and their host communities and to foster the incorporation of refugees' concerns into national development and

[108] *UNHCR Women and Girls Handbook*, 157; UNHCR, 'Evaluation of UNHCR's Returnee Reintegration Programme in Angola', Aug. 2008, available at www.unhcr.org/research/RESEARCH/48ce22a92.pdf, paras. 142–3.

[109] 'Statement by Erika Feller, Assistant High Commissioner – Protection', 42nd Meeting of the Standing Committee, Agenda Item 4(a) – Protracted Situations, 25 Jun. 2008, available at www.unhcr.org/admin/ADMIN/4868a31b2.pdf.

poverty reduction strategies. Such initiatives supporting development for refugees and host communities can be seen as contributing to refugee security and protection, as well as to durable solutions.

By recognising the links between lack of respect for economic and social rights and protection problems and by highlighting development concerns more generally, the human security concept can thus help raise the profile of these issues and support advocacy for more comprehensive responses for refugees in such situations. Specific initiatives, such as those funded by the UNTFHS, represent clear and concrete contributions to implementing and operationalising human security in some of the most complex and long-running situations of forced displacement in the world.

C. Human rights and human security

Some have criticised the notion of human security as lacking the binding force of international human rights and international humanitarian law. In 1998, for instance, UNHCR's Division of International Protection appeared sceptical, suggesting that the concept was 'vague and undefined in international law'; that 'references to UNHCR's role in safeguarding or reinforcing human security' represented 'a distraction from and a dilution of UNHCR's statutory function of providing international protection to and solutions for refugees'; that the concept constituted 'a misguided attempt to use the language of security in UNHCR's dialogue with states, at a time when the organization should be speaking unequivocally in terms of refugee protection and the defence of human rights'; and that the concept had its origins in the field of development and its use by UNHCR would be interpreted as an attempt 'to extend its mandate into that domain'.[110]

Clearly the concept of human security does not have the binding force of law, but does it represent a tool that might help persuade states to respect, protect and fulfil refugees' human rights – what Annan has termed their 'freedom to live in dignity'? Can human security be used to strengthen the operationalisation of human rights, as the latter evolve 'from being legal norms, framed rather abstractly at UN level, to principles and practices applied in domestic law and policy in many different countries around the world'?[111] Or must we be wary of transplanting the

[110] UNHCR, 'The Concept of Human Security and its Relevance to UNHCR'.

[111] International Council on Human Rights Policy, *Catching the Wind – Human Rights*, Geneva, 2007, available at: www.ichrp.org/files/reports/4/133_Final_for_web.pdf, 15.

language of human rights and refugee protection into a human security framework, since the international legal basis for both of the former is much stronger and there may be a risk of undermining the protection afforded by international law?

Ogata and Cels see the relationship between human security and human rights as mutually reinforcing:

> Human security provides a cognitive and practical framework for identifying the rights and obligations at stake in particular insecure situations. And human rights help answer the question, How should human security be ensured? The notion of legal duties and obligations complements the recognition of the ethical and political importance of human security.[112]

Indeed, whether one takes a narrow or broader view of what human security entails, the various definitions identified by different authors have a significant overlap with human rights. Most threats to human security can be formulated as human rights violations.[113] As Ramcharan has noted: 'international human rights norms are crucial to the definition of human security and … human rights strategies are essential for its realization.'[114] Put another way, even though human security represents a policy framework rather than a legal framework, it ultimately seeks to protect fundamental rights set out in international human rights and international humanitarian law.

In many ways, human security, with its clear focus on the individual as well as the state, reflects the trend in international law from operating primarily as a mechanism to regulate relations between states, to becoming also a mechanism to establish and uphold international human rights norms. This shift imposes corresponding obligations on the part of states to respect, protect and fulfil those rights, which require active commitment and positive action by states, thus marking a coming of age of the human rights debate now that core standards have been established. This requirement to respect, protect and fulfil human rights has parallels with the human security approach which views state security and state obligations as not fulfilled unless there is clear and active protection of individual rights and security. As the High-level Panel reported in 2004, 'the notion of State sovereignty, today … clearly carries

[112] Ogata and Cels, 'Protecting and empowering the people', 275.
[113] Persaud, 'How should the human rights community position itself?', 28.
[114] B.G. Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff, 2002), 231.

with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.'[115]

More operationally, advocates intervening before governments and other actors may be able to promote greater respect for refugees' human rights by using arguments related to human security, since these 'can be used in social contexts where the language of human rights would meet entrenched opposition'.[116] Where human rights may be perceived as an instrument of Western values, as can sometimes be the case, UNHCR and other advocates could perhaps use human security arguments to strengthen respect for refugee protection principles, for instance, in regions such as South Asia, where few states are party to the 1951 Refugee Convention.[117] Articulating and analysing human rights and refugee protection concerns in terms of human security may, for instance, help broaden a narrow focus on perceived national interests or security to encompass humanitarian concerns and/or support a recognition that failure to respond to the concerns of displaced populations may eventually undermine national security. Linking human rights to security in this way helps bring human rights concerns to the attention of a wider audience and to prioritise them for audiences used to thinking in terms of national security.

At the same time, human security performs an important function by bringing out the linkages between the denial of rights and a lack of protection. These may relate, for example, to violations of civil and political rights provoking flight or denial of access to self-reliance once displaced, which undermine economic and social rights and prevent solutions. Indeed, this is why it is important to take a broad view of the term 'human security' as encompassing also civil, political, economic, social and cultural rights. In this way, human security can be seen as helping reinforce the 1993 Vienna Declaration's affirmation that '[a]ll human rights are universal, indivisible and interdependent and interrelated'.[118]

[115] This can be taken as including state responsibilities towards not only its own citizens but also to others such as refugees. *A More Secure World*, para. 29.

[116] S. Alkire, 'A Conceptual Framework for Human Security', Centre for Research on Inequality, Human Security and Ethnicity, Queen Elizabeth House, University of Oxford, 2003, available at www.crise.ox.ac.uk/pubs/workingpaper2.pdf, 39; Tigerstrom, *Human Security and International Law*, 30–40.

[117] Tigerstrom, *Human Security and International Law*, 41–42.

[118] Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 Jul. 1993, para. 5.

The focus of the Commission on Human Security on 'critical' and 'pervasive' threats to human security may also assist the prioritisation of responses. A rights-based approach may well identify a whole range of rights violations, some of which nevertheless require more urgent action than others. Viewing these violations from a human security perspective could help identify priorities amongst rights violations, and support a situational analysis which recognises how violations may combine to expose individuals to further danger. It is essential, however, 'not to suggest that any obvious violation of rights can be ignored, let alone that human rights shortcuts can be acceptable'.[119] It is also important to be 'watchful lest the focus on human security … at the UN takes us backward to the 1970s–1980s' framework of basic needs as opposed to rights. Rather we need to ensure that basic needs are seen as human rights and that rights are respected in the pursuit of meeting those needs.'[120]

VIII. Human security and the responsibility to protect

The same reassessment since the end of the Cold War of the balance to be struck between traditional concepts of state sovereignty and the protection of individual human rights, which gave rise to the concept of human security, has also led to a recasting of sovereignty as responsibility.[121] The concept of a 'responsibility to protect' (R2P), which has emerged as part of this re-conceptualisation, has its origins in the debate about humanitarian intervention. It evolved not least as a response to the international community's failed intervention in Somalia in 1992–93, its failure to prevent genocide in Rwanda and Srebrenica in the mid-1990s, and the contested intervention in Kosovo in 1999. Like human security, R2P has a clear focus on the individual as well as the state.

The 2000 report of the International Commission on Intervention and State Sovereignty (ICISS) on the subject sets out the proposition that where 'a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention

[119] P. Alston, 'Ships passing the night: the current state of human rights and development debate seen through the lens of the millennium development goals', *Human Rights Quarterly*, 27 (2005), 806.

[120] C. Bunch, 'A feminist human rights lens', *Peace Review*, 29 (2004), 29, 31, cited in Tigerstrom, *Human Security and International Law*, 42.

[121] R. Cohen and F.M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution, 1998), 275–80.

yields to the international responsibility to protect'.[122] Building on this report, the High-Level Panel in 2004 endorsed 'the emerging norm that there is a collective international responsibility to protect' civilians from large-scale violence which governments have proved unwilling or unable to prevent.[123] The Secretary-General, in turn, has called on states to 'move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities'.[124]

This process led states at the 2005 World Summit to reaffirm the responsibility of each individual state 'to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. In addition, states affirmed that '[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from such crimes'. Further, they expressed their preparedness to take timely and decisive collective action through the Security Council, including Chapter VII, 'should peaceful means be inadequate and national authorities are manifestly failing to protect their populations' from these four categories of crimes.[125]

The responsibility to protect in effect acknowledges that such 'serious human rights violations – in and of themselves – require an international response, regardless of whether or not such violations constitute a threat to international peace and security, as classically understood'.[126] Since then, some commentators have described the concept as 'shunned in practice'[127] and as failing at the first hurdle – Darfur – where in addition to an estimated 400,000 killed, there are some 2.5 million internally displaced or returnee Darfurians and a further 250,000 Darfurian refugees in Chad.[128] The concept may indeed run the risk of

[122] ICISS, *The Responsibility to Protect*, Dec. 2001, available at www.iciss.ca/report-en.asp. See, also, MacFarlane and Foong Khong, *Human Security and the UN*, 177; Tigerstrom, *Human Security and International Law*, 23.

[123] *A More Secure World*, para. 203.

[124] *In Larger Freedom*, UN Doc. A/59/2005, para. 132.

[125] *World Summit Outcome*, UN Doc. A/RES/60/1, paras. 138–9. For the Security Council's first endorsement of the concept, see SC res. SC/RES/1674 (2006).

[126] Arbour, 'The right to life and the responsibility to protect'.

[127] W. Hoge, 'Intervention, hailed as a concept, is shunned in practice', *New York Times*, 20 Jan. 2008.

[128] Responsibility to Protect: Engaging Civil Society, 'Crisis in Darfur', available at www.responsibilitytoprotect.org/index.php/pages/6; UNHCR. 'Sudan Operations at a Glance', 30 Jun. 2008.

becoming discredited, in a similar way to that of humanitarian intervention, if it is too readily used to justify largely unilateral action, as for instance in the US-led invasion of Iraq in 2003[129] or by the Russian Federation in South Ossetia, Georgia, in August 2008.[130]

There are nevertheless clear differences between all three concepts. Critically, the responsibility to protect is more narrowly defined than either humanitarian intervention or human security. It is restricted to responses to four of the most egregious human rights abuses: genocide, war crimes, ethnic cleansing and crimes against humanity, and clearly sets out a requirement for a Security Council mandate. Secretary-General Ban Ki-Moon has affirmed that the responsibility to protect 'is not a new code for humanitarian intervention' but is rather 'built on a more positive and affirmative concept of sovereignty as responsibility' and 'is more firmly anchored in current international law than the two related concepts'.[131]

A greater common understanding is nevertheless needed, for instance, as to exactly what kinds of situations would require international action or what constitutes ethnic cleansing in international law. Governments and the UN have also not always proved willing to define certain events as genocide, whether this relates to Rwanda in 1994, when the US Government was reluctant to do so, or more recently, Darfur, where then US President George Bush characterised the violence there as genocide in 2004,[132] but the UN and the African Union have been reluctant to do so.[133]

It is also necessary to identify more clearly the range and types of action which could be used by the international community to fulfil their responsibility to protect when a state fails to do so. Among other

[129] R.J. Hamilton, 'The responsibility to protect: from document to doctrine – but what of implementation?', *Harvard Human Rights Journal*, 19 (2006), 293.

[130] E. Jurado, 'A responsibility to protect?', *New Statesman*, 15 Aug. 2008; Global Centre for the Responsibility to Protect, *The Georgia–Russia Crisis and the Responsibility to Protect: Background Note*, 19 Aug. 2008, available at www.globalr2p.org/pdf/related/GeorgiaRussia.pdf.

[131] UN Secretary-General Ban Ki-Moon, address at event on 'Responsible Sovereignty: International Cooperation for a Changed World', Berlin, 15 Jul. 2008, available at www.un.org/News/Press/docs/2008/sgsm11701.doc.htm.

[132] US President G.W. Bush, 'President's Statement on Violence in Darfur, Sudan', 9 Sept. 2004, available at www.whitehouse.gov/news/releases/2004/09/20040909-10.html.

[133] It should be noted that using the term 'genocide' not only raises the question of international intervention on the basis of a 'responsibility to protect', but also requires action by parties to the 1948 Convention on the Prevention and Punishment of Genocide, 78 UNTS 277; entered into force 12 Jan. 1951.

analysts, Barbour and Gorlick have outlined some of these issues and urge that the grant of asylum, including through resettlement, and respect for the principle of *non-refoulement* be included.[134] Feller has also presented complementary forms of protection as having their natural home in the debate on the responsibility to protect.[135]

While both human security and the responsibility to protect have a clear focus on individuals, the former has a broader scope than the latter. Human security operates more as a unifying, 'umbrella' concept and encompasses threats to social and economic security as well as to physical security. It also operates to bring out the linkages, for instance, between economic independence and livelihoods for refugee women and their physical protection. As Arbour has indicated:

> Arguably, poverty, hunger, educational deficits, restricted access to health, inequitable distribution of resources, discrimination, and an absence or erosion of justice and of the rule of law generate more insecurity, lead to more instability and endanger more lives than those ultimate violations on which the responsibility to protect currently focuses.[136]

She argues that such violations of human rights are 'as much … a threat to human security … as are arbitrary detention or torture … [and] are equally demanding of an urgent response, at national, regional and international levels'.[137] For refugees, protection and solutions often depend as much on remedies for these wider human rights violations, as on the removal of the threat of persecution and the ending of conflict. Indeed, the focus of human security on both protection and empowerment makes it a potentially useful tool to strengthen respect for refugees' human rights, while R2P may help to address some of the most egregious human rights abuses which may force people to flee.

IX. Conclusion

This chapter has sought to identify ways in which the human security concept and the strategies of protection and empowerment to achieve human security may be relevant to refugees and, in particular, how it

[134] B. Barbour and B. Gorlick, 'Embracing the "Responsibility to Protect": A Repertoire of Measures including Asylum for Potential Victims', UNHCR New Issues in Refugee Research, No. 159, Jul. 2008, available at www.unhcr.org/research/RESEARCH/487b619b0.pdf.

[135] Feller, 'The Responsibility to Protect', 283–93. Complementary protection can also be viewed as a tool to promote human security for individuals who need international protection but are not refugees under the 1951 Refugee Convention.

[136] Arbour, 'The right to life and the responsibility to protect'.

[137] *Ibid.*

might help reduce contemporary gaps in the international refugee protection regime.

The concept has been shown to offer a conceptual framework supporting a more comprehensive analysis of the inter-linked issues under the three pillars of the UN which may expose refugees to risk, impact upon their security, and curtail their freedom from fear and from want, and their freedom to live in dignity. Such an analysis, which encompasses not only more traditional national security concerns, but also individual security risks and underlying social and economic issues, has potential to improve the identification of the complex and inter-linked causes and consequences of refugee insecurity. This can in turn help more targeted and effective responses to be devised and implemented, especially for refugees most at risk.

While some have argued that human security is too broad and dilute a concept, it is in many ways exactly this wider perspective that has the potential to enhance refugee protection. It helps to highlight the links between the risks refugees face and wider threats to peace and security, thereby underlining the contemporary recognition that mass flight from conflict can threaten international peace and security and require international intervention. The focus on development also helps to highlight the connection between violations of economic and social rights and the physical protection problems refugees face. This in turn emphasises the importance of interventions to strengthen refugees' enjoyment of their economic and social rights for their protection, empowerment and self-reliance, and for sustainable solutions.

Indeed, when the General Assembly conducted a thematic debate on human security for the first time in May 2008, the President of the General Assembly, Srgjan Kerim, stressed the value added by the human security concept in bringing out these linkages and the consequent requirement for coordinated responses:

> The interface between security, development and human rights lies at the core of human security. The profound interlink among these three pillars of the United Nations system and policies has been recognized by Member States. By promoting the idea of an integrated and coordinated approach to security, proponents of human security have further underscored this interdependence.[138]

[138] General Assembly Thematic Debate on Human Security, 22 May 2008, at www.un.org/ga/president/62/ThematicDebates/humansecurity.shtml, fulfilling the commitment of the *World Summit Outcome* document, UN Doc. A/RES/60/1, 'to discussing and defining the notion of human security in the General Assembly' (para. 143).

For refugees, the human security concept presents more than a useful analytical tool to understand the complex and inter-linked challenges they face. It also offers two clear strategies to realise their security. The strong focus of the Commission on Human Security on empowerment as well as protection emphasises how essential the former is to strengthening refugee protection and securing durable solutions. Actively involving refugees supports their empowerment and at the same time allows for more accurate protection responses to a whole range of security risks they may face. Ultimately, these two strategies can help support refugees to build on their own resilience and courage and thereby realise more fully their own capacities and potential.

4

From here to where? Refugees living in protracted situations in Africa

EDWIN ODHIAMBO ABUYA*

I. Introduction

Protracted refugee situations threaten the human security of refugees as well as the security of host states, the country of origin and the international community. These refugee situations also challenge the overall purpose of international asylum: to *protect* those who have been forced to flee their home states owing to persecution and/or armed conflict. This is because the long-term nature of asylum without durable solutions in sight leads to the breakdown in social structures and cultural cohesion, which in turn can lead to family breakdown, violence, socio-economic deprivation and poverty, and health problems. As the report of the UN Commission on Human Security notes: '[t]here are limits to people's resilience. The enormous and long-term impacts of HIV/AIDS and other infectious diseases, extended deprivation, unemployment, conflict and violence [and displacement] wipe out … coping mechanisms.'[1]

The United States' Committee on Refugees and Immigrants estimates that approximately 9 million refugees are housed in refugee camps for five years or longer.[2] These numbers are unacceptably high. The issue

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[1] UN Commission on Human Security, *Human Security Now* (New York, 2003), 89. See also, on health challenges of long-term conflict and displacement, 100.

[2] United States Committee on Refugees and Immigrants (USCRI), *World Refugee Survey 2008*, available at www.refugees.org (last accessed 25 Oct. 2008).

of protracted refugee situations is thus one of the most pressing issues on the international protection agenda. It is an issue of both 'national' and 'regional' as well as 'human' security. Statistics show that over half (55 per cent) of protracted refugee situations are in Africa.[3] Of the global number of refugees in protracted situations, as at 1 January 2008, 22 per cent (almost 2 million) were in Africa.[4] In 2008, there were twelve protracted situations in Africa with a total population of almost 3 million refugees on the continent.[5] More significantly, protracted refugee situations now account for the vast majority (67 per cent) of Africa's refugee population.[6] This chapter evaluates the issue of protracted refugee situations, with specific reference to Africa.

For the purposes of this chapter, the term 'refugee' is used to refer to individuals who satisfy the criteria of a 'refugee' set out in the 1951 United Nations Convention Relating to the Status of Refugees[7] (1951 Refugee Convention) or the 1969 African Convention Governing the Specific Aspects of Refugee Problems in Africa[8] (OAU Refugee Convention). That is, a refugee is accepted as being an individual who is outside his or her country of origin or habitual residence owing to a well-founded fear of being persecuted on account of his or her race, religion, nationality, membership of a particular social group or political opinion,[9] and who is not otherwise excluded from protection.[10] In addition, a refugee is an individual who is compelled to leave his or her place of habitual residence owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality.[11] It is accepted that persons fleeing armed conflict fall into one or both of these categories.

In this chapter, I start with an analysis of some of the conceptual and practical difficulties in defining or limiting the category of persons

[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] Convention Relating to the Status of Refugees 1951, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.
[8] Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis Ababa, 10 Sept. 1969, 1001 UNTS 45; entered into force 20 Jun. 1974 (OAU Refugee Convention).
[9] Art. 1A(2), 1951 Refugee Convention.
[10] Art. 1F, 1951 Refugee Convention.
[11] Art. 1(2), OAU Refugee Convention.

falling under the phrase 'protracted refugee situation'. The chapter then evaluates the *effects* of protracted situations in security terms. It is apparent that protracted refugee situations pose serious threats to personal or human security, as well as regional and national security. Within the human security framework, I also consider opportunities that are lost in terms of human potential when refugees stay in camps, away from their countries of origin, for extended periods of time. To meet the needs of refugees trapped in such situations, resources are an essential prerequisite, as section III shows. Durable solutions for long-staying refugees are explored in section IV. Section V concludes with the proposition that, in order to find a lasting solution to protracted refugee situations in Africa, a comprehensive approach is required that takes account of concerns relating to both human and national/regional security, both in countries of asylum and return.

II. Defining 'protracted refugee situations'

Unlike the term 'refugee' outlined in the introduction to this chapter, the phrase 'protracted refugee situation' is not a formal or legal term. It does not appear, for example, in any legally binding instrument or treaty. Additionally, in contrast to the term 'refugee', which was formally defined in the early part of the twentieth century, the phrase 'protracted refugee situation' is a fairly recent development in the area of human rights and refugee protection, its origins traceable to the early part of the twenty-first century.

Protracted refugee situations challenge the original assumption that being a refugee is a temporary, not a permanent, situation. In 1951, Heuven-Goedhart, the first United Nations High Commissioner for Refugees, stated: 'the status of refugee should not be a permanent one'.[12] In general terms, protracted refugee situations are situations in which refugees remain in host countries for a prolonged, often unspecified, duration of time, with no durable solution in sight. Many are forced to rely on agencies like the United Nations High Commissioner for Refugees (UNHCR) and its implementing partners for material assistance. The image that comes to mind is one of large-scale sprawling refugee camps housing men, women and children, who are dependent

[12] UN General Assembly, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Second Meeting', UN Doc. A/CONF.2/SR.2, 20 Jul. 1951.

upon international aid and subject to the lack of political will in finding durable solutions to their situation. An international political agenda governed by state interests and state security concerns has meant that those countries close to the crisis have not been able to garner adequate support of those further away to bring about relief, as their security interests are not seen as being directly affected.[13]

At a consultation held in November 2001, the Africa Bureau of the UNHCR noted that some refugee situations in Africa had taken 'considerable time to resolve'.[14] This may be an understatement, considering some of the different lengths of time in which refugees have stayed in protracted situations, some multi-generational. For instance, Eritrean refugees have spent thirty-nine years in exile in Ethiopia and Sudan.[15]

In protracted refugee situations, many refugees and asylum-seekers find themselves living in limbo. On one hand, they cannot return home because the factors that forced them to flee have not been resolved. On the other hand, prospects of integrating into host communities, or being resettled to other states, are slim. In most situations, they are forced to live in camps. Trapped in such situations, many are left only with hope that a durable solution will be found to their plight that will enable them to re-commence their lives. Protracted situations, therefore, underscore the uncertain future that many refugees face in exile. They act as a catalyst to two situations that threaten both national and international as well as human security. First, the lack of a foreseeable durable solution; many individuals, especially men, depart camps on migratory journeys and contribute to the mass migration across Africa and into Europe, Australia and North America.[16] Secondly, others are at risk of taking up arms in the hope of hastening the possibility of returning home.[17]

Attempts by the UNHCR to define the phrase 'protracted refugee situation' can be traced back to 2001. In two documents produced by the UNHCR's Africa Bureau in that year, protracted situations were defined as situations where groups of refugees had been 'in exile for a

[13] This view disregards, however, the fact that unresolved protracted refugee situations lead to further onward movements, and often characterise mixed asylum–migration flows.

[14] See UNHCR Africa Bureau, *Addressing Refugee Situations in Africa*, available at www.unhcr.org/protect/PROTECTION/3cce5c854.pdf (last accessed: 25 Oct. 2008), para. 1.

[15] See USCRI, World Refugee Survey 2008.

[16] According to the USCRI, as of 1 January 2008, there were 2.8 million refugees in Africa. See USCRI, *World Refugee Survey 2008*.

[17] See ch. 5 by R. Muggah in this book on the inter-linkages between protracted refugee situations and the militarisation of refugee camps.

long time with no durable solution in sight'.[18] Three years later, the Executive Committee of the UNHCR's Programme (EXCOM) adopted a more targeted working definition that defined the phrase to mean instances where 'refugee populations of 25,000 persons or more have been in exile for five or more years in developing countries'.[19] It noted that this definition excludes Palestinian refugees, who fall under the mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East.[20]

Drawing from such definitions, Nathaniel Goetz has indicated that there are three elements of a protracted refugee situation:

> The first is a situation seemingly without end and without a solution … Second, the refugees are in an organized camp setting for at least five years … Third, the refugees caught in this type of situation have little chance of being accepted elsewhere.[21]

There are a number of problems with trying to come up with a definitive definition of 'protracted refugee situations'. Six of these problems are identified in this section. First, it is difficult to determine with mathematical precision the duration that a particular situation should last before it qualifies as 'protracted'. This may be one of the reasons why there has been a reluctance, or inability, to establish a definitive time-period. Thus, in 2001, the UNHCR described a protracted situation simply as one that is long-lasting. Why this was later clarified in a potentially limiting way to a five-year time-frame, however, remains unclear. The agency itself characterises this 'as a crude measure'.[22] Jeff Crisp describes the proposed time-line as 'arbitrary'.[23]

The second issue that definitions of this type raise is in relation to the effects any time limits may have on refugee protection. In the context of international protection, the fundamental question is whether any distinction should be made between refugees in protracted situations and

[18] UNHCR Africa Bureau, *Addressing Refugee Situations in Africa*.

[19] Executive Committee of the UNHCR (EXCOM), *Protracted Refugee Situations*, UN Doc. EC/54/SC/CRP.14 (10 Jun. 2004), para. 5.

[20] *Ibid.*

[21] N. Goetz, 'Lessons from a Protracted Refugee Situation', Working Paper No. 74, Center for Comparative Immigration Studies, University of California San Diego, Apr. 2003, 2–3, available at www.ccis-ucsd.org/PUBLICATIONS/wrkg74.pdf. (last accessed: 25 Oct. 2008), 2.

[22] EXCOM, *Protracted Refugee Situations*, para. 5.

[23] See J. Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa', available at www.unhcr.org/research/RESEARCH/3e2d66c34.pdf (last accessed: 25 Oct. 2008), 1.

other refugees who fall outside this definition. That is, should one distinguish between refugees based on their duration of exile, and if so, on what basis? What is the benefit of doing so? Are there any disadvantages for those who fall outside the time or size parameters? Why are protracted refugee situations of this size and duration under the microscope?

The third issue that the 2004 EXCOM definition raises is its assumption that protracted refugee situations are located in, and are an issue for, the developing world only. Although the majority of protracted refugee situations are today located outside Europe and other developed countries and regions, the 1992 humanitarian crisis in the former Yugoslavia challenges this viewpoint because its peoples were in exile for an extended period. Moreover, the location of the majority of protracted refugee situations in the global South does not preclude the global North from responsibility or concern under principles of international solidarity or responsibility sharing.[24]

Fourth, the definition excludes long-staying urban refugees. Whilst, on the surface, the exclusion of this category of persons may appear unimportant perhaps because their numbers are less, or that persons in camps seem to be more in need, although this is not always true, it becomes an issue of concern when considering the grant of material assistance to refugees. In Kenya, for instance, the UNHCR grants material assistance to refugees who take up residence in camps rather than urban settings.[25]

Fifth, these definitions fail to address the causes of protracted situations. This is in contrast to the definitions of 'refugee' in the 1951 Refugee Convention and the OAU Convention, which are both framed around causes of flight: that is, persecution and/or armed conflict. The problem with disregarding the essential causes of a refugee situation is that there is the risk of taking a narrow approach when it comes to prescribing possible solutions. Whilst earlier definitions of 'protracted refugee situations' mention 'durable solutions',[26] the 2004 EXCOM definition is silent on the measures that might be taken to ameliorate the

[24] See E. Abuya, '"A Place to Call Home": Temporary asylum in Australia – lessons for South Africa', *Stellenbosch Law Review,* 15 (2004), 429, 443.

[25] See, also, E. Campbell, 'Urban refugees in Nairobi: problems of protection, mechanisms of survival, and possibilities for integration', *Journal of Refugee Studies,* 19 (2006), 396, 399 arguing that refugees who fall within the mandate of the UNHCR 'are not allowed to leave the camps or reside outside them'.

[26] See UNHCR Africa Bureau, *Addressing Refugee Situations in Africa*, para. 1.

plight facing refugees living in exile for extended periods. In Africa, the failure to reach peace agreements and to resolve conflicts results in persons living in exile in fear for their lives and safety.[27] Furthermore, the impact of war and armed conflict on return possibilities is evident. Destroyed infrastructure and resources in the home state discourage return or make it unsustainable, leading to repeat or circular refuge.[28]

Lastly, there seems to be an assumption that all victims of persecution and/or armed conflict in protracted situations depend entirely on the UNHCR for survival. This belief is out of step with reality. In addition, it ignores international legal obligations, which posit the state as having primary responsibility for the protection of refugees.[29] It further ignores the autonomy of individual refugees and the control they may exert over their lives. As Loescher and Milner argue, refugees 'are far from being passive'.[30] Although many refugees in protracted situations do rely solely on the UNHCR, section III of this chapter shows that others engage in income-generating activities in order to alleviate dependency and supplement the assistance UNHCR provides.

Although it is not easy to come up with a precise definition of 'protracted refugee situations', it nonetheless remains important to craft a working definition. This is because it could serve to highlight the scope and the plight facing refugees who are trapped in camps indefinitely. Thus, as UNHCR notes, this knowledge and understanding would be useful when it comes to formulating 'effective policy responses' to address these challenges.[31]

[27] On the failure to achieve peace in a number of African countries, see e.g., International Crisis Group, *Salvaging Somalia's Chance for Peace*, available at www.crisisgroup.org/home/index.cfm?l=1&id=1822 (last accessed 25 Oct. 2008); *Sudan: Towards an Incomplete Peace*, www.crisisgroup.org/home/index.cfm?id=2416 (last accessed 25 Oct. 2008).

[28] See UNHCR, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, available at www.unhcr.org/statistics/STATISTICS/4852366f2.pdf (last accessed 25 Oct. 2008), 7, noting that 'renewed armed conflict and gross human rights violations' in Sudan affected voluntary repatriation operations.

[29] See, e.g., Art. 1 of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees (GA res. 428(V), 14 Dec. 1950), which provides that UNHCR is charged with the responsibility of 'assisting governments' to seek 'permanent solutions' to the plight facing refugees and asylum-seekers. See, also, Art. 3 of the 1951 Refugee Convention, which declares that states, not UNHCR or any other international agency, 'shall apply' the provisions of this treaty 'to refugees without discrimination'.

[30] G. Loescher and J. Milner, 'Protracted refugee situations: causes, consequences, and trends', available at www.prsproject.org (last accessed 25 Oct. 2008), 5.

[31] UNHCR, *The State of the World's Refugees 2006: Human Displacement in the New Millennium*, available at www.unhcr.org/publ/PUBL/4444afcb0.pdf (last accessed 25 Oct. 2008), 106.

III. Effects of confining refugees to camps: security concerns and lost opportunities

As noted above, most refugees living in protracted exile do so in camp environments. Some countries operate camp confinement or 'encampment' policies that offer little alternative but to remain in camps. I now turn to this issue because it impacts upon human security, human dignity and human potential, including physical security as well as loss of livelihood opportunities. I start by evaluating whether camp confinement policies are consistent with international law. I then explore the effects of such policies on refugees as well as on countries of origin and countries of asylum.

A. Encampment policies

Many of the almost 2 million refugees and asylum-seekers who live in protracted situations are required by law or other order to stay in refugee camps in the African states to which they have fled in search of protection. Some governments have legalised the confinement or do so under government policy. For instance, the laws in Tanzania and Zambia require asylum-seekers and refugees to reside in camps.[32] Confining refugees in camps raises concerns with regard to a number of human rights, including the rights of individuals to move freely and choose their own place of residence,[33] as well as the right of association,[34] and to the right to seek gainful employment.[35] In contrast, host states have claimed that encampment is in the interests of refugees, especially for their security. Governments also argue that, logistically, it is easier to distribute humanitarian aid, offer shelter, and protect victims of armed conflict and persecution within a set area, rather than outside it. At the 2004 EXCOM General Debate, for example, Mr Awori, former Vice President and Minister of Home Affairs of Kenya, asserted that it was through the Kenyan encampment policy that 'refugee problems could be managed

[32] See ss. 16–19 of the 1998 Tanzanian Refugees Act; ss. 11–14 of the 1970 Zambian Refugee (Control) Act.

[33] See, Art. 26, 1951 Refugee Convention; Art. 13, Universal Declaration of Human Rights 1948 (GA res. 217A (III), 10 Dec. 1948); Art. 12, International Covenant on Civil and Political Rights 1966 (GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976) (ICCPR).

[34] See Art. 15, 1951 Refugee Convention; Art. 20, UDHR; Art. 22, ICCPR.

[35] See Arts. 17–19, 1951 Refugee Convention; Art. 23, UDHR; Art. 6, ICCPR; International Covenant on Economic, Social and Cultural Rights 1966 (GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 3; entered into force 3 Jan. 1976) (ICESCR).

effectively and the most vulnerable refugees protected'.[36] In other words, if refugees were allowed to choose where they wanted to reside in the host state, it would be difficult to reach and assist them.

Although keeping refugees in a single location can ease the logistical burden of providing humanitarian aid to thousands of persons, the real explanation seems to lie in the desire of host states to control the movement of refugees in order to protect the security of their own state. Because many refugees come from regions ravaged by war, including from countries with whom the host state may not be on friendly relations, some governments fear that refugees may attempt to smuggle arms into the host state and thereby contribute to the country's insecurity. In a commentary that explores the reasons why host states prefer housing refugees in camps, Black claims that the prime consideration is 'likely to be the political and security implications of the pattern of refugee settlements', rather than other questions such as those relating to 'accessibility, efficiency and transparency of aid delivery'.[37] Jacobsen also asserts that, even in situations where refugees are not a real danger to the host community, asylum states 'often perceive them to be a threat and act to avoid or reduce political repercussions by imposing greater controls'.[38] The current threats of terrorism, and fear of the 'other', have heightened this anxiety.[39] Accordingly, many African governments are even more reluctant to allow refugees to reside outside camps. The Kenyan Government, for example, has underlined that encampment is 'unavoidable' owing to 'security concerns'.[40]

From an international law perspective, there are a number of concerns with encampment policies. First, they may undermine the long-recognised right to freedom of movement and choice of place of residence for those lawfully in the territory of a state party, which is found in international human rights and refugee laws.[41] It is, however, a limited right. Under the 1951 Refugee Convention, state parties undertake to accord refugees 'lawfully in its territory the right to choose their place of residence and to move freely within its territory'.[42] Arguably, this provision does not apply to all refugees, only those who are *lawfully* in the

[36] Statement by Mr Moody Awori, UN Doc. A/AC.96/SR.597 (8 Oct. 2004), para. 67.
[37] R. Black, 'Putting refugees in camps', *Forced Migration Review,* 2 (1998), 4, 6.
[38] K. Jacobsen, 'Factors influencing the policy responses of host governments to mass refugee influxes', *International Migration Review,* 30 (1996), 655, 673.
[39] On such issues, see the chapters in Part IV of this book.
[40] Statement by Mr Moody Awori, UN Doc. A/AC.96/SR.597 (8 Oct. 2004), para. 67.
[41] See, e.g., Art. 13, UDHR; Art. 12, ICCPR.
[42] Art. 26, 1951 Refugee Convention.

territory of a host state. Article 31 requires those refugees who have not regularised their status in the host country to 'present themselves without delay to the authorities and show good cause for their illegal entry or presence'. Notably, the 1951 Refugee Convention prohibits states from imposing 'penalties' on refugees 'on account of their illegal entry or presence'.[43] The enjoyment of the freedom of movement on the part of refugees who are lawfully within the country is subject to, at least within the migration regime, one exception – the right of a state to control the movement of aliens in its territory under the terms of its domestic legislation.[44] States can also apply restrictions to refugees who are yet to regularise their status.[45]

Article 12 of the ICCPR amplifies the limitation on the freedom of movement by allowing for the restriction of this right under the terms of the 'law' in instances where it is 'necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[46] Like other sovereign states, refugee hosting states in Africa have some discretion to determine if and when their national security, or any of the other instances which permit derogations, are at stake. Accordingly, section 3 of the 1973 Kenyan Aliens Restriction Act allows the Minister of Internal Security, in instances of 'imminent danger' or 'great emergency', to impose restrictions 'requiring aliens to reside and remain within certain places or districts'. Under international law such measures should consider the limitations they may have on the fundamental freedom of movement.[47] Also, it is important to recognise that a state's discretion to derogate from such human rights obligations is not unfettered, as conditions have been set to exercise this power by international human rights law. Article 13 of the ICCPR, for instance, underlines that the decision to expel aliens on grounds of national security must be sanctioned by 'law'. In addition, the persons affected should be given an opportunity to challenge these decisions in an independent court or tribunal.

Although refugees are required to reside in camps in some countries, they can, in certain instances, subject to permission by the UNHCR and the local government administrator, be issued with travel documents

[43] Art. 31(1), 1951 Refugee Convention.
[44] Art. 26, 1951 Refugee Convention.
[45] Art. 31(2), 1951 Refugee Convention.
[46] See, also, Art. 4, ICCPR, which allows states to derogate from certain provisions of this treaty on 'public emergency' grounds.
[47] See, e.g., Art. 12, ICCPR.

that allow them to reside outside the camps. Examples include those persons needing specialised treatment beyond the capacity of the camp's medical facilities, for educational considerations, refugees in the resettlement process, or those with security concerns. However, refugees residing outside the camps are in the minority. Those who leave the camps or are found outside the camps without permission are liable to imprisonment, prosecution, and deportation under provisions of domestic law.[48] As the remainder of this section shows, the encampment policy is problematic because of the human rights and security issues that it raises. This section highlights some of the greatest security threats camps pose.

B. Security concerns

An individual's right to security of the person directly affects his or her right to life, which is arguably the most important human right upon which all other rights rely.[49] States are required to embrace measures that will promote and protect the realisation of the right to security, and, thereby, life. Indeed, it is only through the promotion of these entitlements that society and the rule of law can be preserved. Recognising this, Article 13 of the Universal Declaration of Human Rights 1948 (UDHR), guarantees 'everyone' the right to 'security of person'. An obligation to respect and protect – that is, to refrain from methods causing the deprivation of this right and to take steps to guarantee its respect by others – the right to security is also found in the ICCPR,[50] and variations upon it in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[51] and, more recently, in the 1990 Convention on the Rights of the Child.[52] At the regional level, Article 6 of the African (Banjul) Charter on Human and Peoples' Rights[53]

[48] See, e.g., ss. 10 and 13(3)(a) of the Zambian Refugee (Control) Act (1970) and s. 25(f) of Kenya's Refugees Act (2006).

[49] See, Art. 3, UDHR; Art. 6, ICCPR. See, also, M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn (Kehl: Engel Publisher, 2005), 121.

[50] Art. 9, ICCPR.

[51] Preamble, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987) (UNCAT).

[52] Art. 3(2) and (3), Convention on the Rights of the Child 1989 (GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990) (CRC).

[53] African (Banjul) Charter on Human and Peoples' Rights 1982 (27 Jun. 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); entered into force 21 Oct. 1986).

guarantees every individual the right to security of his or her person. Traditionally, the right to security of the person was interpreted to mean freedom from arbitrary arrest and detention.[54] Today, however, it has been interpreted widely to include the protection of both the physical security and livelihood of a person.[55]

Several national constitutions also recognise the right to security of person. For example, Article 11 of the 1991 Zambian Constitution states that 'every person' in the country shall be entitled to the right to 'security'. Likewise, in Ethiopia[56] and Senegal,[57] the constitutions of both these countries place an obligation on the state to respect and protect the right to security. International refugee law also recognises the importance of according security to refugees. The *travaux préparatoires* of the OAU Refugee Convention, for example, demonstrate that this issue was given considerable attention. In the final text, this Convention called upon member states to endeavour to resettle refugees and asylum-seekers away from borders. According to Article 2(6), which deals with asylum:

> For reasons of security, countries of asylum [in Africa] *shall*, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin. (my emphasis)

However, the fact that international and domestic laws recognise the right of refugees and asylum-seekers to security does not automatically mean that they will enjoy this entitlement. Rather, the challenge lies in translating these provisions into 'real rights'.[58] In conflict, it is the victims who suffer the most.[59] As they say in Swahili: *Wapiganapo tembo nyasi huumia.*[60]

[54] See, e.g., *Massera* v. *Uruguay*, Human Rights Committee, UN Doc. A/34/40 (15 Aug. 1979), paras. 9 and 10; *Luyeye* v. *Zaire*, Human Rights Committee, UN Doc. A/38/40 (21 Jul. 1983), para. 8.

[55] See, e.g., CESCR, Concluding observations on Sri Lanka, UN Doc. E/1999/22 (1999), para. 69; CRC, General Comment No. 3: HIV/AIDS and the Rights of the Child (2003), UN Doc. CRC/GC/2003/3, 17 Mar. 2003, para. 5.

[56] See, Art. 14 of the 1994 Constitution.

[57] See, Art. 7 of the 1991 Constitution.

[58] E. Abuya, 'Reinforcing refugee protection in the wake of the war on terror', *Boston College International and Comparative Law Review,* 30 (2007), 277, 327.

[59] See, e.g., UN Security Council res. 1674 (2006) (adopted at its 5430th meeting on 28 Apr. 2006) where the Security Council expressed 'deep regret that civilians account for the vast majority of casualties in situations of armed conflict'.

[60] 'When two elephants fight it is the grass that suffers' (translation by author).

1. Personal or human (in)security

Many refugee camps in Africa are located close to borders in direct contravention of the OAU Refugee Convention. In the case of Kenya, the main refugee camps are located close to its border with Somalia (Dadaab) and Sudan (Kakuma). The situation is similar in Tanzania and Angola. In Tanzania, the refugee camps are located close to the borders with Burundi and Rwanda. In Angola, the camps are near the border with the Democratic Republic of Congo. These camps, which are located at the mouth of the refugee flow, were designed to house refugees and asylum-seekers from neighbouring states. Indeed, statistics suggest that refugees from countries like Sudan, for instance, constitute the majority population of refugees and asylum-seekers in Kakuma. Similarly, Dadaab's proximity to the Somalia border accounts for its large Somali population.

Apart from directly contravening the OAU Refugee Convention and wide interpretations of security of the person provisions in international and national laws, setting up refugee camps at the mouth of the refugee flow and close to borders raises serious security concerns.[61] As noted in section II above, the primary reason why refugees in protracted situations are unable to return to their countries of origin or nationality is due to prolonged armed conflict there. The close proximity of refugee camps to borders, and the fact that many African borders are fluid, makes it easy for rebels and government forces to gain access to the refugee camps.[62] This can mean that refugees, once again, become vulnerable to violence and persecution.

Whilst it is expected that host states are responsible for providing security in camps, the reality is that, in many cases, these states are themselves economically disadvantaged and, therefore, unable to meet the cost of providing effective security. Of the fifteen African states which are host to the largest protracted refugee populations, ten have been categorised by the United Nations as 'Least Developed states'.[63] In short, over two-thirds (67 per cent) of refugees in protracted situations

[61] See, ch. 5 by R. Muggah in this book for a full treatment of the issue of militarisation of refugee camps.

[62] See, also, G. Loescher and J. Milner, 'The long road home: protracted refugee situations in Africa', *Survival,* 47 (2005), 153, 153 noting that 'sometimes refugee camps are used as bases by armed groups that engage in insurgency, resistance and terrorism'.

[63] These are: Sudan, Ethiopia, Zambia, Angola, Tanzania, Sudan, Uganda, Guinea, Senegal and Liberia. The list of Least Developed States is available at www.un.org/special-rep/ohrlls/ohrlls/allcountries.pdf (last accessed: 25 Oct. 2008).

live in the world's poorest countries. Hence, because of resource issues it can be difficult for host states to provide adequately for the security needs of refugees. Some states that do not fall into the least developed states category, such as Kenya, have also blamed a lack of resources for their failure to provide adequate security in the camps.

The EXCOM, in a 1987 conclusion entitled, *Military or Armed Attacks on Refugee Camps and Settlements*, stated that, whilst refugees continue to suffer attacks in the camps, host states should take measures that are 'within their capacity'.[64] However, this conclusion fails to realise that security rights are non-negotiable. Further, refugee laws in Kenya and Tanzania, for example, emphasise the need for these governments at least to take measures that will promote, not curtail the rights of refugees and asylum-seekers.[65] Thus, it would be wrong for these governments to avoid their legal obligations by invoking lack of resources. In some countries the lack of political will and fiscal mismanagement has led to fewer resources being committed towards providing security in refugee camps. Amnesty International has criticised the Chadian Government for failing to provide 'basic security' to refugees living in a camp because of other priorities.[66] Eventually, this exposes refugees and asylum-seekers to threats to their personal security.

Protecting refugees living in camps cannot be left solely to host states in Africa. While recognising that the refugee burden in general cannot be borne by one country or several countries in one part of the world, the 1951 Refugee Convention and the OAU Refugee Convention both call on the international community to share this load.[67] The idea of international solidarity and responsibility-sharing was designed to alleviate the security threats that refugees face by, among other measures, resettling them in other countries. However, as section IV below shows, Western states in particular have not responded effectively by taking up their 'share'. As discussed below, other countries have adopted push-back methods, which are designed to ensure that asylum-seekers do not reach their territories.[68]

[64] EXCOM Conclusion No. 48 (XXXVIII) (1987).

[65] See, s. 16(1) of the Kenyan Refugees Act (2006) and ss. 31–35 of the Tanzania Refugees Act (1998).

[66] See Amnesty International, *Are We Citizens of this Country?*, available at www.amnesty.org/en/library/asset/AFR20/001/2007/en/dom-AFR200012007en.pdf (last accessed 25 Oct. 2008), 17–19.

[67] See, Preamble to the 1951 Refugee Convention and Art. 2(4) of the OAU Refugee Convention.

[68] See, further, chapters in this book in Part III on Migration, Development and Environment.

As a consequence of the failure of states and the international community to ensure adequate security, refugees have experienced violent attacks in the camps – from outside and inside. As an example, in her research on refugees living in Guinea, Kaiser writes that armed groups from neighbouring states had 'attacked'[69] refugee camps, which were located close to the border with Liberia and Sierra Leone. Research in Chad has also recorded similar findings.[70] Assault, rape, intimidation, child abuse and forced recruitment into rebel forces are common in many camps. Many refugees have lost their lives from attacks. During the author's visits to the Kakuma refugee camp in 2002 and 2003,[71] for example, some refugees and asylum-seekers expressed fear that those who had caused them to flee their homes would seek them out and 'finish them off' inside the refugee camps. The refugee camps are not always capable of offering the safe sanctuary and security that underscored their initial establishment.

The fact that host states offer very little security in the refugee camps aggravates the situation there. Citing security concerns, Rubango (a pseudonym), a refugee from Burundi stated:

> Some of the people who attacked me [in my home state] are presently in the camp. I have seen them with my very own eyes. A number of times they have come looking for me [in my house] at night. Mind you, the security at the camp is not all that good. Overall, we are left to fend for ourselves. Because I am scared that they can finish me, I have decided against sleeping in my house. Rather, I spend nights at my friends' houses. My family and I are very unhappy with this arrangement. But what can I do?

Rubango's example supports the UNHCR claim that the 'conflict' that some refugees have attempted to 'escape' from 'may have followed them'.[72]

Security issues can be even greater for women and children, who in many refugee situations constitute the majority.[73] As is customary in African societies, young girls and women are primarily responsible for

[69] T. Kaiser, *A Beneficiary-Based Evaluation of UNHCR's Programme in Guinea, West Africa*, UN Doc. EPAU/2001/02, 2001, 5.
[70] See, Amnesty International, *Are We Citizens of this Country?*.
[71] For the results of the study, see generally, E. Abuya: 'United Nations High Commissioner for Refugees and Status Determination *Imtaxaan* in Kenya: an empirical survey', *Journal of African Law,* 48 (2004), 187; 'Refugees and their interpreters: lessons from the Kenyan experience', *Australasian Review of African Studies,* 25 (2004), 66.
[72] UNHCR, *The State of the World's Refugees 2006*, 63.
[73] UNHCR, *2007 Global Trends*, 11–13.

collecting firewood. In many refugee camps, refugees may need to supplement fuel rations provided by the UNHCR with their own firewood collection. In other camps, and often at the early stages of setting up a camp, fuel is only available from the surrounding area. The risks associated with firewood collection have been documented for at least a decade. In 1997, the UNHCR recognised firewood collection as one of the main threats to the security and safety of women and girls and introduced a firewood delivery system in response.[74] A Human Rights Watch study regarding sexual violence in refugee camps in Tanzania (1998–99) also found that 'women were liable to be attacked while carrying out routine, daily tasks, such as gathering firewood'.[75] The UNHCR firewood project, which introduced the delivery of firewood to the camps, was aimed at reducing the incidence of rape and sexual violence committed against women and girls while they collected firewood, and later to minimise environmental degradation and to prevent conflicts over resources between refugees and host communities.[76] Owing to this project, there was a considerable decline in sexual and physical violence against women, and violence generally, in the Dadaab camp.[77]

More recently, in 2006, the UNHCR investigated the use of stoves.[78] However, cost implications have made it impossible for this project to take off in earnest.[79] Accordingly, the majority of refugees and asylum-seekers frequently use firewood to complement the rations provided by the UNHCR, as they can be insufficient to meet their energy needs.[80] Moreover, because refugee camps are often located in remote areas, young girls and women must travel long distances to access essential

[74] UNHCR, Evaluation and Policy Analysis Unit, *Evaluation of the Dadaab Firewood Project, Kenya,* UN Doc. EPAU/2001/08, Jun. 2001.

[75] Human Rights Watch, *Seeking Protection: Addressing Sexual and Domestic Violence in Tanzania's Refugee Camps*, available at www.hrw.org/reports/2000/tanzania/(last accessed 25 Oct. 2007), 3.

[76] *Ibid.*, para. 1.

[77] See Loescher and Milner, 'The long road home', 164.

[78] Women's Commission on Refugee Women and Children, *Beyond Firewood: Fuel Alternatives and Protection Strategies for Displaced Women and Girls* (2006), available at www.womenscommission.org/pdf/fuel.pdf (last accessed 25 Oct. 2008), 12 and 14.

[79] *Ibid.*

[80] The Firewood Project, for instance, supplied only 11 per cent of the total household requirements. See, CASA Consulting, *Evaluation of the Dadaab Firewood Project, Kenya* (2001), available at www.unhcr.org/research/RESEARCH/3b33105d4.pdf (last accessed 25 Oct. 2008), 5.

commodities. Camp authorities do not always provide the necessary security for these journeys and, whilst male family members might be expected to accompany them, this does not usually happen. As a result, in many instances, the lack of security exposes young girls and women to the risk of sexual violence.

In Kakuma, the author met Warsame, an 18-year old girl from Somalia, who had just given birth to a baby boy. Her experience underscores the dangers women face owing to inadequate security in and around the refugee camps:

> I was returning home from collecting firewood when a man attacked me. I tried to fight him off but he was stronger than me. He overpowered and knocked me to the ground. He struck me on the head with a blunt object and I passed out. He then raped me and left me by the roadside. I was found by strangers who took me to hospital. A few weeks later I realised that I was pregnant. Some urged me to abort because of the circumstances under which I had conceived. But I decided to keep the baby. After all, children are gifts from Allah.

Much of the contemporary literature on sexual and gender-based violence in refugee camps perceives women and young girls as victims, and men as perpetrators.[81] There are few studies that examine whether (or not) men experience sexual violence in refugee camps, although it is slowly becoming an issue on the international agenda.[82] Future studies should be conducted to investigate the forms of sexual violence that men and young boys are subjected to in refugee camps. Research generated from such studies may enhance our understanding of the challenges facing this neglected category of refugees and identify ways of meeting their special needs.

Sexual violence against refugees and asylum-seekers living in refugee camps is a real problem. In order to stem these acts, integrated solutions are required. The conclusion to this chapter discusses this theme further.

[81] See, e.g., A. Farmer, 'Refugee responses, state-like behavior, and accountability for human rights violations: a case study of sexual violence in Guinea's refugee camps', *Yale Human Rights and Development Law Journal,* 9 (2006), 45; O. Olsen and K. Scharffscher, 'Refugee camps as organisational failures', *International Journal of Human Rights,* 8 (2004), 377; J. Crisp, 'A state of insecurity: the political economy of violence in Kenya's refugee camps,' *African Affairs,* 99 (2000), 601.

[82] There are a number of studies on sexual violence against men and boys in the context of armed conflict, see: S. Sivakumaran, 'Sexual violence against men in armed conflict', *European Journal of International Law,* 18 (2007), 253.

2. Threats to national and international peace and security

Long-term refugee situations are frequently labelled by governments as contributing to insecurity for both the host state and the region. Refugees and asylum-seekers have been seen as agents of conflict, or at a minimum, as threats to international peace and security.[83] The issue of insecurity, owing to refugee flows and presence, was discussed at the drafting of the OAU Refugee Convention. For example, at its Ninth Ordinary Session in 1967, the OAU Council of Ministers realised, among others, the 'considerable' security concerns which arise owing to refugee movements and presence.[84] The Preamble specifically acknowledges that refugees can be a source of friction between states.[85] The final text of the OAU Refugee Convention, borrowing from its international counterpart, states that refugees who are a threat to the national security of a host state can be excluded from international protection. Article 1(5) of the African treaty excludes from protection refugees who have committed war crimes, crimes against peace, and crimes against humanity, as well as those who have committed serious non-political crimes, or who have acted contrary to the purposes and principles of the UN or the African Union. The *non-refoulement* guarantee in the 1951 Refugee Convention is also drafted so as to allow states to exclude its application from those where there are reasonable grounds for believing they pose a danger to national security or, being convicted of a final judgment, they constitute a danger to the community.[86] Moreover, the OAU Refugee Convention contains an explicit provision on the prohibition of engagement by refugees in subversive activities.[87]

Against this background, the asylum laws of many African states prohibit refugees and asylum-seekers from bearing arms. Zambian law, for instance, prohibits refugees from 'possessing' firearms while in the country.[88] Failure to comply with this requirement is an offence that can

[83] See UN Security Council res. 929 (1994) (adopted at its 3329th meeting on 22 Jun. 1994); 1208 (1998) (adopted at its 3945th meeting on 19 Nov. 1998). See, also, UNHCR, *Global Report 2008*, available at www.unhcr.org/publ/PUBL/4848fbee2.pdf (last accessed 25 Oct. 2008), 120 (noting the perception in Tanzania that refugee camps have 'contributed to the deterioration of security').

[84] See OAU Council of Ministers res. 'Resolution on the Problem of Refugees', CM/Res. 104 (IX), 1967.

[85] Preambular para. 3, OAU Refugee Convention.

[86] Art. 33(2), 1951 Refugee Convention. Art. 2(3) of the OAU Refugee Convention does not contain a similar restriction on the prohibition on *non-refoulement*.

[87] Art. 3, OAU Refugee Convention.

[88] See, s. 7 of the Refugee (Control) Act (1970).

attract a maximum term of imprisonment of two years.[89] Similar provisions exist in Malawi. Under the terms of the Refugee (Control) Act refugees, like nationals, are required to maintain 'public order'.[90]

The security in the countries that host long-term refugees can be volatile.[91] Thus, the possibility of some refugees, who have fled from countries ravaged by armed conflict, smuggling arms into neighbouring states is a real possibility.[92] Use of these weapons has the potential to compromise the security of both the host state and the region. Recently, in 2008, the United Nations Security Council stated that the ongoing conflicts in Somalia[93] and Côte d'Ivoire[94] constituted threats to international peace and security in the region. The prolonged presence of refugees has been blamed for the declining level of security in host states. Research conducted in Kenya,[95] Tanzania[96] and elsewhere[97] suggests that there is a connection between insecurity in the host state and the flow of refugees into that country. To some extent these findings explain why the level of insecurity has increased in states and regions that offer sanctuary to refugees over prolonged periods of time.

The proximity of refugee camps to the border has also made it possible for armed groups to gain access to these camps. The Sudan People's Liberation Army, for example, are known to recruit soldiers from Kakuma refugee camp in Kenya. UNHCR further notes that rebels may use the camps 'as rest and recuperation sites'.[98] In Guinea, refugee camps became the base for Liberian armed elements as they pursued their campaign against Charles Taylor.[99] These situations sit uncomfortably with Article 3 of the OAU Refugee Convention, referred to above,

[89] *Ibid.*

[90] See, s. 9, Refugee (Control) Act (1989).

[91] See, USCRI, *World Refugee Survey 2008*. See, also, UNHCR, *The State of the World's Refugees 2006: Human Displacement in the New Millennium*, 106, pointing out that the vast majority of protracted situations are found in the 'most unstable regions' of the world.

[92] E. Abuya, 'Revisiting liberalism and post-colonial theory in the context of refugee applications', *Netherlands Quarterly of Human Rights,* 24 (2006), 193, 221.

[93] UN SC res. 1831 (2008) (adopted at its 5957th meeting on 19 Aug. 2008).

[94] UN SC res. 1826 (2008) (adopted at its 5945th meeting on 29 Jul. 2008).

[95] See, E. Mogire, 'Refugees and the proliferation of illegal small arms and light weapons in Kenya', *Moi University Centre for Refugee Studies, Occasional Paper Series*, 1 (2003).

[96] See Loescher and Milner, 'The long road home', 159–62.

[97] See I. Salehyan and K. Gleditsch, 'Refugees and the spread of civil war', *International Organization,* 60 (2006), 335.

[98] UNHCR, *The State of the World's Refugees 2006*, 65.

[99] G. Loescher, J. Milner, E. Newman and G. Troeller, 'Protracted refugee situations and peace building', *Policy Brief*, 1 (2007) 1, 2.

which requires refugees to refrain from attacking other states or engaging in subversive activities against other states. The supply of troops to armed forces also contributes to the cycle of violence, as well as the destruction and displacement in the refugees' home state. Presence of 'armed and military elements' in refugee camps, as the UN Security Council notes, is one of the causes of increased insecurity.[100] Part of the reason why the conflict in Sudan persisted for decades was because rebel forces had a continuous supply of troops from the refugee camps in neighbouring states, such as Kenya. In the Tanzanian context, Whitaker writes that after 1996, the government kept a close watch on refugees living in the camps close to its border with Burundi.[101] She attributes this measure to the fact that there were fears within the Burundian government that refugees residing in camps in Tanzania 'were preparing to launch cross border attacks'.[102] As the Commission on Human Security notes, failures to ensure the security of refugees may spill conflict into the country of asylum, threatening peace and security.[103]

In sum, whilst international asylum was designed to protect victims of persecution and armed conflict, evidence suggests that refugees in protracted situations continue to be subjected to some of the human rights abuses from which they originally fled. Protracted refugee situations also compromise peace and security in the state of origin, the host state and the region. Violence against refugees, both male and female, must be eradicated. Concrete measures, some of which are discussed in the next section below, must also be taken to ensure that those who seek sanctuary within their borders receive effective and lasting protection. Such measures will benefit refugees and asylum-seekers in prolonged exile, especially in confined camps, by ensuring that their lives and livelihoods are guaranteed. Improved security for refugees can also enhance global peace.

C. Lost opportunities

This section evaluates some of the opportunities that are lost within protracted refugee situations. That is, the failure of the international community to deal with all aspects of human security of refugees:

[100] UN SC res. 1208 (1998) (adopted at its 3945th meeting on 19 Nov. 1998).
[101] B. Whitaker, 'Refugees in Western Tanzania: the distribution of burdens and benefits among local hosts', *Journal of Refugee Studies*, 15 (2002), 339, 352.
[102] *Ibid.*
[103] UN Commission on Human Right Security, *Human Security Now*, 49.

protection and empowerment.[104] In particular, it looks at educational opportunities for refugees in camps. It also examines the innovative, but untapped, income-generating projects which refugees pursue in the camps. This section also underlines the ultimate need to repatriate refugees who are living in protracted situations, where possible, so that they can contribute to the national development of their home countries when the conditions for return are conducive, subject to necessary safeguards that any return is durable and sustainable.

1. Education and vocational training

The 1951 Refugee Convention[105] and the provisions of the international human rights framework[106] recognise the importance of educating refugees. Although the African treaty lacks an express provision that deals with the education and training of refugees, this does not mean that this right is unavailable. The Preamble to the OAU Refugee Convention affirms this by referring to the 1951 Refugee Convention as 'the basic and universal instrument' for the protection of those who have been forced to seek shelter elsewhere as refugees. In addition, while referring to the UN Charter[107] and the UDHR, the OAU Refugee Convention underlines the principle of the universality of human rights. Its Preamble notes that human beings – nationals and refugees alike – 'shall enjoy fundamental rights and freedoms without discrimination'.[108]

Further support for the right to education for refugees in Africa can be found in the drafting history to the African treaty. According to the *travaux préparatoires*, extensive discussion surrounded this issue. Furthermore, the Council of Ministers of the OAU has discussed this issue in a number of its Ordinary Sessions prior to and after the drafting process. At its 12th,[109] 19th[110] and 23rd[111] ordinary sessions, the Council

[104] Protection and empowerment are two strategies identified by the UN Commission on Human Security to bring about human security. See UN Commission on Human Security, *Human Security Now*, chs. 4, 5 and 7. See, also, ch. 3 by F. Nicholson in this book.
[105] Art. 22, 1951 Refugee Convention.
[106] See Art. 26, UDHR; Art. 13, ICESCR; Arts. 28 and 29, CRC.
[107] Charter of the United Nations (26 Jun. 1945, 993 UNTS 3; entered into force 24 Oct. 1945).
[108] Preambular para. 6, OAU Refugee Convention.
[109] OAU Council of Ministers res. CM/Res. 176 (XII) (held in Addis Ababa, Ethiopia, 17–22 Feb. 1969).
[110] OAU Council of Ministers res. CM/Res. 346 (XXIII) (held in Rabat, Tunisia, from 5–12 Jun. 1972).
[111] OAU Council of Ministers res. CM/Res. 266 (XIX) (held in Mogadishu, Somalia, 6–11 Jun. 1974).

highlighted the important role that education plays in the life of refugees. It also recommended the formation of a Bureau of Placement and Education of African Refugees (now AU Bureau for Refugees) to oversee the education and training of refugees on the continent. In short, African states are required to take positive steps that will guarantee refugees and asylum-seekers the enjoyment of the right to education, generally speaking. In the context of primary education, they are obligated to grant refugees the 'same treatment' as is 'accorded to nationals'.[112] As regards secondary and post-secondary education, states are required to grant refugees and asylum-seekers the same treatment as is 'accorded to aliens generally'. This relates also to access to funding and learning institutions as well as recognition of foreign qualifications.[113] A negative obligation is also placed on those states to refrain from acts that will curtail the enjoyment of these rights. At the national level, several refugee-hosting states recognise the right of refugees to education and training.[114]

In addition to physical security, education is a key right for refugees, particularly those in protracted refugee situations, as their chances of finding a durable solution to their situation are pretty low. The importance of education to refugees and asylum-seekers has been underscored as follows:

> Primarily, access to educational facilities ensures that the chain of learning, which might have been severed during displacement, is continued. In addition to increasing the chances of refugees becoming self sufficient in the future, education also reduces the trauma of being in a foreign country, as well as ensuring that the period spent in asylum is productively utilized.[115]

Studies conducted on long-term refugee situations in other parts of the world have drawn similar conclusions.[116] The Conference of Plenipotentiaries to the 1951 Refugee Convention noted the important role of education for refugees. According to Mr Trutzschler, the Federal Republic of Germany delegate, education would 'make it possible'

[112] Art. 22(1), 1951 Refugee Convention.
[113] Art. 22(2), 1951 Refugee Convention.
[114] See, e.g., s. 31 of the Tanzanian Refugees Act (1998) and s. 16 of Kenya's Refugees Act (2006).
[115] E. Abuya, 'Past reflections, future insights: African asylum law and policy in historical perspective', *International Journal of Refugee Law,* 19 (2007), 51, 76.
[116] See S. Alzaroo and G. Hunt, 'Education in the context of conflict and instability: the Palestinian case', *Social Policy and Administration,* 37 (2003), 165; B. Sirhan, 'Palestinian refugee camp life in Lebanon', *Journal of Palestinian Studies,* 4 (1975), 91, 95–99.

for refugees to 'share fully in the life' of the host state.[117] Research conducted on countries such as Australia affirms the importance of empowering refugees through education.[118] Early efforts have been confirmed throughout the Global Consultations on International Protection,[119] and in the Agenda for Protection.[120] The Agenda for Protection states that education and vocational training opportunities prevent the military recruitment of children and adolescents.[121] In particular, it recognises that education is an important protection tool.[122] However, as is true of other rights, it is insufficient to merely proclaim that one exists. If a host state is sincere about protecting refugees living in protracted situations, steps must be taken to providing access to education and vocational training in reality.

During the author's visit to the Kakuma and Dadaab refugee camps in 2002 and 2003, there were a number of educational institutions catering for all individuals, whatever their age. At Kakuma, for example, many of the schools for refugees followed the Kenyan educational curriculum. Some were divided along ethnic lines, in order to ease communication and understanding between the students and teachers. In terms of accessibility, there was no fee for primary or elementary school (ages 6 to 14) and, from the author's assessment, these schools appeared completely full of students. However, for secondary education (ages 15 to 18), as in many Kenyan secondary schools, a fee was payable. An exception was made for a few academically gifted students who could apply for a limited number of scholarships and other forms of financial assistance.

Student numbers, however, reduced dramatically for university education. At camp level, the University of South Africa (UNISA) oversaw a Distance Learning Centre at Kakuma, where refugees were offered scholarships to study and obtain degrees, particularly in the liberal arts. No science courses were on offer. According to Ms Nyambura, the (then) Scholarship Director at the Distance Learning Centre, this was due to

[117] UN General Assembly, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Eleventh Meeting*, UN Doc. A/CONF.2/SR.9 (21 Nov. 1951).

[118] See, e.g., Abuya, 'A place to call home', 439–41.

[119] UNHCR, *Local Integration,* Conference Room Paper, Global Consultations on International Protection, UN Doc. EC/GC/02/06, 25 Apr. 2002, available at www.unhcr.org/protect/PROTECTION/3ccd64536.pdf (last accessed 25 Oct. 2008).

[120] UNHCR, *Agenda for Protection* (3rd edn, Oct. 2002).

[121] *Ibid.*, 5.

[122] *Ibid.*, 18.

'lack [of] important facilities such as microscopes and computers'.[123] The fact that only thirty scholarships were available at any one time seriously limited the number of students who could be admitted to the centre. At Dadaab, there were no equivalent facilities. Nonetheless, other tertiary institutions did exist in the camps and offered carpentry, tailoring and other hands-on related skills that many refugees favoured as an alternative to a university degree. Moreover, it was also possible to seek opportunities outside the camp, although this was dependent on finding a sponsor. In Kakuma, for example, a female Ethiopian student (name withheld) and a Mr Rubango were able, through sponsorship, to complete an undergraduate degree at a Kenyan university, and a course in tailoring at a Nairobi institution, respectively. In fact, the former had been exploring the possibility of pursuing a Masters degree. The author also met several other refugees who were making frantic efforts to obtain travel documents that would allow them to enrol in Kenyan institutions located outside the camps. Although these exceptions are rare, the fact that some refugees are permitted to reside outside the camps, for special reasons such as education, is a step in the right direction and one which should be encouraged.

The provision of education and training facilities *per se* is a positive move and one that fulfils requirements of international refugee and human rights laws. At the drafting of the OAU Refugee Convention the Council of Ministers stressed that access to educational facilities 'can only succeed' when there is 'full financial' and 'material' support.[124] Owing to the large refugee population, the prolonged nature of these situations, and the limited number of educational facilities, ultimately, only a few refugees living in camps are able to access education. For these reasons, a group of Ethiopian university students in Kakuma, who sought asylum in Kenya in 2001, were unable to continue their studies despite an overwhelming desire to do so. Idleness in the camps was endemic and had wider implications. An idle mind, as they say, is the devil's workshop.[125] Refugees who do not have something worthwhile to occupy their time are more than likely to engage in criminal and/or military activities; hence, posing a security threat to other refugees in the

[123] See D. Ghati, 'University offers hope to refugees', *East African Standard* 14–20 Jul. 2001.
[124] See OAU Council of Ministers res. CM/Res. 266 (XIX).
[125] See, also, Loescher and Milner, 'Protracted refugee situations: causes, consequences, and trends', 15 arguing that 'delinquency and substance abuse in situations where refugee youths lack [post-secondary learning] opportunities and see no prospect for a solution to their plight'.

camp. Those who engage in military activity in their home state also contribute to the cycle of violence. Eventually, this prolongs the period that refugees spend in camps. It also exacerbates the challenges that are associated with camp life. The most direct way of ensuring that refugees have access to education would be for developed states, in particular, to increase the amount of material support for educational initiatives. Local integration of refugees would also be a solution, but, as discussed in section IV below, many African states are reluctant to grant this form of durable solution.

2. Income generation

The 1951 Refugee Convention[126] recognises the value of refugees engaging in income-generating activities. The importance of this is demonstrated in the Convention, which dedicates an entire chapter to the question of refugees and gainful employment. Emphasis is placed on making sure that refugees become self-reliant in the long term.[127] International human rights law provisions share this vision.[128] As with education, both a positive and negative obligation is bestowed upon refugee hosting states. Encouraging refugees living in protracted situations to engage in revenue-generating activities recognises the fact that many asylum-seekers flee with more than just a piece of luggage on their heads. Rather, many refugees have useful skills and abilities, which they acquire in their home and/or transit state.

A significant question is: how important is employment to the life of a refugee? Primarily, for refugees in protracted situations, employment provides an opportunity for them to earn an income and therefore reduce their dependency. The *Ad Hoc* Committee, which drafted the 1951 Refugee Convention, and the contracting states, which participated in the making of this treaty, both raised the question of employment. At the *Ad Hoc* Committee, it was noted that, 'if the refugee is to lead a normal life and not to be a burden on the national or international community, he [or she] must be able to work'.[129] Similarly, according to the *travaux préparatoires*, Mr van Heuven-Goedhart reiterated that the entitlement to work was of 'major importance' to the life of a refugee.[130]

[126] See Arts. 17–10, 1951 Refugee Convention.
[127] See, further, UNHCR, *Local Integration.*
[128] See Art. 23, UDHR; Art. 6 ICESCR.
[129] *Ad Hoc* Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 (3 Jan. 1950).
[130] UN GA, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Second Meeting.*

Like education, the High Commissioner observed that employment is 'secondary' 'only' to a refugee's 'right to live'.[131] In addition, employment would provide refugees with something useful to occupy their time and, thus, reduce the chances of engaging in military and/or criminal activity as well as ameliorate the frustration and misery that is normally associated with camp life. Overall, this would increase the level of security in refugee camps and break the cycle of violence. Further, as Mr von Trutzschler, the Federal Republic of Germany delegate at the making of the 1951 Refugee Convention noted, employment would help refugees 'assimilate' 'within the economic structure'[132] of the host state. Today, this is also sometimes the reason for refusing to permit refugees and asylum-seekers to work.

An assessment of the refugee situation, at camp level, shows that one of the main and continuing problems refugees face is a lack of jobs and employment opportunities. Consequently, many refugees spend the better part of their days idling around the camps because, according to some, they have 'nothing better to do'. The situation is further aggravated by the encampment policy, which prevents refugees from leaving the camps in order to compete with locals for scarce employment opportunities. In the case of Kenya, the encampment policy is a radical shift from the situation that existed before 1992, where refugees were able to seek jobs in the domestic market. However, despite these restrictions, refugees in the camps do engage in wage-earning activities. Indeed, there are many examples of refugees who are employed by international agencies and NGOs. UNHCR, for example, employs refugees to work as interpreters in refugee-assessment interviews or other protection activities or as assistants in health centres. There are also many other examples of self-employed refugees.

Contrary to a widely held belief that all refugees depend on external assistance for their survival and livelihood, experience shows that some do engage in income-generating activities. In the camps that I visited, the ingenious extent to which some individual refugees have gone to create self-employment was striking. For example, refugees at Kakuma and Dadaab had established a wide range of businesses, including food 'kiosks' (restaurants) and pubs, photography, carpentry, soap-making, tailoring, bicycle repairs, general merchandise, telephone bureaux, and schools where children could learn how to read and write in English.

[131] *Ibid.*
[132] *Ibid.*

Some also worked as translators for the UNHCR and its implementing partners. Telephone bureaux, in particular, are one such example of the success and innovation of these camp-based income-generating projects. Telephone communication in Kakuma, unlike Dadaab, was not reliable. What was most fascinating at Kakuma was the fact that, when their phones were disconnected, UNHCR officials drove to the camps in order to make local and/or international calls at bureaux run by refugees. Another such example is refugee-operated markets. In Dadaab, there was a food distribution programme in operation but, perhaps more interesting, there was also a large market operated by refugees right outside the food distribution centre. In this market, refugees sold part of their food, predominantly to Kenyan traders, and used the proceeds to supplement their diet by buying meat or other types of food that they were accustomed to in their home states.

Despite these examples, the vast majority of refugees in camps continue to depend entirely on UNHCR for their livelihood. Those in the self-sufficient category are still by far the minority. States that host refugees for protracted periods of time need to realise the significant earning potential that refugees have. It is important to highlight the success stories from the camps and/or elsewhere. This is one way of ensuring that policy-makers see refugees as potential contributors to national development, rather than as a fiscal drain or agents of insecurity. That is, focus should be put on the empowerment of refugees in addition to their protection. At the making of the 1951 Refugee Convention, the representative of the Federal Republic of Germany, Mr Trutzschler, emphasised that we must look beyond categorising refugees as a 'burden, and a burden alone'.[133] Using France as an example, he pointed out that German refugees, who had fled to France 'after the revocation of the Edict of Nantes, … greatly enriched French life'.[134] Immigrants have also contributed significantly, and continue to contribute, to the development of countries such as the United States and Australia.[135]

[133] *Ibid.*

[134] *Ibid.*

[135] See Department of Immigration and Multicultural and Indigenous Affairs, *Migration: Benefiting Australia*, Conference proceedings, Sydney, 7–8 May 2002; G. Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton: Princeton University Press, 1999); J. Nevile (ed.), *The Benefits and Costs of Immigration* (Melbourne: Committee for Economic Development of Australia, 1991).

The hands-off approach to the management of refugees living in camps, adopted by many African governments, is particularly harmful to host states both in terms of security and economically. In terms of the latter, refugee host states have lost, and will continue to lose, substantial amounts of revenue that could have been generated by taxes, had they taken a more active role in the management of refugees. It is generally in the best interest of states to increase their gross domestic and/or national production. For African countries, the need is more urgent, considering that many are struggling to keep their economies afloat. Therefore, it is in their interest to harness all available human and capital resources within their borders. In short, African states need to undertake measures that will transform refugee camps into productive projects. To date, the market and taxes that would otherwise have been levied on refugees living in the camps remain largely untapped. So, too, are the skills and expertise that refugees bring with them.

Critics may argue that it is unjust to impose taxes on refugees living in protracted situations. However, Article 29 of the 1951 Refugee Convention specifically provides that states can levy 'taxes or charges' on refugees. The only condition is that the rate applied to refugees should be consistent with the one applied to locals. Despite international recognition of the ability for states to collect taxes from refugees, domestic asylum laws in a number of African states have yet to take advantage of this potential source of revenue. Apart from Tanzania,[136] the domestic asylum laws of states like Kenya[137] and Ghana[138] are silent on the subject of levying charges on the revenue that refugees generate.

According to some, refugees who have lived in exile for too long have been 'forgotten'.[139] Recently, in 2008, the EXCOM referred to the value of 'incorporating refugee issues within national and regional development agendas' as a way towards promoting the 'long-term welfare of host communities'.[140] In order to bring the attention of governments to the earning potential that exists in camps, firm evidence is needed. Significantly, past studies have documented the economic activities in

[136] See s. 33 of the Refugees Act (1988), which provides: 'Any asylum seeker or refugee residing in Tanzania shall be liable to pay any taxes according to the laws of [the] country.'

[137] See the Refugees Act (2006).

[138] See the Refugee Law (1992).

[139] Loescher and Milner, 'Protracted refugee situations: causes, consequences, and trends', 1.

[140] UNHCR, *Protracted Refugee Situations: Revisiting the Problem,* UN Doc. EC/59/SC/CRP.13 (2 Jun. 2008), para. 25.

which refugees and asylum-seekers engage.[141] However, there is little research that explores the possibility of harnessing revenue from the camps in the form of taxes. Nevertheless, research conducted in other parts of the world can offer insights into this issue. A study that Frank Stilwell conducted in Young, a suburb in Australia, is one such example.[142] This research assessed the flow of income that was associated with the presence of Afghan refugees in this region from mid-2001 to the end of 2002. Interestingly, it found a strong correlation between the refugee presence and the rise in the region's economy. According to Stilwell, there was a 'positive boost'[143] to the economy, which he attributes to the 'income and expenditure generated by the Afghan presence'.[144]

Works by researchers like Montclos and Kagwanja[145] reveal the economic activities in which refugees engage in the camps. However, studies on refugees in protracted situations must go beyond a discussion of their economic activities; they must also practically consider how the available resources in the camps can be harnessed. Ultimately, this will contribute towards helping refugees and asylum-seekers rebuild their lives. At present, however, consigning refugees and asylum-seekers to camps, as Loescher, Milner, Newman and Troeller note, 'prevents them from having a positive contribution'[146] to the development of the state and the region. Such a positive contribution serves the inter-linking aims of human security, economic prosperity, and national as well as regional security.

Needless to say, meeting the plight of refugees and asylum-seekers trapped in protracted situations requires significant resources. 'Full'[147] and sustained funding is necessary to ensure that refugees enjoy the rights set out in international and domestic laws and other declarative instruments. Thus, in a resolution adopted in 2008, the UN General Assembly urged governments and other donors to 'respond promptly' to

[141] See, e.g., M. Montclos and P. Kagwanja, 'Refugee camps or cities: the socio-economic dynamics of the Dadaab and Kakuma refugee camps in Northern Kenya', *Journal of Refugee Studies,* 13 (2000), 205.

[142] F. Stilwell, 'The economic and social impact of Afghan refugees in Young, NSW', *Urban Policy and Research,* 21 (2003), 235.

[143] *Ibid.,* 244.

[144] *Ibid.,* 247.

[145] Montclos and Kagwanja, 'Refugee camps or cities'.

[146] Loescher, Milner, Newman and Troeller, 'Protracted refugee situations and peace building', 4.

[147] See UNHCR, *Global Report 2007,* 193.

UNHCR's requests for funding.[148] For governments in Africa, it is unrealistic to expect them to continue to host large numbers of refugees for prolonged periods and to be able to provide all refugee entitlements without a solid resource foundation. Resources are, however, finite.[149] Nonetheless, much more could be done to share the burden upon developing nations, including possibilities for developing and developed countries alike to allocate more resources towards human security issues rather than the over-emphasis on state security interest of militarisation.

IV. Durable solutions

To solve the 'problem' of refugees, UNHCR recommends three durable solutions: voluntary repatriation, local integration, and resettlement to other countries. Durable solutions are the most effective form of protection for refugees. For those living in protracted situations, the need for a durable solution is pressing. These solutions not only guarantee the lives and livelihoods of refugees, but they could also contribute towards national and international peace and security.

A. Voluntary repatriation

International human rights instruments expressly recognise the right of individuals to return to their home countries. This right extends as far back as 1948 and the adoption of the UDHR, Article 13 of which provides that everyone has the right to leave their home states and to have the right to 'return'. Moreover, subsequent human rights treaties have recognised this right; for example, Article 12(4) of the ICCPR, which provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.[150]

Of the three durable solutions, UNHCR considers voluntary repatriation a 'permanent solution' to the plight facing refugees. This principle is also codified in Article 5 of the OAU Refugee Convention. Although the 1951 Refuge Convention does not expressly provide for voluntary repatriation, it is implied into Article 1(C), which deals with

[148] UN General Assembly, *Office of the United Nations High Commissioner for Refugees*, UN Doc. A/Res/62/124 (24 Jan. 2008), para. 29.

[149] See, also, the South African Constitutional Court (Van deer Westhuizen J) in *S* v. *Jaipal* 2005 (4) 581 at 602 ('few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs').

[150] Art. 12(4), ICCPR.

circumstances when a person will be deemed not to require international refugee protection, including where the situation in their home country has changed to such an extent that international protection is no longer needed.[151] Voluntary repatriation is mentioned in the Statute of the UNHCR, calling upon governments to cooperate by 'assisting the High Commissioner in efforts to promote the voluntary repatriation of refugees'.[152] Since the post-Cold War period began in the late 1980s, voluntary repatriation has been viewed as the most desirable of the three options. For example, in 1994, the Executive Committee described repatriation as the 'ideal solution to refugee problems'.[153] The process of returning refugees to their homes provides opportunities for returnees to rebuild their home states and, at the same time, it relieves pressure on transit and host states.[154] Theoretically, there are possibilities for refugees who refuse to return for protection-related reasons to appeal to the host state to remain in the territory, but rarely are the cessation clauses applied, leaving a gap between legal withdrawal of protection and voluntary repatriation.[155] Nonetheless, because of the scale of repatriation programmes, individual screening is rarely carried out and therefore the possibility to remain is not made available to various individuals in need of it.[156]

For refugees living in protracted situations, the need to find durable solutions should be a high priority on the international displacement and security agendas. As mentioned in this chapter, for the majority, life in the camps can be bleak, depressing and undignified. In the Kakuma and Dadaab refugee camps of Kenya, many refugees expressed the wish that 'one day when the war is finally over, we will be able to return home'. Mayak, a refugee from Sudan, captures the importance of 'home' to refugees in the following poem:

> Oh! What is lovely like our homeland?
> In your own country, you are free,
> free like a butterfly when it flies from

[151] See, in particular, paras. (1) and (4), which deal with a refugee 'voluntarily' returning to his or her country of nationality or habitual residence.
[152] Statute of the UNHCR, para. 2(d) of GA res. 428 (V), 14 Dec. 1950.
[153] UNHCR, EXCOM Conclusion No. 74 (XLV)-1994.
[154] Abuya, '"A place to call home"', 445.
[155] *Ibid.,* 443.
[156] See, e.g,. UNHCR (A. Edwards), *Daunting Prospects: Minority Women – Obstacles to their Return and Integration* (Sarajevo, Bosnia and Herzegovina: UNHCR, 2000), in which it is noted that the option to remain in host communities was not generally available to persons internally displaced during the conflict in the Balkans, available at www.unhcr.ba/publications/proj.pdf (last accessed 25 Oct. 2008).

flower to flower,
free like fish moving in the water.
Homeland is a second heaven.
Without your home
You are like a dog without a tail.
Give us peace,
To return back to our beloved country,
Our precious heaven ancestors' land.[157]

The critical question in voluntary repatriation is: when is it safe for refugees to return to their pre-persecution or pre-conflict homes? In other words, when are conditions deemed sufficiently stable and durable for refugees to repatriate? Early refugee protection instruments failed to prescribe criteria to adequately determine when repatriation should start. They also failed to formulate repatriation guidelines. In its *Handbook on Voluntary Repatriation,* published in 1996, the UNHCR recommends that repatriation should begin only after a careful assessment of the situation in the country of origin. The repatriation must be carried out in conditions of safety and dignity, the return must evidence durable and stable conditions, and voluntariness. In short, repatriation should take place when it is considered safe and dignified for refugees to return.[158] This includes legal, physical and material security, the latter including possibilities to access land or means of livelihood.[159]

There are many difficulties associated with creating a standard by which to determine when changes occurring in a refugee-producing state are stable and durable enough to commence repatriation. However, because many refugees who live in protracted situations in Africa have fled from states ravaged by war and civil strife, one of the pre-conditions that needs to be satisfied before organised repatriation can commence is for hostilities to have ceased. In other words, just as war is a push factor, the end of hostilities should be a pull factor. However, while the conclusion of hostilities and the signing of peace agreements are a necessary pre-condition to return, they are insufficient. Rather, long-term and durable peace should be a prerequisite. The 1951 Refugee Convention and the OAU Refugee Convention support this view by providing that

[157] A. Mayak, 'What is a refugee?' in N. Flutter and C. Solomon (eds.), *Tilting Cages: An Anthology of Refugee Writings* (Sydney: Naomi Flutter and Carl Solomon: 1995) 10–11.
[158] UNHCR, *Voluntary Repatriation: International Protection Handbook* (Geneva: UNHCR, 1996), para. 3.1. The *Handbook* is in the process of being updated by the UNHCR, but the new edition was unavailable at the time of writing.
[159] *Ibid.,* para. 2.4.

the protection offered under these treaties will 'cease to apply' to refugees who are deemed, *inter alia*, to be no longer in fear of their lives.[160]

A number of measures can be adopted to promote long-term peace and, thereby, bring about an end to protracted situations and the suffering experienced by refugees. The end of hostilities is usually marked by the warring factions signing a peace deal, which in many cases contains provisions for the holding of democratic elections. In 2004, following several years of talks aimed at ending the conflicts in Sudan and Somalia, there was a break-through in each of the peace processes. Warring factions signed peace agreements in both of these countries. Further, in Somalia in particular national elections were held. Most recently, in November 2007, the governments of the Democratic Republic of Congo (DRC) and the Republic of Rwanda signed security pacts in Nairobi, which aimed to improve security conditions, particularly along the borders. While the signing of peace agreements is a crucial step towards promoting the return of refugees, it is by no means the only condition that needs to be met. Other concrete measures must be taken so that refugees can feel confident that it is safe for them to return home. Restoration of democracy and the rule of law, as well as the reconstruction of physical infrastructure and institutions, are two additional fundamental ingredients in what should be conceived as a confidence-building process. Failure to address all these essential foundations will compromise the repatriation process. In research that examines the return of Guatemalans displaced by conflict, Rivero, a former officer with the UN Verification Mission to Guatemala, writes that democracy, 'demilitarisation, economic and social reconstruction'[161] played an important role in promoting the return of those who had been uprooted by the long-drawn-out civil war.

Whilst a change of regime may at face value form a viable basis for repatriation, the change itself is insufficient to validate immediate return. In order to return home, the safety of returnees must be assured.[162] In Somalia, general insecurity continued and has been one

[160] See Art. 1(C)(5) of the 1951 Refugee Convention and Art. 1(4)(e) of the OAU Refugee Convention. See, further, UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) & (6) of the 1951 Convention relating to the Status of Refugees* (the 'ceased circumstances' clauses), UN Doc. HCR/GIP/03/03 (Feb. 2003), available at www.unhcr.org/doclist/publ/3bc17bbc4.html (last accessed 25 Oct. 2008).

[161] J. Rivero, 'Reinventing communities: the resettlement of Guatemalan refugees', *Forced Migration Review,* 11 (2001), 8, 8.

[162] See, also, Art. 5(2) of the OAU Refugee Convention, providing that 'adequate arrangements' must be put in place to ensure the 'safe return of refugees'.

of the main obstacles to repatriation.[163] In the case of Sudan, suspicion regarding the government's role in the Darfur crisis, which led to the displacement of almost 2 million people[164] and the death of hundreds of civilians, drastically affected the return process to the South.[165]

Intense fighting in the North Kivu province of the DRC, between the government and Hutu militia from Rwanda, which by the end of 2007 had displaced 400,000 people,[166] has also jeopardised the return prospects of refugees living in the region, despite a peace agreement. The UNHCR had to suspend its operations in this area owing to security concerns.[167] In a resolution adopted on 13 March 2008, the UN Security Council expressed concern that this conflict posed a 'serious threat to the peace and security of the entire Great Lakes region'.[168] Overall, it can be seen that long-lasting, rather than temporary, peace is a prerequisite for voluntary repatriation to be a durable, rather than temporary, solution, and bringing about peace within a particular region can also be critical. At a minimum, if basic safety can not be guaranteed, refugees and asylum-seekers are unlikely to return home. Nonetheless, the alternative prospect of remaining in refugee camps for several more years is less than ideal and can push many refugees to opt for return when faced with two unsatisfactory choices. I now turn to look at the possibility of local integration in host states.

B. Local integration

Article 34 of the 1951 Refugee Convention supports the second durable solution of local integration. It calls on host states to endeavour to 'facilitate the assimilation and naturalization' of refugees, although it is not an obligatory provision. Local integration as a solution is, however, further reinforced by the rights guaranteed in Articles 3 to 33 of the 1951 Refugee Convention and under international human rights law, the

[163] See UNHCR, *Global Report 2007*, 231. See, also, UNHCR, *Global Report 2004*, available at www.unhcr.org/publ/PUBL/42ad4db87.pdf (last accessed 25 Oct. 2008), 224 (noting that lack of security 'made it difficult to envisage sustainable return to south and central Somalia').

[164] See UNHCR, *Global Report 2004*, 183.

[165] See UNHCR, *Global Report 2006*, 240 ('UNHCR's expectation that 10,000 Southern Sudanese refugees would repatriate voluntarily did not materialize' owing to, among other reasons, 'security constraints').

[166] See UNHCR, *Global Report 2007*, 174.

[167] *Ibid.*, 177.

[168] UN SC res. 1804 (2008) (adopted at its 5852nd meeting on 13 Mar. 2008).

fundamental goal of which is to guarantee refugees essentially the same rights as those accorded to other non-citizens.[169]

UNHCR has stated that a comprehensive strategy of durable solutions that gives proper place to local integration and self-reliance is 'particularly important to resolve protracted refugee situations'.[170] Local integration is described as 'the end product of a multifaceted and on-going process, of which self-reliance is but one part'.[171] The UNHCR has indicated that it has three dimensions:

> First, it is a legal process, whereby refugees are granted a progressively wider range of rights and entitlements by the host State that are broadly commensurate with those enjoyed by its citizens … Over time the process should lead to permanent residence rights and in some cases the acquisition, in due course, of citizenship in the country of asylum.
>
> Second, local integration is clearly an economic process. Refugees become progressively less reliant on State aid or humanitarian assistance, attaining a growing degree of self-reliance and becoming able to pursue sustainable livelihoods, thus contributing to the economic life of the host country.
>
> Third, local integration is a social and cultural process of acclimatization by the refugees and accommodation by the local communities, that enables refugees to live amongst or alongside the host population, without discrimination or exploitation and contribute actively to the social life of their country of asylum.[172]

Local integration would allow refugees to leave the squalid camps, to reduce their material dependency on the state and UNHCR, and to integrate into their host communities economically, socially and culturally. Because of the link that has been established between refugee camps and insecurity, local integration can go a long way towards improving human, local and international peace and security. As mentioned above, allowing refugees to enter the local market is also likely to contribute to the economic development of the host country and region, and coincides with the goals of empowerment of the human security framework. It also coincides with UNHCR's own strategies of protection and empowerment.[173]

Despite the fact that local integration is listed as one of the three durable solutions, the reality is that African states are reluctant to grant

[169] Art. 7(1), 1951 Refugee Convention.
[170] UNHCR, *Local Integration*, para. 4.
[171] *Ibid.*, para. 5.
[172] *Ibid.*, paras. 5–8.
[173] See ch. 3 by F. Nicholson in this book, which looks at these two strategies in detail.

this option to refugees living in their territory. The final act of local integration of the granting of citizenship is awarded to refugees 'on a limited scale only'.[174]

Data collected in Tanzania, for example, shows that between 2002 and 2006, the Tanzanian Government did not integrate any refugee,[175] despite the country being host to some of Africa's oldest refugee settlements. Government antipathy indicates that the prospects of local integration, in Tanzania and in other refugee host countries like Ghana[176] and Kenya,[177] are limited. Some authors attribute this to government perceptions that refugees' presence is 'temporary', and that individuals will repatriate to their home states or be resettled in third countries.[178] Although the UNHCR has promoted a continuum of local integration possibilities – from self-reliance strategies that foster any of the three durable solutions by their emphasis on economic, social and cultural empowerment of refugees, but that do not assume that refugees will remain permanently in the host state through to full citizenship and permanence – refugees remain 'warehoused' in far too many refugee situations in Africa and elsewhere.[179]

C. *Resettlement*

A third option for a few refugees living in protracted situations is resettlement to another country. Mr Heuven-Goedhart described resettlement in 1951 as one of the 'ultimate solution[s] to the refugee problem'.[180] This solution involves sharing the global refugee 'burden' by relocating individuals and families to other countries. It is based on the

[174] UNHCR, *2006 Statistical Yearbook*, available at www.unhcr.org (last accessed 25 Oct. 2008), 40.

[175] UNHCR Global Reports 2002–2006.

[176] See S. Dick, *Responding to Protracted Refugee Situations: A Case Study of Liberian Refugees in Ghana*, UN Doc. EPAU/2002/06, available at www.unhcr.org (last accessed 25 Oct. 2008), 29–30.

[177] See, also, E. Aukot, 'It is better to be a refugee than a Turkana in Kakuma: revisiting the relationship between hosts and refugees in Kenya', *Refuge,* 21 (2003), 73 79, noting that local integration is not 'possible'.

[178] See, e.g., G. Loescher and J. Milner, 'The missing link: the need for comprehensive engagement in regions of refugee origin', *International Affairs* 79 (2003), 595, 612.

[179] See A. Fielden, *Local Integration: An Under-Reported Solution to Protracted Refugee Situations*, available at www.unhcr.org/research/RESEARCH/486cc99f2.pdf (last accessed 25 Oct. 2008), at 6–11.

[180] UN GA, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Second Meeting.*

premise that all states have a responsibility to alleviate the plight of those who have been displaced from their homes. However, ultimately, resettlement is seen by states as discretionary or humanitarian in nature; its availability therefore is rather limited. The 1951 Refugee Convention recognises that the 'grant of asylum may place unduly heavy burdens on certain countries', therefore, in order to help find a solution to this 'problem', the Convention calls on other states to share the burden.[181] Similarly, Article 2(4) of the OAU Refugee Convention advocates for burden sharing. It reads as follows:

> Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

As the Refugee Consortium of Kenya, a non-governmental organisation, highlights, 'host countries [in Africa and elsewhere] cannot be left to shoulder alone the impact of refugees'.[182] This view is consistent with the 1951 Refugee Convention. Mr Makiedo, the delegate for Yugoslavia at the time of its drafting, stated that because the refugee 'problem' 'was one of international importance', it had to be 'solved on an international basis'.[183] Failing that, refugees and asylum-seekers risk, not only remaining in limbo, but also being denied protection under the provisions of international human rights and refugee law. An example of the effectiveness of resettlement as a tool for meeting the needs of those who have been uprooted from their home states is the resettlement programme that was instituted after World War II and the hundreds of thousands of European refugees who were resettled, or those resettled from Indo-China as part of the Comprehensive Plan of Action in the 1990s.[184]

The immediate post-9/11 security environment following the terrorist attacks against the United States impacted on the availability of resettlement. Prior to 2001, industrialised states[185] settled on average 90,000–100,000

[181] Preamble, 1951 Refugee Convention.

[182] Refugee Consortium of Kenya, 'Refugee management in Kenya', *Forced Migration Review* 16 (2003), 17, 19.

[183] UN GA, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Third Meeting.*

[184] For further discussion of the Comprehensive Plan of Action, see, generally, *International Journal of Refugee Law,* 5 (1993).

[185] Namely, Australia, Canada, Denmark, Finland, Iceland, Ireland, Italy, Japan, The Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States.

refugees from camps in Africa and elsewhere. The total number of refugees resettled in 2002 and 2003 dropped to approximately half the number resettled in the years prior to 9/11. At the same time, the global number of refugees in 2002 increased by almost 1 million.[186] Statistics for 2006 and 2007 indicate a level of recovery back to normal levels.[187]

The commitment of industrialised states to resettlement as a durable solution is questionable, even with the expanding number of resettlement countries.[188] Moreover, various state reactions following 9/11 highlight the vulnerable nature of this durable solution. Although the number of resettlement places worldwide is but a drop in the ocean (less than 1 per cent of current number of refugees worldwide[189]), any reduction in the overall targets can have a significant impact on the political will of host states to continue to carry the 'burden' and it further reduces options available to some individuals and families who are eligible for resettlement. Ultimately, the resettlement programme needs continued expansion in numbers and resettlement countries. For individuals like Rubango and Warsame, an effective and consistent resettlement programme could give them hope and offer a way out of the cycle of human rights abuses that occur frequently in the camps. This initiative can also help to stop the cycle of violence that is associated with refugee camps, and thereby enhance peace and stability in the state of origin, the receiving country, and the region as well. However, as political will is limited, resettlement needs to be pursued as part of comprehensive durable solutions strategies that combines all three options.

V. Conclusion: working together to get somewhere

In response to the question posed at the beginning of this chapter, 'from here to where?', for many refugees in protracted situations, the future is

[186] UNHCR, *2005 Statistical Yearbook*.

[187] In 2006, the number of resettled refugees was some 29,560 persons by the UNHCR itself and an additional 71,700 refugees by 15 resettlement countries: UNHCR, *2006 Global Trends*, available at www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf (last accessed 25 Oct. 2008), 8.

[188] There are nine traditional resettlement countries, with an additional eight new resettlement programmes operated by Benin, Burkina Faso, Brazil, Chile, Iceland, Ireland, Spain and the United Kingdom: see www.unhcr.org/protect/3bb2e1d04.html (last accessed 25 Oct. 2008).

[189] Approximately 99,000 resettled refugees out of an estimated 11.4 million refugees: UNHCR, *2007 Global Trends,* available at www.unhcr.org/statistics/STATISTICS/4852366f2.pdf (last accessed 25 Oct. 2008), 2. In 2007, UNHCR submitted the highest number of resettled refugees in fifteen years.

uncertain. To borrow Dicken's words: these refugees are 'included while being excluded and excluded while being included'.[190] Simply put, they are trapped in a state of limbo. When asked what their future hopes are, many of the research subjects in Kenya responded: 'whatever the [good] Lord has in store for me.' This demonstrates the worrying state of despondency felt by these refugees. It is crucial, therefore, to explore measures that will successfully meet the plight facing the almost 2 million refugees trapped in long-term situations. It would be misleading, however, to think that the solutions to this issue are quick or easy. Rather, a comprehensive approach, involving a number of steps, is recommended. Collectively, these steps will effectively meet the challenges raised in this chapter.

In Swahili they say: *Ukitaka kupanda mti, anzia chini.*[191] It means that, for a long-lasting solution to protracted situations, the root causes of flight – armed conflict and civil strife – must be tackled. UNHCR contends that engaging with today's war-torn states can 'prevent the refugee crisis of tomorrow'.[192] The 1994 genocide in Rwanda, for instance, has been attributed to the failure of the international community to find a durable solution for the Rwandan refugees from the 1960s.[193] Effectively addressing the root causes can encourage the voluntary return of long-standing refugee populations. The consequences of the failed Somali intervention in the 1990s, and the US-led Operation Restore Hope, underscore the importance of preventive measures. The current crisis in Darfur and the Great Lakes region underline the value of going beyond the mere passing of resolutions.[194] Rather, pragmatic steps must be taken to ensure that warring factions enter into dialogue towards peace. In order to be effective and all-encompassing, refugees and civil society should be represented in peace talks between governments and rebel forces. In Guatemala, for example, refugees played an important role in the brokering of the peace accord.[195] Membership in peace talks should be broad-based. The talks must include all

[190] B. Dicken, 'From refugee camps to gated communities: biopolitics and the end of the city', *Citizenship Studies*, 8 (2004), 83, 84.
[191] 'If you want to climb a tree, start at the bottom' (translation by author).
[192] UNHCR, *The State of the World's Refugees 2006*, 127.
[193] *Ibid.*, 118.
[194] See, also, E. Abuya and D. Nyaoro, 'Victims of persecution and armed conflict in South Africa: between a rock and a hard place', *Hastings International and Comparative Law Review* 32 (2009), 1, 48.
[195] Rivero, 'Reinventing communities'.

stakeholders including women,[196] as well as young people.[197] Views from all the representatives must be given equal weight.

The 2008 post-election violence in Kenya, which created some 500,000 internally displaced persons[198] and 12,000 refugees[199] within a matter of weeks, is a reminder of the crucial role the international community can play in bringing a speedy end to displacement situations.[200] Indeed, in the Kenyan example, sustained external pressure was an important element in bringing the disputing parties to the negotiating table.[201] Following weeks of talks, a power-sharing deal was finally signed on 28 February 2008. The accord, entitled Agreement on the Principles of Partnership of the Coalition Government,[202] was subsequently incorporated into the domestic legal framework and, at the same time, relative calm began to return to the country. Lessons from Kenya cannot be ignored if protracted refugee situations are to be reduced. In fact, this experience should be adopted in other parts of the continent.

Sadly, and unfortunately, bringing about an end to conflict or achieving sustainable peace is not always immediately possible and therefore emphasis on the human security of refugees while they are in exile is crucial. This chapter has highlighted how important it is for states, both regionally and internationally, to address seriously the plight of long-term refugees. Pragmatic steps, which give victims of armed conflict and persecution a real chance to recommence their lives, must be embraced. States must ensure that their legal obligations to refugees are met.

[196] See UN SC res. 1325 (2000) (adopted at its 4213th meeting on 31 Oct. 2008), where the important role women play in peace building and security was reaffirmed. See also, Arts. 9 and 10 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 Jul. 2003, which underscore the value of women as active agents of peace and conflict resolution.

[197] See Arts. 11 and 17 of the African Youth Charter, adopted 2 Jul. 2006, and UN SC res. 1314 (2000) (adopted at its 4185th meeting on 11 Aug. 2000), which emphasise the importance of youth participation in promoting peace.

[198] See Kenya Red Cross Society, 'Kenya: Electoral Violence', available at: www.kenyaredcross.org (last accessed 25 Oct. 2008).

[199] See UNHCR, '12,000 Kenyan Refugees Now in Uganda', available at www.unhcr.org/news/NEWS/47a85a4e2.html (last accessed 4 Nov. 2008).

[200] For a further discussion of the role that the international community can play in governance and conflict prevention, see D. Brown, 'Role of regional organizations in stopping civil wars', *Air Force Law Review,* 41 (1997), 235; T. Nguyen, 'Beyond good offices? The role of regional organizations in conflict resolution', *Journal of International Affairs,* 55 (2002), 463.

[201] See E. Abuya, 'Consequences of a flawed presidential election', *Legal Studies* 29 (2009), 127, 156.

[202] On file with the author.

Moreover, African states must turn the promise of local integration and self-reliance into a reality. It is important to realise that containing refugees in camps is counter-productive in the long-term to the host state and refugees alike. Moreover, it fails to tap the various opportunities inside and outside the camps, and the human potential of refugees. At the same time, developed states must increase the number of resettlement places available[203] and meet funding targets for UNHCR programmes. Ignoring the recommendations in this chapter not only threatens the survival of these victims and ignores their human security and potential, but it also heightens the level of national and international insecurity.

[203] See, also, Loescher and Milner, 'The missing link', 614, arguing that, in order to make a 'significant contribution to the resolution of protracted refugee situations', the European Union should aim to resettle at least 100,000 refugees annually.

5

Once we were warriors: critical reflections on refugee and IDP militarisation and human security

ROBERT MUGGAH*

I. Introduction

The presence of refugees and internally displaced persons (IDPs) are amongst the clearest expressions of a state's failure to protect its civilian population. Although a range of normative mechanisms were developed since the 1950s to guarantee the rights of those forced to cross international borders, many of these are not adequately enforced and no *de jure* protections were created for those unable or unwilling to flee their country of origin. And while a rights discourse is gradually emerging that calls attention to the specific categories of vulnerability of both refugees and IDPs, developed states are increasingly reluctant to grant asylum for the former or invest in sustained durable solutions such as return or resettlement for the latter.

Paradoxically, while the incidence of cross-border and internal displacement temporarily declined in the past decade,[1] scholars and practitioners documented a steady increase in so-called 'protracted' refugee and IDP situations.[2] The outward and inward militarisation of

* I would like to thank Sarah Lischer and Clea Kahn for their helpful comments on an earlier draft of this chapter.

[1] This is attributed to a decline in the number of international and internal conflicts over the past few decades. See, e.g., Human Security Report Project, *Human Security Bulletin 2007* (Vancouver: Simon Fraser University, 2008) at www.humansecuritybrief.info. It should also be noted that the number of refugees and IDPs actually rose sharply between 2006 and 2008, due in large part to the prevailing insecurity in Iraq and Afghanistan: see United Nations High Commissioner for Refugees (UNHCR), *Global Appeal–2008–2009* (Geneva: UNHCR, 2008), at www.unhcr.org/publ/3b7b87e14.html.

[2] A protracted refugee situation is characterised by Crisp and Jacobsen as having at least three features: (1) it is a situation seemingly without a clear durable solution; (2) the refugees are in an organised camp setting for at least five years; and (3) the refugees caught in this type of situation have little chance of being repatriated or resettled

refugees and IDPs, and the potential for armed violence to spread across borders or into otherwise 'peaceful' areas, climbed up the agenda of humanitarian agencies, donors and hosting states.[3] Conceptually, militarised camps reside at the intersection of more conventional 'national security' – security of the state and of territorial frontiers – and 'human security', which privileges the safety, dignity and protection of individuals.[4] Practically, refugee and IDP militarisation constitutes a problem from hell.

Although a nascent literature exists describing the challenges of refugee and IDP militarisation – particularly the security dilemmas and collective action problems associated with international burden-sharing – comparatively little is known about the scale or scope of the problem on the ground.[5] Rather, because there is a widespread assumption that

elsewhere: J. Crisp and K. Jacobsen, 'Security in refugee populated areas', *Refugee Studies Quarterly* 19 (2000), 1–2. While the features are admittedly arbitrary, the UNHCR estimates that some 6 million people are in a protracted refugee camp situation: UNHCR, 2007 *Gobal Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva: UNHCR, 2008). See, further, ch. 4 by E.O. Abuya in this book.

[3] See International Committee of the Red Cross (ICRC), *The Civilian Character of Asylum: Separating Armed Elements from Refugees*, ICRC Statement to the UNHCR Global Consultations on International Protection, 8–9 Mar. 2001, available at www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQWH (last accessed 25 Oct. 2008).

[4] The UN Commission on Human Security specifically identifies the militarisation of civilian refugee and IDP populations as a 'threat' that can spread conflict into neighbouring countries: UN Commission on Human Security, *Human Security Now* (New York, 2003), 42. For further discussion on distinctions between 'national security' and 'human security', see ch. 1 by A. Edwards and C. Ferstman in this book.

[5] See, e.g., G. Loescher, *Refugee Movements and International Security* (London: Brassey's for the International Institute for Strategic Studies, 1992); G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York and Oxford: Oxford University Press, 1993); M. Weiner, 'Security, stability and international migration', *International Security*, 17 (1992/93), 91–126; F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (Ithaca and London: Cornell University Press, 2002); S.J. Stedman and F. Tanner, 'Refugees as resources in war', in S.J. Stedman and F. Tanner (eds.), *Refugee Manipulation: War, Politics, and the Abuse of Human Suffering* (Washington, DC: Brookings Institution Press, 2003); B. Barber, 'Feeding refugees, or war? The dilemmas of humanitarian aid', *Foreign Affairs*, July/August (1997), 8–14; H. Adelman, 'Why refugee warriors are threats', *Journal of Conflict Studies*, XVIII (1998), 49–69; A.R. Zolberg, A. Suhrke and S. Aguayo, *Escape from Violence: Conflict and Refugee Crisis in the Developing World* (New York and Oxford: Oxford University Press, 1989); B.M. Anderson, *Do No Harm: How Aid Can Support Peace – Or War* (Boulder and London: Lynne Rienner, 1999); S.K. Lischer, *Refugee Involvement in Political Violence: Quantitative Evidence from 1987–1998* (UNHCR Working Paper No. 26 Geneva, Jul. 2000); A. Suhrke, 'Human security and the protection of refugees', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the*

states act in accordance with their national security interests, the debate on how to address militarisation is frequently cast in 'rationalist' terms – narrowly focused on *a priori* inter-state security concerns, 'self-help', and game-theoretic bargaining models.[6] Comparatively less attention has been devoted to the causes of different forms of refugee and IDP militarisation, the way different states perceive the problem, the manner in which various manifestations of militarisation are experienced by refugees and IDPs, and the kinds of strategies mobilised by external actors and affected populations themselves to ensure their own protection. More concisely, refugee and IDP militarisation is seldom analysed from a 'human security' perspective.[7]

This chapter provides an overview of the causes and consequences of refugee and IDP militarisation from an historical and international relations perspective. It differentiates between outward militarisation – the recruitment and mobililisation or refugees and IDPs – from inward militarisation – the progressive militancy and exposure of refugees and IDPs to violence and victimisation. Divided into three sections, the chapter first revisits the evolving research agenda on the issue. It focuses primarily on Africa, arguably warranted since the challenges presented by refugee and IDP militarisation are especially acute on the continent. The second section reviews the conceptual parameters of militarisation – focusing on the distinctions between refugees and IDPs and the camps they may inhabit. While refugees and IDPs comprise separate categories of affected populations with differentiated entitlements, they nevertheless share similar types of risk and vulnerability with respect to outward and inward militarisation. In order to identify practical entry points for improving protection, care and maintenance, and prospects for durable solutions, the third section offers a number of conceptual lenses that can better deconstruct the motives and outcomes of refugee and IDP militarisation.

While the challenges presented by refugee and IDP militarisation are real and pressing, this chapter highlights how a human-centred optic

State (Tokyo: United Nations University Press, 2003), 93–108; S.K. Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (Ithica: Cornell Studies in Security Affairs, 2006); R. Muggah (ed.), *No Refuge: The Crisis of Refugee Militarization in Africa* (London: Zed Books, 2006).

[6] See, e.g., Suhrke, 'Human security and the protection of refugees'; A. Suhrke and H. Asha, 'Responsibility sharing', in J.C. Hathaway (ed.), *Reconceiving International Refugee Law* (Hague: Martinus Nijhoff, 1997); Zolberg, Suhrke and Aguayo, *Escape from Violence*.

[7] See, e.g., UN Commission on Human Security, *Human Security Now,* chs. 2, 3 and 4.

can redirect attention on concrete interventions such as the ladder of options. As is now well known, militarisation can lead to a rapid breakdown of law and order in and around camps and to serious violations of refugee and IDP rights, thereby endangering the integrity and security of humanitarian operations,[8] the security of host states, and ultimately the pursuit of durable solutions.[9] Effective interventions to prevent and reduce refugee and IDP militarisation require a clear understanding of the origins of the problem, the dynamic motivations that shape its formation, and the scale and magnitude of its effects.

II. An emerging research agenda on refugee and IDP militarisation

Refugee and IDP militarisation is not a new phenomenon. The militarisation of displaced populations and the camps in which they are contained are issues that have confronted hosting governments and humanitarian agencies since at least the inception of the 1951 Convention Relating to the Status of Refugees.[10] It is when the militarisation of refugees reached new heights during the 1960s and 1970s, particularly in the wake of the independence movements of former European colonies from Latin America to Africa and South and Southeast Asia, that policymakers became seized of the issue.[11] Because post-colonial refugee and

[8] See, e.g., C. Buchanan and R. Muggah, *No Relief: Surveying the Effects of Gun Violence on Humanitarian Aid and Development Personnel* (Geneva: Centre for Humanitarian Dialogue and the Small Arms Survey, 2005), available at www.smallarmssurvey.org; R. Muggah with M. Griffiths, *Reconsidering the Tools of War* (Network Paper No. 39, London: ODI, 2002).

[9] See, e.g., UNHCR, Executive Committee (EXCOM) Conclusion No. 27 (XXXIII), 1982; UNHCR, EXCOM Conclusion No. 32 (XXXIV), 1983; EXCOM Conclusion No. 72 (XLIV), 1993; UNHCR, *The Security, Civilian and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the 'Ladder of Options'*, UN Doc. EC/50/SC/INF.4, 27 Jun. 2000; UNHCR, *The Civilian Character of Asylum: Separating Armed Elements from Refugees.* UN Doc. EC/GC/01/5, 19 Feb. 2001; UNHCR, *Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and Other Locations*, UN Doc. EC/GC/01/9, 30 May 2001; UNHCR, EXCOM Conclusion No. 94 (LIII), 2002; and UN Security Council (UNSC) res. UNSC res. S/RES/1208, 19 Nov. 1998; UNSC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957 of 8 Sept. 1999; UNSC res. S/RES/1296, 19 Apr. 2000.

[10] 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

[11] See, Loescher, *Beyond Charity;* R. Muggah, 'Small arms and forced migration', *Forced Migration Online*, Oct. 2002, available at www.forcedmigration.org/guides/fmo002.

IDP activities aroused considerable anxiety on the part of the governments and elites of these newly-independent states, early reactions and responses tended to be heavy-handed and military-driven. Displacement and concomitant militarisation evoked a challenge to newly acquired 'national' order and 'state' stability – essential features of state consolidation and accepted notions of sovereignty.

Well before the issue of IDPs emerged as a global preoccupation,[12] African countries were particularly affected by refugee miltiarisation in the 1970s and 1980s. For example, camps housing South African refugees in Mozambique and Tanzania were often controlled by members of the military wing of the African National Congress (ANC) and the Pan-African Congress, and were regularly attacked by the South African armed forces.[13] In Angola during the 1970s and 1980s, Namibian refugee camps administered by the then Namibian liberation movement – the South West Africa People's Organization (SWAPO) – were routinely raided by the South African Air Force. In Zambia and Mozambique, refugee camps controlled by Zimbabwean liberation movements were repeatedly assaulted by the armed forces of the former Rhodesian Government. In many cases, these so-called 'armed elements' or 'refugee warriors' were virtually indistinguishable from the civilian population – a blurring characteristic of most internal wars to follow.[14] But refugees who fight cannot, legally, be refugees. Although international humanitarian law disallows combatants from achieving 'refugee' status, distinguishing them from each other is harder to achieve in

[12] See, e.g., R. Muggah, 'Protection and durable solutions: regimes for development and conflict-induced internally displaced and resettled populations', in K. Grabska and L. Metha (eds.), *Forced Displacement: Why Rights Matter* (London: Palgrave Books, 2009), for a review of the emergence of IDP regimes.

[13] Interview with Martin Rupiya, Senior Lecturer in War and Strategic Studies, Department of History, University of Zimbabwe, May 2008.

[14] In international conflicts, international humanitarian law clearly describes who is and who is not a combatant. In non-international or 'internal' conflicts, defining combatants is more difficult. They generally include those who commit acts that are intended to 'cause harm to enemy personnel and *matériel* amounting to a direct participation in hostilities'. But those supplying food and shelter to combatants or generally 'sympathising' with them are not included: ICRC, *The Civilian Character of Asylum: Separating Armed Elements from Refugees*. In either case, host states are obliged to separate combatants from refugees and to intern them as appropriate: see, A. Edwards, 'Crossing legal borders: the interface between refugee law, human rights law and humanitarian law', in R. Arnold and N. Quenivet (eds.), *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff, 2008), ch. 16.

practice. Refugees and erstwhile combatants are often (purposefully and unintentionally) cast as a 'problem' and regularly condemned by elites as a threat to *states*.[15]

Concern with refugee and IDP camp militarisation reached a fever pitch in the late 1980s and early 1990s. Despite mounting alarm registered by relief agencies such as the International Committee of the Red Cross (ICRC), the International Rescue Committee (IRC) and the US Committee for Refugees and Immigrants (USCRI), hosting states, and a modest number of donor governments, the militarisation of refugee and IDP camps persisted – particularly in western, central, and north-eastern Africa and later in the Balkans.[16] Throughout West Africa, for example, sprawling refugee and IDP settlements frequently experienced focused militia recruitment. The movement of heavily armed militia between Sierra Leone, Liberia, Guinea, Cote d'Ivoire and other countries exacerbated simmering political tensions between states and compromised the physical security and safety of refugees and hosting populations. So too in the Great Lakes region of Africa, where rebel groups exploited refugee populated areas of Tanzania and then-Zaire in order to recruit young men, and also as conduits for illegally acquired goods and resources.[17] The social pathologies generated by refugee and IDP militarisation gradually re-emerged in other areas of society, including in host communities and local economies.

International attention and concern with refugee and IDP camp militarisation grew apace. Some of this attention was generated by a nascent academic community intent on examining patterns and

[15] G. Loescher and J. Milner, 'Protracted Refugee Situations: Domestic and International Security Implications' (Adelphi Paper No. 375, London: IISS, 2005).

[16] Muggah, *No Refuge*. Although overall refugee numbers are disputed, there were between 2.42 and 2.93 million refugees in Africa in 2006, increasing to 2.6–3.2 million refugees and asylum-seekers if all those of African origin are included. Due to competing definitions of who is an IDP, the range is much higher. In 2006, UNHCR reported 12.8 million IDPs globally, of which more than 5 million were located in Africa: UNHCR, 2008. By contrast, the Internal Displacement Monitoring Center reported 24.5 million IDPs in 2006 of which 11.8 million were located in Africa: IDMC, www.internal-displacement.org. Communication with Simon Reich, Director, Ford Institute for Human Security, University of Pittsburgh, May 2008.

[17] The experiences in the Great Lakes – particularly the role of the ex-Forces Armées Rwandais (or ex-Armed Forces of Rwanda) soldiers (ex-FAR) and Hutu *génocidaires* – are a paramount example of refugee and refugee camp militarisation.

trends.[18] A number of scholars claimed that refugee and IDP militarisation was increasing in frequency and intensity during the 1990s when compared to previous decades.[19] Another sanguine observer of the UN, William Shawcross, ominously noted that the militarisation of camps was the exception during the 1980s and that by the 1990s it had became commonplace.[20] Some went so far as to quantify the extent of the problem: according to Stedman and Tanner, some 15 per cent of all refugee crises reportedly involved militarised refugees during the 1990s.[21] Meanwhile, practitioners were also more alert to the issue having been scarred by the experiences of refugee and IDP militarisation throughout the Great Lakes in the wake of the Rwandan genocide. For example, the former High Commissioner for Refugees, Sadako Ogata, lamented the 'world-wide … problem of separating refugees from fighters, criminals, or even *genocidaires*'.[22]

Dissenters also rapidly emerged. A number of forced migration specialists disputed the apparent escalation of refugee and IDP militarisation in the 1980s and 1990s – dismissing such claims as more akin to advocacy than empirical research. Lischer, for example, argued that refugee militarisation was neither as novel nor so widespread as many contended. She observed how the popular view of widespread refugee militarisation is reinforced by journalists and academics who focus on a selection of egregious instances of violence.[23] While her conclusions were reached on the basis of a single proxy indicator of refugee militarisation – political violence – they nevertheless remain an important cautionary observation.[24] At the very least, such criticisms signalled the importance

[18] See, e.g., Adelman, 'Why refugee warriors are threats'; S.K. Lischer, *Militarized Refugees Populations: Humanitarian Challenges in the Former Yugoslavia* (Rosemary Rogers Working Paper Series No. 5, 1999); Stedman and Tanner, 'Refugees as resources in war'.

[19] See, e.g., Loescher and Milner, 'Protracted refugee situations'; F. Deng and R. Cohen, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC: The Brookings Institution, 1998); Loescher, *Beyond Charity.*

[20] W. Shawcross, *Deliver Us from Evil: Peacekeepers, Warlords and the World of Endless Conflict* (New York: Simon & Schuster, 2000).

[21] Stedman and Tanner, 'Refugees as resources in war'.

[22] S. Ogata, 'Opening Statement', Presented at the Regional Meeting on Refugee Issues in the Great Lakes, sponsored by the OAU and UNHCR, Kampala, Uganda, 8–9 May 1998.

[23] Lischer, *Refugee Involvement in Political Violence.*

[24] *Ibid.* Lischer administered a quantitative analysis of refugee participation in political violence. Her findings show that the proportion of refugees involved in violence declined from 60 per cent in 1987 to 32 per cent in 1998, with a sharp drop to 13 per cent in 1997. Despite the remarkable drop in the number of refugees affected, the number of receiving states reporting refugee-related violence has remained generally constant, with a slight

of generating more robust longitudinal evidence and appropriate indicators of the real extent of the problem.

There is, in fact, comparatively little evidence of the extent and pervasiveness of refugee or IDP militarisation in Africa or elsewhere. While many governments are adamantly convinced that refugee and IDP camps are rife with armed violence and act as conduits of disorder, little is actually known about the extent to which militarisation occurs or who act as the key perpetrators. Hosting and expelling states regularly denounce refugee and IDP camps for 'exporting' violence into neighbouring communities and for contributing to arms flows and even terrorism, often lacking any basis to make such claims.[25] As such, there are many examples of governments identifying refugees and IDP camps as the source of insecurity. Both the Sudanese and Chadian authorities repeatedly expressed concern to UNHCR and others over the alleged flood of arms into Darfurian IDP and refugee camps and complained of their being controlled by rebels and militia from both countries.[26] In northern Kenya, domestic media outlets regularly denounce Kakuma and Dadaab refugee camps – amongst the largest in the world – for acting as conduits for arms smuggling into Nairobi and other urban centres. Refugee camps in Guinea were also frequently condemned for harbouring vast caches of weapons illegally brought in from neighbouring countries. The fact is that even in the rare instances where weapons are discovered or forcibly seized, they are commonly stored not in, but

increase since the mid-1990s. An average number of sixteen receiving states reported political violence affecting refugees between 1987 and 1991, whereas the same statistic was eighteen states between 1995 and 1998.

[25] It is interesting to note that these 'liquid' or 'fluid' metaphors are similar to those used for refugee and IDP movements to begin with. Some authors have also noted how refugee and IDP movements are anathema to the sedentary aspirations of states. So too with the transfer of military-style weapons, which with the exception of a few notable cases, are usually expected to be retained only by states, thus ensuring their monopoly on the use of force: see, H.L. Malkki, *Purity and Exile: Violence, Memory, and National Cosmology Among Hutu Refugees in Tanzania* (Chicago, IL: University of Chicago Press, 1995); J. Rosenau, 'Stability, stasis, and change: a *fragmegrating* world', in R.L. Kugler and E.L. Frost (eds.), *The Global Century: Globalization and National Security*, Vol. I (Washington, DC: National Defense University, 2001); J. Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minnesota, MN: University of Minnesota, 2000).

[26] Based on personal communications with UNHCR and other authorities in Khartoum between 2005 and 2008 as well as Johan Cels (Senior Policy Advisor, UNHCR) and Alex DeWaal (Programme Director, Social Science Research Council – SSRC), in March 2008.

rather outside, camps.[27] In the case of Tanzania, for example, arms are seldom seen in camps at all and military activities by Burundian refugees residing there such as training drills regularly take place outside the confines of settlements.[28]

Whether exaggerated for political and strategic gain or otherwise, the militarisation of refugee and IDP camps is widely perceived by government representatives as constituting a legitimate threat to (national) security. Responses to the threat are often harsh and explosive. In spite of the considerable potential political and security risks allegedly generated by such militarisation and the growing prominence attached to the issue by UNHCR and its Executive Committee (EXCOM), there is comparatively limited evidence explaining either its causes or symptoms. This is partly because the international relations and legal scholars traditionally concerned with security and stability issues tended to ignore the political or strategic implications of refugee and IDP flows. These experts instead treated forced migrants as 'collateral damage' (i.e. dependent variable) rather than a potentially intervening factor (i.e. independent variable) associated with conflict onset.[29]

In other words, rationalist international relations scholars were more preoccupied with traditional security threats and tensions between unitary nation-states – whether over strategic advantage or resources – than with the particular concerns or interests of non-state actors. Meanwhile, because the forced migration and refugee studies fields

[27] An extreme example of weapons build-ups outside of camps can be found in Rwanda. Arms caches were established along areas of the Zairian border controlled by the *Interhamwe* (i.e. former Rwandan Hutu army and militia members who were responsible for the massacre of several hundred thousand Tutsi and moderate Hutus in the 1994 genocide). Despite repeated warnings by humanitarian personnel to the international community about these stockpiles, little action was taken to address the issue and prevent the ensuing massacres; see, e.g., Small Arms Survey, *Small Arms Survey 2001: Profiling the Problem* (Oxford: Oxford University Press, 2001); Small Arms Survey, *Small Arms Survey 2002: Counting the Human Costs* (Oxford: Oxford University Press, 2002).

[28] Quoting a relief worker in Tanzania, the International Crisis Group (ICG) reported that: 'diplomats keep coming here [Tanzania] asking questions about militarization. We don't see the training in the camps that they fear. They should be looking instead at the huge forest and savannah areas outside the camps. If they really wanted to, they could fly surveillance planes to see … they came only focused on the militarization [sic] of these camps.' ICG, *Burundian Refugees in Tanzania: The Key Factor to the Burundi Peace Process* (ICG Central Africa Report No. 12. 30 Nov. 1999).

[29] See Weiner, 'Security, stability and international migration'; E. Ferris, *Beyond Borders: Refugees, Migrants and Human Rights in the Post-Cold War Era* (Geneva: WCC Publications, 1993).

were shaped by an emergent 'humanitarian paradigm' that privileged rights and needs-based discourses, refugees came to increasingly be cast as 'victims' (and later 'survivors') rather than active agents potentially involved in legitimate political expression or, more rarely, cross-border and domestic political violence.[30] This humanitarian paradigm tended to overlay its own imperatives of 'neutrality' and 'impartiality' across politically divisive and contentious arenas, often (unintentionally) obfuscating the motives and interests of displaced populations themselves.

These two epistemic approaches – the rationalist (i.e. neo-realist and neo-liberal) inclination to focus on interstate relations and the humanitarian neglect of agency – failed to take account of the many real and perceived human security risks presented by refugee and IDP camp militarisation. Proponents of the rationalist school focused primarily on external and well-defined military threats to territorial integrity, while ignoring more unconventional military actors (e.g. armed elements in camps). Meanwhile, the more impartial 'humanitarian school' concentrated on the traumas accompanying displacement and paid comparatively less attention to the political and security dynamics sustaining the process. Over the past decade, discursive transformations in both security[31] and forced migration studies[32] yielded a more progressive inclusion of refugees and IDPs as a referent and dynamic agent of social transformation. Scholars in both traditions thus increasingly accept that the movement of refugees and IDPs constitutes a wide range

[30] T. Havinga and A. Bocker, 'Country of asylum by choice or chance: asylum seekers in Belgium, the Netherlands and the UK', *Journal of Ethnic Studies*, 28 (1999), 43–61; R. Chambers, 'Hidden losers? The impact of rural refugees and refugee programs on the poor hosts', *International Migration Review*, XX (1986), 245–58.

[31] See, e.g., R. Ullman, 'Redefining security', *International Security*, 8 (1983), 129–53; S. Bearman, *Strategic Survey 1990–1991* (London: Brassey's for the Institute of International Security Studies, 1992); R. Miles and A. Thränhardt (eds.), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Pinter, 1995).

[32] See, e.g., Ferris, *Beyond Borders*; M. Weiner, 'Security, stability and international migration', in M. Weiner (ed.), *International Migration and Security* (Boulder, CO: Westview Press, 1991); N.K. Poku and T. Graham, 'Introduction', in T. Graham and N.K. Poku (eds.), *Migration, Globalisation and Human Security* (London and New York: Routledge, 2000); A. Dowty and G. Loescher, 'Refugee Flows as Grounds for International Action', *International Security*, 21 (1996), 43–71; D. Papedimttrou, 'At a crossroads: Europe and migration', in K. Hamilton (ed.), *Migration and the New Europe* (Washington, DC: Center for Strategic and International Studies, 1994); Adelman, 'Why refugee warriors are threats'.

of 'threats' – justified or not – and implicitly draw on a human security perspective in privileging the protection of refugees and IDPs.[33]

Because they are 'legible' or highly visible, refugee and IDP camp militarisation has long preoccupied a combination of policy-makers, practitioners and researchers.[34] In a strict legal sense, armed refugees no longer qualify as refugees. Likewise, combatants cannot become refugees, unless they have surrendered their arms. Nevertheless, a vibrant debate persists over the narrow labelling of forced migrants and the challenges of determining when militarisation does or does not occur. In light of the blurry distinctions between refugees, IDPs, armed civilians and combatants, social science researchers have questioned whether refugees or IDPs can themselves retain their entitlement to protection while armed. These semantic and practical debates aside, international agencies have long been convinced that the preservation of the 'civilian' character of refugee and IDP camps is an essential pathway to safeguarding their humanitarian character.[35] Unfortunately, however, despite the considerable output of rhetoric and policy prescriptions on the subject of dealing with refugee and IDP militarisation, there is actually comparatively limited conceptual clarity or empirical evidence of what the phenomenon is and how it can be addressed.

III. What is refugee and IDP militarisation?

Evidence of solid empirical research on refugee and IDP militarisation are few and far between.[36] Most studies on the issue tend to be more anecdotal than empirical, and informed by a latent bias that displaced people and the camps in which they live often serve as conduits for smuggling and trafficking of arms and munitions.[37] Young unemployed

[33] G. Loescher and L. Monahan, 'Introduction', in G. Loescher and L. Monahan (eds.), *Refugees and International Relations* (Oxford: Clarendon Press, 1999); Loescher and Milner, 'Protracted refugee situations'.

[34] See UNHCR, *UNHCR Statistical Yearbook 2000* (Geneva: UNHCR, 2001); Lischer, *Militarized Refugees Populations.*

[35] See, e.g., J-F. Durieux, 'Preserving the civilian character of refugee camps: lessons from the Kigoma Refugee Programme in Tanzania', *Refugees, Conflict & Conflict Resolution*, 9 (2000), 25–35, available at http://ccrweb.ccr.uct.ac.za/archive/two/9_3/p25_preserving_civilian.html (last accessed 25 Oct. 2008); UNHCR, *The Civilian Character of Asylum: Separating Armed Elements from Refugees.* UN Doc. EC/GC/01/5, 19 Feb. 2001.

[36] A notable exception is the exceptional work of Lischer, *Dangerous Sanctuaries.*

[37] See, e.g., V. Gamba and M. Chachiua, 'Small arms trade in Africa', *New People Africa Feature Service*, 98 (1999); K. Austin, 'Open Letter to the United Nations High

refugee and IDP men are frequently singled out for their involvement in the arms trade, either from their country of origin or locally. Allegations also describe how these activities are undertaken in concert with transnational criminal gangs and corrupt police together with former combatants.[38] Notwithstanding the fact that refugee and IDP camps are themselves primarily resident to the elderly, women and children, rumours persist that arms circulate within and between camps as well as among dormant armed actors and complicit host communities. The impacts of these unsubstantiated claims are far-reaching.

Host governments readily levy accusations against refugees and IDPs for abusing their hospitality or good will. They may also single out the humanitarian community whose members are alleged in certain circumstances to sustain and abet the trade through misguided assistance. These same governments rarely admit that they themselves are potentially implicated in militarisation – either through aggressive security operations or a failure to protect refugees and IDPs. Senior public authorities, including diplomats, representatives of the armed forces, and police, continue to justify restrictions on asylum and forced repatriation by pointing to the refugee- or IDP-related flow of arms and ordinance, although they can seldom validate the relationship.[39] Combined with increasing reluctance among developed countries to support third country resettlement, the so-called 'war on terror,' and the growing priority attached by donors to in-country protection and care and maintenance for would-be refugees, there is a real danger that international protection and asylum are being threatened by an uneven reading of the issue of refugee and IDP militarisation.

Commissioner for Refugees, S. Ogata', 2000, available at www.fundforpeace.org (last accessed Nov. 2000); and D.L. Byman *et al.*, *Trends in Outside Support for Insurgent Movements* (Washington, DC: RAND, 2001).

[38] See, e.g., W. Reno, 'Shadow states and the political economy of civil wars', in M. Berdal and D. Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner, 2000); D. Keen, 'Incentives and disincentives for violence', in M. Berdal and D. Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner, 2000); M. Duffield, *Global Governance and the New Wars: The Merger of Development and Security*, 3rd edn (London: Zed Books, 2005).

[39] In Zambia, having facilitated the flow of arms to the National Union for the Total Independence of Angola (UNITA), the government was well aware of these arms coming back into Zambia carried by Angolan refugees. Confiscated refugee arms regularly made their way into Zambian soldiers' hands, though it is not known whether they were destined for personal use or for the state armoury.

Despite their common usage in popular media, policy and academic circles, there are no clear or commonly accepted definitions of 'refugee/IDP militarisation'.[40] This is particularly disconcerting because such labels confer an array of stigmas and carry political and bureaucratic implications for the prospective protection, care and maintenance (in the vernacular) of displaced persons. A careful review of the forced migration literature suggests a number of tentative ways of defining the parameters of the issue – including 'outward' and 'inward' militarisation. For example, *outward* refugee and IDP militarisation refers to the involvement of individual (or groups of) refugees, IDPs and/or exiles (diaspora) in militaristic activities within and outside refugee and IDP camps. These *activities* can include real or implied political violence, military training, explicit and tacit support for combatants, and armed resistance.[41] Likewise, *inward* refugee and IDP militarisation may include a combination of military or armed attacks against refugees/IDPs *within* camps; the storage and diffusion of weapons; forced and voluntary recruitment; the presence of armed elements;[42] criminal violence within camps; and the exploitative use of relief/development resources by non-refugee/IDP residents and their dependants (see Table 1).[43]

'Militarisation' in the context of refugees and IDPs therefore includes the launching of attacks from camps, military training and recruitment, infiltration and the presence of armed elements, political activism leading

[40] Lischer, however, provides a rare exception. She claims that: 'the term militarization describes noncivilian [sic] attributes of refugee-populated areas, including military training, recruitment, and the inflow of weapons. Militarization also includes actions of refugees and/or exiles who engage in noncivilian activity outside the refugee camp, yet depend on assistance from refugees or international organizations': Lischer, *Dangerous Sanctuaries*, 167.

[41] For the purposes of this chapter, IDP militarisation is similar, and refers to the 'involvement of individual (or groups) of IDPs in militaristic activities within and outside IDP camps'. The question of defining IDP militarisation is potentially more complex than for refugees because of the lack of agreed and legally binding standards for what constitutes IDP status. While the *Guiding Principles on Internal Displacement* (1998) have to some extent clarified the rights of the internally displaced and responsibilities of host governments, there is still no consensus on when IDP status can be said to have begun or ended. See, e.g., C. Phuong, *The International Protection of Internally Displaced Persons* (Cambridge: Cambridge University Press, 2005); R. Muggah, *Relocation Failures: A Short History of Displacement and Resettlement in Sri Lanka* (London: Zed Books, 2008); Muggah, 'Small arms and forced migration'.

[42] Armed elements include ex-combatants, soldiers who refuse to hand in their weapons after seeking asylum, rebels, militias, criminal gangs, police and armed forces of the host states, armed private security firms and armed vigilantes and individuals.

[43] See, e.g., Muggah, *No Refuge*.

Table 1. *Indicators of refugee and IDP militarisation*

Outward militarisation	**Inward militarisation**
Clear evidence of militarised activity in and outside camps, settlements and urban environments.	Armed violence directed against refugees/IDPs in and outside camps.
Political activism involving the use of armed violence.	Forcible training and recruitment of refugees and IDPs.
Storage and trafficking in small arms and light weapons.	Infiltration of armed elements and manipulation of camps and existing structures.
Military training and recruitment.	Criminal violence and victimisation in camps, settlements and urban settings involving refugees and IDPs.
Support for combatants and armed resistance.	Presence of armed guards (public or private) in camps and settlements.
Manipulation of relief/development resources to fund violent or militant activity.	

to armed violence and criminal violence within camps, and the storage and diffusion of weapons. The distinction between outward and inward militarisation highlights the way refugees and IDPs comprise both voluntary and reluctant perpetrators and victims. For example, in the case of Uganda, until recently most camps and settlements were exposed to escalating levels of inward militarisation due to the presence of Lord's Resistance Army (LRA) combatants, Karamoja pastoralists and common criminals. The motivation for such militarisation included a combination of forced recruitment, the pursuit of assets including food and non-perishable goods, and politically motivated violence. Arms caches, usually of assault rifles, grenades and ammunition, were occasionally uncovered outside of refugee settlements, though this was a rare event.[44]

The manifestations of inward militarisation were highly visible. Virtually all IDP camps were fortified with barracks, and housed a military presence with heavy deployments of army forces and militia groups. The policy of the Ugandan army was to increase overall militarisation in order to pursue LRA combatants and to 'protect' refugee settlements and IDP camps. Although the majority of IDPs were not outwardly

[44] R. Muggah, 'Crisis turning inward: refugee and IDP militarization in Uganda', *Humanitarian Exchange*, No. 29 (London: ODI, Mar. 2005), available at www.odihpn.org/report.asp?ID = 2574.

'militarised' *per se*, a considerable number of young men were recruited into paramilitary-style self-defence units. They were trained by the army, with some members redeployed to other parts of the country or even abroad. Consequently, in the central and north-eastern districts, Acholi leaders and displaced people were increasingly reluctant to volunteer for 'militia' service or civil defence activities without guarantees against redeployment to other districts. It was widely felt that the widespread presence of militias, with relatively ambiguous controls, potentially constituted a long-term threat to the protection of refugees, IDPs, and civilians more generally.[45]

IV. Approaches to conceptualising refugee/IDP militarisation

Refugee militarisation can emerge as a result of a combination of long-term structural factors as well as poorly articulated and executed social policy. Inevitably, outward and inward refugee and IDP militarisation is shaped by the context in which displacement and resettlement occurs, the relative sympathies of hosting governments, the involvement of refugees and IDPs in a given struggle and the spatial location and morphology of camps.[46] Ultimately, there is no single raison d'être or causal factor that adequately captures the complex motivations shaping refugee and IDP militarisation. For the purposes of this chapter, three analytical lenses are advanced to develop a more nuanced view of the causes and consequences of militarisation. The first perspective assumes that refugees/IDPs and their camps are *manipulated* from above and serve as *de facto* instruments of warfare. The second perspective envisions refugees and IDPs as *active agents*, rather than passive recipients in determining whether or not to become militarised. A third perspective considers the *humanitarian response* to the phenomenon and the role of international actors in unintentionally exacerbating or hindering militarisation. When combined, the unified optic allows for a more nuanced and human security-oriented approach to apprehending the manifold ways displaced populations experience militarisation.

A. Manipulating refugees and IDPs

A clear measure of refugee and IDP militarisation is their voluntary (or involuntary) participation in and overt support of internal and

[45] Muggah, *No Refuge;* Muggah, 'Crisis turning inward'.
[46] Muggah, *No Refuge.*

cross-border armed conflicts. The actual engagement of displaced populations in warfare was an especially common phenomenon during the US–Soviet proxy conflicts in Asia and Africa throughout the 1960s, 1970s and 1980s. The expression 'refugee warriors' emerged in relation to former Mujahadeen combatants based in Pakistani refugee camps – but soon spread far beyond Pakistan and Afghanistan. In the early 1990s, Loescher observed how refugees were being used as instruments of warfare and for military strategy – a tool of covert operations and the proxy conflicts that persisted during (and in the aftermath) of the Cold War.[47] Unsurprisingly, a controversial debate soon emerged over the extent to which refugees or IDPs were either 'manipulated' from above or acted as 'willing agents' in such activities.[48]

According to Stedman and Tanner, key proponents of this interpretation, 'manipulation' is commonplace and occurs in a variety of contexts. They point to the opportunistic and instrumental use of 'refugee suffering' by warring parties to advance specific political and strategic interests. In many cases, diaspora groups and refugee leaders mobilise public images of suffering to encourage support for military or humanitarian intervention. As such, indicators of manipulation include the siphoning-off of humanitarian assistance for military ends,[49] repeated intimidation, the application of coercive pressure, the use of militaristic propaganda, and the purposive denial of assistance. At its most extreme, manipulation results in the engagement of refugees and IDPs in military-related activities.[50]

Instances of manipulation did not go unnoticed. Indeed, refugee and IDP manipulation was regularly condemned by the UN Security Council

[47] Loescher, *Beyond Charity*.

[48] Lischer, *Dangerous Sanctuaries*.

[49] This occurred, for example, in the case of Sudanese Peoples' Liberation Army (SPLA) recruits in southern Sudan when they sought to prevent refugee repatriation or IDP return and resettlement. Refugee return and repatriation was also prevented in a variety of situations due to the capacity of armed elements to intimidate refugees. For example, in Rwanda, armed elements in (then) Zairean camps used their position to control the information passed on to refugees and were able to indoctrinate camp members. Their hold was such that when UNAMIR air-dropped pamphlets into the camps in August 1994 (in a bid to draw attention to the favourable conditions in Rwanda for the return of Hutu refugees), this was interpreted by many as support for the new regime in Kigali. As such, it was seen as a UN-driven process of involuntary repatriation. See G. Mthembu-Salter, 'The wheel turns again: militarization and Rwanda's Congolese refugees', in Muggah, *No Refuge*.

[50] Stedman and Tanner, 'Refugees as resources in war'.

(UNSC) in the 1990s. The UNSC (2001) observed how 'the failure to separate armed elements from civilians allows armed groups to take control of a camp and its population, politicising their situation and gradually establishing a military culture within the camp'.[51] Such pronuncements were often based on reports from practitioners who witnessed manipulation of refugees and IDPs in the former-Zaire among Rwandan refugees, as well as with Tanzania's Burundian refugee caseload, Liberian and Sierra Leonean refugees in Guinea, Liberians in Cote D'Ivoire, amongst the Sudanese residing in northern Uganda and, more recently, eastern Chad and Darfur.

It is precisely because certain refugee and IDP camps offer safety, security and resources that proponents of the 'manipulation' approach argue that they are ideal sites for outward militarisation to take hold. The 'protected status' afforded refugees under international (refugee) law should, in theory, ensure a degree of safety against reprisals and reduce dependence on the political and economic backing of host states. Lischer observes how armed elements find smaller camps easier to manipulate and control than larger ones.[52] At the same time, there is some evidence that crowded camps also provide cover for armed groups – whether insurgents or organised criminals – and serve as ideal bases for military or other types of operations. But large refugee and IDP camps are also exposed to above-average rates of inward militarisation. According to the Ford Institute, larger camps tend to be more susceptible to attacks than smaller ones.[53] In Sudan, for example, according to available data, more than two-thirds of the 101 camps with populations over 10,000 were attacked while less than one-third of the 188 camps with populations of less than 10,000 were attacked over the same period. Their proximity to international borders in marginalised and ungoverned spaces – as is often the case – is believed to facilitate such activities.[54] There is also evidence

[51] UNSC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/2001/331 of 30 Mar. 2001, available at http://domino.un.org/UNISPAL.nsf/0/e8b5234d0339a2c385256c8700549672?OpenDocument.

[52] Lischer, *Dangerous Sanctuaries*.

[53] The Ford Institute sought to better understand what puts displaced people at risk of armed violence. It reviewed more than 1,500 refugee and IDP camps in Burundi, DRC, Liberia, Senegal, Sierra Leone, Sudan and Uganda and identified more than twenty-five factors that intensified risks and enhanced resilience: see Ford Institute, *Internally Displaced Persons and Refugee Camp Security*, Background Paper for the Small Arms Survey (Geneva: Small Arms Survey, 2008).

[54] Current international standards issued by UNHCR emphasise the importance of locating refugee and IDP camps at least 50 km from neighbouring country borders. But the 50 km buffer between camps and borders or conflict zones does not necessarily protect them.

that the (relative) abundance of humanitarian relief assistance in refugee and IDP camps serves as a magnet for and indirectly provides armed elements with economic resources independent of external patrons.[55]

Refugees and IDPs are also regularly manipulated by host states and 'third parties'.[56] Since the logistical demands of triggering small-scale and incipient armed conflicts in Africa are relatively modest, even poor states can readily facilitate the emergence of a resistance movement to trouble their neighbours.[57] The voluntary and forced recruitment of refugees as 'freedom fighters' and guerrillas has occurred on every continent.[58] In Africa, for example, the governments of Eritrea, Ethiopia and Somalia, as well as Libya, Chad and Sudan, have instrumentally used asylum and assistance to so-called 'refugee warriors' as a form of surrogate support for rebel movements in neighbouring states.[59] Many of these activities have antecedents in Cold War-inspired conflicts.[60] The usual strategy of the superpowers was to exploit and exacerbate the pre-existing fault lines of simmering armed conflicts or to create new ones where they had not previously existed. It is well known that war by proxy entailed an unrestrained and continuous flow of weapons and aid to refugee groups in various theatres of conflict – though verifiable evidence is limited.[61]

B. Refugees as agents and victims of militarisation

The burgeoning literature on refugee and IDP militarisation contains many references to cases where so-called refugees and IDPs applied armed violence to advance their own agendas. In some cases, refugees inhabit camps and settlements overseen by militant leadership structures

[55] Terry, *Condemned to Repeat?*; Loescher and Milner, 'Protracted refugee situations'.
[56] Byman *et al.*, *Trends in Outside Support for Insurgent Movements*.
[57] The recent attempt by a few dozen South African mercenaries to launch a coup in Equatorial Guinea is a good example of this.
[58] Loescher, *Refugee Movements and International Security*; Loescher, *Beyond Charity*.
[59] Y. Sayigh, *Confronting the 1990s: Security in the Developing Countries*, Adelphi Paper No. 251 (London: Brassey's for the International Institute for Strategic Studies. 1990). In the former Zaire, the late president Mobutu Sese Seko, and subsequently Laurent Kabila and his son, Joseph Kabila, used ex-FAR, while Tanzania has used Burundian refugees to achieve strategic goals.
[60] Loescher, *Refugee Movements and International Security*.
[61] Barber, 'Feeding refugees, or war?'; Small Arms Survey, *Small Arms Survey 2002*; Small Arms Survey, *Small Arms Survey 2003: Development Denied* (Oxford: Oxford University Press, 2003); Muggah, *No Refuge*.

intent on recapturing their 'homeland' (e.g. Sri Lankan Tamils in the southern Indian state of Tamil Nadu), the destabilisation of existing regimes (e.g. Burundian refugees in southern Tanzania), or the securing of a separate state (e.g. Timorese or Kosovar refugees living in Western Europe and Australia).[62] Alternatively, exiles, including refugees, may find that given their relative destitution, the most socially meaningful and economically rewarding activity is to join militant or criminal organisations.[63]

Where displaced person camps and settlements are located close to, or form part of, the front line of an armed resistance, as was the case of Sudanese refugees in northern Uganda or north-western Kenya, armed conflict can become the predominant reality for an entire generation of refugees and IDPs. Where they share ethnic affiliations with host populations, they can also outwardly and inwardly militarise ostensibly pacific communities. Zolberg *et al.* have shown convincingly that in such scenarios it is conceivable that armed militants are seen as 'protectors' or safeguards of refugee/IDP community values, ambitions and memories, thus forging more closely the links between the refugee/IDP, the warrior and the community.[64]

While the expression 'refugee warrior' may itself be a misnomer, the direct and indirect participation of refugees and IDPs in armed conflicts routinely takes place. Brown recorded the ways in which refugees and gangs of current and former combatants that cross borders can lead to the internationalisation of conflict.[65] According to Byman *et al.*, 'refugee flows and insurgencies feed into one another' – and can regularly contribute to the onset and extension of war.[66] Stedman and Tanner agree that 'there are cases in which refugees grant legitimacy to the warriors by supporting their activities'.[67] In addition to war, outwardly militarised refugees can also contribute directly and indirectly to the onset of lower-intensity political violence.[68]

[62] Lischer, *Dangerous Sanctuaries*; Loescher, *Beyond Charity*; Zolberg *et al.*, *Escape from Violence*.

[63] Durieux, 'Preserving the civilian character of refugee camps'.

[64] Zolberg *et al.*, *Escape from Violence*.

[65] M. Brown, 'Introduction', in M. Brown (ed.), *The International Dimensions of Internal Conflict* (Cambridge, MA: Center for Science and International Affairs, 1996).

[66] Byman *et al.*, *Trends in Outside Support for Insurgent Movements*.

[67] Stedman and Tanner, 'Refugees as resources in war'.

[68] Countries reporting political violence among refugees include Uganda involving Rwandans and Sudanese, then-Zaire involving Rwandans and Burundians, Tanzania involving Rwandans and Burundians, Ethiopia involving Sudanese, Guinea involving Liberians and Sierra Leoneans, Cote D'Ivoire involving Liberians, Sierra Leone involving Liberians, and Liberia involving Sierra Leoneans.

There is also anecdotal evidence of militarised refugees and IDPs actively harnessing humanitarian and development aid to fill their war chests. Loescher detected how 'humanitarian aid is used widely, both by small and big powers and even by refugee warrior groups [*sic*], to serve strategic and military goals'.[69] Practitioners are often conscious of how rations and logistics architecture can be linked to the procurement of weapons by refugees and IDPs to sustain armed conflicts or for self-defence.[70] According to Barber, 'the aid that flows to the camps where the refugees are gathered can be skimmed by militants based in camps'.[71] Even where insurgent groups enjoyed the support of powerful patrons and diaspora communities, humanitarian and development aid has proved to be an indispensable supplement. Voluntary and involuntary contributions or 'taxes' of rations are not uncommon, and have been documented in Rwandan camps in the Democratic Republic of the Congo (DRC) and western Tanzania, as well as among Sudanese refugees in Uganda and Kenya, and Burundian refugees in Tanzania.[72] In Darfur, there has been an increasing tendency simply to cut out the middle man and seize vehicles, equipment and funds directly from relief workers.

Refugee and IDP militarisation is particularly acute where refugees and IDPs are known to acquire, possess and traffic arms, as well as where camps and host communities are used for arms storage and trans-shipment. As potentially active (voluntary or involuntary) agents in armed conflict, refugees and IDPs can contribute to the proliferation of weaponry as both end-users and intermediate suppliers.[73] Refugee camps are also often used as part and parcel of a military strategy by belligerents in a conflict – including as strategic buffers. The Rwandan camps based in eastern Zaire in 1994 and the IDP camps established in so-called High Security Zones throughout northern and eastern

[69] Loescher, *Refugee Movements and International Security.*

[70] See, e.g., Anderson, *Do No Harm*; Small Arms Survey, *Small Arms Survey 2001*, 227; Terry, *Condemned to Repeat?;* Muggah, 'Crisis turning inward'.

[71] Barber, 'Feeding refugees, or war?'.

[72] Muggah, *No Refuge;* Stedman and Tanner, 'Refugees as resources in war'; Terry, *Condemned to Repeat?*

[73] The demand for small arms by refugees and the presence of such arms in refugee camps can occur under a variety of scenarios: (1) whenever there are armed elements in camps, including criminal gangs; (2) where refugees support armed insurgency; (3) whenever refugee camps are used for arms storage and trafficking; and (4) whenever refugees are engaged in armed resistance.

Sri Lanka are widely cited examples.[74] In such situations, the tightly prescribed mandates of the UN peace-keeping operations can be exploited, as was the case with arms trafficking undertaken by the then Mobutu regime or even between the Sri Lankan Government and the LTTE in order to drive out the Indian peace-keeping force in the late 1980s.

While the acquisition of arms by refugees and IDPs for offensive purposes is pertinent, it is equally important to acknowledge that inward militarisation can be inspired by defensive motivations. The physical protection provided by host governments and their security apparatus to camps ranges from predatory to non-existent. When police or private security actors are absent or abusive, refugees and IDPs are forced to contend with precarious exposure to hostile armed groups or forced recruitment by militant groups. Female Somali refugees in the Kenyan refugee camps of Dadaab and Kakuma, for example, are regularly attacked when collecting firewood and subsistence market goods.[75] The provision of perimeter security, substitution of fuel-efficient stoves, and privately contracted fuel-collection services are all examples of soft interventions intended to minimise armed violence perpetrated against refugees and IDPs.

Whatever the motivation for refugee and IDP camp militarisation, the response by host governments tends to be coercive. Aggressive enforcement can be attributed equally to a given state's authoritarian tendencies or the political and popular dividends of cracking-down on visible minorities. Governments in both northern and southern Sudan, for example, launched a number of controversial forcible disarmament campaigns against IDP camps throughout Darfur and the so-called transitional states between the north and south. Likewise, the Ugandan People's Defense Force undertook assertive disarmament campaigns in IDP camps across northern Uganda.[76] Mtango described how states launched direct military actions in refugee camps suspected of supporting armed insurgents.[77] Likewise, Posen

[74] Muggah, *Relocation Failures*; UNHCR, *UNHCR Statistical Yearbook 2000* (Geneva: UNHCR, 2001).

[75] J. Crisp, *Lessons Learnt from the Implementation of the Tanzania Security Package* (Geneva: UNHCR Evaluation and Policy Analysis Unit, UN Doc. EPAU2001/05, 2001); R. Muggah and E. Berman, *Humanitarianism under Threat: The Humanitarian Impacts of Small Arms and Light Weapons* (Geneva: Small Arms Survey, 2001).

[76] Muggah, 'Crisis turning inward'.

[77] E. Mtango, 'Military and armed attacks on refugee camps', in G. Loescher and L. Monahan (eds.), *Refugees and International Relations* (New York, NY: Oxford University Press, 1989).

documented how military interventions are frequently launched against camps as a pretext to address 'root causes' of the problem even if the real motives may be more insidious.[78] In such scenarios, refugee, IDPs and host communities suffer directly. Refugees and IDPs regularly report rates of fatal and non-fatal injury that exceed the national average, as well as increasing exposure to armed criminality and harassment in areas that become heavily militarised.[79] The pervasive climate of insecurity also has negative consequences for the achievement of durable solutions – stated objectives of the humanitarian community.[80]

C. *Refugee militarisation and the humanitarian community*

As the foremost international agency charged with protecting refugees and IDPs,[81] UNHCR is (reluctantly) at the forefront of addressing refugee and IDP militarisation. With its primary statutory mandate to provide international protection and durable solutions for refugees and IDPs,[82] the agency confronted the issue of outward and inward militarisation in a predictable fashion – by adopting a displacement-centric approach and focusing on refugees and IDPs themselves.[83] Over the past decade, UNHCR, donor and host states, and implementing partners elaborated a number of normative and practical measures to demilitarise refugees

[78] B. Posen, 'Military responses to refugee disasters.' *International Security*, 21 (1996), 72–111.

[79] See, e.g., Muggah and Berman, *Humanitarianism under Threat*. Research undertaken in Dadaab and Kakuma camps, for example, revealed that some 75 per cent of all reported rape incidents involved one or more armed assailants.

[80] This was highlighted by UNHCR and recent EXCOM statements, which noted the ways in which the proliferation of arms in camps and cross-border attacks can impede voluntary repatriation and undermines the reintegration of refugees.

[81] In 2007, the UNHCR developed an IDP Unit to oversee protection and durable solutions for IDP populations. Though a debate persists over which agency 'should' take the lead, the Office of the Coordinator for Humanitarian Affairs (OCHA) and other UN agencies have been less intensely engaged in formulating strategies for protection and durable solutions. See, Muggah, *Relocation Failures*.

[82] See, e.g., Art. 8, 1950 Statute of the Office of the United Nations High Commissioner for Refugees, GA res. 428 (V), 14 Dec. 1950, The UNHCR's mandate was later expanded to cover IDPs in the late 1990s: see, UNHCR, *The Protection of Internally Displaced Persons and the Role of UNHCR*, Informal Consultative Meeting, 27 Feb. 2007, available at www.unhcr.org/refworld/docid/45ddc5c04.html (last accessed 25 Oct. 2008). See Muggah, *Relocation Failures*.

[83] EXCOM Conclusion No. 94 (LIII), 'The Civilian and Humanitarian Character of Asylum' UNHCR Executive Committee, 53rd session, UN Doc. A/AC.96/965/Add.1 and Conclusion No. 94 (LIII), 16 Jun. 2002.

and refugee camps.[84] As such, it established a loose doctrine associated with refugee and IDP demilitarisation that currently informs its practical responses. Stipulated under international law, primary responsibility for the protection of refugees – including ensuring their physical security and maintaining the civilian character of refugee camps and asylum – rests with host governments.[85] In certain extreme cases, however, UNHCR recognises that governments may be unable or unwilling to prevent militarisation from occurring. In these instances, the agency accepts that it may need to become involved.

In practical terms, the demilitarisation of refugee and IDP camps focuses on identifying and preventing armed elements from entering camps, separating armed actors from civilians, and introducing policing measures to enhance safety and security. For example, UNHCR recommends that:

> once armed elements among refugees have been separated and disarmed, the fighters (combatants) should be interned at a suitable location far from the border, or otherwise prevented from continuing their armed struggle or endangering the refugee population. Those confined are entitled to the basic necessities of life, and to be protected from forcible return to their own country under international humanitarian law.[86]

The screening and disarming of incoming refugees or new IDPs is only occasionally undertaken by host authorities – much less so during mass influxes or displacements such as those accompanying Africa's wars. UNHCR determined that unless combatants are prepared to abandon their weapons voluntarily or through organised disarmament, demobilisation

[84] See EXCOM Conclusion No. 27 (XXXIII), 'Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere' (1982); EXCOM Conclusion No. 32 (XXXIV), 'Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere' (1983); UNHCR, *The Civilian Character of Asylum: Separating Armed Elements from Refugees*. UN Doc. EC/GC/01/5, 19 Feb. 2001; EXCOM Conclusion No. 94 (LIII), 'The Civilian and Humanitarian Character of Asylum' UNHCR Executive Committee, 53rd session, UN Doc. A/AC.96/965/Add.1 and Conclusion No. 94 (LIII), 16 Jun. 2002.

[85] See, e.g., EXCOM Conclusion No. 81 (XLVIII), para. (d) (1997) which '*emphasizes* that refugee protection is primarily the responsibility of States, and that UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States'. See also ICRC, '*The Civilian Character of Asylum: Separating Armed Elements from Refugees*', which lays out provisions in international humanitarian law including the Fifth *Hague Convention* of 1907 respecting the *Rights and Duties of Neutral Powers and Persons in Case of War on Land*.

[86] UNHCR, *Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and Other Locations*, UN Doc. EC/GC/01/9, 30 May 2001. See, e.g., www.unhcr.org/protect/PROTECTION/40ebf51b4.pdf.

and reintegration (DDR) programmes,[87] it is exceedingly difficult for poorly armed or unarmed customs officials – much less UN humanitarian workers – to disarm them. Moreover, as soon as armed combatants merge with civilian refugee or IDP populations, screening and separation become exceedingly problematic.[88] Indeed, where there is outright resistance to demilitarisation, more muscular military or policing action may be required. But as the case of militarised Rwandan refugees in what was formerly eastern Zaire has shown, even disciplined and heavily armed military forces may refuse or not be up for the task.[89]

UNHCR has reluctantly come to recognise the importance of enhancing security – and controlling the spread of arms – to achieve its basic protection mandate. For example, Goal 4 of UNHCR's *Agenda for Protection* highlights a variety of security-related concerns. The agenda emphasises the pivotal importance of preserving law and order; curtailing the flow of arms into refugee camps and settlements; disarming armed elements; and identifying, separating, and interning combatants as practical approaches to addressing the problem.[90] Conclusions of UNHCR's Executive Committee likewise called for concrete steps to deal with the problem of refugee militarisation and the importance of adopting practical measures in camps themselves to improve security. For example, the Executive Committee referred explicitly to the need for measures to identify, separate, disarm and intern combatants during refugee emergencies.[91] It further calls upon UNHCR and the UN's

[87] For a review of DDR programmes in Africa, consult R. Muggah (ed.), *Security and Post-Conflict Reconstruction: Dealing With Fighters in the Aftermath of War* (New York, NY: Routledge, 2009) and R. Muggah, 'No magic bullet: a critical perspective on DDR and weapons reduction in post-conflict contexts', *International Journal of Commonwealth Studies,* 94 (2005), 239–52.

[88] The ICRC cautions against the assumption that all former combatants should be excluded from the protection of the 1951 Refugee Convention. While some combatants may not be entitled to refugee status, the ICRC counsels for a case-by-case determination, particularly in light of the difficulties of distinguishing who is and is not a combatant: ICRC, *The Civilian Character of Asylum: Separating Armed Elements from Refugees.*

[89] E.g., following the failure of the UN Security Council and the Zairean Government to respond to calls by the UN High Commissioner for Refugees and UN Secretary-General for a greater peace-keeper presence in eastern Zaire, UNHCR was forced to hire President Mobutu's Presidential Guard to secure the Goma camps during the Rwandan refugee crisis. See G. Mthembu-Salter, 'The wheel turns again: militarization and Rwanda's Congolese refugees', in Muggah, *No Refuge.*

[90] It is important to stress that combatants are not, and cannot, become refugees under existing international humanitarian and refugee law. See, e.g., UNHCR (2002, Goal 4).

[91] See, e.g., EXCOM Conclusion No. 94 (LIII), 16 Jun. 2002, para. c (II)).

Department of Peacekeeping Operations (DPKO) to deploy 'multi-disciplinary assessment teams to clarify the situation on the ground, evaluate security threats for refugee populations and consider appropriate practical responses'.[92] The approach of the UNHCR is very much aligned with the general concerns and proposed responses of the UN Commission on Human Security.[93] This is perhaps not altogether surprising, given that the former UN High Commissioner for Refugees, Sadako Ogata, served as its head.

Partly in response to failures to prevent or deal appropriately with the aftermath of the Rwandan genocide of 1994, UNHCR introduced a 'ladder of options' in the late 1990s to identify, prepare for and respond to particular (militarised) situations as they arose. Recognising the limits of ostensibly humanitarian interventions and the need in some cases for more overt political or military engagement, UNHCR advanced a three-fold approach to improving the physical security of refugees in camps. *Soft options* focused on ensuring the permanent presence of international personnel in or close to camps. They also included the locating of camps at a suitable distance from international borders and ensuring that they did not exceed a certain population size (e.g. no more than 20,000).[94] Soft options also included the election of refugee leaders to promote the civilian and humanitarian character of the camp. *Medium options* included working with local law enforcement agencies (or private security actors), providing training and support to establish national law enforcement capacity, and deploying international civilian and police monitors with the consent of the host state. Finally, *hard options* were to be used in only the rarest of cases, and included the deployment of multinational or regional forces in situations where other interventions had failed.[95]

[92] See, e.g., *ibid.* para. g(II) and UNSC *Final Report of the International Commission of Inquiry*, UN Doc. S/1998/1096, 18 Nov. 1998 and UNSC, *The Situation on Africa Including Refugee Camps.* UNSC res. S/RES/1208, 19 Nov. 1998.

[93] See, e.g., UN Commission on Human Security, *Human Security Now*, ch. 3.

[94] It is worth recalling also that Art. 2(6) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention), 10 Sept. 1969, 1001 UNTS 45; entered into force, 20 Jun. 1974, provides that countries of asylum shall, for reasons of security, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin. That having been said, according to a study undertaken by the Ford Institute (2008), the 50km buffer between camps and borders or conflict zones advocated by UNHCR does not appear to enhance protection universally.

[95] This aspect is derived from UN Security Council's *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/2001/331 of

The ladder of options was institutionalised at the headquarters and field levels in 2000. Early efforts to mainstream the concept yielded some dividends. For example, UNHCR introduced field security officers (FSOs) as part of emergency response teams at the beginning of a refugee or IDP crisis to collaborate with national and local public security institutions.[96] It also established an arrangement with DPKO collectively to assess threats and consider appropriate responses through 'reconnaissance' and 'assessment' missions. Also, UNHCR's Emergency Preparedness and Response Section and the Field Safety Section were merged into the Emergency Security Service (ESS) and administered by a senior-ranking official.[97] Such interventions were dismissed by Stedman and Tanner and Durieux as palliative and 'toothless' for their inability to contend with uncooperative host states and armed elements.[98] Indeed, there is a clear absence of policy alternatives should the UN Security Council refuse to intervene with a Chapter VI or VII mandate – a likelihood that UN officials publicly concede.[99]

Since the introduction of the ladder of options, UNHCR has advanced an array of practical and country-specific interventions on the ground. For example, in Tanzania, a 'security package' was developed to improve security in Burundian camps, and FSOs were deployed to support the process.[100] In Guinea, UNHCR at first pursued more soft options by

30 Mar. 2001, which notes that where armed elements are found and national forces are unable or unwilling to intervene, the international community should consider a range of options including the deployment of international and regional military forces prepared to take effective measures to protect civilians. These measures may include the disarmament of combatants and armed elements.

96 Several types of FSOs have been proposed: (1) police FSOs liaising with local police; (2) public security FSOs working with military forces of the host country; (3) humanitarian security and investigation FSOs providing expertise on criminal procedures in partnership with local judicial authorities; and (4) FSOs with expertise on discrete issues such as sexual and domestic violence.

97 ESS operates in close cooperation with the regional bureaux and coordinates UNHCR's preparedness for, and response to, emergencies, as well as the safety and security of staff and refugees. According to informants within UNHCR, ESS was restructured and strengthened in 2005 to more effectively address policy development and capacity building in the areas of emergency and security management.

98 Stedman and Tanner, 'Refugees as resources in war'; Durieux, 'Preserving the civilian character of refugee camps'.

99 E.g., Chapter VI or VII, as noted in the UN Charter 1945.

100 See, E. Mogire, 'Preventing or abetting: refugee militarization in Tanzania', in Muggah, *No Refuge*. In 1998, in the Burundian refugee camps in Tanzania, UNHCR started supporting some 270 Tanzanian police officers whose task was to enhance security and to assist in ensuring the camps' civilian and humanitarian character.

relocating refugee camps away from the border to protect refugees from attacks by Sierra Leonean and Liberian rebels. UNHCR later entered into a formal agreement with the Canadian Ministry of Foreign Affairs and the country's Royal Canadian Mounted Police (RCMP) that led to the deployment of two RCMP officers who worked with the Guinean Brigade Mixte (gendarmerie and police) in capacity-building efforts towards improved camp security.[101] In Kenya's two protracted camps in Dadaab and Kakuma, police reservists and armed security guards were hired by UNHCR to guard refugee populations.[102]

While these and other interventions arguably enhanced the physical security of some refugee populations, they have not necessarily prevented the outward or inward militarisation of refugees or refugee camps. More recently, the ESS developed a number of supplementary operational responses to deal with the problem of militarisation, including the development of so-called Humanitarian Security Officers (HSOs) to be seconded from DPKO and international police services. Drawing from the experience of Tanzania, Kenya, Guinea (with the RCMP) and elsewhere, these efforts have allowed UNHCR to develop a specialist profile to be known as the Refugee Security Liaison Officer (RSLO).[103]

The *de facto* disarmament of armed elements and combatants mixed within large refugee populations entering host countries or residing in camps has only been attempted sporadically. A major challenge continues to be the difficulty in differentiating armed elements from genuine refugees. As Yu made clear in the context of the DRC:

> preliminary screening may identify some armed elements, [but] the lack of clear markers on militia members or other irregular forces makes it

[101] J. Milner and A. Christoffersen-Deb, 'The militarization and demilitarization of refugee camps and settlements in Guinea, 1999–2004', in Muggah, *No Refuge*.

[102] See Durieux, 'Preserving the civilian character of refugee camps'; ICG, *Burundian Refugees in Tanzania: The Key Factor to the Burundi Peace Process* (ICG Central Africa Report No. 12. 30 Nov. 1999). In the late 1990s, in order to respond to growing insecurity in Kakuma and Dadaab refugee camps, UNHCR supported the hiring of more than 150 informal police reservists to patrol the camps and provide security.

[103] These efforts have not only taken place in Africa. For example, in Kosovo Albanian refugee camps in Macedonia in 1999, UNHCR arranged for the deployment of international police advisors to work in partnership with the local police: see UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000); K. Jacobsen, 'A framework for exploring the political and security context of refugee populated areas', *Refugee Studies Quarterly*, 19 (2000), 3–22; and J. Crisp and K. Jacobsen, 'Security in refugee populated areas', *Refugee Studies Quarterly*, 19 (2000), 1–2.

> nearly impossible to differentiate between combatants and *bona fide* refugees. In cases where combatants can be clearly identified, unless they are willing to give up their arms, unarmed border guards or UNHCR Protection Officers will be ineffective in preventing camp militarisation.[104]

Effective practical disarmament depends on the enduring commitment of host states and the international community. But as the case of the former-Zaire illustrates, political will is often difficult to mobilise. The host country can, and often does, nurture a rather different agenda than outside states, that it pursues while stringing along the international community through endless meetings and *ad hoc* commissions. In many cases police forces are themselves affected by systemic corruption and poorly staffed and under-resourced. Where political will exists, the actual removal and collection of weapons from refugee camps is an intrinsically complex process. Past efforts were forcible and generally unsuccessful: the experiences of Rwanda were tragic in this regard. Responding to the growing concern of the Rwandan Government and the international community, the United Nations Assistance Mission for Rwanda (UNAMIR) sought to disarm a number of southern camps coercively. Before it was able to undertake the operation, however, armed elements escaped and buried their weapons. In response to this failure, the Rwandan Government raided the camp and massacred a large number of refugees. Analogous experiences continue to be repeated in the twenty-first century.

V. Conclusions

Outward and inward refugee and IDP militarisation affects the physical safety and security of those involved and the prospects of achieving durable solutions for refugees. Though humanitarian activities are impeded by both forms of refugee and IDP militarisation and regularly forced to evacuate, it is the displaced caught in protracted situations that assume the highest risk. A number of factors shape and condition refugee/IDP and refugee/IDP camp militarisation. These include, *inter alia*, refugee and IDP participation in armed resistance; support for armed conflicts; the use of camps for military activities, including training, recruitment, and as bases; the presence of 'armed elements' – rebels,

[104] L. Yu, 'Separating Ex-combatants and Refugees in Zongo, DRC: Peacekeepers and UNHCR's "Ladder of Options"', New Issues in Refugee Research Working Paper No. 60, Aug. 2002, 2.

militias, police, paramilitary forces, vigilante groups, criminal gangs and brokers – in camps; the active diversion of humanitarian assistance for military ends; and the increased militarisation and victimisation of displaced populations and host communities.

This chapter has highlighted the many ways in which refugee and IDP militarisation generates insecurity not just for host or neighbouring states, but for displaced and host populations. As such, refugee and IDP militarisation constitute a human security issue par excellence. Put another way, the phenomenon constitutes a challenge not just for 'national', but also for 'human', security. According to the UN Security Council, mass refugee movements (and the resulting instability) together with growing internal displacement constitute an issue of international peace and security. Although militarisation can be conceived narrowly in rationalist instrumental terms, it is only in adopting a broader understanding of the motives and effects of related activities that effective interventions can be mobilised. Applying a lens that considers refugee/IDP militarisation as a function of top-down manipulation, bottom-up agency, and of unintentional humanitarian activities can enhance understanding of the ways in which it is connected fundamentally to questions of human security.

6

Human security and protection from *refoulement* in the maritime context

BARBARA MILTNER

I. Introduction

In recent years, dramatic increases in global irregular migration have led states to step up their border control tactics in an effort to combat unregulated entry to their territory. Land borders in popular destination countries are now virtually impermeable, prompting desperate asylum-seekers, refugees and other irregular migrants to seek alternative means of escape from situations of entrenched poverty, famine, natural disaster, armed conflict, civil strife or persecution. For many of these individuals, an increasingly relied-upon alternative has been to undertake journeys by sea. Despite the terrible dangers and mounting death tolls, figures indicate that irregular maritime migration is on the rise. In 2007 alone, it is estimated that approximately 6,000 individuals died or disappeared in the crossing from North Africa to the Canary Islands.[1] In the same year, the United Nations High Commissioner for Refugees (UNHCR) estimated that another 1,400 were reported dead or missing in the Gulf of Aden between Somalia and Yemen; and nearly 500 deaths occurred between North Africa and Italy.[2] Because such figures rely exclusively on confirmations of *reported* deaths, they are believed vastly to under-represent actual numbers of persons drowned or lost at sea.

The potential magnitude of the problem can be somewhat inferred from the numbers of confirmed *arrivals* by sea. In 2006, 21,000 persons

[1] S. LaFraniere, 'Europe Takes Africa's Fish, and Boatloads of Migrants Follow', *New York Times*, 14 Jan. 2008.

[2] UNHCR's website on asylum and migration, entitled: 'All in the same boat: the challenges of mixed migration', available at www.unhcr.org/cgi-bin/texis/vtx/asylum (last accessed 18 Aug. 2008). These figures are also widely understood to be under-reported estimates: see UNHCR's website 'Irregular Migration by Sea: Frequently Asked Questions', available at www.unhcr.org/cgi-bin/texis/vtx/asylum?page=faqs (last accessed 29 Jan. 2008).

reached Italy from Libya;[3] more than 30,000 made the journey from West Africa to Spain's Canary Islands;[4] and at least another 29,000 crossed the Gulf of Aden from the Horn of Africa to reach Yemen.[5] None of these routes are static; new routes evolve constantly as smugglers attempt to keep one step ahead of border control authorities. Typically, as flows peak on a particular route and state authorities launch crackdowns to stem the flow, smugglers respond in turn by diverting migrants elsewhere. In the last two years alone, irregular maritime migration flows from West and North Africa into Western Europe have given way to new routes in the east, between Turkey and Greece,[6] prompting one researcher to note that: '[w]hile the number has been halved in countries such as Spain and Italy it has tripled in the eastern Aegean.'[7] It is now estimated that up to 50,000 boat migrants are entering Greece from the Turkish coast each year.[8]

The casualties resulting from maritime migration reflect an array of dangers at every step of the journey. Migrants who wind up in the hands of traffickers or smugglers, or even as stowaways hidden aboard a vessel, find themselves at risk of violent abuse by handlers, crew or other migrants. In addition to dangerous conditions such as exposure to extreme temperatures, dehydration or starvation, migrants may also end up lost or adrift at sea, and at risk of drowning from capsize or being deliberately thrown overboard.[9] Smugglers in particular are known to inflict brutal and life-threatening tactics to avoid detection by the authorities. These can include practices such as designating migrants to navigate vessels themselves (rather than have a smuggler risk his or her own arrest); dangerously overloading the vessels to consolidate more migrants into fewer journeys; attempting crossings at night or in poor weather when interception crews are less likely to be monitoring coastlines; selecting longer, more indirect sea routes; and

[3] See T. Kington, 'Italian boats to patrol Libyan waters to curb migrant flow', *The Guardian*, 31 Dec. 2007.

[4] See UNHCR's website on asylum and migration, entitled: 'All in the same boat: the challenges of mixed migration': www.unhcr.org/cgi-bin/texis/vtx/asylum.

[5] *Ibid.*

[6] *Ibid.* Arrivals by sea from Turkey into Greece have skyrocketed from 3,500 to 13,000 between 2006 and 2007.

[7] H. Smith 'An idyllic Greek island becomes the new frontier for African migrants', *The Guardian*, 3 Dec. 2007.

[8] *Ibid.*

[9] X. Rice, 'Smugglers push Yemen migrants into sea and leave 107 to drown', *The Guardian*, 17 Feb. 2007, 22, International Section.

dumping migrants offshore to 'swim for it' while smugglers' crews flee from border patrols.[10]

Even for migrants whose vessels are detected by border control authorities, interception is no guarantee of a safe relocation to dry land. Many coastguard interception operations are poorly equipped to commandeer tiny, fragile vessels and bring their passengers on board, and some operations have inadvertently caused sudden capsize of vessels and terrible loss of life.[11] Other reports allege aggressive or illegal tactics by maritime border patrols, such as deliberately causing vessels to capsize or attempting to tow boats back out to the open sea.[12]

Similarly, migrant vessels in distress remain at the mercy of other vessels for rescue; undetected boats sometimes drift out into the open sea and are lost,[13] while those lucky enough to encounter other vessels may still be denied delivery to safety. This is because, despite the ancient duty of seafarers to assist those in distress, the rescue custom is in acute decline due to states' unwillingness to allow disembarkation of rescued persons. In 2006, for example, a Spanish trawler that rescued fifty-one persons in the Mediterranean Sea set off an international dispute requiring a week of intense negotiations before disembarkation was finally

[10] T. Spijkerboer, 'The human costs of border control', *European Journal of Migration and Law*, 9 (2007), 127–39. See, also, Rice, 'Smugglers push Yemen migrants into sea and leave 107 to drown'.

[11] BBC News Online, 'Spain ends search for immigrants', 21 Jul. 2007. See, also, J. Carling, 'Migration control and migrant fatalities at the Spanish-African borders', *International Migration Review,* 41 (2007), 316.

[12] E.g., on 28 April 2008, a Moroccan naval patrol allegedly caused the deliberate capsize of an inflatable vessel transporting irregular migrants towards the Spanish coast, causing nearly 30 on board to drown: Human Rights Watch, 'Morocco: investigate migrant deaths at sea', available at www.hrw.org/english/docs/2008/05/09/morocc18784.htm (last accessed 19 Aug. 2008). See, further, Smith 'An idyllic Greek island becomes the new frontier for African migrants' (citing accusations by human rights groups of 'heavy-handed coastguard patrols chasing exhausted and terrified migrants out of Greek territorial waters'); M. Lacey, 'New routes and new risk, as more Haitians flee', *New York Times*, 19 May 2007; G. Tremlett, 'Spain intercepts 180 African immigrants in single vessel', *The Guardian*, 30 Jul. 2007.

[13] One particularly grim illustration of this was a small vessel discovered by authorities in April 2006 drifting off the coast of Barbados in the Caribbean. On board were the desiccated bodies of eleven men who were believed to have left the Cape Verde Islands (off the Senegalese coast) in December 2005 seeking to reach Spain's Canary Islands by a longer, less detectable route. It is surmised that the migrant vessel originally set out with some fifty persons before being blown off course into the Atlantic: UNHCR, *Refugees Magazine*, 148(4) (2007), 19.

permitted.[14] As a result of such delays, more and more private vessels are now choosing to shirk their rescue duties altogether rather than wind up embroiled in international disputes and unable to offload rescued persons.[15] This reluctance to become involved in rescue operations has reached new extremes, such as the Maltese fishing vessel whose owner instructed his crew not to take on board more than twenty desperate persons found clinging to his boat's tuna nets on the high seas.[16]

The risks of a sea journey are not limited to smugglers' violence or conditions at sea, but can also include the physical acts of interception and rescue. Just as important, however, is what happens *after* a rescue or interception has taken place, since many of the protection risks that can result from these two practices are significant. Protection risks can include disembarkation delays; prolonged detention, often in poor conditions; absent or inadequate screening to identify those in need of international protection; or the return of individuals to a place where they face a real risk of persecution, torture, or other serious human rights violations.[17] The latter, also known as *refoulement*, is one of the most significant human rights concerns at play in the context of maritime migration.

For irregular maritime migrants, the issues of interception and rescue at sea sit at the intersection of national and human security – where state interests in protecting territorial integrity directly collide with the needs of individuals to escape threats to life, freedom and dignity in search of safety and well-being.[18] *Non-refoulement* is widely considered to be one

[14] See *ibid.*, 20–1; Council of Europe Parliamentary Assembly, Council of Europe Report, *Europe's 'Boat People': Mixed Migration Flows by Sea into Southern Europe*, Doc. 11688, 11 Jul. 2008, para. 37.

[15] M. Davies, 'Obligations and implications for ships encountering persons in need of assistance at sea', *Pacific Rim Law & Policy Journal*, 12 (2003), 109 (concluding that enormous cost disincentives to rescue, borne by the shipowners or charterers, must be addressed before compliance with the rescue obligation will improve).

[16] See J. Hooper, 'UN Rebuke as governments squabble over immigrants found clinging to tuna nets', *The Guardian*, 29 May 2007, 21.

[17] Australia's infamous MV Tampa incident in 2001 very neatly showcased nearly all of these dangers, and involved both a private commercial rescue vessel and a subsequent military interception effort: see, e.g., C. Bostock, 'The legal obligations owed to the asylum-seekers on *MV Tampa*', *International Journal of Refugee Law*, 14 (2002), 279.

[18] For a closer examination of the distinction between 'national' and 'human' security, see ch. 1 by A. Edwards and C. Ferstman in this book. In spite of the importance of this issue, however, nowhere does the UN Commission on Human Security refer explicitly to the principle of *non-refoulement* in their 2003 report, except for a footnote reference (n. 34 of ch. 3), stating that this is an area that needs strengthening: UN Commission on Human Security, *Human Security Now* (2003).

of the fundamental principles of the international protection regime and, for this reason, this chapter examines its applicability in the context of maritime migration. The next section examines the principle of *non-refoulement* under international law, including its scope of application, before moving on to a discussion of protection risks unique to rescue and maritime interception respectively.[19]

II. The *non-refoulement* guarantee

A. *An introduction to the principle of* non-refoulement

The general principle of *non-refoulement* is a state-based obligation not to expel or return a person to the frontiers or territory of a state where he or she would face a real risk of persecution, torture, or other serious harm. The prohibition of *refoulement* is contained, expressly or impliedly, in several major international human rights treaties at both the universal and regional levels. One of its early iterations is found in the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and/or its 1967 Protocol, which states:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.[20]

In addition to its inclusion in the 1951 Refugee Convention, the principle has been extended to apply to all persons in the context of torture:

> No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[21]

[19] For a more detailed discussion of the latter two topics examined in a refugee context, see B. Miltner, 'Irregular maritime migration: refugee protection issues in rescue and interception', *Fordham International Law Journal*, 30 (2006), 75–125.

[20] Art. 33(1), 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954. This principle is also found in the 1967 Protocol, which expressly incorporates 'articles 2 to 34 inclusive of the Convention': Art. 1(1), 1967 Protocol relating to the Status of Refugees, GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967.

[21] See, e.g., Art. 3, UN Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85 (UNCAT).

It is also included expressly in a number of regional human rights and refugee instruments.[22] Beyond these express prohibitions on *refoulement*, the principle has also been implied within the 1966 International Covenant for Civil and Political Rights (ICCPR)[23] and the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).[24]

No survey of the *non-refoulement* obligation would be complete without mention of the UN Protocol against the Smuggling of Migrants by Land, Sea or Air, supplementing the UN Convention on Transnational Organized Crime (Protocol against Smuggling).[25] The Protocol is not a human rights treaty, but rather an instrument designed to combat transnational organised criminal smuggling networks with a strong emphasis on law enforcement. The Protocol against Smuggling contains a number of provisions explicitly designed to deter the maritime smuggling of migrants.[26] It permits, for example, non-flag military vessels to board and search suspected smuggling vessels where flag state authorisation has been given and where there exist 'reasonable grounds' to suspect smuggling – a formal recognition of maritime interception operations.[27]

[22] E.g., Art. 2(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa, 10 Sept. 1969, 1001 UNTS 45; entered into force 20 Jun. 1974; and Art. 22(8) of the 1969 American Convention on Human Rights, 22 Nov. 1969, OAS Treaty Series No. 36, 1144 UNTS 123; entered into force 18 Jul. 1978.

[23] International Covenant on Civil and Political Rights 1966, GA res. 2200 A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976. Art. 7, ICCPR states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The Human Rights Committee, the body with supervisory responsibility over the ICCPR, has stated that Art. 7 'entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm': UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 12.

[24] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953. Art. 3, ECHR provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Art. 3 has been interpreted to include a ban on *refoulement* in the context of both extradition and expulsion: see *Soering* v. *United Kingdom* (1989) 11 EHRR 439 and *Cruz Varas* v. *Sweden* (1991) 14 EHRR 1, respectively.

[25] UN Protocol against the Smuggling of Migrants by Land, Sea or Air, supplementing the Convention on Transnational Organized Crime 2000, 15 Nov. 2000, 40 ILM 335 (2001); entered into force 28 Jan. 2004 ('Protocol against Smuggling').

[26] Part II, 'Smuggling of Migrants By Sea', Protocol against Smuggling.

[27] Art. 8, Protocol against Smuggling.

It also specifically calls on states to cooperate[28] and to ensure the safety and humane treatment of persons on board.[29] Alongside these provisions the Protocol is counterbalanced by a 'savings clause', which preserves the rights of individuals under international human rights law by specifically referencing the refugee treaties 'and the principle of non-refoulement contained therein'.[30] Importantly, it emphasises the centrality of the *non-refoulement* principle even within the context of anti-smuggling tactics.

In addition to these treaty-based sources of the principle of *non-refoulement*, there is some debate as to whether the principle has attained the status of customary international law,[31] or is a peremptory norm.[32] These claims do not, however, enjoy international consensus. Notwithstanding these debates, the principle is universally recognised as the cornerstone of international refugee law and the international protection regime.[33]

[28] Art. 7, Protocol against Smuggling.

[29] Art. 9(1)(a), Protocol against Smuggling.

[30] Art. 19(1), Protocol against Smuggling (emphasis added).

[31] For positions in support of *non-refoulement* as a principle of customary international law, see E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 149; *UNHCR Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, paras. 14–16, 26 Jan. 2007; UNHCR, *Summary Conclusions: The Principle of 'Non-Refoulement'*, Expert Roundtable organised by the UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 Jul. 2001, as part of the Global Consultations on International Protection, para. 1. For examples of the contrary position, see J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 4.1.6; see, also, *R* v. *Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL Dec. 9, 2004), para. 27. See, also, UN General Assembly Resolutions observing widespread violations of the principle: UN General Assembly Resolution UN Doc. A/RES/35/41 25 Nov. 1980; UN Doc. A/RES/37/195, 18 Dec. 1982; UN Doc. A/RES/42/109, 7 Dec. 1987; UN Doc. A/RES/43/117, 8 Dec. 1988; UN Doc. A/RES/51/75, 12 Dec. 1996; UN Doc. A/RES/52/132, 12 Dec. 1997.

[32] J. Allain, 'The *jus cogens* nature of non-refoulement', *International Journal of Refugee Law*, 13 (2001), 533.

[33] See Conclusion of the Executive Committee (EXCOM) No. 65 (XLII) 1991, para. (c). See, also, EXCOM Conclusion Nos. 17 (XXXI) 1980, para. (b); 79 (XLVII) (1996), para. (j). A number of General Assembly Resolutions also indicate the importance of this principle, including: A/RES/51/75, 12 Dec. 1996, para. 3; A/RES/52/103, 12 Dec. 1997, para. 5; A/RES/53/125, 9 Dec. 1998, para. 5; A/RES/52/132, 12 Dec. 1999, para. 16; A/RES/54/146, 17 Dec. 1999, para. 6; A/RES/55/74, 4 Dec. 2000, para. 6; A/RES/56/137, 19 Dec. 2001, para. 3; A/RES/57/187, 18 Dec. 2002, para. 4.

B. *The scope of the* non-refoulement *principle*

One of the arguments against the *non-refoulement* principle as a source of custom is the fact that its different treaty-based permutations preclude a singular interpretation capable of practical application.[34] As a result, the scope of protection afforded by the *non-refoulement* principle varies across the different instruments from the persons protected (*ratione personae*), the type of harm or risk capable of triggering its protection (*ratione materiae*), the geographic scope of its application (*ratione loci*), and/or the standard of proof it requires.

1. Ratione personae

There is some variation among the treaties in terms of the *persons* protected from *refoulement* under international law. The human rights instruments extend protection to all persons without imposing any particular conditions as to their status.[35] By contrast, the 1951 Refugee Convention has far more restrictive parameters reserving *non-refoulement* protection for *refugees*. There has been some debate about whether Article 33 offers protection from *refoulement* only to those formally recognised as 'refugees' under the 1951 Refugee Convention[36] or whether its coverage also extends to asylum-seekers.

Broad consensus favours the latter view that 'the duty of non-refoulement inheres on a provisional basis'[37] to include asylum-seekers. This position makes sense from a practical standpoint, since states' refusal to formally identify refugees would negate any effective protection under Article 33.[38] More importantly, it is consistent with the text of the Convention (which defines refugees as rights holders from the moment they meet the definitional criteria). This approach has also been

[34] See Hathaway, *The Rights of Refugees under International Law*, 365.

[35] This is true, e.g., for the UNCAT, the ICCPR, and the ECHR.

[36] Art. 1A(2) defines a refugee as someone who, 'owing to a 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it'.

[37] See Hathaway, *The Rights of Refugees under International Law*, 303.

[38] See *ibid.*, 302–4; G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford: Clarendon Press, 1996), 137; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', 116.

endorsed by the UNHCR.[39] On this basis, protection accrues from *de facto* rather than formal *de jure* refugee status. State parties' *non-refoulement* obligations thus extend not just to formally recognised refugees but to asylum-seekers.

2. Ratione materiae

There are also differences among the above-mentioned instruments in terms of the *type of harm* that warrants *non-refoulement* protection. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) provides the most limited safeguard, protecting persons only from return to *torture*,[40] rather than lesser harms not rising to the level of torture.[41] The scope of protection of the International Covenant on Civil and Political Rights (ICCPR), in contrast, extends beyond torture to include all forms of 'irreparable harm' such as the threat of death, torture, or cruel, inhuman or degrading treatment or punishment.[42] By comparison, the protection afforded by the 1951 Refugee Convention bans return where a person's 'life or freedom would be threatened',[43] a standard which has been variously

[39] According to the UNHCR: '[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one'. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1979, re-edited 1992), para. 28.

[40] This narrow meaning applies to 'torture' as it is defined in Art. 1(1) of the UNCAT, which provides: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] 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.'

[41] See D. Weissbrodt and I. Hortreiter, 'The principle of non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in comparison with the non-refoulement provisions of other international human rights treaties', *Buffalo Human Rights Law Review,* 5 (1999), 1, 8 ('Even the prospect of cruel, inhuman or degrading treatment does not protect the applicant from *refoulement* under the [UNCAT].') Note also that the UNCAT bans not only expulsions or returns to such places, but also extraditions.

[42] See Human Rights Committee, General Comment No. 31, para. 12.

[43] Art. 33(1), 1951 Refugee Convention.

interpreted to be narrower than,[44] broader than,[45] or identical to,[46] the concept of persecution found in the refugee definition. Notwithstanding the fact that Article 33 covers a potentially broader range of harm than the human rights instruments, its protection is also functionally *narrower* in that the harm must be linked to one or more strictly enumerated grounds.[47] The *non-refoulement* principles contained in the UNCAT,[48] the ECHR[49] and the ICCPR[50] are deemed to be absolute and non-derogable, whereas certain exceptions are permitted to Article 33 of the 1951 Refugee Convention.[51]

3. Ratione loci

Protection from *refoulement* in the maritime context is a complex matter, not only because of the different legal instruments offering varying degrees of protection, but also because the maritime venue is not a uniform zone for the purposes of treaty application. The territorial

[44] *INS* v. *Cardoza-Fonseca* 480 US 421 (1987).

[45] This argument relies on the premise that the *non-refoulement* guarantee applies to anyone whose 'life and freedom' is at risk, without the need to link such harm to an enumerated ground such as race, religion, nationality, membership of a particular social group or political opinion. This position is based on a number of EXCOM Conclusions that tend to omit the nexus requirement from their pronouncements on *non-refoulement*: see Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', 117–18.

[46] The meaning given to situations where a person's 'life or freedom would be threatened' is widely understood to have a meaning consistent with that of persecution, which also encompasses '[o]ther serious violations of human rights'. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 51; G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* 3rd edn (Oxford: Oxford University Press, 2008), 233–34; Hathaway, *The Rights of Refugees under International Law,* 302–7.

[47] A refugee must demonstrate that 'his life or freedom would be threatened on account of his of race, religion, nationality, membership of a particular social group or political opinion'. Art. 33(1), 1951 Refugee Convention.

[48] UNCAT *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2 para. 1, 24 Jan. 2008. See also *Tapia Paez* v. *Sweden*, Comm. No. 39/1996, U.N. Doc. CAT/C/18/D/39/1996 (1997), para. 14.5.

[49] See *Chahal* v. *UK,* Applic. No. 221414/93, 15 Nov. 1996, paras. 79–80.

[50] UN Human Rights Committee, *General Comment No. 20: Article 7*, UN Doc. HRI/GEN/1/ Rev.1 at 30, 1994, para. 3.

[51] Persons who would otherwise qualify as a refugee and be eligible for non-refoulement protection under Art. 33(1) are excluded from protection under the 1951 Refugee Convention where they are already receiving UN protection or assistance; where they are not in need of international protection, or where they are deemed to be not deserving of international protection as articulated under the Convention itself. See Arts. 1 D, E, and F respectively. Additionally, Art. 33(1) protection is not available to refugees with a serious criminal background who may present a danger to their host country: Art. 33(2).

sea, on the one hand, is viewed as comprising part of a state's own territory and thus constitutes an extension of its territorial sovereignty.[52] Because a treaty is binding 'upon each party in respect of its entire territory',[53] there is little debate that states continue to be bound by their treaty obligations within their own territorial seas. However, while the territorial seas may comprise sovereign territory, the high seas represent the opposite: a zone open to all states, where freedom of navigation reigns[54] and which cannot be subjected to any state's sovereignty.[55] So what is the position under international law in relation to the extraterritorial application of international treaties?

Ultimately, the extraterritorial scope of treaty obligations must be determined on a treaty-by-treaty basis and must conform to the rules of treaty interpretation.[56] In some treaties a single provision may explicitly set out the ambit of *all* of the obligations for that instrument.[57] Other treaties may be silent[58] on the issue, with the result that any extraterritorial scope must be determined one provision at a time.

[52] 'The sovereignty of a coastal State extends, beyond its land territory … to an adjacent belt of sea, described as the territorial sea.' Art. 2(1), UN Convention on the Law of the Sea (UNCLOS), 10 Dec. 1982, 1833 UNTS 397; entered into force 16 Nov. 1994 (superseding the four 1958 Law of the Sea Conventions: Convention on the Territorial Sea and the Contiguous Zone, 29 Apr. 1958, 516 UNTS 205; Convention on the High Seas, 29 Apr. 1958, 450 UNTS 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 Apr. 1958, 559 UNTS 285; Convention on the Continental Shelf, 29 Apr. 1958, 499 UNTS 311).

[53] Art. 29, 1969 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331; entered into force 27 Jan. 1980.

[54] Art. 87, UNCLOS.

[55] Art. 89, UNCLOS.

[56] According to the VCLT, a treaty must be interpreted in good faith and 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose': Art. 31, VCLT. Art. 29 of the same treaty further provides that: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' Thus, determining the ambit of the *non-refoulement* guarantee is a treaty-specific inquiry concerned with plain language informed by contextual analysis, with a general assumption that it applies to the whole territory of a state party.

[57] Both the ICCPR and the ECHR have such provisions setting out the scope of application of the instrument as a whole. Art. 2(1) of the ICCPR, for example, requires state parties to respect and ensure Covenant rights 'to all individuals within its territory and subject to its jurisdiction', while Art. 1 ECHR obligates its state parties to secure Convention rights to 'everyone within their jurisdiction'.

[58] In contrast to the ICCPR and the ECHR, the 1951 Refugee Convention contains no universal provision outlining the geographic scope and reach of the instrument's obligations.

Notwithstanding these caveats, however, consensus favours the view that the *non-refoulement* obligation in each of the instruments discussed above is capable of extraterritorial application. The ECHR, which arguably has the most developed jurisprudence regarding its extraterritorial scope, has been determined to apply extraterritorially in instances of: extradition or expulsion;[59] state agent control and authority over persons;[60] effective control of a territory;[61] and 'cases involving the activities

[59] *Loizidou* v. *Turkey* (Preliminary Objections) (1995) 20 EHRR 99 para. 62; *Bankovic* v. *Belgium and others* (2001) 11 BHRC 435. In *Bankovic,* the Grand Chamber distinguished this category as technically falling outside the limited categories of extraterritorial jurisdiction since 'such cases do not concern the actual exercise of a State's competence or jurisdiction abroad'. Rather, they involve an action taken over a person who is within the state's territorial jurisdiction at the time. Notwithstanding this narrow formulation, more recent cases have given rise to circumstances permitting a wider view of extraditions and expulsions, lending support to the idea that such actions may, in some instances, occur extraterritorially. See, generally, *Ocalan* v. *Turkey* (2003) 37 EHRR 10; (2005) 41 EHRR 45 (Grand Chamber) (recognising extraterritorial jurisdiction where Turkish officials took custody of a Turkish national in Nairobi in order to secure his return to Turkey for prosecution there); *Xhavara and others* v. *Italy and Albania* (dec.), Applic. No. 39473/98, 11 Jan. 2001, unreported (commenting, *obiter dicta*, that the attempted expulsion of an Albanian migrant vessel undertaken by the Italian Navy 35 miles off the Italian coast would constitute an exercise of Italian extraterritorial jurisdiction). Support for this view is also provided by the UK House of Lords, which interpreted *Ocalan* as falling within the category of 'irregular extradition' and constituting part of this group of exceptions to territorial jurisdiction. See *Al-Skeini and others* v. *Secretary of State for Defence* [2007] UKHL 26 at paras. 119–120, per Lord Brown.

[60] This category of extra-territorial jurisdiction was first recognised by the European Commission on Human Rights in the context of the Turkish military occupation of northern Cyprus. *Cyprus* v. *Turkey* (Applic. Nos. 6780/74 and 6950/75), Commission decision of 26 May 1975, (1975) 2 DR 136. However, the European Court of Human Rights later referred to this same test under a new incarnation, recognising extraterritorial jurisdiction 'because of acts of their authorities producing effects outside their own territory'. See *Drozd and Janousek* v. *France and Spain*, judgment of 26 Jun. 1992, Series A No. 240, p. 29, para. 91; *Loizidou* v. *Turkey* (Preliminary Objections) (1995) 20 EHRR 99, para. 62; *Bankovic* v. *Belgium and others* (2001) 11 BHRC 435, para. 69; *Ilascu* v. *Moldova and Russia* (2005) 40 EHRR 46 (Grand Chamber), para. 317 (referring to 'acts which have sufficiently proximate repercussions'). The court has not always been consistent in the language it uses to characterise this test, and has also sometimes reverted to the Commission's original 'authority and control' terminology to refer to this category. See *Ocalan* v. *Turkey* (2003) 37 EHRR 10; (2005) 41 EHRR 45 (Grand Chamber), para. 91; *Issa* v. *Turkey* (2005) 41 EHRR 27, para. 71; *Isaak* v. *Turkey* (Applic. No. 44587/98), decision of 28 Sept. 2006.

[61] This test first appeared in *Loizidou* v. *Turkey* (Preliminary Objections) (1995) 20 EHRR 99 (Merits); (1997) 23 EHRR 513. See also *Bankovic* v. *Belgium and others* (2001) 11 BHRC 435; *Cyprus* v. *Turkey* (2002) 35 EHRR 30; *Ilascu* v. *Moldova and Russia* (2005) 40 EHRR 46 (Grand Chamber), para. 314.

of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State'.[62] The rights enshrined within the ICCPR have been held to apply 'to those within the power or effective control of the forces of a State Party acting outside its territory'[63] by the Human Rights Committee, a view broadly endorsed by the International Court of Justice.[64] The *non-refoulement* provision in the UNCAT's Article 3 has been held to have extraterritorial effect by international human rights bodies[65] and by scholars alike. Similarly, notwithstanding the US Supreme Court judgment to the contrary,[66] the view that Article 33(1) of the 1951 Refugee Convention is capable of extraterritorial effect has also been widely endorsed by international tribunals,[67] the UNHCR[68] and scholars.[69] Although some scholarly commentary refutes the extraterritorial application of the *non-refoulement* principle in these instruments,[70] it comprises a distinctly

[62] *Bankovic* v. *Belgium and others* (2001) 11 BHRC 435, para. 73. See also *Cyprus* v. *Turkey* (App. Nos. 6780/74 and 6950/75), Commission decision of 26 May 1975, (1975) 2 DR 136; *Loizidou* v. *Turkey (Preliminary Objections)* (1995) 20 EHRR 99. See generally *Ocalan* v. *Turkey* (2003) 37 EHRR 10; (2005) 41 EHRR 45 (Grand Chamber); *Xhavara and others* v. *Italy and Albania* (Dec. no. 39473/98, 11 Jan. 2001, unreported.

[63] See Human Rights Committee, General Comment No. 31, para. 10.

[64] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 Jul. 2004, General List No. 13, 1 para. 111.

[65] The Human Rights Council has interpreted the Art. 3 prohibition expansively, requiring state parties 'not to expel, return ("refouler"), extradite *or in any other way transfer a person to another state* …' Human Rights Council, 'Torture and other cruel, inhuman or degrading treatment or punishment', HRC res. 8/8, UN Doc. A/HRC/RES/8/8, 18 Jun. 2008 (emphasis added). UNCAT's own treaty body has also implicitly rejected the notion that Art. 3 is territorially limited. Committee Against Torture, 'Conclusions and recommendations of the Committee Against Torture: USA', UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 20.

[66] *Sale* v. *Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S. Ct. 2549 (1993).

[67] *Haitian Centre for Human Rights et al.* v. *United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.995 Doc. 7 rev. at 550 (1997).

[68] For its most recent statement on the issue, see UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 Jan. 2007. UNHCR Refworld, available online at www.unhcr.org/refworld/docid/45f17a1a4.html (accessed 12 Aug. 2008), paras. 28–31.

[69] Goodwin-Gill and McAdam, *The Refugee in International Law*, 244–53; Hathaway, *The Rights of Refugees under International Law*, 159–71 and 335–42; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: opinion', 110–14.

[70] See, e.g., the scholarly commentary cited by the majority in *Sale* v. *Haitian Centers Council* contesting the extraterritorial application of Art. 33 of the 1951 Refugee Convention. For a similar argument regarding Art. 3 UNCAT, see J. Yoo, 'Transferring terrorists', *Notre Dame Law Review* 79 (2004), 1183–235. For the same regarding ICCPR,

minority view not only difficult to reconcile with established rules on treaty interpretation,[71] but more and more diluted by the ever-expanding jurisprudence of human rights treaty bodies on the subject.

4. Standard of proof

Comparisons of the standard of proof necessary to invoke the obligation can also be made, although the practical impact of these nuanced differences exceeds the scope of this chapter. The UNCAT, for example, contains language of 'substantial risk' of torture, whereas the European Court of Human Rights and the Human Rights Committee have applied the standard of 'real risk'.[72] The UNHCR argues that any threat to life or freedom for the purposes of Article 1(A)(2) of the 1951 Refugee Convention needs to be established to a 'reasonable degree', that is, beyond mere conjecture, less than probability or certainty. By analogy, the same standard would apply to Article 33.[73] Some commentators, for example, assert that the standard of proof of 'real risk of torture' required of the ECHR is stricter than either the 'substantial risk' test for UNCAT or the 'well founded fear' of persecution standard found in the 1951 Refugee Convention.[74]

see G. Noll, 'Seeking asylum at embassies: a right to entry under international law?', *International Journal of Refugee Law*, 17 (2005), 542.

[71] These include the need to interpret a treaty in good faith consistently with the ordinary meaning of its terms, in context, and in light of the instrument's object and purpose: Art. 31, VCLT. Of additional importance is the need to interpret the document as a living instrument, reflecting constantly evolving human rights norms. See Goodwin-Gill and McAdam, *The Refugee in International Law,* 208, observing the progressive development of the principle and noting that: '[a] realistic appraisal of the normative aspect of non-refoulement in turn requires that the rule be examined not in isolation, but in its dynamic sense and in relation to the concept of asylum and the pursuit of durable solutions.'

[72] See CAT, *General Comment No. 1: Implementation of Article 3 of the Convention in the context of Article 22*, UN Doc. A/53/44, 21 Nov. 1997, para. 6: 'whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.' For ECHR, see *Soering* v. *United Kingdom* (Appl. No. 14038/88, 7 Jul. 1989); *Said* v. *The Netherlands* (Appl. No. 2345/02, 5 Jun. 2005); *Bader and others* v. *Sweden* (Appl. No. 13284/04, 8 Nov. 2005); *Vilvarajah* v. *United Kingdom* (Appl. Nos. 13163/87, 13164/87, 13165/88 *et. al.*, 30 Oct. 1991).

[73] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 42.

[74] See Weissbrodt and Hortreiter, 'The principle of non-refoulement', 36.

III. Rescue at sea: challenges to international protection

The obligation to come to the aid of those in distress at sea is an ancient one regarded as constituting a general principle of international law[75] long before it was eventually codified into various treaties. Today, three principal treaties concerned with the rescue obligation include: the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention on Maritime Search and Rescue (SAR)[76] and the International Convention for the Safety of Life at Sea (SOLAS).[77] The UNCLOS, for example, calls on all states to require its vessels to render assistance on the high seas as part of its framework establishing a legal order for the seas and oceans.[78] The SAR is credited with the creation of a global search and rescue regime in which state parties have agreed to provide search and rescue services and to establish rescue coordination centres for the world's oceans. SOLAS, regarded as 'the most important of all international treaties concerning the safety of merchant ships', contains a chapter on navigational safety with a rescue duty applicable to all vessels.[79] Both of these latter instruments are particularly relevant to recent developments aimed at improving the rescue framework.

[75] Prior to being superseded by UNCLOS in 1982, the Preamble to the 1958 Convention on the High Seas characterised its provisions as 'generally declaratory of established principles of international law'. The UNCLOS Preamble notes further that even matters not regulated by that instrument 'continue to be governed by the rules and principles of general international law'.

[76] International Convention on Maritime Search and Rescue, 27 Apr. 1979, 1405 UNTS 97; entered into force 22 Jun. 1985.

[77] International Convention for the Safety of Life at Sea, 1 Nov. 1974, 1184 UNTS 278; entered into force 25 May 1980. See, also, International Convention on Salvage, 28 Apr. 1989, 1953 UNTS 193. For a thorough overview of maritime treaty sources of the rescue obligation, see T.A. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms* (The Hague: Asser Press, in co-operation with the Migration Policy Institute (Washington DC), the Graduate Institute of International Studies (Geneva) and the International Organization for Migration (Geneva)), ch. 8.

[78] The rescue duty in this instrument is found in a set of provisions governing activities on the high seas and requires each state to ensure that all ships operating under its flag 'render assistance to any person found at sea in danger of being lost': Part VII, s. 1, Art. 98(1)(a), UNCLOS.

[79] Ch. V: Safety of Navigation, Regulations 7, 33, SOLAS.

A. *Rescue in the traditional context*

For centuries, the primary objective of the rescue custom had always been to provide immediate humanitarian assistance to those in distress at sea. Such distress was usually the result of shipwrecks, damaged vessels or those adrift at sea. Typically, rescued persons were taken aboard, promptly disembarked at the closest or next port of call, and then returned home after arrangements were made for their repatriation through consular channels. Although disembarkation had always been a discretionary matter for coastal states, it was a matter of established practice in the traditional rescue context. Unfortunately, despite the fact that *disembarkation* was such a necessary and inherent component of the rescue process, its explicit inclusion in the early versions of the SAR and SOLAS rescue instruments in the 1960s and 1970s was entirely overlooked.[80] According to UNHCR, the issue of disembarkation of rescued persons was 'until recently considered so obvious that it was not found necessary in any of the instruments [pertaining to rescue at sea] to stipulate an express obligation for the country of the first port of call to permit the disembarkation of rescued persons'.[81] This drafting oversight has created grave problems for migrants at sea.

B. *The disembarkation problem*

In the 1980s the emerging phenomenon of so-called 'boat people' from southeast Asia touched off a full-scale rescue crisis which brought the disembarkation ambiguity to the attention of the world community. Unlike rescued sailors or commercial seafarers of the past, 'boat people' took to the seas in order to escape persecution, torture or mistreatment in their countries of origin, and emphatically did *not* want to be returned there. Instead of arranging for diplomatic or consular assistance in returning such persons, coastal states found themselves burdened with long-term

[80] See, UNHCR, EXCOM, Sub-Committee on International Protection (SCIP), *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, UN Doc. EC/SCP/18, 26 Aug. 1981) (describing the evolution of the rescue duty from its first emergence in an international instrument in 1910), para. 19.

[81] *Ibid.*, para. 20.

protection and resettlement obligations that created a strong disincentive to the traditionally liberal attitudes towards rescue-related disembarkations.[82] The difficulties encountered by coastal states eventually led many to resist and ultimately refuse further disembarkations – a reaction not altogether prohibited by the rescue instruments at the time. These refusals by coastal states transferred the problem to rescuing vessels.[83] In turn, rescue vessels found themselves diverting resources to on-board care of rescued persons, incurring along the way significant interruptions to their commercial shipping schedules and heavy financial penalties as they moved from port to port seeking disembarkation permission.[84] Perhaps not surprisingly, many ship owners eventually began to ignore rescue signals altogether and turn a blind eye to those in distress at sea,[85] a problem that persists today.[86]

Eventually, UNHCR initiated resettlement guarantee programmes offered by developed states in exchange for agreement by coastal states to provide disembarkation and temporary processing of the Vietnamese boat people.[87] Unfortunately, however, such programmes were temporary and were not designed to resolve the ambiguity surrounding disembarkation responsibility in the rescue instruments.

[82] UNHCR, Global Consultations on International Protection, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea,* 18 Mar. 2002, paras. 13, 38, and 40.

[83] See UNHCR, EXCOM, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, paras. 2–3.

[84] Davies, 'Obligations and implications for ships encountering persons in need of assistance at sea'.

[85] UNHCR, EXCOM, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, Conclusion No. 34 (XXXV), 18 Oct. 1984, para. (a); UNHCR, EXCOM, *Rescue of Asylum Seekers in Distress at Sea*, Conclusion No. 31 (XXXIV) 20 Oct. 1983, para. (a).

[86] 'There are an increasing number of reports of ship's masters ignoring distress signals from vessels in trouble', Council of Europe Parliamentary Assembly, Council of Europe Report: *Europe's 'Boat People': Mixed Migration Flows by Sea into Southern Europe*, para. 6.

[87] Two such initiatives were the Rescue at Sea Resettlement Offers (RASRO) and the Disembarkation Resettlement Offers (DISERO) schemes, initiated in response to the Vietnamese boat people crisis of the 1970s. These programmes were later replaced by the Comprehensive Plan of Action in 1989. See, generally, UNHCR, EXCOM Conclusion No. 34 and EXCOM Conclusion No. 31. See, also, Goodwin-Gill, *The Refugee in International Law* (2nd edn), 157–59.

The southeast Asian boat people crisis of the 1980s was by no means an isolated episode. Subsequent incidents of maritime mass migration occurring in Haiti,[88] Cuba[89] and Albania[90] further accentuated the need for rescue-related reform throughout the 1990s. More recently, high-profile maritime rescue operations such as the MV Tampa incident off the Australian coast called attention to the diplomatic crises that can result when rescued individuals cannot be disembarked.[91] By 2002, the

[88] Although Haitian asylum-seekers began arriving by boat on US shores as early as 1963, numbers surged in 1980 and 1981 due to political instability and violence there. The migrant boat traffic from Haiti to the US continued to ebb and flow in response to the changing political situation in Haiti: dropping in 1990 after the election of President Aristide, rising again dramatically after a coup in September 1991, and abating in late 1994 after his restoration to office. Problems in Haiti remain, and after an outbreak of violence in 2004, another surge of boat traffic took place. See S. Legomsky, 'The USA and the Caribbean Interdiction Program', paper presented at *The Right to Seek Asylum? The Pacific, Mediterranean and Caribbean Plans Compared* Conference, Prato, Italy, 26–27 Sept. 2005. For more information on the Haitian situation, see generally: B. Frelick, 'Abundantly clear: *refoulement*', *Georgetown Immigration Law Journal,* 19 (2004–05), 245; H. Hongju Koh, 'The "Haiti Paradigm" in United States human rights policy', *Yale Law Journal,* 103 (1994), 2391–435.

[89] In 1980, more than 125,000 Cubans fled Cuba by boat to come to the US in what came to be known as the Mariel boatlift. This was followed by a second mass exodus of over 35,000 in 1994. See, Legomsky, 'The USA and the Caribbean Interdiction Program'. In 2007, migration from Cuba to the US reached its highest figures since 1994, when boats began abandoning the shorter route across the Florida straits for a longer sea journey to the Mexican Island of Isla Mujeres, to enter the US from the US/Mexico land border. See M. Lacey, 'Fleeing to US, Cubans' First Stop is Often Mexico', *New York Times*, 16 Oct. 2007.

[90] Following the collapse of communism and the chaos of early democratisation in Albania, tens of thousands of Albanian boat people attempted to cross the Mediterranean into Italy and Greece in 1990 and 1991, a process that repeated itself in 1997. See R. King and J. Vullnetari, 'Migration and Development in Albania', Working Paper, Sussex Centre for Migration Research, Development Research Centre on Migration, Globalisation and Poverty, available at www.migrationdrc.org/publications/working_papers/WP-C5.pdf (last accessed 18 Aug. 2008).

[91] In 2001, the Norwegian cargo ship the *MV Tampa* sent a distress signal to the Australian Government after taking on board more than 400 distraught and weakened rescuees on a vessel designed for a crew of only fifty. When disembarkation permission was refused, the desperate situation on board led the ship's captain to attempt disembarkation on grounds of necessity, prompting a commando-style boarding of the vessel by Australian special forces and eventual extra-territorial processing of those rescued. See, generally, Bostock, 'The international legal obligations owed to the asylum seekers on the *MV Tampa*'; J. Howard, 'To deter and deny: Australia and the interdiction of asylum seekers', *Refuge,* 21 (2003), 35; T. Magner, 'A less than "Pacific" solution for asylum seekers in Australia', *International Journal of Refugee Law*, 16 (2004), 53; J. Morris, 'The spaces in between: American and Australian interdiction policies and their implications for the refugee protection regime', *Refuge,* 21 (2003), 51–62.

combined impact of these events made it clear that, with death tolls rising at sea and the rescue tradition in sharp decline, the ambiguity over disembarkation was ripe for reform.

C. *Recent amendments to the rescue instruments*

Recently, significant progress has been achieved in resolving the disembarkation ambiguity and its threat to the maritime rescue tradition. In particular, UNHCR is to be credited with bringing external partners together to help tackle the problem. In May 2004, following roundtable discussions with UNHCR and other international agencies to address the disembarkation problem,[92] the International Maritime Organization (IMO) adopted amendments to the SAR and SOLAS instruments designating coastal state responsibility for the disembarkation of persons rescued at sea:

> [Parties] shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from [these obligations] does not further endanger the safety of life at sea. *[The party] responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety,* taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant [parties] shall arrange for such disembarkation to be effected as soon as reasonably practicable.[93]

These amendments give discretionary disembarkation authority to the coastal state responsible for search and rescue in the region where the rescue is occurring. Notably, this approach contrasts with previous suggested approaches such as deferring to the shipmaster's discretion[94] or simply

[92] See UNHCR, *Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees: Summary of Discussions*, Expert Roundtable on Rescue-at-Sea, Lisbon, Portugal, 25–26 Mar. 2002, para. 1

[93] See IMO, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, MSC Res 153(78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004); entered into force 1 Jul. 2006 (emphasis added).

[94] See UNHCR, *Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees: Summary of Discussions,* paras. 6–8.

designating disembarkation to occur at the 'next port of call',[95] though not necessarily to greater advantage. Under the amendments, the state party has responsibility for 'ensuring' that 'co-ordination and co-operation' occurs with regard to disembarkation, but this falls short of empowering the relevant rescue coordination centre unilaterally to designate the state of disembarkation. It also avoids a more direct approach of mandating disembarkation by any coastal state designated by the rescue coordination centre to receive rescued persons. Given that the amendments appear to have settled for diplomatic language over a more practical and disciplined approach, the ultimate effectiveness of the amendments seems doubtful.

Assuming that disembarkation is safely achieved, the new amendments' next call is for survivors to be delivered to a 'place of safety'. This concept is problematic for several reasons, not the least of which is its failure to be defined in the amendments. As clarified in accompanying non-binding Guidelines,[96] a place of safety is described as 'a location where rescue operations are considered to terminate' and 'a place from which transportation arrangements can be made for the survivors' next or final destination'.[97] Normally, this might be understood to imply delivery to dry land, but the guidelines reveal otherwise. Instead, a 'place of safety' can technically also be 'aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination'.[98] The fact that disembarkation from one rescue vessel can now be accomplished by transfer to another vessel essentially robs the amendments of meaningful improvements, since the possibility of rescued persons languishing at sea, unable to reach dry land, continues to exist under these amendments. More worrisome still is the reference to a suitable 'facility at sea' to which such migrants might be disembarked, raising the spectre of floating migration processing facilities for states unwilling to allow rescued migrants onto their territory. In sum, the understanding of what constitutes delivery to a 'place of safety' appears to be an unsuitable and unacceptable compromise in which

[95] See UNHCR, EXCOM Conclusion No. 23 (1981); UNHCR, Global Consultations on International Protection, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea,* 18 Mar. 2002, para. 12.

[96] See IMO, *Guidelines for the Treatment of Persons Rescued at Sea*, Maritime Safety Commission (MSC) Res. 167(78), app. para. 3, MSC Doc. 78/26/Add.2, Annex 34 (IMO Guidelines).

[97] See IMO Guidelines, para. 6.12

[98] See *ibid.,* para. 6.14

states' interests in managing migration have outweighed the humanitarian concerns which form the foundation of the rescue custom.

While it is clear that the amendments have successfully removed the obstacle to private vessels fulfilling their rescue obligations, the remaining challenges will be to mandate that rescued migrants are disembarked *to dry land* as soon as possible and are appropriately screened to identify those in need of international protection.

IV. Interception at sea: challenges to international protection

A. *Introduction to maritime interception*

A second type of encounter a migrant is likely to face when crossing international borders by sea is that of interception. The practice of interrupting the movement of a migrant across an international border can be applied to travel by land, air or sea, in either an administrative capacity or by physical intervention. Although there is no universal definition, interception has been defined by the Executive Committee of UNHCR as constituting:

> [o]ne of the measures employed by States to:
>
> (i) prevent embarkation of persons on an international journey;
> (ii) prevent further onward international travel by persons who have commenced their journey; or
> (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner.[99]

Interception is a tool used for controlling and combating irregular migration both on land and at sea, but its application at sea is particularly troubling for the lack of oversight available from independent third parties such as the media and non-governmental and international organisations, as well as for the conflict it creates with humanitarian objectives to provide safe haven to individuals fleeing serious harm.

[99] See UNHCR, EXCOM, *Conclusion on Protection Safeguards in Interception Measures*, Conclusion No. 97 (LIV) (10 Oct. 2003).

Domestic policy objectives underlying the practice of interception tend to focus on immigration control and national security concerns. At the international level, the practice is more difficult to reconcile with many international human rights treaty obligations. This dilemma was neatly encapsulated in a joint statement on interception issues made by the International Organization for Migration (IOM) and the UNHCR, in which the former (an international agency without a protection mandate) hailed interception as 'one of the most effective measures to enforce [states'] domestic migration laws and policies', while UNHCR cautiously noted 'the difficulty of reconciling [interception] with relevant international legal responsibilities'.[100] Although state practice continues to make vigorous and creative use of interception in all its forms to combat irregular migration, many international human rights agencies, scholars and advocates remain in doubt as to its legality and deeply concerned about its human rights implications for some of the world's most vulnerable people.

B. Protection risks in interception at sea

Interception is a process, not an outcome. Interception can be carried out in a manner that does not endanger human rights or human safety; however, the opposite is also true. It is the open-ended application of interception practices that creates protection risks. From the moment of interception, persons should be given immediate access to adequate food, shelter, medical care and security; access to non-governmental organisations, the UNHCR or consular assistance, if requested; and appropriately screened to assess their protection needs.[101] Persons determined to be in need of international protection should be granted asylum, or resettled to another state, while others may be repatriated after careful and thorough assessments indicate that returns are safe and appropriate and do not give rise to *refoulement*. Unfortunately, however, in the context of interception, few such safeguards are universally implemented. As a result, one of the greatest risks to intercepted persons is the complete absence of an internationally uniform, systematic method for

[100] UNHCR, Global Consultations on International Protection, *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, paras. 14 and 35, respectively, UN Doc. EC/GC/01/11, 31 May 2001.

[101] UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, para. 42.

identifying the country responsible for the protection of intercepted persons and determining the nature of the protection required. Until screening of intercepted persons occurs on a systematic basis, the risk of *refoulement* of such persons is high.

1. Identifying the state responsible for protection

In addition to providing the working definition of interception, the 2003 EXCOM Conclusion mentioned above is noteworthy for its contribution of a concrete proposal to identify the state responsible for the protection of intercepted persons. It represents an important milestone in linking protection duties and interception activities. An examination reveals limitations, however, which open the door to shifting interception practices designed to exploit technical loopholes and to sidestep international protection obligations.

According to the 2003 EXCOM Conclusion, the state designated as having primary protection duties for intercepted persons is the state on whose territory interception occurs. The Conclusion provides: '[t]he State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons'.[102] In the context of maritime interception, when state A acts to intercept migrants in its own territorial waters, operation of the rule would designate state A as having primary protection responsibility. However, where state A is authorised by state B to intercept a vessel in state B's waters,[103] the protection responsibility would rest with state B (in whose territorial waters the interception takes place) rather than with the state which actually performed the interception. This is so because state B retains sovereignty over its own territorial sea and must exercise its sovereign authority to grant interception permission to state A, so accordingly it retains protection responsibility for those intercepted on its territory. The 2003 EXCOM Conclusion arrangement, therefore, has no application to any maritime zone beyond a state's territorial seas, given that such zones do not, under international

[102] See EXCOM Conclusion No. 97, para. (a)(i).

[103] This scenario arose in the context of pirate vessels when the US Navy agreed to provide assistance in protecting Somalia's territorial waters from pirate vessels operating off its coasts. See 'US to Help Tackle Somali Pirates', *BBC News*, 17 Apr. 2006.

law, comprise sovereign territory. That is, it fails to resolve the question of state responsibility on the high seas.[104]

The failure of the EXCOM Conclusion to designate the state responsible for the protection of persons intercepted on the high seas has several negative consequences. First, it creates an incentive for states to abandon border patrols in their territorial waters in favour of conducting interceptions exclusively on the high seas in order to sidestep the protection responsibilities that would otherwise accrue. Certainly states in the developed north with sophisticated coastguard infrastructure are likely to prefer extending their patrols further out to sea given that they have the capability and resources to do so.

A second likely consequence is that states will be inclined to extend their border patrols out further still – directly into the territorial waters of migrant-producing (or transit) states through bilateral agreements. Destination states in the developed north willing to outsource their border control capabilities to the territorial waters of migrant-producing (or transit) states will benefit twofold. With this detection and deterrent capacity in place, fewer irregular migrants will arrive at their destination. In addition, the protection responsibility for intercepted persons would appear to be borne by the migrant-producing (or transit) country, with the outcome that international protection responsibilities will fall on states least equipped to provide it.

More importantly, the EXCOM scheme purports to assign 'primary responsibility' for the international protection needs of intercepted persons based on geographic locale, but it assigns these duties without regard to pre-existing treaty obligations which supersede soft law sources. One example of this is the recent agreement between Italy and Libya whereby the Italian maritime border services, manned by joint Italian and Libyan crews, have undertaken to patrol Libyan territorial waters to stem the flow of migrants departing Libyan shores for Italian territory.[105] Under the EXCOM approach, Libya would retain 'primary protection responsibility' for those intercepted in its waters, despite the fact that it is not a party to the 1951 Refugee Convention and is not

[104] UNHCR has observed: 'States' protection responsibilities were relatively clear where individuals were intercepted or rescued in territorial waters, but differences remained over protection obligations outside such waters.' UNHCR, *Note on International Protection 2008*, A/AC.96/1053 para. 18.

[105] T. Kington, 'Italian boats to patrol Libyan waters to curb migrant flow', *The Guardian*, 31 Dec. 2007.

under any obligation to grant any refugee-specific rights to any refugees under that instrument.[106] The EXCOM approach ignores the fact that Italy continues to be bound by treaty obligations that apply extraterritorially[107] with regard to its role in the interceptions. According to the International Law Commission's Articles on State Responsibility, any breach by Italy of its extraterritorial obligations under the 1951 Refugee Convention could incur its legal liability.[108]

The failure of the EXCOM proposal to accommodate high seas interceptions or those inside another (sometimes non-signatory) state's territorial waters states appears not to have registered as a policy concern to EXCOM during the drafting phase of the 2003 Conclusion. While the proposal maintains the appearance of improving protection safeguards in relation to interception, its likely practical outcome is more worrisome.

2. Interception cloaked as rescue

Interception and rescue share little common ground, other than the protection concerns that follow from each activity. They are, after all, grounded in very different policy objectives (migration control versus humanitarian concerns), largely implemented by different actors (state

[106] Libya is, however, a party to the ICCPR and the UNCAT and is still bound by *non-refoulement* obligations under these instruments, although it is not under any obligation to grant any of the protections due to refugees that are unique to the 1951 Refugee Convention.

[107] See discussion in section II.B. pertaining to the extraterritorial application of all treaty obligations under the ECHR and the ICCPR and that of Art. 33 of the 1951 Refugee Convention. Additionally, Arts. 3, 13, 16(1), 20, 22, 29, and 34 of the 1951 Refugee Convention also have extraterritorial effect. See Hathaway, *The Rights of Refugees under International Law,* 3.1.1.

[108] Of particular interest is the assertion that Art. 16(1) of the 1951 Refugee Convention (access to the courts) is capable of extraterritorial application. An intercepted migrant prevented from exercising his or her right to access the Italian courts could constitute a breach of the 1951 Refugee Convention by Italy. See Hathaway, *The Rights of Refugees under International Law,* 3.1.1. In particular, conduct attributable to a state that constitutes a breach of an international obligation constitutes an internationally wrongful act entailing its international responsibility: Arts. 1 and 2, International Law Commission, *Articles on Responsibility for Internationally Wrongful Acts 2001*, text adopted by the ILC at is fifty-third session, in 2001, and submitted to the General Assembly as part of the ILC's report covering the work of that session, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 25 Oct. 2008): J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

versus private), and they have developed in very different contexts (modern versus historic). As the 2003 EXCOM Conclusion attempts to make clear, 'when vessels respond to persons in distress at sea, they are *not* engaged in interception'.[109] On the surface, then, the distinction between rescue and interception appears obvious, but a closer look reveals problematic ambiguities arising in practice.

From a practical standpoint the EXCOM Conclusion provides little concrete guidance in distinguishing between interception and rescue. Recently, it has emerged that some interception practices are being deliberately characterised as rescue for the purpose of side-stepping states' international protection responsibilities and for evading responsibility for disembarkation of intercepted persons.

The blurred lines between rescue and interception are not difficult to envision: when a state coastguard encounters an unseaworthy vessel suspected of transporting irregular migrants, it is not altogether obvious whether such an operation should more properly constitute a rescue or an interception. Likewise, when a vessel targeted for interception is, at the point of encounter, discovered to be already in distress, the same confusion exists. Ultimately, it is unclear whether it is the distressed, unseaworthy condition of the vessel or the suspicion of smuggling that is more determinative in characterising the activity. For coastal states that regularly engage in both rescue and interception operations (often performed by the same state agency), such issues require greater clarification. At the outset, what is needed is a close examination of the factors that may favour reliance on rescue.

Characterising a maritime encounter as a rescue rather than an interception offers several advantages to a state military vessel, which can include: legitimising engagement with a foreign-flagged vessel, co-opting rescue-related disembarkation procedures, and shirking protection-related responsibilities for intercepted persons. On the high seas, international law provides very limited bases for interfering with a foreign-flagged vessel,[110] and when these grounds are unavailable, interception is

[109] EXCOM Conclusion No. 97, Preambular para. 4 (emphasis added).

[110] According to Art. 110, UNCLOS, the most significant exception to exclusive flag state jurisdiction on the high seas is that of a right of visit, which permits a state military vessel to interfere with a foreign vessel only under certain enumerated circumstances which include a reasonable suspicion of: slavery, piracy, unauthorised broadcasting, a flagless ship, or that a foreign-flagged ship may in reality be of the same flag as the inspecting vessel. More recently the Protocol against Smuggling also permits interference by a military vessel only where both reasonable grounds to suspect smuggling *and*

impermissible. Stated broadly, if a foreign-flagged vessel on the high seas is not under suspicion of slavery, piracy or smuggling, no interference with such vessel is permitted without the flag state's authority, *unless* the vessel is in distress, in which case a rescue operation is warranted.[111]

In addition to furnishing a legal justification for interfering with a vessel, a high seas *rescue* operation also provides disembarkation assistance from a regional SAR coordination centre. By contrast, a state party that intercepts migrants on the high seas is itself responsible for disembarkation. In other words, some states will find it advantageous to characterise such action as a rescue in order to benefit from the rescue-related disembarkation framework recently implemented by the SAR and SOLAS amendments. Simultaneously, intercepting states able to secure rescue-related disembarkation elsewhere also benefit from transferring their international protection duties to a third party. In short, the benefits of characterising an interception as a rescue operation are considerable.

That the disembarkation amendments have attracted the attention of interception authorities has been confirmed by state representatives at a UNHCR meeting, raising concerns over 'the practice whereby several States [a]re classifying some interception measures as rescue at sea operations, in order to use SAR operational capacity for such activities'.[112] Perhaps it is not a surprising result given that disembarkation responsibilities for rescue amendments are allocated by one scheme, while protection responsibilities flowing from interception are guided by another. However, it is not the separate schemes that pose a problem, but the lack of clarity distinguishing rescue from interception operations in close-call situations that must be addressed.

In order to help clarify the distinction between rescue and interception, one helpful starting point is the 2003 EXCOM Conclusion, which

permission by the suspect vessel's flag state are present. See, Art. 8, Protocol against Smuggling.

[111] The SOLAS requires state parties to coordinate and rescue those in distress off their coasts, and requires shipmasters of merchant vessels to rescue any persons in distress at sea: ch. V; regs. 7 and 33, SOLAS. UNCLOS Sub-Articles 98(1) and (2) respectively obligate member states to require its flag vessels to 'render assistance to any person found at sea in danger of being lost' and to 'proceed with all possible speed to the rescue of persons in distress'; while coastal states shall establish and maintain 'an adequate and effective search and rescue service'.

[112] See UNHCR, State Representatives' Meeting on Rescue at Sea and Maritime Interception in the Mediterranean, *Chairman's Summary*, Madrid, May 2006, paras. 1 and 23–24.

states that 'when vessels respond to persons *in distress* at sea, they are not engaged in interception' (emphasis added).[113] A closer look at the meaning of 'distress' is provided by the SAR definition of 'a distress phase', defined as '[a] situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[114] The distress phase requirement of *reasonable certainty* over a danger can be distinguished from other phases involving either mere *uncertainty* or the lesser standard of *apprehension* as to the existing danger. The fact that a *distress* phase is characterised by reasonable certainty of a grave and imminent danger highlights a spectrum of certainty as to the risk that may exist in a given situation. This can be usefully contrasted against the lower threshold required of interception in the anti-smuggling context, which permits interference with a vessel on the less stringent basis of merely 'reasonable grounds to suspect' migrant smuggling.[115]

In essence, interference with a vessel on grounds of distress requires *reasonable certainty of distress*, while interference on grounds of interception requires *reasonable suspicion of smuggling* – a clear distinction in the standard of proof. Notwithstanding the potential for situations with overlapping elements of *both* suspected interception and distress, the higher burden of proof associated with rescue may be relevant to determining how such encounters should be characterised.

One possible approach to distinguish between rescue and interception operations would be to adopt a rebuttable presumption in which encounters *by state military vessels* would be characterised as interceptions by default.[116] Such a presumption could be rebutted – enabling an encounter to qualify as a rescue instead – where clear evidence of grave and imminent danger is present, or where the call for rescue is initiated by a rescue coordination centre rather than a state military vessel. In these situations, state military vessels would be permitted to access SAR operational capacity for rescue-related disembarkation procedures. In the absence of any clear evidence suggesting legitimate rescue as defined by the SAR treaty, ambiguous encounters would be characterised as

[113] EXCOM Conclusion No. 97, Preambular para. 6.
[114] See, ch. 1.3.13, SAR Annex.
[115] See, Art. 8(1), (2) and (7), Protocol against Smuggling.
[116] Recalling that only certain dual-function state military vessels are capable of performing both rescue and interception activities, the proposed rebuttable presumption would only be applied to ambiguous actions taken by such dual function military vessels.

interceptions, and the intercepting vessels would be required to comply with the 2003 EXCOM Conclusion framework designating primary protection responsibility (to the extent applicable).

As a policy matter, the presumption could help reduce demands on the rescue infrastructure and help restore SAR operational capacity to merchant vessels undertaking rescue as a humanitarian gesture, thereby helping to reduce rescue-related disembarkation duties. The presumption also operates on a common-sense level by erring on the side of caution in ambiguous cases to burden state military and border protection services in order to safeguard a universal custom of humanitarianism.

V. Conclusion

This chapter has sought to outline several significant threats to irregular migrants taking to the seas in search of improved human security conditions. First, the maritime journey itself often constitutes an equal or even greater human security risk than the very conditions prompting movement. Second, it has been established that certain human rights treaty obligations apply extraterritorially – including the principle of *non-refoulement* – and state practice contravening these obligations represents a critical threat to the international protection of migrants seeking protection elsewhere, particularly those travelling on the high seas.

The third risk to migrants crossing borders by sea is a weakened rescue infrastructure. Despite centuries of adherence to the humanitarian custom of rescue at sea, many vessels are now reluctant to rescue persons in distress for fear of being unable to secure prompt disembarkation. Recent maritime rescue amendments have sought to produce greater clarity concerning coordination and cooperation for disembarkation responsibility, yet ambiguities in the rescue instruments remain. In particular, the amendments permit delivery to other vessels or to facilities at sea, rather than to require delivery to dry land, as logic, safety and dignity would suggest. Although the recent rescue amendments tend to reduce the cost disincentives to merchant vessels engaged in rescue by speeding disembarkation of rescued persons, they fail to solve the problem of disembarkation delays and delivery to dry land for the rescued migrants themselves.

Finally, two principal challenges to the human security of migrants at sea exist in the interception context. First, the UNHCR EXCOM framework designed to link protection duties to interception activity has very limited practical effectiveness due to its inapplicability on the high seas.

More critically, it ignores any pre-existing treaty-based protection obligations, many of which remain in effect on the high seas. The second problem, involving the emerging practice of interception activities cloaked as rescue, weakens the rescue regime by co-opting SAR operational capacity and thus endangers rescue compliance by merchant vessels over the long term. Both issues represent a failure by states to self-regulate their interception practices by responsibly owning up to their concomitant protection obligations. Ironically, an effectively operating rescue system inherently serves to reduce the burden on states' anti-smuggling operations, since many of those rescued at sea by private vessels are irregular migrants. State attempts disingenuously to divert intercepted persons into the rescue system are straining a framework already struggling to cope with real increased rescue demands. Genuine interception operations masquerading as rescue create hostile responses (in practice and in policy) to the new disembarkation amendments, and further weaken an already strained safety net for asylum-seekers, refugees and migrants.

PART III

Migration, development and environment

7

Empowering migrants: human security, human rights and policy

PIA OBEROI

I. Introduction

It is seemingly every day that our attention is captured by media reports portraying the situation of migrants, or as these reports will often label them, 'illegal immigrants', 'economic migrants' or 'aliens'. Frequently harrowing, such stories, from all around the world, typically depict migrants setting out in search of new opportunities in leaky boats or airless lorries, prey to traffickers and corrupt border officials; working long hours in cramped, unsanitary factories; languishing in arbitrary detention for years on end; or confronting racism, violence and xenophobia in host communities.[1] In the twenty-first century, migrants have become the human face of the feared and vilified 'other'; accused of importing not just themselves, but also disease, crime and societal breakdown into countries of transit and destination.[2] The

[1] See the following sources for a snapshot of such reports: 'Immigrants fleeing South Africa after deadly attacks', Associated Press, 22 May 2008, available at http://ap.google.com/article/ALeqM5gDApNxRrx3yewVQFozZ-tzwc-ZggD90QSATO0 (last accessed 25 Oct. 2008); 'Egypt: African migrants killed trying to enter Israel illegally,' *New York Times*, 28 Mar. 2008; 'Burmese migrants suffocate in lorry,' BBC News, 10 Apr. 2008, available at http://news.bbc.co.uk/2/hi/asia-pacific/7339939.stm (last accessed 25 Aug. 2008); 'Italian police target foreigners in crackdown on illegal immigration', *The Seattle Times*, 16 May 2008, available at http://seattletimes.nwsource.com/html/nationworld/2004418270_wdig16.html (last accessed 25 Oct. 2008).

[2] Currently nearly 200 million people are estimated to live in countries other than their own; this includes refugees and asylum-seekers in addition to migrant workers and members of their families. IOM, *Global Estimates and Trends*, available at www.iom.int/jahia/Jahia/pid/254#4 (last accessed 25 Oct. 2008). To this figure should be added the uncounted, and often uncountable, numbers of irregular migrants. However, the proportion of migrants in relation to populations who remain in their countries of origin is a relatively small 3 per cent. In addition, it is worth noting that accurate statistical data in the field of migration is often difficult to obtain, particularly and obviously in relation to irregular migration, but also in terms of regular migration as in many countries

migratory journey, once imbued with images of heroism and entrepreneurship, is now seen as a journey borne out of desperation or self-indulgence, embarked upon not by adventurers and heroes but by criminals and scroungers. Former United Nations Secretary-General Kofi Annan noted that: 'The public has been fed images of a flood of unwelcome entrants, and of threats to their societies and identities. In the process, immigrants have sometimes been stigmatised, vilified, even dehumanised.' He called this 'a silent human rights crisis that shames our world'.[3]

At the same time, the subject of migration now tops the political agenda in domestic politics around the world, in inter-governmental deliberations, and in discussions at the United Nations. Over the last few years, international debate on migration has increased dramatically. Particularly in the post-9/11 climate of fear, 'illegal immigration' has been singled out to constitute a direct threat to national security.[4] The UN Development Programme (UNDP) has pronounced 'excessive international migration' to be amongst the greatest threats to global human security.[5] International migration has also been debated through the lens of poverty and inequality between states, and this has led to antagonistic and deeply entrenched positions being taken between states of the global North and South. Commentators have been struck by the 'intense, heated and polarized nature of the debate on international migration'.[6]

On the other side of the equation, though, it is said that properly 'managed' migration can bring untold benefits to states: in sending states, migration can alleviate poverty; in receiving states, the socio-economic effects of changing demographics can be offset by migration. Migrant remittances exceed, often significantly, the flow of official development assistance, and have been called 'the most direct form of

administrative procedures for the entry of persons into the territory (and for recording that entry) are very disordered.

[3] 'Annan attacks fortress Europe over migrants – United Nations Chief pleads for warmer welcome,' *The Guardian,* 30 Jan. 2004.

[4] In 2006, for instance, in the midst of the on-going US debate on immigration, Congressman Tom Tancredo of the US House of Representatives' group for immigration reform was moved to declare that: 'Our porous borders pose a major national security threat because not all of the illegal aliens are coming to "do the job that no American will do," as President Bush often says.' BBC News, 23 May 2006, available at http://news.bbc.co.uk/2/hi/americas/4989248.stm (last accessed 25 Oct. 2008).

[5] UNDP, *Human Development Report 1994*, 34.

[6] M. Ramphele, 'Global Commission on International Migration presents its final report', Rush Transcript; Federal News Service, 7 Oct. 2005.

development aid'.[7] New transnational models of skills sharing are being discussed in multilateral fora, with the return and circulation of skills through migration being high on the agenda of states. Temporary labour migration schemes are said to hold out the promise of relieving surplus labour, unemployment and population pressures on developing countries. Yet the individual migrant cuts a lonely and often invisible figure in this debate; his work is accepted but his presence rejected, her obligations emphasised but her rights denied. The human element of migration appears in many cases to have become a footnote to intergovernmental discussions on remittance management, readmission agreements, counter-terrorism strategies and temporary labour schemes.

In this context, it is pertinent to investigate the place of contemporary migration in the international human rights architecture. This chapter is the first in a series of chapters in Part III of this book dealing with international migration. It presents a picture of the current landscape of migration, the various actors involved and the different arenas in which practice towards migrants is debated and regulated. What are the rights and needs of migrants today, and where are the important areas of vulnerability that must be addressed? Juxtaposed with this picture is the discourse of human rights norms and standards on the one hand, and that of human security on the other. What does the concept of 'human security' add to the protection of migrants in policy and practice? How can either or both frameworks challenge the state-centric discourse of contemporary multilateral migration policy-making, and why is this important? And, finally, what does the concept of empowerment mean in the context of migration, and how can it be achieved?

II. Portrait of a twenty-first century migrant

Who is the migrant in the twenty-first century? Many, if not most, of the readers of this chapter may have intimate experience of migration, whether because they themselves have migrated for work, to be with their family, or for other reasons such as their health, to a country that is not their own, either temporarily or permanently, or because someone in their circle of family or friends has done the same. However, what

[7] In 2007, the World Bank estimated the flow of recorded remittances to be US$318 billion worldwide. This did not take into account money that was sent home by migrants through informal channels. Of the total recorded flow, the World Bank estimates that US$240 billion was sent to developing countries. See www.worldbank.org/prospects/migrationandremittances (last accessed 25 Oct. 2008).

defines a person as a 'migrant' can be difficult to pin down, and the issue of definitions has plagued the theory and practice of migration policy-making, and commentators have highlighted the lack of an accepted, universal definition of a 'migrant'. At a fundamental level, the migrants referred to in this chapter are international migrants; i.e. persons who have crossed, or are seeking to cross, an international border in their migratory journey.[8]

The clearest universal definition that currently exists is that of a 'migrant worker' contained in the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990 (the Migrant Workers' Convention or MWC) as 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national'.[9] There have been other attempts at constructing a more general universal definition of the term 'migrant'. The Working Group of Inter-Governmental Experts on the Human Rights of Migrants stated that: 'the term migrant should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of "personal convenience" and without intervention of an external compelling factor.'[10]

[8] Migration can, and does, take place within the territorial borders of states, as, for instance, when people move to cities in search of employment. While this chapter, in light of the volume's focus on non-citizens, addresses the situation of international migrants, it is worth bearing in mind that estimates suggest that the numbers of internal migrants are far larger than those of migrants who cross international borders. In China alone, in 2003 an estimated 120 million internal migrants had moved from rural to urban areas of the country. See International Organization for Migration (IOM), *World Migration 2005: Costs and Benefits of International Migration* (2005).

[9] Art. 2(1), MWC. International Convention on the Protection of the Rights of Migrant Workers and Members of their Families 1990, GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003.

[10] Report of the Working Group of Intergovernmental Experts on the Human Rights of Migrants submitted in accordance with Commission on Human Rights res.1997/15, *Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers*, Commission on Human Rights, 54th sess., 1998. While recognising that 'at the international level, no universally accepted definition for migrant exists', the IOM *Glossary on Migration* largely reproduces the definition given in the text above, concluding that the term applies to persons, and family members, moving to another country or region to better their material or social conditions: IOM, *Glossary on Migration* (Geneva:10m, 2004). The former Special Rapporteur on the Human Rights of Migrants proposed a definition which included the following characteristics of the individual migrant: that they were outside the territory of their state of nationality or citizenship and not subject to its legal protection; that they did not enjoy legal recognition of rights granted by the status of refugee, naturalised person or similar status; and that they did not enjoy legal protection of their rights by virtue of diplomatic agreements, visas or

Yet, and as the media reports highlighted in the Introduction to this chapter demonstrate, the 'life-cycle' of contemporary migration is complex, and will often result in the individual migrant falling into and out of definitional categories throughout his or her migratory journey. Former Secretary-General Kofi Annan noted that: 'Most immigrants are not refugees. We call them voluntary migrants – and some of them truly are. However, many leave their home countries not because they really want to, but because they see no future at home.'[11] In contrast to the definition of the Working Group, not all persons determined or deemed to be 'voluntary migrants' have left their countries of origin as the result of a truly voluntary, free and informed choice. Along the migration continuum, varying degrees of coercion and voluntariness mark each individual's experience of their journey, an experience which is dynamic in that it changes as the journey progresses. For example, women who leave their country voluntarily in search of work as care-givers can find themselves in the hands of traffickers, who find the migrant women through abusive recruitment agencies. Migrant workers who were employed legally can find themselves in a situation of irregularity as a result of being unlawfully dismissed from their jobs by unscrupulous employers. A dramatic change of conditions in their country of origin can mean that migrants are unable to return home and in need of international protection in the host country. And some migrants who entered their country of destination in an irregular manner will have their status regularised as a result of a state-declared amnesty.

Migrants who make their primary movement out of a degree of necessity rather than free choice are at greater risk of human rights violations throughout the life cycle of their migration, are less likely to be able to make choices about their condition or formulate exit strategies, and therefore are more likely to migrate in conditions which do not respect the dignity of the human being. The necessity to move can be triggered, for instance, by one or a combination of poverty and inequality, conflict including conflict over scarce resources, lack of access to an adequate standard of living linked to discrimination, or forced evictions

other agreements. See G. Rodríguez Pizarro, Special Rapporteur on the Human Rights of Migrants of the Commission on Human rights established pursuant to Commission on Human Rights res. A/57/292, *Human Rights of Migrants*, Note by the Secretary-General, 9 Aug. 2002.

[11] Secretary-General Kofi Annan, Address to the European Parliament accepting the Andrei Sakharov Prize for Freedom of Thought, European Parliament, Brussels, 29 Jan. 2004.

arising from misguided development projects or to enable profit making extractive industries to seize control of land.

In addition, certain other contextual factors exacerbate the vulnerability of migrants, including their age, sex, nationality, ethnic or social origin, religion, economic position, and their legal status in countries of transit and destination.[12] Irregular migrants[13] are particularly vulnerable to abuse, whether at the border or in their houses and the places in which they live, in their workplace and in the communities in which they attempt to make their home.

All of us will probably know a migrant; many of us *are* migrants. The term can encompass a highly paid and educated business executive who travels to a different country every week, as well as a low-skilled domestic worker who, lacking a secure legal status, has been unable to leave her country of employment for years. Yet, both will have moved to live and work outside their country of nationality. While a lack of attachment to the country in which migrants live and work creates a situation in which all migrants can be abused, marginalisation and exclusion makes certain migrants in certain situations more vulnerable to abuse. Accordingly, it would usually be safe to assume that the migrant domestic worker above is more vulnerable than the business executive. The international debate, which will be described in the following sections, encompasses all groups of migrants, usually viewing them as a source of labour, remittances or even insecurity, and often only fleetingly as human beings, with human rights. For the individual migrant, however, it is a framework with a specific focus on discrimination, vulnerability, and exclusion that is of real relevance to their situation.

[12] See, in this respect, Art. 7 of the Migrant Workers' Convention (the non-discrimination clause) which, although illustrative and non-exhaustive, is noteworthy in being broader in scope than the non-discrimination provisions in either the International Covenant on Civil and Political Rights 1966 (ICCPR) (GA res. 2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976) or the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (GA res. 2200A (XX), 16 Dec. 1966, 993 UNTS 3; entered into force 3 Jan. 1976.

[13] The International Labour Organization (ILO) has noted that: '[P]eople who enter or work in countries without legal authorisation have been labelled illegal, clandestine, undocumented or irregular. "Illegal migrants" has a normative connotation and conveys the idea of criminality.' ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004). For similar reasons, and despite some conceptual ambiguity surrounding the term, most human rights commentators prefer to use 'irregular migrant' to describe a migrant who does not have legal permission to enter and remain in a host country.

III. The multifaceted nature of contemporary migration

As the world changes, patterns of human mobility are becoming increasingly complex. Even though the absolute numbers of international migrants remains relatively small, more people are leaving their homes and countries today than in any other time in contemporary history. In 1994, the International Conference on Population and Development identified 'international economic imbalances, poverty and environmental degradation, combined with the absence of peace and security, human rights violations and the varying degree of development of judicial and democratic institutions' as key motivating factors for migration.[14]

The motivations for movement are changing often dramatically, and migratory journeys becoming more complex. The High Commissioner for Refugees, António Guterres, stated recently that:

> Old barriers to human mobility have fallen and new patterns of movement have emerged … These new challenges make it all the more important that we find ways to address the increasingly complex root causes of displacement.[15]

Developments within the global economy and technological advances, changing demographics in some regions of the world, persistent and generalised situations of violence and human rights violations in others, endemic poverty and structural underdevelopment, natural and human-made disasters, the changing global climate, growing inequalities between different regions of the world, post-9/11 counter-terrorism policies, and declining commitment to the protection of asylum space have all contributed to these more complex human mobility patterns.

Even as the movement of goods, capital and services has increasingly been de-regulated within the international arena, states have sought to

[14] International Conference on Population and Development, Programme of Action, 1994, UN Doc. A/CONF.171/13, 18 Oct. 1994.

[15] The speech went on to note that such new movements might include patterns of forced displacement that were not envisaged by the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), 28 Jul. 1951, 198 UNTS 150; entered into force 22 Apr. 1954. The High Commissioner stated: 'Conflict today may be motivated by politics, but looking deeper it can also be about poverty, bad governance, climate change leading to competition for scarce resources. Recent food and fuel shortages have had an immediate and dramatic effect on the poor and the dispossessed.' Message by UN High Commissioner for Refugees António Guterres to mark World Refugee Day, 20 Jun. 2008, available at www.unhcr.org/news/NEWS/485b86532.html (last accessed 25 Oct. 2008).

restrict or even halt the movement of persons across borders in search of employment. Yet the 'pull factors' that draw migrant labour into economies and societies provide a powerful motivation for movement, often circumventing restrictive policies put in place by states at their frontiers. Similarly, while counter-terrorism strategies have increasingly sought to prevent movement, and to institute draconian regimes for identifying potential migrants,[16] these too have often been re-negotiated in practice by migrants. In seeking to move they have been assisted, often to the detriment of their rights, by an increasingly complex network of smugglers and traffickers.[17]

Awareness is also growing of the effects of climate change and environmental degradation on the migration of people internally and across borders.[18] The Deputy High Commissioner for Human Rights recently noted that:

> available data confirm today that almost as many people are forced to leave their homes because of environmental disasters and natural resource scarcity that affect their economic and social rights as those who flee their communities to escape political oppression, religious persecution, ethnic discrimination and conflict.[19]

While much of the movement caused by environmental factors will initially take place within the borders of states, the cumulative effects of slow onset disasters and environmental degradation, particularly when coupled with poverty, will cause individuals and communities to migrate in search of new opportunities where they will be able to enjoy protection of their rights. Indeed, such movements are already taking place; for instance as severe water stress drives families first to urban centres within their own countries, and then, when they are able to gather sufficient resources, to countries further afield. Commentators note here that such migration is often the result of a range of causes, asserting that it involves 'complex patterns of multiple causality, in

[16] The mandatory collection and retention of biometric data from migrants could, for instance, breach human rights standards on privacy, and some such regimes have been alleged to be discriminatory in effect if not in purpose. See R. Thomas, 'Biometrics, international migrants and human rights,' *Global Migration Perspectives* 17 (Jan) (2005).

[17] See, further, ch. 11 by R. Piotrowicz in this book.

[18] See, further, ch. 10 by J. McAdam and B. Saul in this book.

[19] Address by Ms Kyung-Wha Kang, Deputy High Commissioner on Human Rights of the Office of the High Commissioner for Human Rights to the Conference on Climate Change and Migration: 'Addressing Vulnerabilities and Harnessing Opportunities', Geneva, 19 Feb. 2008.

which natural and environmental factors are closely linked to economic, social and political ones'.[20]

Migratory movements can also take place in response to structural deficits in development or to large-scale development projects that threaten the environment and livelihoods. The relationship between migration and development has increasingly become an issue in the international sphere.[21] The migration policy of some states has in some cases included strategies of poverty reduction in migration-producing countries through either bilateral assistance or in the framework of international cooperation. The rationale for this is that it will alleviate the pressure to migrate, and therefore reduce the influx of migrants. However, it is worth noting that, in the short or even medium term, bringing communities out of extreme poverty could increase migration flows, as material resources gradually become available to enable people to move to areas of relative prosperity. International migration is in most cases a highly cost-intensive exercise.[22] The debate on migration and development has also increasingly looked to how migration can help or hinder the development of both states of origin and destination. Looked at primarily through the lens of economic development, attention has focused on the issues of brain drain, brain gain, remittances, and diaspora communities as sources of intellectual and material capital. Policy responses to harness the potential of migrants as 'agents of development' have overwhelmingly looked to temporary or circular migration.

As technology has advanced, migrants have been able to benefit from enhanced transport links and from increased communications with diaspora communities. Technology, such as the increasing use and reach of the internet, has enabled migrants to know where jobs are available and where and how to find places to live, as well as the whereabouts of communities with cultural links. Technological advances, coupled with reduced costs surrounding transportation and communication, have

[20] S. Castles, *Environmental Change and Forced Migration: Making Sense of the Debate,* New Issues in Refugee Research, UNHCR, Working Paper No. 70, available at www.unhcr.org/research/RESEARCH/3de344fd9.pdf (last accessed 25 Oct. 2008).

[21] The Global Forum for Migration and Development, which is the most recent arena in which the links between migration and development are being explored, will be described later in this chapter.

[22] The final report of the Commission on Human Security has noted that: 'poverty reduction strategies may contribute to increased movement in the short and medium terms as people have access more to the money, information and networks that are essential for moving from one country to another.' Commission on Human Security, Final Report, *Human Security Now,* ch. 3 'People on the Move' (New York: CHS, 2003), 44.

thus allowed for the intensification of transnational connections and mobility, often in defiance of government migration programmes. At the same time, unscrupulous recruiters and employers are also able to benefit from these advances, including by being able to make direct contact with potential migrants and by-passing safeguards put in place by the state to protect migrants.

IV. Policy responses to migration

As the increasingly complex issue of migration has moved up the political, economic and security agendas, states have increasingly sought to assert sovereign control of their borders and territory. Migration is seen as a direct challenge to sovereignty. According to scholars of international relations, it was the Treaty of Westphalia of 1648 that first created the understanding that it is the protection of territory that is the key source of state sovereignty and power.[23] As Weiner has noted:

> Since the development of the modern state from the fifteenth-century onward, governments have regarded control over their borders as the core of sovereignty. It is axiomatic that states decided which people to admit, how many, and from where.[24]

Accordingly, controlling and containing the entry of migrants onto state territory is seen as a distinct goal of state security, in order, *inter alia*, to demonstrate the state's command over its borders and territory. Policy-making on migration-related issues has for some time been the preserve of the state, and has been taken for granted as such by most states. Hence, the Chairman's summary of the state-led Berne Initiative process (see below) could assert unequivocally that: 'Migration is managed first and foremost at the national level, with each State retaining its right to determine who can enter and remain in its territory and under what conditions.'[25] Such consideration led for years to an outright refusal on the part of states to consider migration as anything but a matter of

[23] In a seminal account, Hans Morgenthau asserted that the Westphalian notion of statehood, that arose from the Treaty of Westphalia of 1648, made the territorial state the cornerstone of the modern state system: H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace,* 7th edn (New York, NY: McGraw-Hill, 2005).

[24] M. Weiner, 'The global migration crisis', in W. Gungwu (ed.), *Global History and Migrations* (Boulder, CO: Westview, 1997), 95.

[25] Berne Initiative, Chairman's Summary, Berne II Conference, 16–17 Dec. 2004, Berne, Switzerland. For more information on the Berne Initiative see the IOM website, available at www.iom.int/jahia/Jahia/pid/1491 (last accessed 25 Oct. 2008).

domestic concern. The United Nations Deputy Secretary-General thus remarked recently that: 'Only a short time ago, the international community had great difficulty discussing matters related to migration. Dividing lines were drawn between North and South … Accusations and recriminations trumped reasoned dialogue.'[26]

This situation of inter-state deadlock has been somewhat broken in recent years by a growing realisation among governments that, despite their inclination to maintain their discretion and flexibility in migration management, the cross-border nature of migration was making this increasingly difficult in a globalised world. Countries of destination have realised that they have to enter into discussion with countries of transit and of origin. There has accordingly been a relative proliferation of bilateral and multilateral arenas in which states have come together to discuss policy responses to migration.[27] In recent years there has been multilateral debate under the auspices of the United Nations, and more targeted discussions between particular regional or issue-focused groupings of states. In addition to the few genuinely multilateral discussions, a plethora of initiatives have sprung up under the general heading of Regional Consultative Processes (RCPs).[28] What many, if not most, of these initiatives have in common is that they are entirely or

[26] Department of Public Information, UN News and Media Division, 'Deputy Secretary General, in remarks to conference on migration and development, urges "ethic of cooperation" around mutually beneficial issues', New York, 17 Jan. 2008.

[27] Migration is an area where there is a preponderance of bilateral agreements, whether labour agreements, or agreements to address concerns such as smuggling and trafficking. Countries of origin enter into agreements with countries of destination to guarantee access to labour markets and protection for their migrant workers, and at other times to protect the flow of remittances. Similarly, countries of destination enter into agreements with countries of origin or transit in a bid to restrict the entry into their territory of irregular migrants. There has been concern amongst civil society actors about the prevalence of bilateral treaties on migration-related issues that openly flout human rights standards. Readmission agreements have often been a feature of governmental efforts to 'combat' irregular migration, and there has been similar concern raised in this regard. The EU has, for instance, in recent years keenly been pursuing the negotiation of bilateral readmission agreements in Africa and the Middle East in order to return irregular migrants and rejected asylum seekers. Since the entry into force of the Treaty of Amsterdam in 1999, the European Community has had the power in its own name to enter into readmission agreements. Other regions of the world have also seen the negotiation of bilateral readmission agreements between states.

[28] According to the IOM, which serves as a Secretariat for a number of such initiatives, RCPs: 'address the need identified by states for greater inter-state dialogue and cooperation on migration issues. While the first RCP was established in 1985, the majority of RCPs have emerged since 1995, often as a result of specific events of developments – for example the fall of the Soviet Union, sudden major influxes of irregular migrants, and

overwhelmingly states-owned fora.[29] Through such initiatives, therefore, governments have sought explicitly to delineate the sphere of migration policy-making as one owned exclusively by states. The place of migrants themselves in such discussions is, however, at best marginal. The outcomes of many of these discussions have in addition often been merely symbolic, resulting in non-binding declarations, summary statements, or 'common understandings'. The importance of such processes lies to a large extent in demonstrating the growing importance of migration on the international agenda, and creating the momentum and enabling conditions for more binding policies and practices to result. States have, for example, used such fora to negotiate specific readmission agreements. The following section describes the most important of such regional and international initiatives.

A. Major international initiatives

One of the first recent international initiatives to address the issue of migration took place in 1993. The Vienna World Conference on Human Rights, which was mandated by the General Assembly to review and assess progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights, was attended by representatives of 171 states, as well as civil society actors, academics and representatives of national human rights institutions. It presented a new global vision and a common plan for extending universal human rights efforts through the Vienna Declaration and Programme of Action. In respect to migration, the Declaration stated that:

concerns over security linked to the events of 9/11.' See www.iom.int/jahia/Jahia/lang/en/pid/386 (last accessed 25 Oct. 2008).

[29] The characterisation of these processes as 'states-owned' emphasises that the primary purpose of the forum is to respond to the interests and concerns of states. Some will allow international organisations, such as UN agencies, to participate as observers, and only rarely will such fora allow the participation in any capacity of non-governmental organisations (NGOs) or other civil society organisations including migrants' organisations. As the agenda is set and led by states, discussions often centre on issues of control and containment of migration, and the focus is on building common understandings and cooperation between states. Although the agenda will sometimes include public health, labour migration or trafficking issues, the parameters of the discussion are usually bounded by traditional security concerns. Human rights standards, whether in the context of safeguards or as guiding principles for the discussion, are seldom explicitly on the agenda.

> Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments.[30]

The Declaration went on to advise states to create the 'conditions to foster greater harmony and tolerance between migrant workers and the rest of the society of the State in which they reside', and urged all states to ratify, at the earliest possible time, the new International Convention on the Rights of All Migrant Workers and Members of Their Families. This was a significant development, as it was one of the first occasions where the plight of migrants had been highlighted within the human rights context. This was important and necessary, particularly in the context of a world which was increasingly turning its back on the need to provide protection to migrants.

The following year, the International Conference on Population and Development (ICPD) was held in Cairo, from 5 to 13 September 1994. The ICPD was convened under the auspices of the United Nations and was organised by a secretariat composed of the Population Division of the UN Department for Economic and Social Information and Policy Analysis and the United Nations Population Fund. The Conference devoted some attention to migration issues, and the ICPD Programme of Action urged that 'countries should guarantee to all migrants all basic human rights as included in the Universal Declaration of Human Rights'.[31] However, expectations that this statement would result in a global conference on migration were soon dashed, as governments continued to insist that the principle of sovereignty trumped universal human rights, and accordingly retreated into non-binding regional processes on selected, usually state security-related, migration issues.

The World Conference against Racism, which took place in Durban, South Africa, from 31 August to 7 September 2001, did, however, explore such key issues as trafficking in women and children, and migration and discrimination. The Durban Declaration and Programme of Action dealt in substantial part with the issue of migration and

[30] The final Declaration was endorsed by the forty-eighth session of the General Assembly (resolution 48/121 of 1993). See Vienna Declaration and Programme of Action, A/CONF.157/23, 12 Jul. 1993.

[31] Principle 12 of the Programme of Action of the International Conference on Population and Development 1994.

the human rights implications of immigration laws, policies and practices.[32] It has been called a 'major breakthrough for international attention on the human rights of migrants' and provided significant impetus for the entry into force of the Migrant Workers Convention in 2003.[33] The Durban process was, however, mired in political controversy, with a sharp divide coming between developing and developed counties on the question of discrimination, as well as controversy on the question of the human rights record of Israel. Effective follow-up to, and review of, the process has been impeded by such considerations, and has detracted to some extent from the overall value of the process itself. A Review Conference was held in Geneva in April 2009 which aimed, *inter alia*, to review progress and assess implementation of the Durban Declaration and Programme of Action by all stakeholders at the national, regional and international levels. However, key countries such as the United States, Canada and Germany did not participate, and the actual impact that this Review Conference will have remains in doubt.

The Millennium Summit, the largest ever gathering of world leaders, was held in September 2000 to discuss the role of the United Nations at the turn of the twenty-first century. At the Summit, 189 member states pledged collective action, including concrete steps towards poverty eradication. The Millennium Declaration, adopted unanimously at the conclusion of the Summit, included an important statement of intent on migration when states committed themselves to: 'take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies.'[34] The Millennium Development Goals, which were derived from the Declaration and which include specific targets and indicators for development actions, do not, however, include an explicit focus on migration (see below).

In 2001, the Berne Initiative was launched by the Swiss Government as a states-owned consultative process focused on fostering better

[32] See UN Doc. A/CONF.189/12, 25 Jan. 2002.

[33] Human Rights Watch, *Second Preparatory Meeting for the Durban Review Conference – Human Rights Watch's Position Paper on the Durban Preparatory Committee*, 21 Apr. 2008. See http://hrw.org/english/docs/2008/04/21/global18613.htm (last accessed 25 Oct. 2008)

[34] Part V of the Declaration also committed states to 'respect fully and uphold the Universal Declaration of Human Rights', and also to 'strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all'. United Nations *Millennium Declaration*, UN Doc. 55/2, 8 Sept. 2000.

management of migration at the regional and global levels through enhanced cooperation between states. In 2004, the Berne Initiative produced an International Agenda for Migration Management (IAMM), which is described as 'a non-binding policy framework aimed at facilitating cooperation between States in planning and managing the movement of people in a humane and orderly way'.[35] The originators of the IAMM were careful to stress that the document is non-binding and does not aim to create new normative standards on migration. IOM, which was the Secretariat for the Berne Initiative, incorporates aspects of the IAMM into its operational programmes. The document was also presented to the Global Commission on International Migration (see below). However, it appears that the IAMM, which did not have much support from civil society, also suffered eventually from a lack of state interest in and commitment to evolving common goals on migration, or indeed 'migration management'.

In his 2002 report on the Strengthening of the United Nations: An Agenda for Further Change (informally known as the Doyle report), the UN Secretary-General identified migration as a priority issue for the international community.[36] Subsequently, and acting on the encouragement of the UN Secretary-General, Sweden and Switzerland, together with the governments of Brazil, Morocco and the Philippines, launched the first ever global panel on migration in December 2003. The Global Commission on International Migration (GCIM) was mandated to analyse gaps and provide a framework for the formulation of a coherent, comprehensive and global response to migration issues, and to put migration on the global agenda. Nineteen experts in migration from around the world were nominated to serve as Commissioners, led by Dr Mamphele Ramphele, former managing director of the World Bank and Jan Karlsson, former Minister for Development Cooperation, Migration and Asylum Policy of Sweden. Several countries subsequently joined the effort and an open-ended Core Group of thirty-two governments established itself to support and follow the work of the Commission.

The final report of the GCIM was entitled *Migration in an Interconnected World – New Directions for Action* and was released in October 2005. The report noted that the UN did not currently have a specialised

[35] Berne Initiative, *International Agenda for Migration Management,* IOM and the Federal Office for Migration, Swiss Federation, 2004, available at www.old.iom.int/DOCUMENTS/OFFICIALTXT/EN/IAMM_E.pdf (last accessed 25 Oct. 2008).

[36] UN Secretary-General, Kofi Annan, *Strengthening of the United Nations: An Agenda for Further Change*, UN Doc. A/57/387, 9 Sept. 2002.

migration agency, and that the ongoing reform process created an opportunity for the UN to review institutional arrangements in relation to its response to migration issues. Stating that migration functions were spread across various institutions, including the International Labour Organization (ILO), the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Department of Economic and Social Affairs (UNDESA), the United Nations Population Fund (UNFPA) and the United Nations High Commissioner for Refugees (UNHCR), the report concluded that there remained a lack of inter-agency cooperation and coordination on migration issues which had led to fragmented and incoherent responses.[37] The International Organization for Migration (IOM), which has increasingly tried to assume a pre-eminent role on migration management issues, operates outside the UN system.

While a useful compendium of migration-related issues, the GCIM report was seen by civil society and other actors to have failed in large part to provide sufficient and innovative recommendations in relation to international migration; notable among which was its hesitation even to promote the ratification of the Migrant Workers' Convention. In addition, there was disappointment that the report did not provide groundbreaking solutions to the gaps, including the institutional gaps noted above, in the current global governance of migration. The options of (1) merging the UNHCR and IOM in order to create an agency mandated to work with refugees as well as migrants (which would recognise the 'grey zones' of international migration) or (2) bringing the IOM within the United Nations system were considered, but deferred as 'long-term' options. The report finally recommended only that the Secretary-General create an Inter-Agency Global Migration Facility. Although it hesitated to provide the terms of reference for, or even pronounce on the format and function of, such a facility, the report noted that such as body could 'facilitate the exchange of experience and expertise' in core areas including policy planning, capacity-building and data collection. Many commentators saw this hesitation to provide innovative

[37] The report noted that: 'the Commission has identified overlaps within the current institutional architecture that at times undermine an integrated, coherent and effective response to the opportunities and challenges presented by international migration. Rather than being complementary, different institutional approaches to the same issue can diverge and even conflict, and there is also frequent competition for limited funds to achieve the same goals.' Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, launched 5 Oct. 2005, available at www.gcim.org/en (last accessed 25 Oct. 2008), 73.

recommendations on global governance as a consequence of the political influence of the Core Group on the report, particularly the reluctance displayed by states to create new multilateral institutions in the migration arena. However, the report did provide a balanced picture of the current landscape of migration, and proposed six principles for further action, which although intentionally abstract did note that migration should ideally take place out of choice rather than necessity, and that there was need for greater protection of the rights of migrants.[38]

The Global Migration Group (GMG) was established in 2006 following the recommendations of the GCIM. It built on the membership and activities of the earlier Geneva Migration Group which had been set up in April 2003 by Geneva-based UN agencies, including UNHCR, IOM, ILO and OHCHR, to discuss migration-related issues. The group currently consists of some fourteen institutions and agencies, including the World Bank and the UN regional commissions. The GMG is mandated to meet at the level of heads of agencies, and aims to provide coherent and stronger leadership to migration issues within the UN. The effectiveness and global presence of the GMG has, however, been hampered by the lack of participation, and thus to some extent commitment, at the most senior level of the participating agencies. It is also hindered by the absence of an effective work plan, including a plan for joint advocacy and operational activities.

In parallel to the GCIM process, the United Nations General Assembly, through resolution 58/208 of 23 December 2003, decided to hold a High Level Dialogue on International Migration and Development (HLD) at its sixty-first session. The Secretary-General appointed a Special Representative on Migration, Peter Sutherland, who was tasked

[38] These principles recommended action on the following six broad themes; (i) migrating out of choice: migration and the global economy; (ii) reinforcing economic and developmental impact; (iii) addressing irregular migration; (iv) strengthening social cohesion through integration; (v) protecting the rights of migrants; and (vi) enhancing governance: coherence, capacity and cooperation. They were offered by the GCIM as a guide to migration policy-making for states, to monitor and evaluate the impact of such policies, and/or to provide a framework for action for states and other stakeholders. Given, however, that the GCIM Secretariat was not mandated to continue its work following the production of the report, and that therefore there was no institutional body charged with follow-up monitoring of the report, it is hard to know the real impact of these principles on the domestic policy and actions of states: Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, launched 5 Oct. 2005, available at www.gcim.org/en (last accessed 25 Oct. 2008).

with assisting in the preparation of the HLD and writing the background report to the Dialogue.[39]

The HLD was held on 14 and 15 September 2006, and participation was restricted to UN member states, while selected inter-governmental organisations, as well as a few representatives from civil society, were invited as observers.[40] One of the recommendations voiced at the HLD was the creation of a Global Forum that would continue global focus on the issue of migration and development. Some voices, principally in civil society, argued that the Forum should retain links to the UN system, should be inclusive in its membership, and should place emphasis on the human rights of migrants. However, the Forum that eventually came into being (see below) was far removed from these ideals, and is now set to function as an almost exclusively inter-governmental body, with only tenuous links to the UN system and human rights mechanisms. The HLD itself ended with a summary report, which noted, *inter alia*, that international migration was a growing phenomenon and that people often had to migrate because of poverty, conflict, human rights violations, poor governance or lack of employment. Participants expressed an interest in continued dialogue, although the creation of a global forum was questioned by some states who considered that existing institutional arrangements should suffice in addressing the links between migration and development. In addition, it was agreed that an extension of the mandate of the SRSG on International Migration and Development would be sufficient to ensure the link between the new global forum and the UN.[41]

[39] See Report of the Secretary-General, *International Migration and Development*, UN Doc. A/60/871, 18 May 2006.

[40] Prior to the HLD, on 12 Jul. 2006, the United Nations held informal interactive hearings on international migration and development, with civil society, which included NGOs, civil society organisations, and the private sector. The informal hearings were intended to provide an opportunity for civil society to offer input to the HLD process. Although the informal hearings yielded rich contributions from the various participants represented, the fact that an overcrowded agenda did not leave room for meaningful discussion and that few states had decided to attend as observers left the impression that these hearings were merely a token nod to the principle of participation. The summary report of these hearings stressed the importance of upholding the human rights of migrants, and of including the participation of migrants themselves in any international debate on migration. However, key recommendations, such as the opinion of many participants that future discussion on migration should take place within the UN system, were largely omitted from the report. See *Summary of Informal Interactive Hearings of the General Assembly with Representatives of Non-governmental Organizations, Civil Society Organizations and the Private Sector*, UN Doc. A/61/187, 27 Jul. 2006.

[41] *Summary of the High-Level Dialogue on International Migration and Development – Note by the President of the General Assembly*, UN Doc. A/61/515, 13 Oct. 2006.

During the HLD, the Government of Belgium offered to host the first Global Forum on Migration and Development (GFMD), which was held between 9 and 11 July 2007. The GFMD is characterised as a 'voluntary, inter-governmental, non-binding, and informal initiative' to which UN agencies and 'other international and regional bodies *may* be invited as observers' (emphasis added).[42] This follows the procedural model of the HLD, where civil society (including NGOs, academic experts and the private sector) was kept largely distinct from the main government forum. It is not a decision-making or policy-making body. The global process is aimed, *inter alia*, at 'establishing cooperative links between the various actors involved'. One can assume from this that civil society, including migrants themselves, are not high on the list of such actors, as they were largely kept distant from the main inter-state process during the Brussels GFMD.[43]

Issues discussed in round tables at the Brussels GFMD included looking at circular migration and sustainable return as development tools, strengthening the development contribution of temporary labour migration, and increasing the formal transfer of remittances. Despite the

[42] See Annex I of the *Summary Report of the First Meeting of the Global Forum on Migration and Development*, 9–11 Jul. 2007, available at www.gfmd-fmmd.org/en/system/files/Rapport+GFMD_EN+_3_.pd (last accessed 25 Oct. 2008).

[43] The Summary Report, *ibid.*, similarly pays only passing attention to the discussions and conclusions of the Civil Society Day. See www.gfmd-fmmd.org/en/system/files/Rapport+GFMD_EN+_3_.pd (last accessed 25 Oct. 2008). NGOs and other civil society actors did organise a global community forum on migration, development and human rights on the margins of the Brussels GFMD. Without denigrating the value of such events, which allow actors to network and share information and solidarity activities, there are concerns that civil society is increasingly unable to voice persuasively to governments the added value and even the necessity of ensuring that the voice of migrants, and their communities and advocates are included, and *heard*, in global discussions on migration. The voice of civil society, migrants and their communities is increasingly being entrenched on the margins of the global debate. At the second GFMD, held in Manila in October 2008, some civil society organisations also organised a 'Peoples' Global Action on Migration, Development and Human Rights', with a similar agenda to the community forum held in Brussels. In addition, migrant communities are beginning to protest their effective exclusion from many of these processes, noting: 'We are afraid that our basic issues will be sidelined [in the Manila GFMD] as the apparent objective of participating sending and receiving states is on how gains from migration can be maximized.' They note in addition that the civil society day: 'has been managed and directed mainly by non-government organizations or NGOs. While we respect the efforts of NGOs to support causes of migrants, still the best representatives for migrants are the migrants themselves.' *GFMD must hear migrants from the ground – Migrants alliance prepares to challenge migration and development frame of global confab in Manila*, Press release of the Asian Migrants Coordinating Body, 11 Jun. 2008.

efforts of a few states (mainly from Latin America), strong opposition kept the issue of human rights off the agenda as anything more than a weak 'cross-cutting' issue. The final report of the Forum proclaimed that it had 'established a new approach to migration by squarely moving development to the centre of the migration debate … and pave[d] the way for a longer term common global vision on migration, based on the recognition of mutual benefits for developing and developed countries'. While many commentators would be rightly sceptical of such hyperbole, it is noteworthy in addition that migrants themselves do not find mention in any of the six key conclusions reached at the GFMD meeting.[44]

The concept of the 'marketplace' was also pioneered at the Brussels GFMD, and replicated in Manila. This is aimed at allowing countries to 'market' their needs in connection with migration and to reach concrete agreements.[45] In a climate where concerns have been increasingly growing and voiced about the 'commodification' of migrant workers, the use of such terminology is unfortunate, to say the least, and points to the determination of states to retain migration, at least in theory, within a states-only sphere where migrants are seen through an almost wholly instrumental lens. Further, fears remain that the lack of any regulation or independent oversight of these marketplace proposals might lead to projects that are abusive of the rights of migrants. The Government of the Philippines hosted the second meeting of the GFMD in Manila in October 2008, and a regular schedule of subsequent hosting countries is being established. However, the extent to which the essentially inter-state character of the GFMD will be able to accommodate the presence and concerns of migrants and their advocates, including stressing the importance of ensuring that all discussions are premised on the international human rights framework, remains unclear, and there is nothing in its current agenda or working methods to suggest that, apart from its global remit, it will differ much in substance from state-led RCPs. In addition, and particularly in regard to the protection of the human rights of migrants, the removal from the UN system of the multilateral debate on migration and development continues to be problematic.

[44] Global Forum on Migration and Development, *Report of the First Meeting of the Global Forum on Migration and Development, Belgium 9–11 July 2007* (Bruxelles: Etablissements Emilie Bruylant S.A., 2008), 16.

[45] E.g., India and the United Arab Emirates are planning to complete negotiations on a 'joint labour management system' at the Manila GFMD. The project aims to promote 'legal, orderly and managed' migration between the two countries, with a focus on temporary contractual mobility. See, for more details, www.mfasia.org/mfaStatements/F135-ShatteredDreams.html (last accessed 25 Oct. 2008).

B. Regional processes[46]

The Inter-Governmental Consultations on Asylum, Refugees and Migration Policies (IGC) first met in 1985 and exemplified the scope and nature of the discussions on migration that states were prepared to undertake. It is an informal, non-binding, 'information exchange' forum, membership of which is strictly limited to states, with the occasional participation of inter-governmental organisations. Other RCPs have followed. They now number approximately thirteen in total, including the Budapest Group, the Puebla Process, the Migration Dialogue for Southern Africa, the Migration Dialogue for West Africa, the Bali Process, the 5+5 Dialogue and the Inter-Governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants. With some exceptions,[47] these initiatives have largely excluded the participation of migrants, their communities and their advocates, such as non-governmental organisations. The agenda of RCPs typically focuses on such topics as 'border security and management', 'return and readmission' and 'information and intelligence sharing'. The UN Commission on Human Security has contended that RCPs 'coordinate restrictive policies at the highest possible levels, while agreeing to protect migrants at the lowest possible levels'.[48]

RCPs are, however, not the only arena in which regional migration policy is crafted. In this context, mention should be made of recent conclusions reached within the regional European context in relation to migration, which indeed appear to protect migrants at the lowest possible level. The EU Returns Directive, adopted by the European Parliament on 18 June 2008, contains measures that have been widely criticised as abusive of the human rights of migrants.[49] These include contemplating a detention period of a maximum of eighteen months for

[46] See ch. 8 by R. Cholewinski in this book. See also the IOM website at www.iom.int/jahia/Jahia/pid/680 (last accessed 25 Oct. 2008) for a snapshot of RCPs.

[47] Within the Puebla Process, for instance, NGOs do engage with the process at the technical level, and have been invited to attend seminars and conferences. However, unlike inter-governmental organisations (IGOs), such as IOM and UNHCR, they are unable to obtain observer status. For more information on the Puebla Process, see www.rcmvs.org (last accessed 25 Oct. 2008).

[48] Commission on Human Security, 'People on the move', 47.

[49] See *UN experts express concern about proposed EU Return Directive*, UN Press Release, 18 Jul. 2008. Among others, the South American trade bloc Mercosur issued a declaration voicing 'deep rejection' of the European Union's immigration policy. See EUobserver.com, *Latin American Leaders Condemn 'Racist' EU Laws*, 2 Jul. 2008, available at http://euobserver.com/9/26432 (last accessed 25 Oct. 2008).

migrants who have committed no crime but have no authorisation to remain on EU territory, including unaccompanied children, trafficked persons and other vulnerable groups of persons.

C. The Commission on Human Security

The Commission on Human Security (CHS) was established in January 2001 in response to the Millennium Summit, in which the UN Secretary-General had called for a world 'free of fear' and 'free of want'. The final report of the Commission on Human Security entitled *Human Security Now* and published in 2003, dedicated one chapter to 'People on the Move'. This analysed the situation of forced migrants and internally displaced persons, as well as 'economic migrants'. Along with insisting that 'migration issues have to be squarely put on the development and poverty reduction agendas', the report declared that 'for many people … migration is vital to protect and attain human security'.[50] The report also included recommendations for institutional reform at the United Nations in order to promote human security; and an Advisory Board on Human Security was created in September 2003 to advise the Secretary-General on human security issues.[51] In May 2004, following recommendations from the Advisory Board, a dedicated Human Security Unit (HSU) was established in the Office for the Coordination of Humanitarian Affairs. The overall objective of the HSU is to place human security in the mainstream of UN activities. The HSU-administered trust fund priorities include: 'supporting and empowering refugees, IDPs, economic migrants and others on the move. Particular attention should be given to the socio-economic impact on the displaced and their host communities.'[52] While several projects carried out under the aegis of the trust fund address the situation of displaced persons, most of them appear to focus on conflict induced displacement.[53] The HSU

[50] Commission on Human Security, *Human Security Now*, 'People on the move', 41.

[51] In May 1999, the United Nations Trust Fund for Human Security had been launched with funding from the Government of Japan in order to fund activities of UN agencies on human security. One of the main areas of inquiry for the Advisory Board had been to amend the management of the trust fund. It is now administered by the Human Security Unit at OCHA.

[52] Human Security Unit: Overview and Objectives, Human Security Unit, OCHA, New York, available at www.ochaonline.un.org/humansecurity (last accessed 25 Oct. 2008).

[53] Since 1999, the trust fund has supported 180 field-based projects implemented by UN agencies in developing countries. Projects related to forced displacement include a UN inter-agency project on protection, reintegration and resettlement of IDPs in Somalia

aims in addition to conduct awareness-raising and outreach to UN agencies about the concept of human security in order to influence their priorities and programming. Recently, a project implemented by the World Health Organization and IOM (a non-UN agency) aimed to improve health conditions amongst vulnerable migrant workers in Thailand. However, the limited attention paid to the human rights of migrants within both the human security concept as well as the programmes of most UN agencies means that such projects will probably remain in the minority.

A. Global governance of international migration

The final report of the CHS did address the global governance of international migration, and canvassed a number of policy recommendations in this regard. Noting that 'there is no single institutional arrangement for the orderly management and protection of people moving across borders', it called for a 'high-level and broad-based' commission to explore available options for an international migration framework of norms, processes and institutional arrangements and should propose 'alternative institutional arrangements'.[54] While the GCIM process fulfilled the criteria of being high-level and broad-based, as mentioned above it largely failed to recommend innovative alternative institutional arrangements. Notably, the CHS report also recommended that the United Nations, due to its 'unique mandate' should take the lead in this endeavour. The Doyle report had previously noted that:

> as the absence of an authoritative United Nations "voice" on migration becomes more obvious and more keenly felt, the question arises as to how the Organisation might most effectively fulfill a role in migration governance and establish a presence in the migration debate.[55]

In recent times, the possibility has been raised of the creation of a specialised UN migration institution or agency. Suggestions include the creation of such an agency as an entirely new UN body, or as the

and a UNHCR project on reproductive health services for refugees in Turkmenistan. Some projects funded by the trust fund address the issue of trafficking such as a UNODC project which provided support to victims of trafficking in the Philippines. For more details of the projects, see *Letter dated 13 Feb. 2008 from the Permanent Missions of Japan and Mexico to the United Nations addressed to the President of the General Assembly*, UN Doc. A/62/695, 15 Feb. 2008.

[54] Commission on Human Security, *Human Security Now,* 45.

[55] UN Secretary-General, Kofi Annan, *Strengthening of the United Nations: An Agenda for Further Change*, UN Doc. A/57/387, 9 Sept. 2002.

result of the merger or mandate change of existing institutions. IOM has, for instance, frequently expressed a desire to take a formal role as the leading international institution on migration, including through entering the UN system. Other options that do not envisage the creation of new institutions include putting in place a more formal inter-agency system of coordination on migration, possibly along the lines of the 'collaborative approach' or 'cluster approach' successively put in place for the UN response to Internally Displaced Persons (IDPs).[56]

While there are some inter-agency initiatives within the UN such as the GMG which are mandated to coordinate action on migration, they have, as noted above, failed in many respects to ensure a collaborative and coherent response, including a protection response, to the movement of migrants. This is due in large part to a lack of institutional commitment within UN agencies to the issue of migration, and particularly to the protection of the human rights of all migrants. UNHCR, for example, is keen to ensure the coherence of its mandate on forced displacement and is generally hesitant to expand its

[56] In the absence of a single UN agency mandated to protect and assist IDPs, the 'collaborative approach' was a system put in place to share responsibility for protecting and assisting IDPs amongst the various UN agencies, which shared this responsibility with coordination assigned to the UN Emergency Relief Coordinator. The design and operation of this approach was eventually found to be problematic, not least because it lacked a real locus of responsibility in the field, and because there was no predictability of response. Following a review of the global humanitarian response system in 2005, a new 'cluster approach' was designed as a way of addressing gaps and ensuring predictability and greater accountability in response to IDP and other humanitarian situations. The Inter-Agency Standing Committee (IASC) has accordingly designated global cluster leads for the eleven areas of humanitarian activity. While all 'new' humanitarian emergencies currently fall within the cluster approach, following a decision of the IASC in late 2006, all countries with UN Humanitarian Coordinators should also now use the cluster approach. There has, however, been mixed reaction also to this new approach, with some actors questioning the actual impact of the approach on the ground. There has also been criticism of its practical value in the field as opposed to its use as a methodology more suited to headquarters. In addition, the institutional actors on migration issues are arguably more diverse than the agencies engaged in the humanitarian response to IDPs, and would include development actors, the ILO, international financial institutions and rights-based agencies in addition to humanitarian actors. These, then, are just a few considerations and cautions that must be taken into account before any attempt is made to replicate the same model for inter-agency action on migration issues. See the Humanitarian Reform website for more details of the cluster approach, at www.humanitarianreform.org/humanitarianreform/Default.aspx?tabid=53 (last accessed 28 Aug. 2008). For a criticism of the cluster approach, see International Council of Voluntary Agencies, *Talkback – the newsletter of ICVA*, Vol. 7–3, 3 Oct. 2005.

advocacy or operations to include 'voluntary' migrants.[57] On the other hand, OHCHR, which supports the work of the Committee on Migrant Workers and the Special Rapporteur on the Human Rights of Migrants, has in the past hesitated to devote sufficient resources to the issue, including through committing resources to the provision of policy, advocacy and technical assistance on the human rights of migrants to states and other actors. And states themselves are reluctant to engage in multilateral institution-building in the arena of international migration for reasons of cost, but also in order to retain sovereign power over the issue of migration. In sum, therefore, there remain a number of large institutional gaps at the global and multilateral level which have meant that the governance of international migration has not been placed within a coherent and, crucially, rights-respecting framework.

V. Looking beyond the state: other actors

In the current migration landscape, notwithstanding the rhetoric of governments, it is increasingly apparent that states are not the sole drivers behind migration policy-making. Indeed, the growing importance of certain non-state actors has on occasion significantly restricted the ability of states to formulate and implement migration policies independently of these actors. The latter include companies, whether large transnational corporations or small sub-contractors, as well as recruitment and brokerage agencies, employers and employers associations, and even non-governmental organisations. As the Director-General of the IOM, which has largely functioned to preserve the pre-eminent role of states in migration policy-making, has observed:

[57] The following sentence in the introductory section of the 10-Point Plan of Action on Mixed Migration is noteworthy in this respect, particularly in reiterating the links often made by states between the control of migrants and criminality: 'UNHCR is especially mindful of the need to ensure that the provision of protection and asylum to refugees and other people of concern to the Office does not compound the difficulties that States experience in controlling more generally the arrival and residence of foreign nationals and in combating international crime.' UNHCR, *Refugee Protection and Mixed Migration: A 10 Point Plan of Action*, Geneva, 1 Jan. 2007. The organisation has also made clear on a number of occasions that it is not a 'migration agency', and it is not looking to expand its mandate to activities that 'are more properly done by other organisations'. See UNHCR, *High Commissioner's Dialogue on Protection Challenges; Theme: Refugee Protection, Durable Solutions and International Migration; Opening Statement by Mr. António Guterres*, Geneva, 11 Dec. 2007. Available at www.unhcr.org/admin/ADMIN/475fb70f4.html (last accessed 25 Oct. 2008).

> While the management of cross-border population flows is an intrinsic feature of state sovereignty, it is undeniable that many aspects of migration are also of concern to stakeholders in addition to governments. For example, both in home and host countries, the business community plays a critical yet under-recognised role in the economics of labour migration, perhaps the critical role.[58]

This section will concentrate on the importance of the role played by business in the migration arena, highlighting also areas of concern in relation to the human rights of migrants.

In the first place, the actions of private companies create the conditions under which people are forced to move away from their homes and places of origin. Extractive industries such as logging companies forcibly evict communities from their land, often with the connivance of local government authorities. Mining companies pollute groundwater supplies, thereby destroying livelihoods and forcing people to leave their homes. Such movements are usually confined to internal movements within the country; predominantly from rural to urban areas. Yet, while forced evictions or displacement in response to environmental degradation will not always result in immediate international migratory movements, such movements, and the human rights abuses that underpin them, may create conditions of vulnerability and increase the risk of individuals who will eventually be able to migrate away from their countries of origin.

Secondly, the vast majority of migrants are engaged in some sort of employment, many of them connected to the supply chains of transnational corporations, others employed in small or medium-sized business enterprises. Many migrants work seasonally as agricultural labour. Some will have been recruited by profit-making agencies, specifically set up to fulfil a growing demand for migrant labour from the private sector. As commercial pressures from global buyers increase in supply chains, for instance, there is a rise in demand for contract and casual labour, a substantial proportion of which is migrant labour. At the same time, the influence and reach of corporations has grown as a result of globalisation and other global developments. States, particularly developing countries, increasingly cannot afford to ignore the opinions and demands of business.

[58] B. McKinley, Opening Address to the Conference on International Migration and Development: Continuing the Dialogue – Legal and Policy Perspectives, New York, 17 Jan. 2008.

For business, as employers of migrant workers, it is important to ensure that adequate standards are in place in their workplaces, supply chains, and spheres of influence to uphold the human rights of migrants. As the increasing competitiveness of the global economy raises the demand for migrant labour, business will need to engage in policy discussions with state authorities on the control, or 'management', of migration in order to investigate restrictions on the movements of workers.

Apart from employers, one specific group of private sector actors who also play an important role in the lives of migrants, and who are increasingly demanding a seat at the table when migration policy is debated, are recruitment or brokerage agencies. The services of recruitment agencies are often sought after by governments and employers who require the services of migrant labour. The services offered to migrants – such as job placements, assistance with visa and work permit formalities, and transportation to the country of employment – are often essential to ensuring a smooth start to the migratory journey. However, recruitment agencies, particularly those not regulated by the state,[59] can be responsible for a raft of violations of the rights of migrants. These include obliging migrants to sign fraudulent or misleading contracts, placing them in a situation of debt bondage through charging excessive recruitment fees before they have even left their countries of origin, and even detaining them for months in harsh conditions as a requirement of 'pre-departure training programmes'.[60]

Business actors can have an interest in promoting human rights norms through their operations and in their public voice. One simple reason for this is that human rights violations can destabilise the

[59] At the same time though, it is important to recognise that states-owned agencies can be and have been responsible for abusive practices in relation to the recruitment of migrants.

[60] The following case of migrant workers in Malaysia is sadly typical of the situation in which many migrants find themselves as a result of a combination of unscrupulous recruitment agencies, cruel employers and abusive legislation: 'Sleazy labour brokers outside the country tricked the workers into paying huge placement fees for jobs that yield a net income close to zero … [One migrant] paid a broker in Bangladesh $3,600 to get him a job at Local Technic. When he arrived, he says, he learned he was making $114 a month after deductions for room, board and taxes. The math is simple; minus the broker's fee, his net monthly pay is $14. If he never spends a penny on himself, three years of back-breaking labour will earn him a grand total of $504 … So why don't these foreign employees just quit? Because they can't, even if they find out they've been cheated by the very brokers who brought them there. Malaysian law requires guest-workers to sign multiple-year contracts and surrender their passports to their employers.' 'Bottom of the Barrel – Millions of Asian workers producing goods sold here are trapped in servitude', *Newsweek*, 15 Mar. 2008.

investment climate. At stake, apart from safeguarding employees from abuse, are company assets, project viability and corporate reputation. One recent study has noted that: 'very few businesses would say "human rights are not our concern" and a growing number are actively engaging the issue. Over 100 companies now have human rights-based policies, and this number rises significantly if labour rights are included.'[61]

While there has been marked disagreement over the necessity or practicality of evolving binding norms that can regulate corporate action in regard to human rights (or indeed whether businesses have responsibilities to respect human rights standards and protect against human rights abuses), there has been a proliferation of voluntary codes of conduct. These range from company-specific codes (such as the Nike Code of Conduct) to industry-wide initiatives (such as the Ethical Trading Initiative and the Electronic Industries Code of Conduct). However, much remains to be done to ensure that such initiatives pay particular attention to the specific vulnerabilities of non-citizens, who lack attachment to, and often a legal status in, the state in which they live and work. For example, many risk and impact assessment checklists do not identify migrant workers, or non-citizens, as a specific marginalised group. Broader principles, such as the UN Global Compact, do not explicitly call attention to the situation of migrant workers, but do ask businesses to respect internationally proclaimed human rights and labour standards.[62]

Through the Global Forum on Migration and Development and other processes, business is coming to realise its interest in being at the table when migration-related issues are discussed.[63] In addition, as the

[61] K. Dovey and J. Morrison, 'Opening Perspective on the Case for Human Rights in Business', in United Nations Global Compact and the UN Office of the High Commissioner for Human Rights, *Embedding Human Rights in Business Practice II* (2007), available at www.unglobalcompact.org/docs/news_events/8.1/EHRBPII_Final.pdf (last accessed 25 Oct. 2008).

[62] The UN Global Compact is a voluntary framework of ten principles relating to human rights, labour standards, the environment and anti-corruption. Currently over 4,000 companies have committed to participate in the Compact, which does not, however, have regulatory powers and relies instead on 'enlightened self interest': see www.unglobalcompact.org (last accessed 25 Oct. 2008).

[63] See, e.g., the agenda of the 2007 Responsible Business Summit, held in London on 9–10 May 2007, where an agenda item was devoted to 'inclusion and migration in Europe', and the question asked: 'how can responsible businesses best develop innovative practices [on migration], and maintain progressive pressure on politicians?' See www.ethicalcorp.com/europe2007/programme.shtml (last accessed 29 Oct. 2008). Several companies started to take a keener interest in migration issues in the lead-up to the Manila GFMD, which offered an opportunity to discuss issues of common interest in side events at the meeting.

influence and presence of the private sector on migration grows, states will increasingly need to take into account their views on migration policy. The challenge will be to influence business leaders to adopt human rights-based approaches to migration, in their public voice and in their company operations.

VI. Hearing the migrant voice: the human rights and human security frameworks explained in the migration context

A striking feature of human migration through the ages, including contemporary migration, is that it is largely driven by the entrepreneurship or desperation (or a combination of the two) of individual migrants, rather than through state-controlled programmes or policies. While every country in the world might pretend it can control its borders, in reality this is an almost impossible task. The UN Secretary-General recognised this in his address to the Brussels GFMD, stating:

> [We are not here to] design a blueprint for how to manage international migration flows. There can be no such thing: people move to the pull of a better life, to the push of danger or despair, to the forces of the market, to the call of the human heart. We have not come to dictate to one another how many, or how few, migrants should come or go from our countries. These should be decisions made by individuals within the framework of each sovereign nation's laws.[64]

While highlighting, as I do in a later section of this chapter, that states retain obligations to promote, protect and respect the human rights of migrants regardless of instrumentalist reasons, the fact remains that states today need to listen to other voices in making migration policy. As civil society organisations noted during the informal interactive hearings in advance of the HLD:

> It has long been understood that migrants and other civil society actors are central to the migration debate and excluding them results in decisions and conclusions that are at best partial and distorted and at worst discredited and ineffective. This assertion is based on the fact that states have never really had full sovereign control over migration, and in an era of globalisation this power, such as it is, is waning further. [If we do not] the international community is in danger of having yet another debate

[64] UN Department of Public Information, *Secretary-General, addressing Global Forum on International Migration and Development, Calls for Policy Action to Benefit Migrants, Families, Communities*, UN Doc. SG/SM/11084, 10 Jul. 2007.

> hermetically sealed off from the complete picture, which chooses only to speak to those aspects of the issue that governments can see and hence think they can control.[65]

Migration policy made and implemented without consideration of the voices and opinions of non-state actors, most importantly migrants and their advocates, is often fundamentally flawed. For example, the Secretary-General's report on International Migration and Development on the concept of 'co-development' creates a so-called 'win–win' picture of international migration. The concept of circular migration – whereby migrant workers are expected to move solely on a temporary basis, often or even usually without the right to bring their families with them to the country of employment – is being increasingly posited as the ideal model for migratory movement. The 'circularity' of the concept refers to the posited ability of migrants to move back and forth between their countries of origin and countries of destination. The GCIM noted that 'the old paradigm of permanent migrant settlement is progressively giving way to temporary and circular migration'.[66] However, states have concentrated more on the temporary nature of this movement; expecting that workers will remain in the destination country only as long as their original permission to enter and work remain valid, and so keeping in place the high barriers to migrant entry and ignoring the other societal and economic factors that 'pull' migrant workers into a country, its economy and its society. Accordingly, temporary migration from a state's perspective relies on relatively draconian systems of enforcing return, and tends to ignore the human needs and rights of the individual migrant worker, including the right to family life. In the concept of 'co-development' in the Secretary-General's report, then, countries of origin would 'win', as they would not be losing human resources permanently, and countries of destination would 'win', as they would not be gaining permanent immigrants but would be benefiting from their much-needed labour. The migrant, however, is reduced in this conceptualisation to a commodity or unit of labour, able to be shuttled around the world at will, and unable often to enjoy such fundamental rights as the right to family

[65] See statement delivered on behalf of the Asian Forum for Human Rights and Development (FORUM-ASIA) to the Informal Interactive Hearings on International Migration and Development, 12 Jul. 2006, held at the United Nations, New York. The full text of the statement can be accessed at www.december18.net/web/general/page.php?pageID=574&menuID=36&lang=EN (last accessed 25 Oct. 2008).

[66] GCIM report, 31.

life.[67] The concept of 'circular migration' appears to hark back to the European guest-worker programmes of the 1960s and 1970s. Yet, far from remaining just for a few years until their economic usefulness had run out, the West Indian and Indian workers who came to the United Kingdom, or the Turks who came to work in Germany, and the North Africans who sailed to France, eventually settled and integrated into the country of employment, often at the request of their employers, and ultimately brought their families over to settle with them.[68]

While the importance of 'hearing the migrant voice' might seem axiomatic, this has, as the preceding sections have charted, rarely been the case in recent global debate on migration. Yet the result of ignoring the important role of migrant participation in state migration policy-making is that this policy is often coercive or chaotic. And it leaves an increasing number of people in conditions that amount to little more than slavery. Such policy is morally indefensible, and is also costly in human as well as material terms. As Goodwin-Gill has noted:

> simplistic responses to the multidimensional complexities of migration which are framed in strictly sovereign terms are destined for failure, and only add to the sum of misery; failure because laws and regulations divorced from the human dimension of migration have little or no effect on what is an established constant of human behavior.[69]

The human rights and human security frameworks, detailed below, appear to be able to provide a path to hearing the migrant voice, and thereby pointing migration policy in a more humane and coherent direction.

[67] See International Migration and Development – Report of the UN Secretary-General, UN Document A/60/871, 18 May 2006.

[68] Civil society has questioned the human rights impact of circular migration programmes, noting that: 'Temporary migration programmes often place migrants in vulnerable, often irregular, situations. These programmes can often result in abusive practices and do not reflect the real demands of the receiving society and/or labour market. They are often a response to hostile or even xenophobic political discourse within the receiving country. Many temporary migration programmes do not allow freedom of movement to and from the country of employment, do not provide the migrant worker with a secure legal status for the entire duration of their employment contract, and do not ensure sufficient protection of the rights of the migrant, including protection from discrimination and abuse.' Amnesty International, *Amnesty International's Contribution to the Global Forum on Migration and Development*, Brussels, 10–11 Jul. 2007, AI Index POL 33/003/2007, 1 Jul. 2007.

[69] G. Goodwin-Gill, 'Migrant rights and "managed migration"', in V. Chetail (ed.), *Globalisation, Migration and Human Rights: International Law under Review* (Brussels: Bruylant, 2007), 168.

A. Human rights norms and migration

The international human rights architecture is delineated by universal normative standards to which actors, primarily states, voluntarily agree to bind themselves. All core international human rights instruments[70] contain non-discrimination provisions which apply to all persons, including migrants, and regardless in most cases of the legal status of the migrant.[71]

One such instrument is the Migrant Workers' Convention (MWC), the first universal international instrument that provides specific recognition and unifies the legal standards of protection of the fundamental human rights of all migrant workers and members of their families. Covering regular and irregular migrants, the MWC makes some distinctions between the two groups.[72] Yet Part III of the MWC indicates that

[70] The Office of the High Commissioner for Human Rights has designated nine core human rights instruments in addition to the Universal Declaration of Human Rights 1948, GA res. 217A (III), 10 Dec. 1948. These instruments comprise the International Convention on the Elimination of Racial Discrimination 1965 (GA res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969), the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women 1979 (GA res. 34/180, 18 Dec. 1979, 1249 UNTS 13; entered into force 3 Sept. 1981), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987), the Convention on the Rights of the Child 1989 (GA res. 4425, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990), the MWC; and the International Convention on the Rights of Persons with Disabilities 2006 (GA res. 61/106, 13 Dec. 2006; entered into force 3 May 2008). The last is the International Convention for the Protection of All Persons from Enforced Disappearances, which has not yet entered into force.

[71] There are a limited number of legitimate distinctions that can be made under international human rights law between citizens and non-citizens, such as with respect to political rights explicitly guaranteed to citizens (Art. 25, ICCPR) and in respect of the right to freedom of movement (Art. 12, ICCPR), which is limited to those regularly on the territory of the state. All such distinctions must, however, serve a legitimate purpose and be proportional to the achievement of that purpose. See *Final Report of the Special Rapporteur on the Rights of Non-Citizens*, UN Doc. E/CN.4/Sub.2/2003/23 (2003) and OHCHR, *The Rights of Non-Citizens* (New York and Geneva 2006). See also Committee on the Elimination of Racial Discrimination, *General Comment XIV*, 22 Mar. 1993; Human Rights Committee, *General Comment No. 18*, 10 Nov. 1989; CESCR, General Comment 19, UN Doc. E/C.12/GC/19, 4 Feb. 2008.

[72] Additional rights provided for regular migrant workers include freedom of movement and residence within the state of employment (Art. 39) and the right to vote and to be elected in their country of origin (Art. 41). Other additional provisions granted to regular migrant workers include the right to transfer earnings from the state of employment, as well as a provision that attempts to de-link authorisation of residence from permission to work, in order to prevent abuse by employers (Art. 49).

the vast majority of rights enjoyed by irregular migrants are in fact rights which they already enjoy in some measure under international human rights instruments.[73] Certain additional rights, which are particularly important in the context of migration, are contained within the MWC, including prohibitions and safeguards in relation to confiscation and destruction of documents[74] and protection against collective expulsion.[75] Article 23 recognises the right of all migrants to consular protection and assistance, noting the importance of protecting this right in case of expulsion. In addition, rights in relation to conditions of work including equal protection from dismissal as nationals, and restrictions in regard to the minimum age of employment are protected,[76] as is the right of all migrants to transfer their earnings and savings during and at the end of their stay, which is an important protection against the destitution of returning migrant workers.[77] The MWC is the only instrument requiring governments to take the necessary measures to ensure that migrant workers and their families are informed by state of origin, transit or destination of their rights as contained in the Convention. Another new right under the MWC is the right to be informed of the conditions of admission into the territory of a state in a language the migrant worker understands.[78]

According to the MWC, labour rights apply to all migrant workers, regardless of their status including the right to be free of slavery or servitude and a prohibition on forced or compulsory labour.[79] All migrant workers must have equality of treatment with nationals in pay, working conditions, including overtime, hours, weekly rest and termination of employment. In particular, the Convention makes it unlawful for employers to discriminate between migrant workers and native

[73] E.g., freedom of opinion and expression (Art. 13); freedom from arbitrary detention (Art. 16); birth registration and the right to a nationality (Art. 29); the right of children to access education (Art. 30); protection of cultural identity (Art. 31); property rights and transfer of assets (earnings, savings and belongings) (Arts. 15 and 32) upon termination of their stay in the country of destination; and the right to be informed of rights (Art. 33).

[74] Art. 21, MWC.

[75] Art. 22, MWC, in particular provides a high standard of protection to all migrants, regardless of their status, by requiring that all migrants have the right to protection from collective expulsion, and that they may only be expelled in pursuance of a decision taken in accordance with law.

[76] Art. 25, MWC.

[77] Art. 32, MWC.

[78] Art. 33, MWC.

[79] Art. 11, MWC.

workers in private employment contracts.[80] Article 66 protects workers from abuse at the hands of unlicensed recruitment agents in the migration process, in stipulating that only officially sanctioned agencies should be allowed to recruit migrant workers for employment.

All migrant workers, regardless of their status, are entitled to social security benefits on an equal basis with nationals of the state of employment. Where migrants are unable to receive certain benefits, on account of applicable national legislation, the Convention encourages the state to reimburse the 'amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances'.[81] General Comment 19 of the Committee on Economic, Social and Cultural Rights (CESCR) on the right to social security has stated that: 'non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable.'[82]

While the MWC is a key standard for the protection of migrants' rights, it is important to note that it can also be a cumbersome instrument, with over ninety articles contained in the text. In addition, and in particular in relation to economic and social rights such as health and housing, it appears to set a standard that is somewhat lower than that provided in general human rights instruments. Advocates are looking to the Committee on Migrant Workers to gradually provide authoritative guidance on such issues, such as through General Comments.[83]

Other human rights treaty bodies have focused some attention on providing interpretive guidance on general human rights standards for the protection of migrants. General Recommendation 30 of the Committee on the Elimination of Racial Discrimination, for instance, urges states to: '[e]nsure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour,

[80] Art. 25(2), MWC.

[81] Art. 27, MWC.

[82] CESCR, *General Comment 19: The Right to Social Security,* UN Doc. E/C.12/GC/19, 4 Feb. 2008.

[83] E.g., the MWC provides that all migrants, regardless of their legal status, have the right only to emergency medical care (Art. 28, MWC). However the ICESCR provides an arguably higher standard, requiring that '*everyone* has the right to enjoyment of the highest attainable standard of physical and mental health' (emphasis added, Art. 12(1) ICESCR).

descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.'[84] CESCR has underlined the importance of protecting migrant workers from discrimination in relation to employment opportunities, and urged that national plans of action be devised to respect and promote this by all appropriate measures, legislative or otherwise.[85]

In addition to the guidance of human rights treaty bodies, the jurisprudence of regional and domestic courts has also provided clarity to emerging international norms of protection of migrants. The Inter-American Court of Human Rights has, for instance, advised that irregular migrants should be protected under labour law, stating that:

> [a] person who enters a state and assumes an employment relationship, acquires his [or her] labour human rights in the state of employment, irrespective of his [or her] migratory status … the migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights.[86]

At the national level, in South Korea, for example, the Seoul High Court has handed down a decision providing that undocumented or irregular migrant workers were entitled to form trade unions in order to protect their right to freedom of association.[87] This ruling, in effect, recognised and thereby legalised the Seoul-Gyeonggi-Incheon Migrant Trade Union, the first trade union founded by and for migrant workers in South Korea, as a union representing the rights of all migrant workers, regardless of their status, and provided concrete protection of their right to association.

The International Labour Organization (ILO) has adopted a number of instruments relevant to the protection of migrant workers. Two Conventions are specifically related to the protection of the labour rights of migrant workers: the 1949 Migration for Employment Convention (Revised) (No. 97) and the 1975 Migrant Workers (Supplementary Provisions) Convention (No. 143). In addition, the eight Conventions

[84] Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against Non-Citizens*, 1 Oct. 2004.

[85] CESCR, *General Comment No. 18*: *The Right to Work,* UN Doc. E/C.12/GC/18, 24 Nov. 2005.

[86] Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants,* 17 Sept. 2003, para. 106.

[87] 11th Special Division of Seoul High Court, South Korea (Justice Su-hyung Kim presiding), 1 Feb. 2007. The Ministry of Labour has appealed against this decision to the Supreme Court of South Korea.

designated as core or fundamental labour standards by the ILO are relevant to the situation of migrant workers,[88] as is the 1997 Convention on Private Employment Agencies Convention (No. 181), which protects migrant workers from abuse by recruitment agencies and brokers. In addition to binding treaties, the ILO has also looked to protect migrant workers through the elaboration of 'soft' law standards. Accordingly, the 2004 International Labour Conference undertook a General Discussion on migrant workers, which resulted in a resolution calling for an ILO Plan of Action on Labour Migration, and recommending the development of a rights-based Multilateral Framework on Labour Migration.[89] In 2005, a tripartite meeting of experts debated and adopted the Framework, and in 2006 the ILO Governing Body decided that it should be published and disseminated. While the Framework contains a set of useful and often practical guidelines on labour migration, it is worth remembering that these guidelines are themselves the result of negotiations between governments, employers and workers' unions and, therefore, often represent compromise rather than the highest attainable rights-based standard on a given issue.

Finally, the rights of non-citizens can also be protected through application of international refugee law and the law relating to stateless persons.[90] Where migrants have been smuggled or have been victims of trafficking, some protection is provided to them under the Palermo protocols to the Convention against Transnational Organized Crime.[91]

[88] These are: No. 29, Convention concerning Forced or Compulsory Labour, 28 Jun. 1930; No. 87, Convention concerning Freedom of Association and Protection of the Right to Organise, 9 Jul. 1948; No. 98, Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1 Jul. 1949; No. 100, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29 Jun. 1951; No. 105, Convention concerning the Abolition of Forced Labour, 25 Jun. 1957; No. 111, Convention concerning Discrimination in Employment and Occupation, 25 Jun. 1958; No. 138, Convention concerning Minimum Age for Admission to Employment, 26 Jun. 1973; No. 182, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 Jun. 1999.

[89] ILO, *Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration*, ILO, 2006.

[90] Notably the MWC expressly excludes refugees and stateless persons from the application of the treaty (Art. 3 (d), MWC).

[91] Protocol Against the Smuggling of Migrants by Land, Sea or Air 2000, 12 Dec. 2000, entered into force 29 Sept. 2003, UN Doc. A/RES/55/25, Annex I, 8 Jan. 2001, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000, 12 Dec. 2000, entered into force 25 Dec. 2003, UN Doc. A/RES/55/25, Annex II, 8 Jan. 2001, each supplementing the UN Convention on Transnational

Migration has begun in recent years to receive attention in the context of international development. The HLD as well as the GFMD are explicitly premised on analysing migration through the lens of development. However, 'development' in this context has been used very much as a shorthand for the economic growth of countries of origin, transit and destination. Migration, accordingly, is conceptualised as an enabling factor for such growth. Development, when understood as a comprehensive process of enlarging peoples' choices with the human person as its central subject as provided in the UN Declaration on the Right to Development,[92] appears often to be missing from this discourse. The CESCR, on the other hand, has recommended that UN development strategies should expressly recognise the 'intimate relationship' between development activities and efforts to promote respect for human rights; that development cooperation activities should be subject to human rights impact assessments; that development personnel should receive human rights training; and that human rights obligations should be taken into account at every stage of development projects (i.e. needs assessment, project identification, project implementation, project monitoring and project evaluation). The human rights framework thus allows all development actors to define more clearly the objectives of development as a means to enable individuals, including migrants, to enjoy their fundamental human rights.

While, as was mentioned above, the Millennium Declaration devoted some attention to the subject of migration, it is noteworthy that none of the Millennium Development Goals (MDGs) specifically mention migration, yet the achievement of many of these goals is highly relevant to protecting and promoting migrants' rights. All of the goals are pertinent to migration from the perspective both of how migration impacts on development and how development impacts on migration. In this context, it should be recalled that while the MDGs provide an important statement of intent in regard to the fulfillment of economic, social and cultural rights, they often fall short of human rights standards, reflect only a partial spectrum of these rights, and exclude civil and political rights such as freedom of expression and association. The

Organized Crime, 15 Nov. 2000, entered into force 28 Jan. 2004, UN Doc. A/RES/55/25, 8 Jan. 2001.

[92] See the 1986 UN Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 Dec. 1986, as well as the UNDP *Human Development Report*, 2000, available at http://hdr.undp.org/en/media/hdr_2000_en.pdf (last accessed 25 Oct. 2008).

MDGs also suffer from a lack of explicit focus on vulnerability and marginalisation, making their usefulness to the protection of (often vulnerable and marginalised) migrants groups less helpful.[93] Accordingly, the human rights framework would see the MDGs as a useful guide, but recognises their limitations in practically ensuring the promotion and protection of migrants' rights. Because the MDG targets are not sufficiently targeted towards inequality and marginalisation, achievement of the targets can ignore the situation of migrant communities (or indeed other marginalised communities such as indigenous peoples). In their desire to meet the MDG targets, such as for instance halving the number of people living in poverty (Target 1.A) or achieving a significant improvement in the lives of at least 100 million slum dwellers (Target 7.D), states are able within the MDG approach to focus only on citizens or the relatively well-off among the poor in order to achieve their MDG targets. One way for advocates to overcome such limitations is to call for migrant communities, regardless of their status, to be included in the national MDG targets set by governments and for the integration of human rights standards, including standards on the human rights of migrants, into monitoring and evaluation of the achievement of individual MDG targets.

The human rights approach is a particularly useful tool for migration policy-makers in that it provides a specific focus on disempowerment and exclusion. In development interventions, for instance, a human rights approach requires that specific attempts be made to reach the most marginalised communities. Irregular migrants should therefore be included in national housing strategies, for instance, or national plans to ensure access to water and sanitation services. A rights-based approach recognises the indivisibility and interdependence of all rights – such as recognising that migrants who are rendered homeless and unable to enjoy their right to adequate housing will also be vulnerable to such violations as arbitrary arrest and ill-treatment in detention. Through the various international, regional and national mechanisms noted previously, a human rights approach allows for accountability of duty-bearers

[93] The Office of the High Commissioner for Human Rights notes that: 'the MDG targets are not sufficiently focused on the poorest of the poor or on inequality within a country – several require only the halving of a certain poverty indicator.' In addition to effectively ignoring marginalised and disadvantaged groups, which in many countries could be migrants and their families, the MDGs make no effective mention of the right to participation. See OHCHR, *Claiming the Millennium Development Goals: A Human Rights Approach* (New York and Geneva: OHCHR, 2008).

to rights-holders, and for rights-holders to obtain appropriate remedies for abuse of their rights. The recognition that all persons are equal before the law means that even migrants in an irregular status in their country of destination should be provided equal protection of the law. Perhaps most significantly in this context, the human rights approach places a strong emphasis on the concept of empowerment.[94] Genuine participation in planning and decision-making and effective access to information underpin the concept of empowerment. Thus migrants and their communities should, within this approach, be able to participate actively and effectively in policy-making on migration, at all stages of the process of making policy, including monitoring the implementation of policy to ensure that it does not entrench vulnerability, marginalisation and exclusion.

B. Human security framework

As outlined in Chapter 1 of this book, human security has been pioneered in recent years as a conceptual framework that counterbalances the state-centricity of much traditional discourse on international relations. It is also set up as a policy framework championed by some governments, inter-governmental organisations and academic commentators.[95] Owing much of its early intellectual roots to thinking within the 'human development' discourse, advocates of human security have attempted to humanise the treatment of security, bringing the human person to the forefront of academic and policy analysis of security. Sadako Ogata, former UN High Commissioner for Refugees and Co-Chair of the Commission on Human Security (CHS),[96] has stated that: 'Human security seeks to build upon and combine insights from various

[94] This can be understood as an expansion of people's capabilities and freedoms to participate in, negotiate with, influence, control and hold accountable institutions that affect their lives. See M. Darrow and A. Tomas, 'Power, capture and conflict: a call for human rights accountability in development cooperation', *Human Rights Quarterly*, 27 (2005), 494.

[95] Prominent in this is the Human Security Network (HSN), set up in 1998 by the Governments of Canada and Norway as 'a group of like-minded countries from all regions of the world that, at the level of Foreign Ministers, maintains dialogue on questions pertaining to human security'. The HSN has links to a diverse group of academic, intergovernmental and non-governmental institutions. See www.humansecuritynetwork.org (last accessed 25 Oct. 2008).

[96] The Commission on Human Security was launched at the 2000 UN Millennium Summit, following former UN Secretary-General Annan's emphasis on the freedom from fear and from want (drawing on President Roosevelt's State of the Union speech in 1941 in which he presented 'four freedoms' as his vision for the post-war future).

perspectives. In addition to examining the state security perspective, we were able to gain from two other human-centred concepts, namely human rights and human development.'[97]

On the face of it, therefore, the human security framework is one which would easily lend itself to a normative analysis of contemporary international migration. The report of the CHS identified a number of priority issues and areas of inquiry in relation to human security and migrants. It stated that efforts to combat terrorism had privileged state security over the rights of migrants, and that irregular migrants were being subject to indefinite or arbitrary detention, and it highlighted a climate of intolerance towards migrants generally. It noted in particular the vulnerability of migrants with serious health concerns, including HIV/AIDS, and recommended that migrants be included within national plans to address the spread of HIV/AIDS in order to ensure their protection and access to health services. Notably, the CHS recognised that the minimum requirement to protect the 'human security' of migrants was a secure legal status that enabled access to basic services and to legal protection of their fundamental rights. It also recommended that migration issues be placed on international development and poverty reduction agendas. In its recommendation for the creation of an international migration framework, the CHS urged that such a framework 'protect against racism and intolerance and other human rights violations'.[98] In order to gain human security, state policies (including migration policies) were urged to aim towards respect, protection and fulfillment of human rights norms and standards.

While the report unfortunately adopts the rhetoric of state-centric analyses of migration, which emphasise the orderly and predictable management of migration,[99] it also acknowledges that 'from a human security perspective, managing migration has to go beyond coordinating restrictive policies among states'.[100] It notes that while the Universal

[97] S. Ogata, 'The Human Security Commission's strategy', *Peace Review*, 16 (2004), 25–28.

[98] Commission on Human Security, *Human Security Now,* 47.

[99] The language of orderly migration management is, for instance, the guiding principle of IOM's normative engagement with migration, and has been much criticised by civil society actors. Amnesty International stated to the 88th meeting of IOM's Governing Council that the organisation was: 'concerned that the concept of "migration management" has yet to be authoritatively defined in a manner which explicitly acknowledges that such management cannot be conceptually or practically detached from the human rights obligations that states have voluntarily assumed.' Amnesty International, Statement to the 88th Session of the Governing Council of the IOM, AI Index IOR 30/025/2004, 2 Dec. 2004.

[100] Commission on Human Security, *Human Security Now,* 47.

Declaration of Human Rights grants all persons the right to leave a country, the fact that states have 'carefully guarded' their right to permit who will enter and reside in their territory has slowed progress towards the effective governance of international migration. While the report recognises that 'for many people, migration is the only option', it shies away from an unequivocal statement in respect of the human rights of all migrants, regardless of their legal status on the territory, their mode of entry, or other personal characteristics such as nationality or ethnic origin. While acknowledging the existence of the MWC as well as some relevant ILO Conventions, it does not urge states to ratify and effectively implement these instruments, and does not explicitly recognise that, regardless of ratification of these instruments, the human rights of all migrants are protected by core human rights standards by virtue of their humanity. Thus, while acknowledging that some truth lies in the assertion of the report that 'there has been little progress in developing a normative framework to regulate the movement of people between states and to protect their rights',[101] it is important to note that the human rights architecture has in fact provided such a framework, through treaty obligations as well as other normative standards. The challenge, as ever, remains in implementation and effective regulation of state conduct.

Criticism of the 'quicksilver' concept of human security centres on the fact that it is ambivalent and vague; investigating the conceptual parameters of the discourse, it is easy to feel that it can mean all things to all people. Within the definition of human security, i.e. that it protects the vital core of all human lives in ways that enhance human freedoms and human fulfilment,[102] it is hard to see what human security is *not*. This accordingly diminishes its use as a practical tool of research or policy-making. If attempts are made, on the other hand, at narrowing the concept down, such as focusing on freedom from fear at the expense of freedom from want for instance, it is hard to escape criticism that the spirit of the exercise is being tarnished.[103] At the same time, however, the

[101] *Ibid.*, 45–6.

[102] Commission on Human Security, *Human Security Now,* 4.

[103] The Government of Canada's human security website, for example, announces a focus on 'freedom from fear' in the following policy areas; democratic transitions, human rights and protection of civilians, conflict prevention, rule of law and accountability, and public safety. However, the basis for this classification of a hierarchy of 'human security' threats appears arbitrary, and could be seen to be motivated by overtly political or foreign policy goals, rather than to enhance 'human security'. See www.humansecurity.gc.ca (last accessed 25 Oct. 2008).

attention, including the rhetorical attention, paid by the human security framework to the issue of migration should be noted.

VII. Protecting migrants: human security versus human rights?

Advocates of the human security framework agree at a minimum that the ultimate security referent is the individual, i.e. that the individual human person is and must be at the centre of policy and action. This, too, is a key component of the human rights regime. The CHS has asserted that:

> Human rights and human security are … mutually reinforcing. Human security helps identify the rights at stake in a particular situation. And human rights helps answer the question: how should human security be promoted? The notion of duties and obligations complements the recognition of the ethical and political importance of human security.[104]

The 1994 Human Development Report also emphasised that human security is people-centred; noting that 'one of the most important aspects of human security is that people should be able to live in a society that honours their basic human rights'.[105]

As has been noted above, the human security framework broadly expands traditional notions of security to include non-state factors that affect 'security'. Migration is seen within the human security framework as an issue of international, rather than merely national, concern. The CHS report accordingly placed the situation of migrants within the broader political, social and economic context, noting that 'migration should be seen as a process that empowers people and creates new opportunities for people and states alike'.[106] Yet the human security project, despite its attention to the international and cross-border dimension of security, retains the state as central to the concept, thereby retaining an essential component of the traditional notion of security – i.e. the fundamental role of the state in the provision of security. The human rights framework too centres around the principal role of the state, where rights are directed chiefly at states as the primary duty bearers. Is there anything to be gained for advocates of migrants' rights by adopting a human security approach if, at its best, the framework

[104] Commission on Human Security, *Human Security Now,* 10.
[105] UNDP, *New Dimensions of Human Security, Human Development Report* (Oxford: Oxford University Press, 1994), 23, 32.
[106] Commission on Human Security, *Human Security Now,* 47.

could be seen as an expression of the indivisibility of human rights, effectively integrating economic and social rights ('freedom from want') with civil and political rights ('freedom from fear')?

Within the human rights framework the migrant as rights-holder is able to demand protection, promotion and respect for his or her rights from the duty-bearer; primarily the state. A network of standards and norms, institutions and processes, developed and refined in practice, can be called upon to provide specific protection to migrant workers, to non-citizens, and to the other particularly vulnerable groups within which migrants find themselves. However, as migrants' rights advocates are all too well aware, these binding norms and standards are often ignored and thus delegitimised in practice. There is no guarantee that rights-holders are able to oblige action of duty-bearers. The Migrant Workers' Convention has only been ratified by a handful of states, mainly by countries from which migrants traditionally originate.[107] Despite guidance from treaty bodies, few state reports incorporate information on the human rights situation of migrants. In addition, there is widespread opposition by states and corporations to the imposition of binding obligations on transnational corporations to protect human rights, including the rights of migrants. Accordingly, it is left to the corporation to determine whether it is in its interest to adhere to voluntary codes of conduct, and to ensure respect for human rights standards through its operations, including supply chains.

So, while the topic of migration climbs up political agendas, and the political rhetoric on migration gets louder, the political will to protect and promote the rights of migrants remains limited. It is in such a context that the rhetorical value of the human security framework emerges as useful. As has been noted, as a concept it is possibly too amorphous to provide a useful framework of analysis to scholars. And its wide scope and imprecision makes it of little use to practitioners to demand action from states and other actors to protect migrants' rights. However, it might still be of use in order to garner political will.

The human security framework is already being championed by states and inter-governmental organisations, and has therefore achieved a level of acceptance amongst influential actors. While sufficiently vague to garner the support of governments hesitant to commit to binding norms of migrants' rights protection, the language of the human security

[107] As of April 2008, the MWC had been ratified by thirty-seven countries, with fifteen signatory countries that have yet to ratify the text. The MWC entered into force in July 2003. For updates on the status of ratification, see www.december18.net (last accessed 25 Oct. 2008).

framework does place concrete emphasis on protecting and promoting the human rights of migrants.[108] Human security could thus be most usefully described as a rallying cry to advance the protection of the rights of migrants, and to some extent to unite states with other actors such as non-governmental organisations and academic experts. In so doing, it may have a chance of breaking the current deadlock on political will, and thus enabling policy-makers to focus on the individuals who make up the 'phenomenon of migration'.

VIII. Conclusion: migration and empowerment

In placing primary emphasis on the individual, both the human rights and the human security frameworks challenge the dominant discourse prevalent in migration policy-making today, which asserts that the principle of sovereignty accords states an ascendant position, able ultimately to privilege state security over the 'human security' of migrants. The achievement of the human security framework is envisaged through the twin pillars of protection and empowerment: 'People protected can exercise choices. And people empowered can make better choices.'[109] The human rights-based approach similarly emphasises the necessity of genuine participation and access to information. Yet, as has been demonstrated above, migrants, their communities and advocates, are usually and intentionally excluded from discussions on migration policy-making in the international sphere, and more often than not at the national level as well. As migration is seen and portrayed as a concern solely of 'sovereign states', the participation of migrants in decisions affecting their lives is deemed neither useful nor warranted. Empowerment, and the right to participation embedded within that concept, is thus explicitly denied to migrants. This exclusion runs the gamut from regional consultative processes on 'migration management' to voluntary codes of corporate conduct and even UN discussions such as the HLD

[108] The CHS accordingly asserts that: 'From a human security perspective the movement of people should be looked at comprehensively, taking into account the political, civil, security, economic and social dimensions affecting peoples' decisions to move. It cannot be approached solely from the perspectives of countries of origin, transit and destination. It must also be approached from the perspective of the different stages and motivations for displacement – for many people migration is the only option.' Commission on Human Security, *Human Security Now,* 45.

[109] S. Ogata, 'Empowering people for human security,' Presentation at the 56th Annual DPI/NGO Conference, available at www.un.org/dpi/ngosection/annualconfs/56/ogata.pdf (last accessed 25 Oct. 2008).

where migrants and NGOs were kept at a safe distance from the main states-dominated dialogue. It is striking, in addition, that despite the current frenzy of attention to linkages between migration and development, very rarely is the situation of migrants and their communities integrated into national development and poverty-reduction strategies. Yet, the focus on empowerment in the human rights-based approach, and mirrored in the human security framework, provides for the right of all migrants to active, free and meaningful participation in the plans, policies and processes of development.[110]

Migration policy-making usually takes place behind closed doors in interior and home ministries or at bilateral and multilateral fora. Often, the primary determinants of such policies are security, meaning border control, return and readmission, and other perceived requirements of sovereignty. Migration policy-making thus is often confined to those areas of government charged with protecting the state and its citizens from threat; in this case the threat of the migrant 'swamping' the society and the economy. Participation and empowerment are not goals of policy-making. Neither, often, is protection.

The lack of protection as an explicit goal of policy-making is seen most starkly in policy responses to irregular migration. The 'fight against illegal migration' is both rhetoric and policy in states around the world. Such policy responses tend to ignore the fact that most irregular migrants are not criminals, and that many have become irregular through an arbitrary or unlawful act, such as withholding or confiscation of their passports by employers. For some migrants, moving in an irregular manner is the only option in the face of severely inadequate living conditions, including violations of their economic and social rights, denial of livelihoods, discrimination and exclusion in their country of origin, and limited if any legal channels of entry to countries of destination. Far from ensuring that such migrants are protected, state responses tend to be either directly abusive of the rights of such migrants (including subjecting them to arbitrary or prolonged detention) or to place migrants in extremely vulnerable situations (such as obliging them

[110] The Office of the High Commissioner for Human Rights has stated that a rights-based approach to development allows for: 'Higher levels of empowerment, ownership, and free, meaningful and active participation, by putting beneficiaries in charge of development. It is now widely recognized in development circles that local ownership and participation are fundamental to sustainable improvements.' OHCHR, *Frequently asked Questions on a Human-Rights Based Approach to Development Cooperation* (New York and Geneva: OHCHR, 2006).

to seek out the services of traffickers or abusive employers). 'If you don't need them for your labour markets, then send them home', a German member of the European Parliament recently urged his European Union counterparts;[111] highlighting again that migrant workers are seen by many policy-makers as little more than units of labour, not as human beings with dignity and rights. In the contemporary world of migration policy-making, migrants are treated solely as objects of the policy; rarely if ever being recognised as central subjects, with well-defined rights to participation, information and involvement in decision-making. Yet these decisions will influence, often dramatically, their livelihoods and their lives.

The media stories with which this chapter began show migrants inhabiting an uncertain world; with access neither to human security nor to their human rights. While there is no dearth of legal and normative tools by which to regulate state conduct towards migrants, there remains a critical lack of political will to protect and empower them. Indeed, states often display a cynical 'common hypocrisy' towards migrants. They are pushed to migrate in dangerous conditions by their own governments eager to benefit from remittances. The economies and societies of countries of destination use and benefit from their labour in dirty, difficult and dangerous jobs. Yet in inter-state discussions the world over, agreement is reached that it is the migrant who is to blame for the chaotic state of contemporary migration, it is the migrant who is a terrorist, a queue jumper, a criminal; he or she is barred from the rooms in which migration policy is being discussed, and ever higher barriers to entry seek also to bar the presence of migrants from countries of destination. The deficit in political will is displayed also in the continuing absence of an adequate institutional framework to govern migration and protect migrants at the global level.

Former Secretary-General Kofi Annan had a clear message to states on International Migrants Day:

> Our societies would be poorer without the contributions of migrants. Today, as we celebrate those contributions, let us also resolve to safeguard the human rights of every man, woman and child who crosses borders in search of a better life.[112]

States, it appears, have yet to make this resolve.

[111] 'EU votes to unify rules on detention of migrants', *International Herald Tribune*, 18 Jun. 2008.

[112] United Nations Information Service, 'In migrants day message, Secretary-General calls for safeguarding human rights of all who cross borders "in search for a better life"', SG/SM/10263, 14 Dec. 2005.

8

Labour migration management and the rights of migrant workers

RYSZARD CHOLEWINSKI*

I. Introduction

The interests of migrant workers and their families in the process of international labour migration are often articulated in terms of the economic benefits that accrue to them given significant wage differentials between countries of origin and destination, particularly in the context of South–North but also South–South labour migration. Protecting their fundamental rights during the whole labour migration continuum of departure, travel, residence and return is also underlined as is the need to minimise the social costs of such migration, both for migrant workers and family members in the country of destination as well as family members left behind in the country of origin. The international legal framework for protecting vulnerable groups of migrant workers is well developed. It comprises standards found in international and regional human rights treaties and international labour law, which in principle apply to all human beings and workers irrespective of their nationality or immigration status; the more specific instruments of the International Labour Organization (ILO); the UN Migrant Workers

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Convention 1990; and legally binding treaties adopted at the regional level, particularly in Europe. However, international and regional instruments specifically aimed at protecting migrant workers and their families have been ratified by relatively few states. Moreover, the importance of ensuring effective protection of their rights is evident in the continuing abuses suffered by migrant workers in all parts of the world.[1]

While states, and particularly countries of employment, remain reluctant to enter into legally binding international and regional commitments to protect the rights of migrant workers and members of their families, this does not mean rights' protection is no longer on the agenda of governments. Increasingly, the rights of migrant workers are discussed in various inter-state fora, cooperation and consultative processes at the international, regional and bilateral level, which have also resulted in the adoption of consensus texts containing non-binding political commitments. Particularly interesting recent developments at the global level are the ILO's Multilateral Framework on Labour Migration, a product of its member states and social partners, which contains a set of non-binding principles and guidelines for a rights-based approach to labour migration, and the Global Forum on Migration and Development, a states-owned consultative process that is focusing more on human rights issues.

This chapter undertakes a preliminary investigation into these 'supplementary' approaches to safeguarding the rights of migrant workers and considers whether they can be successful in protecting migrants in practice given the relatively limited acceptance by states of the specific legally binding instruments as well as an inadequate level of implementation of human rights and labour standards generally in regard to migrants. The question posed is whether such approaches can really make a difference to the protection of migrant workers and their families or whether they can only be poor substitutes for the meticulous and considered implementation by states of legally binding instruments. Another consideration is whether it is possible to view inter-state consultation and cooperation together with the acceptance of legally binding standards not as entirely separate processes but as mutually reinforcing with the potential to benefit the interests of both migrants and the states concerned.

[1] See Amnesty International, *Living in the Shadows, A Primer on the Human Rights of Migrants* (London: Amnesty International, 2006).

II. Legally binding standards: international and regional frameworks

The international legal framework for protecting migrant workers and their families is mainly found in universal international human rights and labour standards and in the specific instruments adopted to protect this group, supported by supplementary mechanisms. Trade provisions regulating the provision of services across borders at the global level also need to be considered, although they are not *per se* rights-oriented. At the regional level, the legal framework is located in human rights instruments as well as regional integration processes that are largely economic in their objectives, although, in the case of the European Union (EU), the integration process is considerably deeper and extends into foreign policy (including development) and home affairs which also impact on international labour migration.

A. Universal human rights standards

In principle, non-citizens, including migrant workers, are entitled, with very few exceptions, to the same human rights protections as nationals. This position is confirmed in the texts of the main universal human rights instruments, the treaty bodies monitoring state implementation of international human rights law,[2] and other human rights mechanisms established by the United Nations.[3] However, the difficult plight of migrant workers in many countries of the world in terms of the protection of their basic human and labour rights and their limited access to legal remedies both in law and practice, often exacerbated by their non-citizen and/or unauthorised status, reveals the existence of a substantial gulf between 'rhetoric and reality' in guaranteeing these rights to all persons.[4] To a great

[2] See, e.g., Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 30: Discrimination against Non-Citizens, 1 Oct. 2004*, paras. 2 and 3; Human Rights Committee (HRC), *General Comment No. 15: The Position of Aliens under the Covenant*, 11 Apr. 1986, paras. 1 and 2.

[3] UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, *The Rights of Non-Citizens*, Final report of the Special Rapporteur, Mr. David Weissbrodt, UN Doc. E/CN.4/Sub.2/2003/23 (26 May 2003), 2 (Executive Summary).

[4] Global Commission on International Migration (GCIM), *Migration in an Interconnected World: New Directions for Actio*n (Geneva: GCIM, Oct. 2005), 58, para. 24: '[T]here is an urgent need to fill the gap that currently exists between the principles found in the legal and normative framework affecting international migrants and the way in which legislation, policies and practices are interpreted and implemented at the national level'.

extent, this gulf is also manifested in the low acceptance by states of the specific international legal standards developed by the international community to protect migrant workers, which are discussed below. As one commentator has argued, however, considerably more countries (eighty-two to date) have now ratified one or more of the three international instruments protecting migrant workers.[5] While this total number of ratifications is fairly impressive, the standards in question differ and, together with their piecemeal implementation by states parties, means that supplementary approaches should be considered and pursued to ensure that migrant workers and their families obtain adequate protection at all stages of the labour migration process.

B. ILO standards

The ILO is the specialised UN agency concerned with the protection of persons in their working environment. In addition to the adoption of a large body of international labour law, including eight core fundamental rights Conventions,[6] which generally does not make any distinctions between workers based on their nationality or immigration status, the legislative arm of the ILO, the International Labour Conference, has adopted two legally binding instruments relating specifically to the protection of migrant workers: Convention No. 97 of 1949 and Convention No. 143 of 1975,[7] which are both complemented by non-binding Recommendations, Nos. 86 and 151 respectively.[8]

[5] See P. Taran, 'The Key Role of International Labour Standards in Defending Rights of Non-nationals', paper presented to the Expert Meeting on Clarifying and Expanding the Rights of Non-nationals, Open Society Initiative, New York, 9–10 Nov. 2003, 3.

[6] These Conventions encompass four thematic areas: elimination of forced and compulsory labour – Conventions No. 29 (1930) and No. 105 (1957); abolition of child labour – Conventions No. 138 (1973) and No. 182 (1999); freedom of association and collective bargaining (trade union rights) – Conventions No. 87 (1948) and No. 98 (1949); and elimination of discrimination in respect of employment and occupation – Conventions No. 100 (1951) and No. 111 (1958). The 1998 ILO Declaration on Fundamental Principles and Rights at Work underlines that all ILO member states, by virtue of the very fact of membership, are bound to respect, promote, and realise the principles found in these instruments irrespective of whether they have ratified them (para. 2).

[7] Convention No. 97 concerning Migration for Employment (Revised) (1949); Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975). Convention No. 143 is also known as the Migrant Workers (Supplementary Provisions) Convention. For the texts, see www.ilo.org/public/english/standards/index.htm.

[8] Recommendation No. 86 concerning Migration for Employment (Revised) (1949) and Recommendation No. 51 concerning Migrant Workers (1975). See www.ilo.org/public/english/standards/index.htm.

Convention No. 97, which applies to the whole labour migration continuum from entry to return, covers the conditions governing the orderly recruitment of migrant workers. Importantly, it also articulates the principle of equal treatment of lawfully resident migrant workers with national workers in respect of working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the Convention.[9] However, it does not protect irregular migrant workers.

The scope of Convention No. 143 is broader. Adopted at a time when particular migration abuses, such as human trafficking and smuggling, were attracting the attention of the international community (as indeed is still the case today), this instrument devotes a whole section (Part I) to the abuses associated with irregular migration, and underscores the need for inter-state cooperation and collaborative measures to prevent this phenomenon. It also imposes the very important obligation on states parties 'to respect the basic human rights of *all* migrant workers',[10] thus confirming the applicability of this Part to irregular migrants and, more generally, the universality of human rights standards. More specifically, Part I of Convention No. 143 also protects irregular migrant workers and their families, on equal terms with regular migrants, in respect of rights arising out of past employment as regards remuneration (i.e. unpaid wages), social security and other benefits.[11] Part II of Convention No. 143 is concerned with the equal treatment of lawfully resident migrant workers with national workers on a more general basis and contains a number of liberal provisions, including the right of migrant workers to free choice of employment after two years of lawful residence or after completion of the first work contract if this is shorter in duration.[12]

C. *International Migrant Workers' Convention*

In the context of its broader human rights mandate, the UN, after ten years of negotiations, adopted in December 1990 the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers' Convention or

[9] Art. 6, ILO Convention No. 97.
[10] Art. 1, ILO Convention No. 143.
[11] Art. 9(1), ILO Convention No. 143.
[12] Art. 14(a), ILO Convention No. 143.

MWC),[13] which came into force on 1 July 2003 after having obtained its twentieth ratification. As with the specific ILO instruments protecting migrant workers, the MWC covers the entire labour migration continuum, although its scope is considerably broader and the provisions are more detailed. The MWC is by far the lengthiest core international human rights instrument, containing ninety-three articles. To date, however, only forty-two states parties have ratified the Convention.[14] Only three of these (Argentina, Libya and Nigeria) can be classified as destination countries, although Mexico and Morocco are significant transit countries and are also becoming destination countries.

In addition to underlining in explicit terms that most of the civil and political rights found in the other more general human rights instruments apply to all persons, including migrant workers and members of their families, irrespective of their immigration status, the MWC also clarifies, in Part III, that basic economic, social and cultural rights apply to both regular and irregular migrant workers. Part IV, however, only applies to migrant workers in a regular situation and affords them more extensive rights, such as housing[15] and family reunion; the latter 'right' is worded, however, as a rather weak obligation on states parties 'to take measures that they deem appropriate … to facilitate the reunification of migrant workers with their spouses or [common law partners] …, as well as with their minor dependent unmarried children'.[16] In Part V, the MWC permits states parties to limit the rights of particular categories of migrant workers, including temporary migrants such as seasonal workers, project-tied workers and specified-employment workers. Part VI of the MWC, discussed further below, is particularly important because it addresses the need for consultation and cooperation among all states parties to ensure that international labour migration takes place in sound, equitable, humane and lawful conditions. Consequently, it

[13] GA res. 45/158 of 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003. For an analysis of the origins of the MWC, the drafting process and its provisions, see R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997), ch. 4.

[14] The following countries have ratified the MWC: Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia-Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Jamaica, Kyrgyzstan, Lesotho, Libya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, the Philippines, Rwanda, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay.

[15] Art. 43(1)(d), MWC.

[16] Art. 44(2), MWC.

includes state obligations to collaborate with a view to preventing and eliminating irregular migration, including the imposition of sanctions on those who exploit irregular migrants, such as traffickers, smugglers and employers.[17] This Part, therefore, challenges the misperception in some quarters that the MWC somehow promotes irregular migration. On the contrary, it sees the implementation of the provisions relating to the protection of all migrant workers, including irregular migrants, as a means to the elimination of this phenomenon.[18] Moreover, the MWC underlines in Article 79 that it does not affect the sovereign prerogative of states to decide on the admission of foreigners into their territory.

D. Protection gaps

Despite their comprehensive nature, these legally binding standards provide incomplete protection for the rights of migrant workers, arguably because the international and regional conditions under which labour migration takes place have changed significantly since the instruments were first adopted. In particular, these changing conditions include:[19]

- the decreasing significance of state or public agencies in recruiting migrant workers, and the increasing importance of private recruitment agencies and employment intermediaries, who are able to respond more quickly and efficiently to a demand for foreign workers in accordance with labour market needs;[20]

[17] Art. 68(1), MWC.

[18] MWC, Preambular para. 14: 'Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognised and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the states concerned.'

[19] See, also, International Labour Conference, 87th Session, Geneva, Jun. 1999, Report III (1B), *Migrant Workers: General Survey on the Reports of the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Geneva: International Labour Office, 1999) paras. 657–62.

[20] The ILO is attempting to regulate private recruitment agencies, including their activities relating to migrant workers. See, in particular, Convention No. 181 (1997) concerning Private Employment Agencies, which obliges states parties, in consultation with the social partners and, where appropriate, in collaboration with other ILO member states, 'to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies' (Art. 8(1)). Convention No. 181 revises an earlier instrument (Convention No. 96 (1949) concerning Fee-Charging Employment Agencies) and has been ratified by twenty-one states parties.

- the feminisation of labour migration, to both skilled and lower skilled jobs, with the predominance of women migrant workers in non-regulated low-skilled sectors, such as domestic or household work, care of children and elderly persons, and commercial sex work – areas characterised by a strong bond of subordination between the employer and employee, irregular employment (frequently facilitated by criminal trafficking networks) and usually being beyond the protection of national labour laws;
- the increasingly short-term or temporary and circular nature of labour migration characterised by the expansion of transnational identities and the growing trends in some destination countries to make distinctions between low- and semi-skilled migrant workers and highly skilled migrants in terms of access to social rights and integration requirements; and
- the considerable growth in irregular migration, and the need to balance control mechanisms in countries of employment with measures that facilitate labour migration and protect migrant workers.

1. Other human rights mechanisms for protecting migrant workers

A number of these protection gaps can be filled to some extent by supplementary UN mechanisms set up to protect migrant workers and which are applicable to the whole of its membership and not merely to the states which have ratified the legally binding instruments in question. The most prominent mechanism is the Special Rapporteur on the human rights of migrants,[21] established by the Commission on Human Rights (replaced by the Human Rights Council in June 2006). Since the inception of this thematic rapporteurship, nine general reports have been issued, all of which examine the situation of migrant workers.[22] The Special Rapporteur has also visited and reported on Burkina Faso, Canada, Ecuador, Guatemala, Indonesia, Iran, Italy, Mexico, the border between Mexico and the United States, Morocco, Peru, the Philippines, Spain, South Korea and the United States.[23] The MWC figures prominently

[21] Gabriela Rodríguez Pizarro, Costa Rica (1999–2005); Jorge Bustamante, Mexico (2005–). For the Special Rapporteur's website, see www2.ohchr.org/english/issues/migration/rapporteur.

[22] See, UN Docs. E/CN.4/2000/82 (6 Jan. 2000), E/CN.4/2001/83 (9 Jan. 2001), E/CN.4/2002/94 (15 Feb. 2002), E/CN.4/2003/85 (30 Dec. 2002), E/CN.4/2004/76 (12 Jan. 2004), E/CN.4/2005/85 (27 Dec. 2004), E/CN.4/2006/73 (30 Dec. 2005), A/HRC/7/12 (25 Feb. 2008) and A/HRC/11 (14 May 2009).

[23] Country reports are available at www2.ohchr.org/english/issues/migration/rapporteur/visits.htm.

in a number of these reports, which the Special Rapporteur has used to encourage Canada, Indonesia (which has only signed), Iran, Italy, Peru (which has since ratified), Spain, South Korea and the United States to ratify the Convention.

E. General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS) operates under the auspices of the World Trade Organization (WTO)[24] and contains some limited globally applicable rules of relevance to the mobility of workers in the context of the trade in services. These rules are found in Mode IV of the Agreement and their aim is to liberalise the movement of 'natural persons' across international borders for the purpose of providing a service, which is recognised as one of the four possible ways of trading a service under GATS. However, for the time being, these rules are tied to the commitments in member state schedules, which are presently limited to a narrow category of persons, i.e. primarily to those working for multinational companies such as executives, managers and specialists, business visitors and intra-company transferees. Further, this movement can only take place on a temporary basis (e.g. business visitors are generally permitted to stay for up to ninety days). Permanent presence in the country is therefore expressly excluded. Moreover, GATS does not apply to measures concerning individuals independently seeking access to a member state's labour market and it does not exempt natural persons from fulfilling any visa requirements.[25]

In the context of recent WTO trade negotiations, delegations from developing and least developed countries have sought greater access to labour markets in developed countries, particularly by broadening the categories of persons who can enter and by simplifying admission rules. However, progress has been slow, as revealed by the round of trade negotiations in Hong Kong in December 2005.[26]

GATS Mode 4, as a trade agreement, is mainly concerned with the access of service providers to the labour market of the countries concerned, although current GATS Mode 4 commitments, in respect of

[24] For the text of the Agreement, see www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm.
[25] GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement.
[26] The latest developments, including the Hong Kong round of negotiations, are summarised by M. Klein Solomon, 'GATS Mode 4 and the Mobility of Labour' in Cholewinski, Perruchoud and Macdonald (eds.), *International Migration Law*, 107–27. See, also, Baruah and Cholewinski, *Handbook on Labour Migration (2006)*, 194 (Textbox IX.7).

which most countries provide for wage and labour standard parity, demonstrate that the WTO can protect the rights of migrant workers. However, the WTO itself does not formally have a labour protection mandate, and, furthermore, GATS Mode 4 does not specifically address the human dimension of labour migration or the social costs associated with it.[27]

F. Regional standards

Human rights standards and more specific safeguards concerned with the protection of migrant workers have also been formulated and adopted at the regional level. While regional standards are particularly useful in that they are agreed by like-minded states facing similar challenges and possessing similar interests (which also means that the enforcement mechanisms established to monitor the implementation of these standards tend to be more effective), they should be viewed as complementary to the standards adopted at the international level. Consequently, if regional standards are more restrictive in personal or material scope, they cannot override international standards if the latter have been accepted by the state concerned or if deemed also to reflect customary international law. In addition to the application of human rights and related standards, the protection of migrant workers is an integral aspect of regional integration systems which seek to open up national labour markets to nationals from other participating countries.

The Council of Europe's instruments in the field of labour migration cover general human rights as well as more specific agreements relating to migrants and migrant workers. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR)[28] has the broadest application because it applies to all persons within the jurisdiction of states parties,[29] including migrant workers and irrespective of their immigration status. While there are no specific provisions on migrant workers in the ECHR, migrants have obtained remedies from the European Court of Human Rights under its case law, particularly in protection of their right to respect for family life[30] when

[27] See C. Dommen, 'Migrants' human rights: could GATS help?', *Migration Information Source*, Mar. 2005, available at www.migrationinformation.org.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950, ETS No. 5).

[29] Art. 1, ECHR.

[30] Art. 8, ECHR.

facing expulsion from the country.[31] The court has also applied the principle of non-discrimination,[32] in conjunction with a broad reading of the right to peaceful enjoyment of possessions, to protect migrants from unfair distinctions based on nationality in respect of access to social benefits.[33] The European Social Charter 1961, its Additional Protocol 1988, as well as the Revised European Social Charter 1996,[34] include a number of provisions relating to individuals living and working in countries of which they are not nationals, covering, *inter alia*, the right to engage in a gainful occupation in another contracting party's territory, provision of information to migrant workers, facilitation of the migration process, equality of treatment of nationals and non-nationals in employment, the right to family reunification, and guarantees against expulsion.[35] On their face, these instruments are only relevant to migrants who are nationals of Council of Europe member states, and their application is conditional on reciprocity (i.e. if the member state in question has ratified). However, this formal position has been challenged by the European Committee of Social Rights, which monitors the application of the Charter and the Revised Charter and also administers the Collective Complaints Protocol 1995,[36] which allows specific trade unions and NGOs to bring complaints against those contracting parties accepting the procedure under the

[31] See, e.g., *Moustaquim* v. *Belgium* (1991) 13 EHRR 802; *Boultif* v. *Switzerland*, Eur. Ct H.R. judgment of 2 Aug. 2001. However, there have been fewer successful cases, which have challenged refusal of entry decisions on these grounds. See e.g., *Abdulaziz, Cabales, Balkandali* v. *United Kingdom* (1985) 7 EHRR 471; *Sen* v. *the Netherlands*, Eur. Ct H.R., judgment of 21 Dec. 2001.

[32] Art. 14, ECHR.

[33] See, respectively, Art. 1 of First Protocol to the ECHR (Paris, 20 Mar. 1952, ETS No. 9); and *Gaygusuz* v. *Austria*, Appl. No. 17371/90, Eur. Ct. H.R., judgment of 19 Sept. 1996 and *Poirrez* v. *France*, Appl. No. 40892/98, Eur. Ct. H.R., judgment of 30 Sept. 2003. For an insightful analysis of this case law, see J.-Y. Carlier, '*L'Europe et les étrangers*', in V. Chetail (ed.), *Globalization, Migration and Human Rights: International Law under Review* (Brussels: Bruylant, 2007) 239, 267–8.

[34] See, respectively, European Social Charter (Turin, 18 Oct. 1961, ETS No. 35), Additional Protocol to the European Social Charter (Strasbourg, 5 May 1988, ETS No. 128), and European Social Charter (revised) (Strasbourg, 3 May 1996, ETS No. 163).

[35] Arts. 18 and 19, European Social Charter and Revised Charter.

[36] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Strasbourg, 9 Nov. 1995, ETS No. 158). Twelve member states have ratified this instrument: Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal and Sweden.

Protocol.[37] The European Convention on the Legal Status of Migrant Workers 1977 includes provisions relating to the main aspects of the legal status of migrant workers coming from contracting parties, and especially to recruitment, medical examinations and vocational tests, travel, residence and work permits, family reunion, housing, conditions of work, transfer of savings, social security, social and medical assistance, expiry of the contract of employment, dismissal and re-employment, and preparation for return to the country of origin. To date, however, only eleven countries have ratified the Convention.[38]

With regard to the EU framework, differences exist in terms of rights and benefits granted to EU citizens moving to work in other member states, migrant workers coming from EU accession countries, and those from third countries. The Treaty Establishing the European Community (EC Treaty) guarantees the right of free movement for workers from EU member states (although transitional arrangements are in place limiting this freedom for nationals from the new member states)[39] and prohibits any discrimination based on nationality between these workers as regards employment, remuneration and other conditions of work and employment, including social security.[40] The EC Treaty also invites the

[37] In a case against France (Complaint No. 14/2003, *International Federation of Human Rights (FIDH)* v. *France* decided in Sept. 2004) the Committee found a violation of Art. 17 of the Charter concerning protection and assistance to children and young persons in respect of national measures limiting the access of the children of irregular migrants to health care provision. The Committee found it difficult to apply the restrictive personal scope of the Charter to a situation involving the denial of the fundamental right to health care to a particularly vulnerable group of persons, such as children. The Committee reasoned that it was necessary to interpret limitations on rights restrictively in order to preserve the essence of the right and to achieve the overall purpose of the Charter. The restriction in this case went to the very dignity of the human being, and impacted adversely on children who were exposed to the risk of no medical treatment. Given that medical care is a prerequisite to the preservation of human dignity, legislation or practices denying entitlement to such treatment to foreign nationals within the territory of a state party, even if they are present without authorisation, cannot be justified under the Charter (*ibid.*, paras. 29–32).

[38] European Convention on the Legal Status of Migrant Workers (Strasbourg, 24 Nov. 1977, ETS No. 93). Albania, France, Italy, Moldova, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and Ukraine have ratified the Convention, and the Convention has been signed by Belgium, Germany, Greece and Luxembourg.

[39] As of Jul. 2009, out of the former fifteen EU member states, only Austria and Germany continue to apply transitional arrangements to the nationals of the eight Central and Eastern European countries which joined the EU in May 2004.

[40] Arts. 12, 39 and 42, EC Treaty. See, also, Council Regulation 1612/68/EEC of 15 Oct. 1968 on free movement for workers within the Community, OJ Sp. Ed. Series-I 68(II), which deals principally with equality of treatment in respect of access to employment,

Council of Ministers to take measures necessary to ensure equality of treatment and opportunity between men and women and to combat discrimination based on, *inter alia*, race, ethnic origin, religion or belief and sexual orientation.[41] As far as the protection of migrant workers from other EU member states is concerned, the EU free movement regime is the quintessential system affording them a set of economic and social rights unparalleled elsewhere. Furthermore, these rights can be enforced in the domestic courts subject to the overall oversight of the European Court of Justice. With regard to third-country nationals, the Council is also empowered to take measures in the fields of asylum and immigration, including safeguarding the rights of nationals of third countries, although the measures to date on legal migration have afforded third-country nationals lesser rights than those granted EU citizens.[42]

The EU also has its own human rights instrument, the EU Charter of Fundamental Rights, adopted in 2000.[43] Most of the Charter's

working conditions, social and tax advantages, trade union rights, vocational training and education, and Council Regulation 1408/71/EEC of 14 Jun. 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1971 L 149/2 (as amended).

[41] See, respectively, Council Directive 76/207/EEC of 9 Feb. 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40 (as amended), Council Directive 2000/43/EC of 29 Jun. 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22, and Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16. The latter two Directives give effect to Art. 13 of the EC Treaty, which is the general non-discrimination clause.

[42] Despite the promises of the provision of 'near equality' for third-country nationals made by the European Council in its Conclusions adopted at Tampere, Finland in Oct. 1999. See *Presidency Conclusions*, Tampere European Council 15–16 Oct. 1999, *Bulletin EU* 10–1999. The principal three measures adopted on legal migration to date have been Council Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification (OJ 2003 L 251/12), Council Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44) and Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for purposes of highly qualified employment (OJ 2009 L 155/17). In Oct. 2007, the European Commission, following up its *Policy Plan on Legal Migration* (COM (2005) 669, 21 Dec. 2005), issued a proposal for a Council Directive on the rights of lawfully resident third-country nationals who have not yet attained long-term resident status. See European Commission, *Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State* (COM (2007) 638, 23 Oct. 2007).

[43] Charter of Fundamental Rights of the European Union (Dec. 2000), OJ 2000 C 364/1.

provisions, which contain the full range of civil, political, economic and social rights, are applicable to all persons, EU citizens and third-country nationals, irrespective of their nationality, although there are some limitations in respect of irregular migrants that arguably fall short of full compliance with universally recognised human rights standards.[44] However, the Charter is not yet a legally binding text, although it will become binding for most EU member states once the Treaty of Lisbon amending the EC and EU treaties is ratified by them and enters into force.[45]

Within the African and inter-American systems for the protection of human rights, there are no specific legally binding instruments protecting migrant workers and their families, although in Africa this group enjoys the general human rights protection provided by the 1981 African (Banjul) Charter of Human and Peoples' Rights,[46] adopted under the former Organization for African Unity (replaced by the African Union), and in the Americas by the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights (Pact of San José),[47] adopted under the auspices of the Organization of American States (OAS). These instruments guarantee equal protection before the law and freedom from discrimination on a number of grounds which are not exhaustive.[48] Certain principles applicable to migrants and their families have also been developed on the basis of the case law of the Inter-American Commission on Human Rights and the

[44] E.g., Art. 34(2) of the EU Charter stipulates: 'Everyone *residing and moving legally* within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices' (emphasis added).

[45] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 Dec. 2007, OJ 2007 C 206/1. However, exceptions regarding the Charter's application by the European Court of Justice and national courts as well as the justiciability of economic and social rights have been agreed in respect of two EU member states. See Protocol on the Aplication of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ 2007 C 206/156.

[46] African Charter on Human and Peoples' Rights (ACHPR), 27 Jun. 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); entered into force 21 Oct. 1986. The ACHPR has been ratified by fifty-three states.

[47] See, respectively, American Declaration of the Rights and Duties of Man (OAS res. XXX; adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948) and American Convention on Human Rights (ACHR) (22 Nov. 1969; OAS Treaty Series No. 36, 1144 UNTS 123; entered into force 18 Jul. 1978; ratified by twenty-four states).

[48] ACHPR, Arts. 2 and 3; American Declaration of the Rights and Duties of Man, Art. II; ACHR, Arts. 1(1) and 24.

Inter-American Court of Human Rights.[49] In light of the importance that migration has acquired in the past decade, the Commission decided to devote special attention to the situation of migrant workers and their families in the Americas. The OAS General Assembly adopted a number of resolutions on this topic and organised Summits of Heads of State. In 1997, the Commission appointed a Special Rapporteurship on Migrant Workers and their Families with a view to promoting the human rights of this vulnerable group in the Americas.[50] The establishment of this mechanism complements the Special Rapporteurship within the UN system referred to above. To date, the Special Rapporteur has visited and reported on the situation of migrant workers and their families in Costa Rica, Guatemala, Mexico and the United States.[51]

While there is no regional human rights instrument applicable to the Asian region, a particular milestone is the Association of Southeast Asian Nations (ASEAN) Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted in January 2007.[52] This document, however, contains a number of limitations. In particular, it is phrased in terms of receiving and sending country obligations (as well as ASEAN commitments) rather than the individual rights of migrant workers, and these obligations are 'pursuant to the prevailing laws, regulations and policies of the respective receiving [or sending] states'. Nevertheless, the adoption of the Declaration, as well as the ASEAN commitment to develop a legally binding instrument on the protection and promotion

[49] See, in particular, the Court's Advisory Opinion on the Legal Status of Undocumented Migrants (Inter-American Ct. H.R., Advisory Opinion OC-18/03 of 17 Sept. 2003, Series A No. 18, para. 160: 'The Court considers that undocumented migrant workers, who find themselves in a situation of vulnerability and discrimination with respect to workers who are nationals, have the same labour rights that belong to the rest of the workers in the state in which they are working, and this last must take all necessary measures to see that this is recognised and complied with in practice. Workers, being entitled to labour rights, must be able to count on all adequate means to exercise them.'

[50] For the website of the Special Rapporteurship, see www.cidh.org/Migrantes/defaultmigrants.htm.

[51] See www.cidh.org/Migrantes/migrants.countryreports.htm. These reports contain considerable factual information on labour migration in the region, the conditions of migrant workers and their families, the national regulatory framework pertaining to labour migration, and the pertinent international and regional instruments accepted by the countries in question.

[52] ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 12th ASEAN Summit, Cebu, the Philippines, 13 Jan. 2007, available at www.aseansec.org/19264.htm. The ASEAN comprises the following members: Brunei Darussalam, Cambodia, Indonesia, Lao's People Democratic Republic, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand and Viet Nam.

of the rights of migrant workers,[53] are significant developments given the paucity of ratifications of international human and labour rights' standards in this region, including those specifically concerned with migrant workers.[54]

As far as economic integration systems are concerned, the principal regimes in Africa are the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC),[55] which, however, are still in an early phase of implementation.[56] In the Americas, the Caribbean Community and Common Market (CARICOM), the Andean Pact and the Southern Common Market (MERCUSOR) in South America, and the North American Free Trade Agreement (NAFTA) and the Central-America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR)[57] are the systems in operation. NAFTA facilitates the entry of certain categories of business persons, i.e. business visitors, traders and investors, intra-company transferees and professionals, as well as service providers from the three signatory states (Canada, Mexico and the United States).[58] However, rights questions are only addressed rather marginally through a side

[53] *Ibid*., para. 22.

[54] The Philippines has ratified ILO Conventions No. 97 and No. 143 and the MWC, and Malaysia (Sabah) has ratified ILO Convention No. 97. Timor-Leste, which is not an ASEAN member, has also ratified the MWC.

[55] Other regional economic integration systems in Africa include the Common Market for Eastern and Southern Africa (COMESA), available at www.comesa.int/index_html/view and the Economic Community of Central African States (ECCAS – *Communauté économique des états de l'Afrique Centrale* – CEEAC) available at www.ceeac-eccas.org.

[56] For an overview of both of these systems, see A. Adepoju, 'Interstate cooperation: Africa' in *Interstate Cooperation and Migration* (Geneva/Berne: IOM and Swiss Federal Office for Migration, 2005) 87, 90–1 and J. Martens, 'Moving freely on the African continent: the experience of ECOWAS and SADC with free movement protocols', in Cholewinski, Perruchoud and Macdonald (eds.), *International Migration Law*, 349–61.

[57] See, respectively, North American Free Trade Agreement (NAFTA) (entered into force 1 Jan. 2004) between Canada, Mexico and the US, available at www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78, and Central America-Dominican Republic-United States Free Trade Agreement between the Governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the US, available at www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. For an analysis of both agreements in the migration context, see G.A. Flores-Macías, 'Migration and free trade agreements: lessons from NAFTA and perspectives from CAFTA-DR', in Cholewinski, Perruchoud and Macdonald (eds.), *International Migration Law*, 147–59.

[58] Chs. 16 and 12, NAFTA.

treaty called the North American Agreement on Labor Cooperation.[59] This Agreement lists a series of labour principles in Annex 1, which states parties are committed to promote in accordance with their domestic law, and which include '[p]roviding migrant workers in a party's territory with the same legal protection as the party's nationals in respect of working conditions'.[60] In Asia, facilitation of movement for business travellers is a feature of the Asia-Pacific Economic Cooperation (APEC) in the form of the Business Travel Card applicable in 14 APEC Member Economies,[61] and recent developments in the ASEAN have been discussed above.

III. Consultation and cooperation with reference to international labour migration and the protection of the rights of migrants

Before considering the role of non-binding and informal consultative and cooperation processes may play in international labour migration and protecting the rights of migrant workers, it is often overlooked that consultation and cooperation is also an important feature of legally binding agreements adopted in this field, with the result that states parties ratifying such agreements have obligations to consult and cooperate with one another and possibly also with other stakeholders.

A. Consultation and cooperation in international agreements

Specific ILO instruments protecting migrant workers, the MWC and pertinent regional standards also contain provisions addressing inter-state cooperation.

While the MWC establishes a principled framework for the protection of the human rights of all migrant workers and their families irrespective of their immigration status, it also acknowledges in a number of places, and particularly in Part VI, that such a human rights framework cannot be effectively applied without consultation and cooperation between states. This involves not only inter-state consultation and cooperation

[59] North American Agreement on Labor Cooperation, 14 Sept. 1993 (entered into force 1 Jan. 2004). The text of the agreement is available from the US Department of Labor website at www.dol.gov/ILAB/regs/naalc/naalc.htm.

[60] Principle 11, North American Agreement on Labor Cooperation, *ibid.*

[61] For more information, see www.apec.org/apec/business_resources/apec_business_travel0.html.

at the bilateral, regional and multilateral levels, but also government consultation and cooperation internally, and with pertinent stakeholders, such as employers, trade unions and other organisations. In this way, therefore, consultative and cooperation processes on labour migration and the acceptance of legally binding standards on the protection of the rights of all migrant workers and their families can be viewed as mutually reinforcing, with the potential to benefit both migrants and the states concerned.

Part VI on the promotion of sound, equitable, humane and lawful conditions in connection with international labour migration is the principal section in MWC addressing inter-state consultation and cooperation. States parties are under the general obligation, by virtue of Article 64, to consult and cooperate 'with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families' and '[i]n this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned'. More specifically, Part VI also discusses consultation and cooperation between states parties in respect of the following three areas, two of which focus on return and reintegration in the country of origin:

- consultation, exchange of information and cooperation between the competent authorities of states parties involved in the international migration of workers and members of their families;[62]
- cooperation in the adoption of measures regarding the *orderly return* of migrant workers and members of their families to the state of origin, when they decide to return, or their authorisation of residence or employment expires, or when they are in the state of employment in an irregular situation;[63] and
- cooperation with a view to promoting adequate economic conditions for the resettlement of regular migrant workers and to facilitating their durable *social and cultural reintegration* in the state of origin.[64]

The MWC also attaches considerable importance to the role of bilateral, regional and multilateral arrangements and agreements, particularly in

[62] Art. 65(1)(b), MWC.
[63] Art. 67(1), MWC.
[64] Art. 67(2), MWC.

the context of furthering the rights of migrant workers and members of their families.[65] Indeed, if bilateral and other multilateral instruments in force for the state party in question grant more favourable rights and freedoms to migrants, such instruments must be respected.[66]

With regard to the specific ILO instruments, there are also provisions imposing obligations upon states parties to adopt measures, in collaboration with other states, with a view to preventing abuses in the migration process as well as measures 'for systematic contact and exchange of information on the subject with other states, in consultation with representative organisations of employers and workers'.[67] Moreover, it should be recalled that cooperation is an integral aspect of ILO's work given its tripartite structure and that ILO standards are adopted by the International Labour Conference, a body comprising government delegates and representatives of employers' and workers' organisations.

However, to date, and as noted earlier, these specific multilateral instruments have not received the wide-ranging acceptance, which would enable the development of a comprehensive framework for multilateral cooperation.

With regard to formal binding cooperation on labour migration at the regional level, Council of Europe instruments relating to the protection of migrant workers, such as the (Revised) European Social Charter and

[65] Preambular para. 6, MWC.

[66] Art. 81(1), MWC. A governing principle in many international and regional instruments is that the provisions therein are minimum standards and therefore subject to the more favourable standards found in other multilateral treaties, bilateral agreements or national legislation. Some specific international instruments on migrant workers also refer to bilateral agreements with a view to broadening the categories of protected migrants or augmenting rights. For example, the definitions of self-employed migrant workers or dependant relatives of migrant workers in the MWC can effectively be extended by virtue of bilateral agreements (Arts. 2(h) and 4 respectively). Moreover, specific ILO instruments on migrant workers, the MWC, the European (Revised) Social Charter, the European Convention on the Legal Status of Migrant Workers and ILO and Council of Europe social security instruments recognise that the right of migrant workers to social security on a basis of equality with nationals cannot be adequately protected without further inter-state cooperation on the bilateral level. While states are reluctant to enter into legally binding commitments regarding labour migration at the global and regional level, they may be more willing to do so with a view to regulating the flow of migrant workers in a bilateral context. Indeed, such agreements appear to be increasing in number. See OECD, *Migration for Employment – Bilateral Agreements at a Crossroads* (Paris: OECD, 2004). In this regard, ILO Recommendation No. 86 of 1949, which accompanies ILO Convention No. 97, includes a model bilateral agreement, as an Annex, which has been used by a number of countries to develop their own agreements. See, also, Baruah and Cholewinski, *Handbook on Labour Migration (2006)*, 179–80.

[67] Arts. 3 and 4, Part I of ILO Convention No. 143.

the European Convention on the Legal Status of Migrant Workers (ECMW), include a number of provisions requiring contracting parties to cooperate with one another. For example, the (Revised) European Social Charter, in Article 19(3) on the right of migrant workers and their families to protection and assistance, requires states parties 'to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries'. ECMW provides for cooperation between contracting parties, *inter alia*, on matters concerning the departure of migrants and their return to the country of origin:

- exchange and provision of appropriate information to prospective migrants on their residence, conditions of employment, opportunities for family reunion, and the nature of their employment, social security, housing, transfer of savings, etc.;
- vocational training and retraining schemes to ensure that they cater as far as possible for the needs of migrant workers with a view to their return to their country of origin;
- arrangements, so far as practicable, for the teaching of the migrant worker's tongue to the children of migrant workers to facilitate, *inter alia*, their return to their country of origin; and
- provision of information to migrant workers about conditions in their country of origin on their final return home.[68]

B. Non-binding consultative and cooperation processes

Non-binding consultative and cooperation processes relating specifically to international migration exist at both the global and regional levels. With the exception of one particular inter-regional dialogue that has been ongoing for over twenty years, these processes are a relatively recent phenomenon. While the regional processes are likely to be more effective because of the similar interests and challenges faced by the participating states concerned, the significance of possibilities for wider dialogue at the global level should not be overlooked given the opportunities available for sharing valuable experiences, which can also be achieved through interaction between the participants of the various regional processes. Indeed, it is increasingly being recognised that regional processes can serve as building-blocks for the development of broader forms of dialogue at the global level. Moreover, contrary to perceptions that such processes are solely

[68] Arts. 6, 14(5), 15 and 30 ECMW, respectively.

concerned with migration controls, the promotion of regular migration avenues and the protection of migrants, including migrant workers, are becoming important topics for discussion as illustrated below.

1. Global level

Informal inter-state dialogue, consultation and cooperation on international migration at the global level has occurred, more generally, through the so-called Berne Initiative, a states-owned consultative process, launched by the Swiss Government in 2001 and supported by IOM (which provided the Secretariat), an outcome of which is the International Agenda for Migration Management; the IOM's International Dialogue on Migration (IDM); and more specifically with regard to international labour migration, under the auspices of the ILO, with the participation of the social partners (i.e. employers' and workers' organisations), which has resulted in the adoption and dissemination of the Multilateral Framework on Labour Migration, advocating a rights-based approach.[69] Most recently, growing interest by the international community in the relationship between migration and development has spawned a global consultative process, which is starting to devote considerable attention to labour mobility as well as related human rights concerns.

1.1 Berne Initiative: International Agenda for Migration Management

The Berne Initiative had as its goal obtaining 'better management of migration at the national, regional and global levels through enhanced cooperation between states'.[70] The International Agenda for Migration

[69] Inter-state dialogue also took place in the context of the Global Commission on International Migration (GCIM), set up by a core group of states in Dec. 2003 and supported by the UN Secretary General, with the objective of formulating a coherent, effective and global response to international migration. The GCIM issued a report in October 2005. One part of the GCIM's mandate was to 'promote a comprehensive dialogue on international migration among governments, international organizations, civil society, the private sector and other relevant stakeholders'. See the GCIM's website at www.gcim.org/en. While this 'process' has clearly played an important role in improving understanding of international migration issues, it is not discussed in more detail in this chapter because it was essentially a 'one-off' event and is not ongoing, although it appears to have contributed to the development of new processes.

[70] M. Klein Solomon, 'International Migration Management Through Inter-State Consultation Mechanisms', paper presented to the UN Expert Group Meeting on International Migration and Development, Population Division, Department of Economic and Social Affairs, UN Secretariat, New York, 6–8 Jul. 2005, available at www.un.org/esa/population/publications/ittmigdev2005/P13_MKSolomon.pdf, 14.

Management (IAMM)[71] was the most important outcome of the Berne Initiative. The IAMM constitutes 'a non-binding reference system and policy framework of migration management at the international level'[72] and sets out a number of common understandings and effective practices for a planned, balanced and comprehensive approach to management of migration, including labour migration and the human rights of migrants. While the IAMM represents the common views and perspectives on migration of officials and experts from all regions of the world, it remains a rather unique document because it has not been adopted on the basis of negotiations between states, and is therefore clearly non-binding. It has been designed as a practical and balanced tool for administrators to assist them in the planning and development of coherent migration policies.

In the twenty common understandings for the management of international migration on which the IAMM is based, two are particularly relevant to the human rights of migrants, recognising the universality of human rights standards and the importance of the compliance with these principles for effective migration management:

> 4. According to customary international law and applicable legal instruments, states are required to protect and respect the human rights and dignity of migrants, irrespective of their status; the special needs of women and children, the elderly and the disabled require particular attention. Similarly, migrants are required to comply with the laws of the host state.
>
> …
>
> 8. Compliance with applicable principles of international human rights, refugee, humanitarian, migrant workers and transnational organised crime laws is an integral component of any migration management system, at the national, regional and international levels.[73]

In the section on 'effective practices,' the IAMM devotes a whole chapter to the human rights of migrants focusing on human rights, the principle of non-discrimination, the principle of *non-refoulement*, statelessness and internal displacement.[74] Importantly, the first effective practice with regard to the human rights of migrants is '[a]ccession to existing human

[71] *International Agenda for Migration Management*, Berne, 16–17 Dec. 2004 (IOM, Swiss Federal Office for Migration, 2005), available at www.iom.int//DOCUMENTS/OFFICIALTXT/EN/IAMM_E.pdf.
[72] Klein Solomon, 'International Migration Management', 5.
[73] Common Understandings 4 and 8. IAMM, 23–4.
[74] IAMM, 45–9 (ch. 7).

rights treaties and effective implementation at the national level'. The IAMM also emphasises that 'migrants in an irregular situation are entitled to protection of their human rights', but recognises that they 'are particularly vulnerable in practice to discrimination and to exploitation and do not enjoy access to a range of social services and other forms of protection of the host society'.[75] With regard to the principle of non-discrimination, the IAMM recommends, as an effective practice, the 'implementation of measures to ensure the appropriate treatment of migrants, regardless of their status, to prevent racist or xenophobic actions and policies and to eliminate discriminatory practices against migrants'.[76]

With reference to international labour migration, the IAMM identifies, as a common understanding, that 'providing adequate and regular channels for migration is an essential element of a comprehensive approach to migration management'.[77] A separate chapter is also devoted to labour migration,[78] although it is recognised that there are clear links between this topic and other areas of the IAMM, in particular regular migration, including temporary migration, irregular migration, migration and development, and migration and trade.

1.2 IOM's International Dialogue on Migration The International Dialogue on Migration (IDM) is an informal and non-binding consultation mechanism established by IOM for its member and observer states at the 82nd Session of the IOM Council in November 2001. The purpose of the IDM is 'to contribute to a better understanding of migration and to strengthen cooperative mechanisms between governments to comprehensively and effectively address migration issues'.[79] The IDM fulfils one of IOM's main purposes, as set out in its Constitution, which is 'to provide a forum to States as well as international and other organizations for the exchange of views and experiences, and the promotion of co-operation and co-ordination of efforts on international migration issues, including studies on such issues in order to develop practical solutions'.[80] The two activities of the IDM are annual sessions taking

[75] *Ibid.*, 46.
[76] *Ibid.*, 47.
[77] Common Understanding 13. IAMM, 24.
[78] *Ibid.*, 40–2 (ch. 5).
[79] Klein Solomon, 'International Migration Management', 12.
[80] Art. 1(1)(e), IOM Constitution (19 Oct. 1953) as amended, available at www.iom.int/jahia/Jahia/pid/10. See, also, Klein Solomon, 'International Migration Management', 12.

place at the IOM Council and the convening of two or three intersessional workshops each year. These sessions and workshops are structured around specific themes, although the latter focus more on developing linkages between migration and other fields. For example, the two intersessional workshops that took place in 2006 explored the relationships between migration and health in the context of the mobility of health workers; and migration and integration with a view to identifying best integration measures and practices with the potential to benefit migrants, the host society and other pertinent stakeholders. In 2007, the guiding theme of the IDM was migration management in the evolving global economy, which focused more closely on labour migration issues. For 2009, human rights and migration was chosen as the guiding theme and the two intersessional workshops held focused on effective respect for the human rights of migrants and trafficking in persons and exploitation of migrants.[81]

1.3 ILO's Multilateral Framework on Labour Migration In June 2004, the ILO's International Labour Conference adopted Conclusions on a fair deal for migrant workers in the global economy, as well as a Plan of Action for such workers. Rather than asking states to agree to a set of legally binding principles, or to reformulate the standards already in place, the Plan of Action sought to work with the social partners and other international organisations to develop 'a non-binding multilateral framework for a rights-based approach to labour migration, which takes account of labour market needs'.[82] The non-binding Multilateral Framework on Labour Migration has now been developed and comprises a set of principles and guidelines in a broad range of areas: decent work; means for international cooperation on migration; effective management of labour migration; protection of migrant workers; prevention of and protection against abusive migration practices; social integration and inclusion; migration and development; migration process; and global knowledge base.[83] With reference to the June 2004 Conclusions, the Framework also contains a follow-up mechanism, urging the ILO

[81] See IOM's IDM web pages at www.iom.int/jahia/Jahia/pid/411.

[82] International Labour Conference, 92nd Session, 2004, Report of the Committee on Migrant Workers, *Conclusions on a Fair Deal for Migrant Workers in a Global Economy – ILO Plan of Action for Migrant* Workers, available at www.ilo.org/public/english/protection/migrant/download/ilcmig_res-eng.pdf, paras. 21 and 23.

[83] *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (Geneva: International Labour Office, 2006), available at www.ilo.org/public/english/protection/migrant/download/multilat_fwk_en.pdf.

Governing Body 'to periodically review the progress made in the implementation of the Multilateral Framework', and also contains examples of best practices relating to the areas identified.[84] The draft framework was discussed and adopted at a tripartite meeting of experts between 31 October and 2 November 2005, and in March 2006 the ILO Governing Body took note of the adopted document and approved its publication and dissemination to ILO's tripartite constituents.

1.4 Global Forum on Migration and Development More recently, the issue of the human rights of migrants was raised at the first meeting of the Global Forum on Migration and Development (GFMD), held in Brussels in July 2007.[85] The GFMD is the follow-up process to the UN General Assembly's High-Level Dialogue on International Migration and Development held in New York in September 2006.[86] It is essentially a states-owned consultative process, although the July event included a civil society day, the report of which was presented to state delegations. While the human rights of migrants did not constitute a priority theme of discussion at the GFMD, they were nonetheless identified as an important horizontal or cross-cutting issue together with gender and root causes of migration. Indeed, the report of the first meeting of the GFMD underscored that human rights were seen throughout as 'an essential prerequisite to migrants contributing to development. However, international human and labour rights treaties are not always respected in practice, or applied in an equitable manner to migrants'.[87] With regard to protection of the human rights of migrants, the report noted that policies were needed to:

- fight racism and xenophobia, particularly to foster more integration of migrants in host countries;
- fight and prevent human trafficking;

[84] *Ibid.,* 31 and Annex respectively.

[85] See the website of the first GFMD meeting at www.gfmd-fmmd.org/en/public/global-forum-migration-and-development-0. Three principal themes were discussed at the Forum in the form of Roundtables: human capital development and labour mobility – maximising opportunities and minimising risks; remittances and other diaspora resources – increasing their net volume and development value; and enhancing institutional and policy coherence and promoting partnerships.

[86] See the website of the High-Level Dialogue at www.un.org/migration/index.html.

[87] *Report of the first meeting of the Global Forum on Migration and Development, Belgium, 9–11 July 2007* (Brussels: Bruylant, 2008), 22, available at www.gfmd-fmmd.org/en/system/files/2080096_FORMON_UK_BAT.pdf.

- address the mismatch between labour needs and legal migration channels;
- respect and implement relevant international instruments (UN and ILO) on human and labour rights;
- adopt legislation and procedures to ensure protection and non-discriminatory treatment of migrants;
- empower migrants, e.g. through better information, skills recognition, access to banking and other financial services and options of re-entry in the host country; [and] …
- to monitor the impact of initiatives taken in the field of migration and development on the human and labour rights of migrants.[88]

Nonetheless, in their written contribution to the GFMD formulated during their day of discussion, civil society representatives called for greater attention to be devoted to the human dimension in the migration and development debate.[89] Indeed, this call appears to have been partly heeded as the second meeting of the GFMD, held in Manila, the Philippines, on 27–30 October 2008, devoted one of its roundtable discussions to the human rights of migrants.[90]

1.5 UN Commission on Human Security and the Human Security Network The various aspects of the relationship between migration and security, including both state and human security, was analysed by the UN Commission on Human Security in its 2003 report.[91] While the Commission recognised that massive population movements affect the security of states, it also observed that the movement of people is a development issue. From the perspective of human security, the

[88] *Ibid.*, 16–17.

[89] See *Report of the Civil Society Day of the Global Forum on Migration and Development*, Brussels, 9 Jul. 2007, available at http://smooz.gfmd-civil-society.org/gfmd/files/Final_CSD.pdf. Civil society representatives were also clear on their position towards the specific international instruments protecting migrant workers: 'Governments (origin, destination and transit) should ratify and effectively implement as well as monitor compliance of UN and ILO standards of protection for migrant workers and members of their families. They should legislate national laws and policies to promote and fulfil the rights of migrant workers and members of their families, particularly the women and children who bear the brunt of the high social cost of migration.' *Ibid.*, 26.

[90] Roundtable 1 on Migration, Development and Human Rights. The working papers for this roundtable are available from the Philippine Government website at http://government.gfmd2008.org.

[91] UN Commission on Human Security, *Human Security Now* (UN Commission on Human Security: New York, 2003), available at www.humansecurity-chs.org/finalreport/English/FinalReport.pdf, ch. 3.

Commission advocated the need to adopt a comprehensive approach to the movement of people and proposed the development of an international framework that would address, *inter alia*:

- Taking steps towards the orderly and safe movement of people, including increasing migratory opportunities and burden-sharing among countries.
- Developing international and regional norms for the movement of people between countries and for the rights and obligations of migrants.
- Formulating strategies to combat trafficking and smuggling and implementing the relevant international and regional conventions, while protecting the rights of victims.
- Protecting against racism and intolerance and other human rights violations.
- Developing an institutional framework.[92]

Two non-binding states-led mechanisms have emerged around the theme of human security: the Human Security Network, launched in 1999, which is an informal coalition of states committed to working together to strengthen human security;[93] and the 'Friends of Human Security' (FHS), established by Japan as an unofficial, open-ended forum at the UN for governments as well as international organisations to discuss human security from different angles in order to seek a common understanding of human security and explore collaborative efforts for mainstreaming it into UN activities, and which met for the first time in October 2006.[94] These mechanisms have yet to place migration generally on their agendas, although one migration-related topic that has been considered is displacement due to environmental or climate change reasons, which is increasingly attracting the attention of policy-makers and is likely to become a more significant issue in the future.[95]

[92] *Ibid.*, 47.

[93] The members of the Network are Austria, Canada, Chile, Costa Rica, Greece, Ireland, Jordan, Mali, Norway, Slovenia, Switzerland and Thailand, and South Africa participates in the Network as an observer. The Network's website is at www.humansecuritynetwork.org/network-e.php.

[94] For more information, see the Friends of Human Security website at www.mofa.go.jp/policy/human_secu/friends/index.html.

[95] See, e.g., the paper by the Greek Chairmanship of the Human Security Network, 'Human Security and the Climate Change Impact on Vulnerable Groups', 8 May 2007, available at www.humansecuritynetwork.org/menu-e.php.

2. Regional level: regional consultative processes

Less formal regional arrangements, as opposed to the more formal mechanisms found in legally binding treaties and integration regimes, are regional consultative processes (RCPs), which are non-binding fora bringing migration officials of states of origin, transit, and destination, international organisations, and civil society together at the regional level to discuss migration-related issues in a cooperative way.[96] RCPs have been described as:

> both a reflection of the growing recognition that migration should be studied through a comprehensive lens, and that states, particularly in the regional context, are more likely to share common migration-related interests and concerns. The emergence of [RCPs] thus reflects states' recognition that they can benefit from cooperation on migration issues, and their willingness to come together in an informal, non-binding way to do so.[97]

According to some commentators, 'by design, [RCPs] promote a convergence in policy and practice … which is evidenced through their immediate objectives, [namely] capacity building and fostering dialogue'.[98] Convergence also occurs on a number of levels, within and across regions as well as in the form of better coordination within governments nationally.[99]

There are a number of important characteristics common to RCPs. First, RCPs are states-owned, with the principal participants being government officials and representatives of international organisations, although, in some instances, NGOs can also participate.[100] Secondly, they are informal and the results, though consensual and sometimes in the form of declarations, recommendations and plans of, or guidelines for, action, are non-binding.[101] This point 'goes to the heart of

[96] A. Klekowski von Koppenfels, *The Role of Regional Consultative Processes in Managing International Migration*, IOM Migration Research Series No. 3 (Geneva: IOM, May 2001), 7; Klein Solomon, 'International Migration Management', 4.

[97] C. Thouez and F. Channac, 'Convergence and divergence in migration policy: the role of regional consultative processes', *Global Migration Perspectives* 20 (2005), available at www.gcim.org/attachements/GMP%20No%2020.pdf, 5.

[98] *Ibid.*, 8. One definition of capacity building is 'training on legislation, practice, [and] implementation of projects', *ibid.*

[99] *Ibid.*, 9, n. 25.

[100] However, one of the criticisms of RCPs is that while some enable other stakeholders, such as NGOs, to participate as observers, their opportunities for more concrete input and involvement is limited. See Thouez and Channac, 'Convergence and divergence in migration policy', 13 (references omitted).

[101] Klein Solomon, 'International Migration Management', 6.

[RCPs] … Rather than acting as a brake to action, it appears that the non-binding nature of [RCPs] actually encourages participation'.[102] A third feature of RCPs is that they meet more than once, although the process itself may well have been initiated by a conference on a particular topic. Fourthly, RCPs are either geographically based or structured around a common theme, such as trafficking in human beings or labour migration (see below). The substantive focus of RCPs may also be viewed as flexible in accordance with the changing needs of participating states.[103] Finally, the operation of RCPs is supported by a minimum of administration, which is seen as an advantage in that 'direct communication is more easily possible between high level officials and experts in [RCPs]'.[104] In practice, however, many RCPs are facilitated by intergovernmental organisations, particularly IOM.[105]

Importantly, the perception that RCPs are 'control-oriented' is in essence no longer correct. RCPs address a broad range of issues that also encompass labour migration and the human rights of migrants.[106] Indeed, there is even one process wholly dedicated to labour migration, which also includes a significant rights protection dimension, namely, the 'Colombo Process', known formally as the Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia, which began in Colombo, Sri Lanka in 2003 on the basis of cooperation among ten countries,[107] and which continued in Manila, the Philippines in 2004. This Process is facilitated by IOM. At the Third

[102] Klekowski von Koppenfels, *The Role of Regional Consultative Processes*, 5 (Executive Summary). See, also, Thouez and Channac, 'Convergence and divergence in migration policy', 12, who observe that the fact that RCPs are mainly consultative fora and that their decisions remain non-binding for participating states 'partially explain the success of the [RCPs] as states enter cooperative processes with the knowledge that their sovereign decision making abilities will not risk being constrained'.

[103] Klein Solomon, 'International Migration Management', 6.

[104] Klekowski von Koppenfels, *The Role of Regional Consultative Processes*, 9. See, also, Thouez and Channac, 'Convergence and divergence in migration policy', 5.

[105] IOM participates in RCPs as a member, partner or observer depending on the RCP, and has provided support to RCPs since their inception. In addition, IOM also provides secretariat services for many of the principal RCPs and contributes to RCPs in other ways, e.g., through research and information dissemination, policy advice, capacity building and technical cooperation, and project implementation. Klein Solomon, 'International Migration Management', 6, n. 7.

[106] *Ibid.*, 7.

[107] Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Viet Nam. Afghanistan, which participated as an observer in 2004, became a member of the group in 2005. For more background information, see the Colombo Process website at www.colomboprocess.org.

Ministerial Consultations, held in Bali, Indonesia in September 2005, destination countries for contractual labour from this region participated for the first time.[108] Protection of their workers abroad is one of the principal objectives for countries of origin when devising overseas employment policies, and collaboration and cooperation among countries of origin (which are frequently in competition with each other) in this area can lead to the adoption of better policies and practices as well as their effective implementation.[109] Important thematic areas addressed by the Third Ministerial Consultations relating to the protection of overseas contractual workers concern action to ensure the welfare and well-being of vulnerable workers, particularly women, during recruitment and employment, and providing valuable services to contractual workers, such as pre-departure information and orientation, support services during their stay abroad, and reintegration assistance. Pertinent recommendations include the development of regulatory frameworks and related measures to prevent malpractices and abuses in recruitment (e.g. by the close supervision and monitoring of recruitment agencies); the establishment and operation of Overseas Worker Welfare Funds; and close collaboration with destination countries to set minimum wage levels and ensure safe and decent employment conditions for contractual workers in low-skill and low-wage sectors.[110]

In January 2008, Colombo Process countries met in Abu Dhabi, in the United Arab Emirates (UAE), with Gulf Cooperation Council (GGC) states and Malaysia, Singapore and Yemen. This 'Abu Dhabi Dialogue' resulted in the adoption of a Declaration, which provides a basis for

[108] Bahrain, Italy, Kuwait, Malaysia, Qatar, Saudi Arabia, South Korea and the United Arab Emirates (UAE). In addition to IOM, the following regional and international organisations also participated in the process: ASEAN, EU, Gulf Cooperation Council (GCC), ILO, UN Development Fund for Women (UNIFEM) and the World Bank.

[109] While individual countries of origin alone can do much to protect their workers abroad, and one model approach often cited is that of the Philippines (see D. Agunias and N. Ruiz, *Protecting Overseas Workers: Lessons and Cautions from the Philippines* (Washington, DC: Migration Policy Institute, 2007), available at www.migrationpolicy.org/pubs/MigDevInsight_091807.pdf and T.D. Achacoso (former Administrator of the Philippine Overseas Employment Administration – POEA), 'The Role of the State in Managing an Overseas Employment Programme', unpublished paper, Oct. 2003, on file with the author), clearly, concerted dialogue and action at the regional level, particularly with the participation of destination countries, is more likely to lead to the desired results.

[110] Third Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia, Bali, 20–21 Sept. 2005, *Summary of Statements and Recommendations of the Ministers,* available at www.colomboprocess.org/Ministerial-Consultations/Bali/ Bali_recommendations_final.pdf.

cooperative action, to be undertaken with the support of IOM. Four specific areas of partnership were identified. The third partnership focuses specifically on rights-related or protection issues, namely: 'Preventing illegal recruitment practices and promoting welfare and protection measures for contractual workers, supportive of their well being and preventing their exploitation at origin and destination.'[111]

With the exception of the Colombo Process, however, none of the other RCPs focuses exclusively on labour migration, although this subject is becoming either an integral aspect or an increasingly important agenda item. For example, in the European region, a RCP that is gaining some significance in this respect is the Cross-Border Co-operation or Söderköping Process,[112] established in early 2001 and involving ten countries along the Eastern EU enlarged border.[113] The process is supported by the EU, IOM, the Swedish Migration Board and UNHCR, and its objective is to support cross-border cooperation between participating countries on asylum, migration and border management issues. The Road Map of the Söderköping Process 2005–2007 refers to regional harmonisation on labour migration and remittances as one of the aims of the process and identifies 'support in regulating labour migration including ensuring access to information on foreign employment and travel opportunities' as an information-related need for beneficiary countries.[114]

Another RCP of particular relevance to the European region is the Budapest Process, established in the early 1990s after the fall of the Berlin Wall and the spectre of massive East–West migration, which did not however materialise. This RCP, involving over fifty governments from the wider European region and ten international agencies, focuses on cooperation and the exchange of information and experiences with regard to irregular migration, including trafficking and smuggling in human beings, and return and readmission. Since 2003, this RCP has

[111] The remaining partnerships focus on enhancing the knowledge in the areas of labour market trends, skills profiles, temporary contractual workers and remittances policies and flows and their interplay with development in the region; building capacity for effective matching of labour demand and supply; and developing a framework for a comprehensive approach to managing the entire cycle of temporary contractual mobility that fosters the mutual interests of countries of origin and destination.

[112] For more information, see the website of the Secretariat (based in Kiev, Ukraine) at http://soderkoping.org.ua/page108.html.

[113] Belarus, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia and Ukraine.

[114] *Road Map of the Söderköping Process 2005–2007* (2005), available at: http://soderkoping.org.ua/files/en/pub/ROADMAP_eng2.pdf, 2, 4.

been redirected from Central Europe towards the region of Commonwealth Independent States (CIS). The International Centre for Migration Policy and Development (ICMPD) acts as the Secretariat for the Budapest Group of countries.[115] While the focus of the Budapest Process addresses largely control-oriented issues, the informal and non-binding nature of RCPs, as discussed above, provides them with the flexibility to evolve and encompass additional topics of interest in accordance with the priorities set by participating states. Given the intersection of irregular migration with other important topics in the context of the adoption of a comprehensive migration management strategy at the national and regional levels, it is perhaps not surprising that a number of important measures of particular relevance to labour migration were proposed at the Ministerial Conference of the Budapest Group, held at Rhodes in June 2003.[116] The Ministers invited destination countries 'to assess the impact of current labour market policies with regard to the prevention of irregular migration'; reaffirmed 'the need for effective and deterrent sanctions on employers to suppress the employment of illegal migrants'; and recommended the initiation of a dialogue among Central and Eastern European countries on the 'harmonization of rules for the admission of various categories [of migrants, such as *inter alia*] … employed and self-employed persons [and] students'.[117] In October 2006, at the fourteenth meeting of the Budapest Group of Senior Officials in Istanbul, participants agreed 'to continue addressing issues related to legal migration, in the framework of the existing Working Group on Immigration and Admission Policies or any other relevant activity'.[118]

[115] See, ICMPD's website at www.icmpd.org.

[116] Conference of Ministers on the Prevention of Irregular Migration in the Wider European Region, *Recommendations*, Rhodes, 25–26 Jun. 2003, available at www.icmpd.org/fileadmin/ICMPD-Website/Budapest_Process/Ministerial_Meetings/Rhodes_Recommendations.pdf.

[117] *Ibid.*, Recommendation 12.

[118] 14th Meeting of the Budapest Group of Senior Officials, *Conclusions*, Istanbul, 19–20 Oct. 2006, available at www.icmpd.org/fileadmin/ICMPD-Website/Budapest_Process/BG_Meetings/Istanbul_Final_Conclusions.pdf, Conclusion 8. The second meeting of the Working Group on Immigration and Admission Policies, held in Bratislava on 18–19 Dec. 2006, available at www.icmpd.org/fileadmin/ICMPD-Website/Budapest_Process/Working_Groups/Bratislava_meeting_summary_of_the_chair_ENG.pdf, was almost wholly devoted to labour migration concerns. The Chair's Summary (para. 4) refers to the view of the Secretariat that: 'the issue in focus is access to the labour market and access to social rights in the host country. The purpose is to identify properly managed migration, thus conditions under which temporary migration schemes and admission policies have worked, as well as unintended effects.'

Two important inter-regional processes, involving Europe, North America, Oceania and North Africa, have also recently devoted more attention to labour migration and rights' questions. The Inter-Governmental Consultations on Migration, Asylum and Refugees (IGC) is the oldest RCP, established in 1985, and comprising twelve Western European states and four traditional immigration countries.[119] While not focusing on a particular region, this process is made up of like-minded states, which are essentially developed industrialised countries facing similar migration challenges in terms of inward migration and the presence of migrants on their territories. For many years, asylum was the principal topic preoccupying the minds of officials during these consultations, but recently the IGC has reoriented its focus towards non-asylum issues, and has started to discuss immigration and integration, with labour migration (particularly temporary labour and circular migration, and highly skilled migration) an important item on its agenda.

The '5+5 Dialogue' on Migration in the Western Mediterranean involves five countries of Southern Europe and the five Maghreb countries,[120] and its purpose is to hold frequent and informal meetings between the governments to discuss the various dimensions of migration. To date, five ministerial meetings have been held, in Tunis in October 2002, in Rabat in October 2003, in Algiers in September 2004, in Paris in 2005 and in Algeciras in December 2006. The Tunis meeting resulted in the adoption of the Tunis Declaration,[121] which, in accordance with the *raison d'être* of RCPs, is not a legally binding document, but which commits the participants to a number of political objectives, such as the establishment of regional processes for consultation, information exchange and analysis of migration trends; addressing the phenomenon of irregular migration and trafficking in human beings, including the promotion of readmission agreements; linkages between migration and co-development; management of regular migration flows and movement of persons, including the introduction of a more streamlined approach to visa policy; and initiating actions with a view to improving the health of migrant workers. Importantly, from a human rights perspective, the Tunis Declaration also underlines the need to

[119] The IGC participating states are Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States.

[120] France, Italy, Malta, Portugal, Spain, and Algeria, Libya, Mauritania, Morocco and Tunisia. For more information, see IOM's website at www.iom.int/jahia/Jahia/pid/860.

[121] Available at www.old.iom.int//DOCUMENTS/OFFICIALTXT/EN/Declaration_e.pdf.

integrate migrants on the basis of respect for their fundamental rights while respecting cultural diversity. In particular, specific goals identified include: the facilitation of family reunification, promotion of free movement of regular migrants between countries of origin and destination, equal treatment with nationals in respect of access to employment, vocational training, decent housing and other economic and social rights, and raising the awareness of the rights and obligation of migrants. Another objective concerns the management of labour migration to address skills shortages in countries of the western Mediterranean, including the implementation of vocational training opportunities in regions with a high migration potential in source countries, to better match labour supply and demand. In 2003, in proposals to implement the Tunis Declaration, the Second Ministerial Conference held in Rabat identified three specific topics of cooperation, with one focusing on the rights and obligations of migrants and the integration process. The other topics concern the treatment of migration flows through the concerted management of the movement of people; the promotion of human exchanges and the fight against the trafficking of migrants; and migration and co-development.[122]

The human rights of migrants have been identified as 'a basic concern' of the countries participating in the South American Conference on Migration ('Lima Process').[123] It is noteworthy that this RCP envisages the protection of these rights through existing international standards. During the Second South American Conference on Migration, held in Santiago, Chile in April 2001, the participating governments reaffirmed

> the will … to ensure the protection of human rights of both migrants and their families, *within the framework of applicable International Conventions and Agreements in force* … and to take the steps required for promoting and protecting such fundamental rights and endeavor to incorporate the organised civil society and specialised international agencies to these actions.[124]

[122] 5 + 5 Dialogue Second Ministerial Conference on Migration in the Western Mediterranean, Rabat, 22–23 Oct. 2003.

[123] See www.oimconosur.org/varios/index.php?url = conferencia (in Spanish) and specifically the Lima Declaration on Migration, Integration and Development, Lima, Peru, 14 Jul. 1999, available at www.old.iom.int//DOCUMENTS/OFFICIALTXT/EN/lima_decl.pdf. The countries participating in the Lima Process are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Surinam, Uruguay and Venezuela.

[124] Second South American Conference on Migration, Santiago, Chile, 2–3 Apr. 2001, *Final Declaration,* available at www.oimconosur.org/imagenes/archivos/28.pdf, point 1. Emphasis added.

A related but more focused objective is '[t]o intensify and develop initiatives in each country to secure full integration and exercise of migrants' rights'.[125] At the Third South American Conference on Migration in Quito, Ecuador in August 2002, the participating states adopted a Plan of Action of International Migration in South America, which identifies the promotion of the human rights of migrants and their families as the first specific objective and proposes the development of actions to protect and defend these rights. The Action Plan also recommends that governments undertake to:

- apply and implement agreements and resolutions of human rights international organisations, in aspects related to the human rights of migrants and their families;
- assess the state of application of these measures in each country; and
- collect and systematise national initiatives (governmental and non-governmental) concerning the protection and promotion of migrants' rights.[126]

The Fourth South American Conference on Migration in Montevideo, Uruguay in November 2003 reiterated that a core component of the objectives of the Dialogue is '[c]oordinating actions for the assistance for and protection of the human rights of migrants, particularly South American migrants'.[127] The Fifth Conference, held in La Paz, Bolivia in November 2005, emphasised the importance of the MWC and declared that the policies of the countries participating in the process are inspired by the human rights of migrants,[128] while the Sixth Conference, held in

[125] *Ibid.*, point 4.

[126] Third South American Conference on Migration, Quito, Ecuador, 15–16 Aug. 2002, *Plan of Action of International Migration in South America,* available at www.oimconosur.org/imagenes/archivos/43.pdf. The Plan of Action also proposes, under the specific objective of 'multilateral treaties', 'cooperation for developing sub-regional treaties on migration in the Andean Community and MERCOSUR (Southern Common Market)', and identifies as a specific task the monitoring and application of the MWC. *Ibid.*

[127] Fourth South American Conference on Migration, Montevideo, Oriental Republic of Uruguay, 7–8 Nov. 2003, *Final Declaration*, available at www.oimconosur.org/imagenes/archivos/55.pdf, point 2. On a practical level, the Conference also considered the need to: 'produce an analysis on the topics connected with the protection of the human rights of migrants and their families and their full and effective enjoyment, which should reflect the criteria for interpretation laid down by concerned bodies and courts when applying the International Law of Human Rights.'

[128] Fifth South American Conference on Migration, La Paz, Bolivia, 25–26 Nov. 2005, *La Paz Declaration,* available at www.oimconosur.org/imagenes/archivos/70.pdf, preambular para. 2 and para. 1 respectively.

Asunción, Paraguay in May 2006, went somewhat further by reaffirming as basic goals on migration matters, *inter alia*, to respect unconditionally the rights of migrants regardless of their immigration status and encouraging all countries from the region as well as other regions from the world to ratify the MWC.[129]

The Regional Conference on Migration ('Puebla Process'), inaugurated in 1996, encompasses eleven countries in Central and North America.[130] Human rights are identified as one of three main subject areas comprising the Plan of Action adopted in Guatemala City in June 2002 and updated since.[131] The objectives under this subject heading are fourfold:

1. full respect for existing provisions on human rights of migrants, irrespective of their migration status, as defined in the Universal Declaration of Human Rights of 1948 and other relevant international instruments;
2. strengthening respect for the human rights of all migrants regardless of their migrant status, with special attention to protection of rights of vulnerable groups such as women and children;
3. ensure international protection of refugees; and
4. promote activities in the area of 'migration and health'.[132]

The Plan of Action is intended to be a practical document and includes actions for implementation and activities under each objective. For example, with regard to the first objective, draft regional guidelines for the protection of human rights of migrants in situations of interception, detention, deportation, and reception have been elaborated by the regional network of civil organisations for migration, with collaboration

[129] Sixth South American Conference on Migration, Asunción, Paraguay, 4–5 May 2006, *Asuncion Declaration,* para. 1, available at www.oimconosur.org/imagenes/archivos/88.pdf.

[130] The following countries participate in this process: Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States. For more information, see the Puebla Process website at www.rcmvs.org/Principal.htm.

[131] *Plan of Action*, Regional Conference on Migration, updated by the Regional Consultation Group of Migration, San Salvador, El Salvador, 27–29 Nov. 2006, available at www.rcmvs.org/plande.htm. The two other main subject areas are migration policies and management and the link between migration and development.

[132] *Ibid.*, 6–8. Before the adoption of the Plan of Action, a seminar on human rights and migrants was held under the auspices of the process in Crystal City, Virginia on 23–24 Apr. 1998, available at www.rcmvs.org/pagina_n5.htm. The purpose of this seminar was to identify the core rights of concern to migrants.

of the liaison officer network for consular protection. With regard to the second objective, the Plan refers to the implementation of a pilot project for voluntary repatriation and social integration of children, and victims of trafficking and smuggling.

There are also two well-established RCPs in sub-Saharan Africa, the Migration Dialogue for West Africa (MIDWA)[133] and the Migration Dialogue for Southern Africa (MIDSA).[134] Labour migration and the human rights of migrants constitute an integral aspect of both dialogues. For example, in March 2007, at the MIDSA Regional Workshop on Human Capital Mobility, Labour and the MDGs in Southern Africa, held in Victoria Falls, Zimbabwe, in concluding that '[t]he human and labour rights of migrant workers, their conditions of employment, and their access to social security benefits are of concern',[135] MIDSA participants recommended that:

> regional and international instruments related to migration and labour should be ratified, including the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the SADC Protocol on the Facilitation of Movement of Persons, and all other core ILO conventions.[136]

IV. Force of law versus non-binding consultative and cooperation processes

In an ideal world, a network of legally binding commitments to regulate international migration and to protect the rights of migrants would likely give rise to an international regime that benefits all stakeholders in the migration process and ensures that the rule of law is applicable to it.

[133] MIDWA comprises thirteen member countries: Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. For an overview, see Adepoju, 'Interstate cooperation: Africa', 92–4.

[134] MIDSA comprises fifteen member countries: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The Southern African Migration Project (SAMP) hosts the MIDSA website at www.queensu.ca/samp/midsa. In May 2008, a new RCP on migration was established in East Africa among six member states of the Intergovermental Authority on Development (IGAD): Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda.

[135] Regional Workshop on Human Capital Mobility, Labour and the MDGs in Southern Africa, 26–28 Mar. 2007, Victoria Falls, Zimbabwe, Conclusion and Recommendation 12, available at www.queensu.ca/samp/midsa/downloads/MIDSA_VicFalls2007.pdf.

[136] *Ibid.*

However, this assumption probably holds less true in the specific case of the regulation of labour migration, which is an area where states are most reluctant to enter into legally binding commitments, precisely because they believe that this would prevent them from adjusting their admissions' systems in a flexible manner in accordance with changing economic, social and political circumstances, as evidenced for example by the slow process of GATS negotiations in terms of broadening the categories of service providers to be admitted. But in the case of rights protection, it is far more difficult to support a thesis that changing conditions warrant adjustments in the degree and quality of such protection, particularly in terms of the more fundamental human and labour rights. Given that migrant workers may find themselves in exploitative situations for numerous reasons, often linked to their status as non-citizens, their immigration situation (regular, temporary or irregular), and/or the kind of work they undertake, the reluctance of many destination countries to enter into specific legally binding commitments is rather troublesome and gives rise to some difficult questions regarding real intentions. It should also be underlined, however, that mere ratification of such instruments is not in itself a panacea for ensuring adequate protection. Of the forty-two states parties to the Migrant Workers' Convention, to date only thirteen initial reports have been lodged with the Committee on Migrant Workers, which is the body established to examine the compliance of states parties with the MWC.[137] Nevertheless, the value of a legally binding system where the specific obligations in a treaty, such as the MWC, are meticulously addressed in a state report cannot be underestimated. The detailed reports submitted to the Committee on Migrant Workers by the Governments of Mexico and the Philippines are good examples. Such a mechanism assists considerably in assessing the situation in a given country and facilitates the adoption of follow-up measures.

The outcomes of global and regional consultative and cooperation processes on migration are harder to measure given that they are relatively new. Moreover, their non-binding and informal nature hardly lends itself to proper evaluation, which may be considered an inherent shortcoming of such mechanisms. There is some anecdotal evidence,

[137] These reports are from Algeria, Azerbaijan, Bolivia, Bosnia and Herzegovina, Colombia, Ecuador, Egypt, El Salvador, Mali, Mexico, the Philippines, Sri Lanka and Syria. The Committee has examined eleven of these reports and issued Concluding Observations, which, together with all the reports, are available from the Committee's website at www2.ohchr.org/english/bodies/cmw/index.htm.

however, that RCPs have had an impact on the more effective governance of migration generally, the development and refinement of specific migration policy issues at the national level, and that concrete results have also been achieved, including in the labour migration field:

- participating states have placed certain migration issues on their agendas and/or changed the focus of issues already on their agendas because of new understandings or have acted in response to recommendations made in the context of a RCP;
- states have created, reviewed or amended national legislation, including specific initiatives relating to the migration of women for low-skilled and low-wage employment such as domestic work;
- participants of one RCP have implemented new initiatives or supplementary activities relating to pre-departure orientation programmes for migrant workers that provide them with vital information about employment and living conditions in the host country, as well as the training of migrant workers.

Moreover, one of the aims of these processes is to enable participants to share valuable information about initiatives taking place in their respective countries. In this regard, it is worth noting that the Newsletter on the '5+5 Dialogue'[138] refers to the establishment in 2004 of an independent Centre for Migrants' Rights in Rabat, Morocco, funded by the European Commission. With a view to contributing towards the promotion of a culture of respect for human rights and the dignity of migrants, the Centre disseminates information and provides assistance to Moroccan migrants in a regular situation in terms of their rights and duties in accordance with the legislation in the main destination countries and other relevant European and international standards. The Centre also supports actions to prevent the exploitation of migrants and potential migrants by better explaining the risks and consequences of irregular migration. The establishment in 2004 in Portugal of the ACIME National Immigration Support Services[139] to provide a more coherent and efficient response to the problems of integration faced by migrants residing and working in that country, is another important initiative referred to in the Newsletter.

[138] See *Dialogue 5+5 Newsletter*, No. 2 (Jun. 2005), available at www.old.iom.int/en/know/dialogue5-5/3rd_conf_2nd_bulletin/anglais/news.html.

[139] High Commissioner for Immigration and Minorities (*Alto Comissariado para a Imigração e Minorias* – ACIME).

V. Conclusion

Given the relative newness of global and regional consultative and cooperation processes, it is too early to judge their successes or indeed their failures, even though a number of RCPs are already considered to be in a relatively advanced state of development.[140] The general perception, however, appears to be that they are succeeding 'in building a common understanding, promoting cooperation and contributing to capacity-building'.[141] In particular, it is too early to ascertain whether these processes may have an important bearing on opening up more regular labour migration channels in both South–North and South–South contexts, and on improving the protection of the rights of migrant workers and their families found also in general international human rights law, international labour law, specific instruments concerning the protection of migrant workers, and regional standards. Clearly, more focused research is needed to map the nature of these processes and evaluate the outcomes in relation to these two areas. For the moment, however, three preliminary conclusions can be advanced. First, international labour migration and the human rights of migrants are moving up the agenda of many of these processes, and the initiation of the states-owned process, the GFMD, as the principal outcome of the UN General Assembly High-Level Dialogue on International Migration and Development, held in New York on 14–15 September 2006, is only likely to heighten the attention already being devoted to these issues in intergovernmental fora. Second, in the absence of the acceptance by a sufficient number of states (and destination countries in particular) of the legally binding standards found in the specific instruments protecting migrant workers at both the global and regional level and the far from satisfactory implementation of these standards in those countries

[140] E.g., IGC and Budapest Process, which have been operating for over twenty and ten years respectively. According to Klekowski von Koppenfels, *The Role of Regional Consultative Processes*, 28, the fourth and last stage of development of a RCP is 'a shift toward a more operational and action-oriented process with the purpose of concretely addressing some of the issues raised'. The first three stages are, respectively: (1) the decision to address problematic issues in a regional cooperative forum; (2) the agreement upon definitions, i.e. a 'common language'; and (3) the agreement upon a Plan of Action or list of goals facilitating the exchange of information and regional dialogue. See, also, Thouez and Channac, 'Convergence and divergence in migration policy', 6–7.

[141] UN, General Assembly, 60th Session, Agenda item 54(c), *International migration and development; Report of the Secretary General*, UN Doc. A/60/871 (18 May 2006), 82, para. 301.

purporting to adhere to them, consultative and cooperation processes on migration will continue to play a role in the management of international labour migration and the protection issues connected with such movements. Third, the protection of the human rights of migrants is an integral aspect of good governance on international migration and therefore cannot be dislocated from such processes.[142]

It is to be hoped that, with time, the convergence towards good governance on international migration identified in these processes will assist states to arrange their migration policies in accordance with the legal framework for the protection of migrant workers at the global and regional level, at least on an informal basis, and inspire mutual confidence to take this framework more seriously for the benefit of all stakeholders in the labour migration process, and particularly migrant workers and members of their families.

[142] B. Ghosh, 'Managing migration: interstate cooperation at the global level: is the emergence of a new paradigm of partnership around the corner?', in *Interstate Cooperation and Migration*, 109, 120. Moreover, Ghosh, *ibid.*, 120–1, contends that as more states become both countries of origin and destination, they see the value in effective cooperation on migration within a multilateral framework for the protection of their own citizens while abroad, which also impacts positively on their policies towards migrants within their territory.

9

Socio-economic rights, human security and survival migrants: Whose rights? Whose security?

EVE LESTER*

I. Introduction

Although migration is 'the oldest action against poverty',[1] the debate on international migration has escalated since the end of the Cold War. The dismantling of old barriers that prevented many nationals from leaving certain countries coincided with a parallel construction of barriers that restricted entry by non-citizens into the territory of other states. The end of the Cold War also marked a departure from an era where the phenomenon of forced migration was dominated by the exilic discourse that characterised refugee protection. Once the euphoria of the new era dissipated, states came to realise that migration remained a powerful and 'ineradicable'[2] impulse that would expose the underbelly of globalisation and highlight extant social and economic inequality. Survival migration, that is migration as a survival strategy, would become a metaphor for the tainting of 'unprecedented human progress' with an undercurrent of 'unspeakable human misery',[3] a metaphor for the globalisation of prosperity and poverty.[4]

* I am grateful to the editors of this collection and to Susan Harris Rimmer for thoughtful and insightful comments on earlier drafts of this chapter. Any errors and omissions remain, of course, my own.

[1] See J.K. Galbraith, *The Nature of Mass Poverty* (Cambridge, MA: Harvard University Press, 1979), 136.

[2] M. Lane, 'A philosophical view on states and immigration', in K. Tamas and J. Palme (eds.), *Globalizing Migration Regimes: New Challenges to Transnational Cooperation*, Research in Migration and Ethnic Relations Series (Aldershot: Ashgate, 2006) 131.

[3] UNDP *Human Development Report* 1994, 'Overview: An Agenda for the Social Summit', 1.

[4] *Ibid.*

Human rights are a set of minimum standards that reflect the inherent dignity, equality, and inalienable rights of all members of the human family, regardless of status.[5] They are regarded as the foundation of freedom and justice[6] and essential for maintaining peace and security.[7] In a similar spirit, 'human security' is considered to be essential for the 'lives, livelihoods and dignity of individuals and realizing the abundant potential inherent in each individual'.[8] Each concept is explicitly people-centred,[9] and each emerged or re-emerged in the post-Cold War era decisively. In the human rights domain, the post-Cold War period reinvigorated understandings of the centrality of all human rights, in particular strengthening acknowledgment of the importance of social and economic rights by giving prominence to the concepts of interdependence and indivisibility.[10] At the same time, a process of reformulating the idea of security from one exclusively focused on national security to one that embraced the idea of individual or people-centred 'human security' was triggered. Thus, through broadening understandings of factors that may have a causal link with security problems,[11] the notion of 'human security' took seed.[12] The idea of 'human security' emerged as a counterweight to the state-centric notion of 'national security' because, as some contend, continuing widespread structural poverty and inequality between the developing and developed worlds are dynamics that have as much contemporary significance to any analysis of security – whether individual, community, national or global – as issues such as global 'terrorism'.[13]

[5] Preamble, Universal Declaration of Human Rights 1948, GA res. 217A (III), 10 Dec. 1948 (UDHR).

[6] *Ibid.*

[7] Preamble, Charter of the United Nations 1945, 26 Jun. 1945, 993 UNTS 3; entered into force 24 Oct. 1945.

[8] See, e.g., Japan, Ministry of Foreign Affairs, *Diplomatic Bluebook 2002* (Tokyo: MOFA, 2002), Chapter 1, available at www.mofa.go.jp/policy/other/bluebook/2002 (last accessed 29 Aug. 2008).

[9] See, e.g., B. von Tigerstrom, *Human Security and International Law: Prospects and Problems,* Studies in International Law: vol. 14 (Oxford: Hart, 2007), 50–54 and Preamble, UDHR.

[10] Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 Jul. 1993, as adopted by the World Conference on Human Rights on 25 Jun. 1993, para. 5.

[11] von Tigerstrom, *Human Security and International Law,* 9–10.

[12] See UNDP, *Human Development Report* (1994).

[13] E. Aydinli and J. N. Rosenau (eds.), *Globalization, Security, and the Nation State: Paradigms in Transition,* SUNY Series in Global Politics (Albany, NY: SUNY Press, 2005), 1–2.

In the context of non-citizens, structural poverty and inequalities remain the principal causes of both forced and voluntary migration to 'oases of development' from the vast 'deserts of deprivation' by which they are surrounded.[14] Put another way, human insecurity, and its human rights counterpart, social and economic rights privations, are still among the major drivers of survival migration. This suggests that the imperative to examine the legal implications of and possibilities for addressing structural poverty and inequalities is compelling.

With this background in mind, the central question that I consider in this chapter is whether the concept of 'human security' has any capacity to enhance *in law* the enjoyment of social and economic rights by survival migrants. In doing so, in section II of the chapter, I begin by unpacking the ideas of and relationship between survival migration and human security. In section III, I consider the challenges and possibilities for constructing a 'rights and security' framework that would apply to survival migrants. In section IV, having considered how a melded human rights/human security discourse might look in theory, I endeavour to give it practical application. To this end, in section IV, I take an issue that is squarely on both the human rights and human security agendas – HIV/AIDS – and I consider how engagement of human security discourse may provide a tool that more effectively delivers law's promise of justice than the human rights paradigm can do alone. In doing so, I attempt to apply human security discourse to two examples that relate to the HIV status and rights of non-citizens in the United Kingdom whose cases came before the European Court of Human Rights,[15] but with very different outcomes. Finally, section V offers reflections on whether the use of human security as a tool to expand the embrace of social and economic rights for survival migrants might afford an opportunity for states and international policy-makers to re-imagine migration as a naturally occurring symbiotic relationship between communities.

Although embarking on an exploratory analysis, I do not go so far as to make the argument as an alternative to national security and principles of sovereignty, both of which are unavoidable in a world order comprising nation states and their 'imagined communities'.[16] Nor do

[14] UNDP, *Human Development Report* (1994), 'Overview: An Agenda for the Social Summit', 6.

[15] *D* v. *United Kingdom,* Appl. No. 30240/96, 2 BHRC 273; *N* v. *United Kingdom,* Appl. No. 26565/05; [2008] All ER (D) 05 (Jun).

[16] B.R.O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised edn (London: Verso, 2006).

I suggest that there is merit to the assumption that addressing social and economic disparities simply by increasing aid or development assistance to poor countries will justify a reduction in asylum or (survival) migration space by rich countries. Rather, I argue that the application of a human security lens to the social and economic rights framework may be seen as integral to the migration cycle and may serve as a counterweight to the forces of national security and sovereignty that have historically dominated legal and political discourse, often at the expense of justice.

However, while human security may serve as a counterweight to national security and principles of sovereignty, this is not to suggest that human security should – or could – serve as a counterweight to human rights. Rather, I argue that human rights should be viewed as the *sine qua non* of a human security approach, which effectively cements the people-centred orientation of both of these concepts. Indeed, as von Tigerstrom has noted, 'human security may in fact be worse than redundant if it has the effect of undermining commitments to human rights'.[17] It is therefore hoped that this approach may lead to more holistic understandings of migratory motives and realities that can in turn contribute to a loosening of the strictures of statism that have characterised the migration debate, not least since the latter part of the twentieth century. Space for the enjoyment of human rights, in particular social and economic rights, may thereby be created.

II. Survival migration and human security

A. *Taxonomies of the survival migrant*

The task of this volume is to examine dimensions to the relationship between human security and non-citizens from a legal standpoint. Not all non-citizens can be described as migrants.[18] The focus of this chapter is, therefore, on that portion of non-citizens who may be considered migrants, and more specifically survival migrants, exploring how their social and economic rights and human security may effectively be mediated.

[17] von Tigerstrom, *Human Security and International Law*, 41.

[18] However, many non-citizens, in particular stateless persons, are descended from migrant populations. For further discussion on human security and stateless persons, see ch. 2 by M. Manly and L. van Waas in this book.

Survival migration is one of the primary responses to social and economic inequality and injustice in the world.[19] Needless to say, survival migration in a globalised world assumes a number of different forms. It may be temporarily or permanently motivated, forced or voluntary, regular or irregular, circular or seasonal. Motives may be specific and easily discerned, or they may be mixed. Some survival migrants may fall easily into categories that different bodies of international law have constructed to respond to specific situations; for example, refugees, or migrant workers and members of their families. Others, such as rejected asylum-seekers, may be entitled to 'complementary forms of protection'[20] or may be otherwise unable to return to their country of origin, arising, for example, out of *de facto* or *de jure* statelessness.[21] Still others may not easily be 'shoe-horned' into any particular legal category, but nevertheless remain entitled to human rights guaranteed to all persons by virtue of their common humanity and regardless of status; take, for example, climate change 'refugees'.[22] Irrespective of the particular legal construction that may apply to an individual, the motive of survival is commonly driven by and leads to human insecurity throughout the migration cycle. Often, survival migrants will resort to dangerous means, such as the use of people smugglers, to leave their own country and enter the territory of other states.[23] Other characteristics common to survival migrants are that they rarely enjoy a secure immigration status in countries of destination or transit and they are frequently subject to premature return to a country of origin wracked by conflict, structural poverty, or both.

[19] 'In too many parts of the world, migration has become a survival strategy, employed by people who are seeking a way to escape armed conflict, human rights violations, authoritarian and corrupt governments, as well as unemployment and poverty. Disadvantaged groups in society, such as women, ethnic minorities, indigenous and stateless people, are often the most desperate to leave and are at most risk of finding themselves in the hands of traffickers and smugglers': Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (GCIM, 2005), 58.

[20] For a comprehensive study of complementary forms of protection, see J. McAdam, *Complementary Protection in International Refugee Law,* Oxford Monographs in International Law (Oxford: Oxford University Press, 2007).

[21] With regard to *de jure* statelessness, see Convention relating to the Status of Stateless Persons 1954, 28 Sept. 1954, 360 UNTS 1171; entered into force 9 Jun. 1960 and Convention on the Reduction of Statelessness 1961, 30 Aug. 1961, 989 UNTS 178; entered into force 13 Dec. 1975.

[22] For more on the rights of climate change 'refugees', see ch. 10 by J. McAdam and B. Saul in this book.

[23] See, e.g., A. Gallagher, 'Trafficking, smuggling and human rights: tricks or treaties', *Forced Migration Review,* 12 (2002), 25.

In the refugee context, then UN High Commissioner for Refugees, Sadako Ogata, noted at a meeting on human security in 1999 that: 'Refugees are doubly insecure: they flee because they are afraid; and in fleeing they start a precarious existence.'[24] This double insecurity is equally applicable to the broader category of survival migrants, many of whom feel impelled to leave their countries of origin albeit for reasons that may not always be classically attributable to refugee flight. For example, a person who leaves abject poverty to seek unauthorised entry and employment in another state undeniably experiences the dual vulnerability that Ogata describes. Indeed, in some cases it is arguable that the circumstances of migrants who leave their countries for non-refugee-related reasons may be more extreme given that, with the grant of asylum, the protection and enjoyment of human rights and a measure of human security should ensue if states are to meet their international obligations towards refugees.[25]

The term 'survival migrant' also serves another purpose. In seeking to make the case for a positive intervention by a state, even refugee advocates have in the past fallen into the trap of distinguishing between refugees as a special case deserving of separate legal attention as though 'ordinary migrants' can, in comparison, be cast as right-less. The term 'survival migrant' therefore endeavours both to recognise the agency of the migrant and to obviate as far as possible ill-conceived and destructive binaries that may loosely translate into 'good' versus 'bad' migrants. This approach also avoids legally meaningless but highly damaging distinctions that reflect populist preoccupations with 'abuse' and 'deterrence' such as 'genuine refugees' and 'bona fide refugees' as compared to 'economic migrants', 'queue-jumpers', and 'bogus asylum-seekers'. These terms are often part of deliberate government strategies to undermine the quality of the debate on these issues[26] and must be strongly resisted.

[24] UNHCR, Keynote Speech by Mrs Sadako Ogata, (then) United Nations High Commissioner for Refugees, at the Ministerial Meeting on Human Security Issues of the 'Lysoen Process' Group of Governments, 'Human Security: A Refugee Perspective', Bergen, Norway, 19 May 1999, available at www.unhcr.org (last accessed 29 Aug. 2008).

[25] Suhrke notes with some concern that the statement of Ogata, regarding human security of refugees did not encapsulate the vital element of asylum as being central to achieving human security: A. Suhrke, 'Human security and the protection of refugees', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (New York, NY: UNU Press, 2003) 93, 103.

[26] See, e.g., P. Mares, 'Distance makes the heart grow fonder: media images of refugees and asylum seekers', in Newman and van Selm (eds.), *Refugees and Forced Displacement* 330, 333.

Although the term 'survival migrant' is broad and does not seek to slot individuals into the 'neat' categories that the law has created for them, there are, of course, still good reasons to distinguish between refugees and asylum-seekers, migrant workers and others drawn into the migration vortex. Distinctions between refugees and migrants make it possible to draw on and benefit from separate bodies of international law that accord specific protection and that have been crafted to respond to the circumstances of certain categories of non-citizen. So, although the term survival migrant does not dispense with the legal distinctions between the 'refugee' and the 'migrant', it is intended to acknowledge the agency of the individual and to illustrate the commonalities of experience.

B. What is human security?

Human security promises an escape from both poverty and war.[27] It has been described as an approach which is 'people-centred', locating the human being at the centre of its sphere of concern.[28] Making the individual rather than the state the 'referent object' of security, human security 'promises a focus on individuals and peoples, but more widely, on values and goals such as dignity, equity and solidarity'.[29]

One of the objectives of crafting a new concept of human security is to cement recognition of the fact that the traditional national (or international) security debate fails to take into account a sufficiently wide number of threats to the protection and security of the individual human being.[30] Although its meaning remains unsettled and contested,[31] at the heart of each articulation of the concept is the notion that the individual, not the state, should be the referent object. The idea incorporates critical and life-threatening dangers that are anthropogenic

[27] Suhrke, 'Human security and the protection of refugees', 100; See also UNDP, *Human Development Report* (1994).

[28] See N.K. Poku, N. Renwick and J. Glenn, 'Migration, globalisation and human security', in D.T. Graham and N.K. Poku (eds.), *Migration, Globalisation and Human Security*, Routledge Research in Population and Migration (London: Routledge, 2000) 9, 17.

[29] S. Tadjbakhsh and A.M. Chenoy, *Human Security: Concepts and Implications*, Routledge Advances in International Relations and Global Politics 51 (London: Routledge, 2007), 13.

[30] T. Owen, 'Challenges and opportunities for defining and measuring human security', *Disarmament Forum*, 3 (2004), 15, 21.

[31] See ch. 1 by A. Edwards and C. Ferstman in this book for an overview of the evolution and development of the human security concept, and the range of definitions proposed.

as well as naturally occurring, focusing principally on people and securing their freedom from fear or want.[32] Threats may be violent or non-violent[33] and will often be of a social and economic nature.

The observation has been made that human security does not seek to 'explain' threats, but does recognise new ones.[34] This suggests that the paradigm is more a tool for identification of a problem rather than a means for resolving it.[35] However, by realigning the notion of security with the safety and interests of people and communities and seeking to take security discourse beyond existential matters of mere survival, questions of security engage in a close encounter with the human rights discourse. For example, human security discourse recognises that poverty constitutes a threat to the dignity of the human beings affected.[36] The strengthening of the social and economic rights paradigm in the human rights field, not least through the acknowledgment of the interdependence and indivisibility of human rights, is similarly attributable to recognition that such rights are vital to permit productive engagement with and contributions to a society.[37]

The people-centred approach of 'human security' and the objectives of dignity, equity and solidarity are also characteristics of a human rights-based approach, particularly an approach that gives prominence to social and economic rights. However, there is no point in shaping a new concept of human security unless it is willing to do something that is radically different from and more comprehensive than both the national security[38] and human rights paradigms.[39] Likewise, there is

[32] See, e.g., United Nations University working definition, 2001, cited in E. Newman, 'Refugees, security, and vulnerability', in Newman and van Selm (eds.), *Refugees and Forced Displacement*, 15. See also D. Petrasek, 'Human rights "lite"? Thoughts on human security', 3 (2004) *Disarmament Forum,* 59, 60, who notes that freedom from fear and want are two of the four key freedoms underlying the Universal Declaration of Human Rights 1948, and questions the absence of freedom of expression and religion rather than celebrating the inclusion of fear and want.

[33] Canadian Government, Department of Foreign Affairs and International Trade, *Human Security: Safety for People in a Changing World* (Ottawa: DEFAIT, 1999), cited in Suhrke, 'Human security and the protection of refugees', 101.

[34] Tadjbakhsh and Chenoy, *Human Security*, 14.

[35] See also von Tigerstrom, *Human Security and International Law*, 49. This is one of the principal conclusions that she draws in her text.

[36] Tadjbakhsh and Chenoy, *Human Security*, 1.

[37] See, e.g., S. Castles and A. Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (New York, NY: Routledge, 2000), 104, 110–11.

[38] Owen, 'Challenges and opportunities for defining and measuring human security', 19.

[39] Petrasek, 'Human rights "lite"?', 61–2.

no value added by a notion of 'human security' that simply equates it with 'human development'.[40]

In her analysis of the debate on defining human security, von Tigerstrom makes an important distinction between defining 'human security' as a concept and determining a human security policy agenda. As she rightly notes, a policy agenda would be much broader, and might include issues that reduce vulnerability and empower but which may not constitute *in themselves* critical, severe or pervasive threats to human life, livelihood or dignity in the absence of other factors. This suggests, therefore, that a workable but sufficiently broad definition of human security should factor in critical, severe or pervasive threats to the vital interests of human life, livelihood or dignity, where the harm caused can be prevented or mitigated by human action. Such human agency in prevention or mitigation can arise, directly or indirectly, as a result of the acts or omissions of human activity.[41]

C. *Human security and the migration trajectory*

The breakdown in the human security of people has a ripple effect that transcends borders. If they ever were confined within national borders, there is no doubt that famine, conflict, structural poverty and inequality,[42] human rights abuses, terrorism, environmental degradation, and transnational organised crime are no longer isolated events.[43] Their consequences, and not least their human consequences, travel the globe. As such, lack of 'human security' is well recognised as a cause of migration, in particular survival migration.[44]

The migration cycle can be described as having multiple phases; preparation and departure, transit, arrival, destination and return. At each stage in the cycle, human rights and human security issues arise. However, these issues are manifested in different ways. It is essential, therefore, that the particular characteristics of each of these phases of

[40] Suhrke, 'Human security and the protection of refugees', 101.
[41] von Tigerstrom, *Human Security and International Law*, 32–4.
[42] See, e.g., B.S. Chimni, 'Aid, relief, and containment: the first asylum country and beyond', in N. Van Hear and N. Nyberg Sorensen (eds.), *The Migration-Development Nexus* (Geneva: International Organization for Migration, 2003) 51, 54.
[43] UNDP, *Human Development Report* (1994), 'Overview: An Agenda for the Social Summit', 3.
[44] See, e.g., GCIM, *Migration in an Interconnected World*, and P. Wongboonsin, 'Asian labour migration and regional arrangements', in Tamas and Palme (eds.), *Globalizing Migration Regimes* 203, 205.

migration is recognised, not only for the purpose of identifying the different human rights and human security challenges at each point on the migration trajectory, but also because this is the only way in which human rights abuses and human insecurities can be effectively addressed.

At the stage of preparation and departure, the primary focus is on the root and proximate causes of survival migration.[45] The structural and power dynamics that cause social and economic inequality and insecurity often lie at the root of a survival migrant's decision to leave her[46] country of origin. Many of the conditions that have in some instances 'unleashed' ethnic conflict are threats to human life, livelihood or dignity and are social and economic in character.[47]

With the advent of increasingly restrictive border control measures, many survival migrants seek the assistance of people smugglers, or fall unwittingly into the hands of traffickers.[48] Threats to human life and dignity in these circumstances are well documented.[49] Livelihoods are

[45] See S. Schmeidl, 'The early warning of forced migration: state or human security?', in Newman and van Selm (eds.), *Refugees and Forced Displacement* 130, 136. Schmeidl separates out the complex causality of movement into root and proximate causes. Root causes are those underlying events and conditions that have existed for many years and cannot easily be changed. Proximate causes, on the other hand, are the immediate conditions, informed by root causes that precipitate flight; a notion that suggests that root causes are not sufficient in and of themselves to prompt migratory movements without the proximate triggers.

[46] Where gender neutral language would normally be used in this chapter, I have chosen to use the female pronoun in recognition of the increasing feminisation of survival migration and the fact that an estimated 80 per cent of the world's refugee population are women and children. According to the International Organization for Migration (IOM), women accounted for 49.6 per cent of global migrants in 2005, available at www.iom.int/jahia/Jahia/pid/254 (last accessed 19 Aug. 2008). In the refugee context, I am grateful to Professor James C. Hathaway, whose work first alerted me to this approach: J. C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991). With regard to the increasing feminisation of migration see, e.g., L.E. Lucas (ed.), *Unpacking Globalization: Markets, Gender, and Work* (Lanham, MD: Lexington Books, 2007).

[47] E.g., this was the case in Rwanda and the rising tension between the Hutu and Tutsi populations. See Chimni, 'Aid, relief, and containment', 55.

[48] For a brief overview of the distinction between human smuggling and human trafficking, see Gallagher, 'Trafficking, smuggling and human rights'.

[49] See, e.g., Human Rights Watch, *'By Invitation Only': Australian Asylum Policy* (vol. 14, No. 10 (C), HRW, 2002); Anti-Slavery International, *The Migration-Trafficking Nexus: Combating Trafficking through the Protection of Migrants' Human Rights* (ASI, 2003); Amnesty International, *Kosovo (Serbia and Montenegro): 'So Does it Mean that we have Rights?' Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (AI Index: EUR 70/010/2004); Anti-Slavery International, *An Absence of Choice: The Sexual Exploitation of North Korean Women in China* (ASI, 2005); Anti-Slavery

also threatened. In the migrant's country of origin, already vulnerable and now heavily 'mortgaged' families receive no repayments through remittances where onward travel is blocked or the smuggler abandons their charge. In the transit country, survival migrants are left to languish without status or support networks, unable to engage with or contribute productively to the society in which they are present[50] unless they do so illegally and with attendant risks. Some become 'stranded' and forced into exploitative labour in the transit country, unable to return and unable to reach their destination country.[51]

For those who arrive in the 'destination' or 'receiving' state, there are also threats to life, livelihoods and dignity, whether in the destination or receiving state itself or through the application of restrictive immigration laws that overlook the human consequences of return. Some arrivals are threatened with 'push backs' into the territory of transit countries or summarily returned to their country of origin. Others are subjected to policies of enforced destitution designed to deter them from pursuing lawful procedures to remain.[52] Still others find themselves in exploitative labour, in indentured or slave-like conditions.

Return that is truly voluntary is most likely to result in sustainable return in safety and dignity, whether for refugees[53] or for other survival migrants. However, although voluntary return is now a principal

International, *Trafficking for Forced Labour in Europe* (ASI, 2006); Anti-Slavery International, *Trafficking in Women, Forced Labour and Domestic Work: In the Context of the Middle East and Gulf Region* (ASI, 2006); Anti-Slavery International, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (ASI, 2007); Anti-Slavery International, *Missing Out: A Study of Child Trafficking in the North-West, North-East and West Midlands* (ASI, 2007).

[50] See, e.g., Human Rights Watch, *ibid.*, documenting the experience of Iraqi asylum-seekers in Indonesia.

[51] Amnesty International, *Living in the Shadows: A Primer on the Human Rights of Migrants*, (AI Index: POL 33/007/2006), 17.

[52] See, e.g., S. Taylor, 'Do on-shore asylum-seekers have economic and social rights? Dealing with the moral contradiction of liberal democracy', *Melbourne Journal of International Law,* 1 (2000), 70; R. Cholewinski, 'Enforced destitution of asylum seekers in the United Kingdom: the denial of fundamental human rights', *International Journal of Refugee Law,* 10 (1998), 462.

[53] See Arts. 1(C)(4) and 33, 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954. See also B.S. Chimni, 'Post-conflict peace-building and the return of refugees: concepts, practices, and institutions', in Newman and van Selm (eds.), *Refugees and Forced Displacement* 195, 204.

preoccupation of both UNHCR[54] and the International Organization for Migration (IOM),[55] many returns of survival migrants to their country of origin, including of refugees, are not voluntary and are often in 'less than ideal circumstances'; a euphemism for a range of unfavourable conditions which may include ongoing conflict, unsustainable social and economic conditions, volatile political conditions or other structural instability. Return may also be the subject of bilaterally negotiated readmission agreements. However, the rhetoric of sustainable return in safety and dignity is rarely matched by the practice, with threats to life, livelihood and dignity remaining pervasive.[56]

Threats to human security unquestionably inform a migrant's decision to leave her country of origin, transit others, remain in a destination country or return home. The central question for this chapter is, therefore, not whether the human security paradigm is relevant to the movement of people across the multiple phases of the migration trajectory. Rather, the core question is how might the paradigm inform or assist interpretation of applicable laws in ways that may serve to strengthen

[54] Voluntary repatriation is addressed in no fewer than thirty-one conclusions of the Executive Committee of the High Commissioner's Programme (EXCOM Conclusions); see in particular EXCOM Conclusions No. 18 (XXXI) – 1980 – *Voluntary Repatriation*, No. 40 (XXXVI) – 1985 – *Voluntary Repatriation,* and No. 101 (LV) – 2004 – *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees.* See also UNHCR Handbook, *Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996).

[55] 'Assisted Voluntary Return (AVR) is one of many migration management services IOM offers to migrants and governments. It aims at orderly, humane and cost-effective return and reintegration of migrants who are unable or unwilling to remain in host countries and wish to return voluntarily to their countries of origin. Pre-departure, transportation and post-arrival assistance is provided to unsuccessful asylum-seekers, migrants in an irregular situation, migrants stranded in transit, stranded students and other persons under similar circumstances. IOM return programmes are either available to all migrants in an irregular situation, or tailored to the particular needs of specific groups, including vulnerable migrants. The assistance typically provides information, referral, arrangement of travel to the home location and limited support towards reinsertion. AVR assistance may also include profiling of target groups, information and counselling to potential returnees, medical assistance, reception and longer-term reintegration assistance in countries of origin in order to facilitate sustainable returns'. IOM, *Return Assistance to Migrants and Governments*, available at www.iom.int/jahia/Jahia/pid/747 (last accessed 9 Sep. 2008).

[56] See, e.g., Human Rights Watch, *Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India*, Vol. 19, No. 7(C) (HRW, 2007); Amnesty International, *Rwanda: Protecting their Rights: Rwandese Refugees in the Great Lakes Region* (AI Index: AFR 47/016/2004); Amnesty International, 'Kosovo (Serbia and Montenegro): *'So Does it Mean that We have Rights?'*; Amnesty International, *Afghanistan: Continuing Need for Protection and Standards for Return of Afghan Refugees* (AI Index: ASA 11/014/2002).

rather than weaken the protection of individuals within the migration cycle against the vulnerabilities to which they are exposed.

D. Survival migrants as agents of human security

There is no doubt that threats to and the search for human security are deeply embedded in many decisions to migrate. However, there are a number of ways in which survival migrants may also be seen as agents of human security in respect of the communities from which they have come and to which they may return, as well as the communities in which they reside.[57] In their country of destination it is well documented that migrants, including survival migrants, contribute to the social and economic strength of their community.[58] Put simply, they increase the supply of labour and services as well as demand. They also enrich their new communities socially and culturally.[59]

Families and communities of origin also benefit in human security terms from migration, through remittances. Indeed, it is well recognised that remittances far exceed overseas aid and development assistance.[60] So, although there is some evidence that the financial support of diasporas can fuel conflict,[61] the overall impact of remittances diminishes many pervasive threats to lives, livelihoods and dignity. Returning migrants, including refugees, also strengthen the human security of their communities, bringing with them social and economic capacities in the form of new skills and resources. However, this is only likely to be achieved if return is voluntary and the door has been unlocked to the

[57] This is consistent with the 'protection and empowerment' ideology of the Commission on Human Security: Commission on Human Security, *Human Security Now* (2003), 10–12.

[58] See, e.g., Galbraith, *The Nature of Mass Poverty*.

[59] See, e.g., 'Muslim communities enrich Australia's multicultural mosaic', *Insight* (Canberra), 1 (1992), 7–8; A. Esteves and M.J. Caldeira, 'Reinventing cultures: the contribution of the Cape Verdean community to the cultural dynamics of Lisbon', in R. King (ed.), *The Mediterranean Passage: Migration and New Cultural Encounters in Southern Europe*, Liverpool Studies in European Regional Cultures (Liverpool: Liverpool University Press, 2001), 95–118; 'Kofi Annan on an immigration strategy for Europe', *Population and Development Review,* 30 (2004), 188.

[60] According to the International Fund for Agriculture and Development (IFAD), in 2006, remittance flows to developing countries are estimated to have exceeded USD $300 billion worldwide, available at www.ifad.org (last accessed 25 Oct. 2008). By way of comparison, according to provisional data for 2006, development assistance was USD $104.4 billion, roughly one-third of the remittance figure for the same period, available at www.oecd.org (last accessed 25 Oct. 2008).

[61] See, e.g., Commission on Human Security, *Human Security Now* 51.

enjoyment of social and economic rights and security while the survival migrant remained in the country of destination.

E. Survival migrants as agents of human insecurity?

Although migrants may be seen as agents of human security, they are also often cast as agents of human *insecurity*, particularly as part of xenophobic responses by host states. Even though the sensitivity of the debate and its potentially incendiary consequences may be recognised,[62] some view migration as a threat to human security in the sense that economic stability is threatened by employment competition and social stability undermined by the rise of xenophobia and lack of integration of migrants into their host communities.[63] However, given the severity of the threat that the human security concept demands,[64] as well as the likelihood that threats to social and economic stability are more likely to be enlivened by xenophobic perceptions, it is difficult to see migration as a threat to a host community's 'human security' except in extreme circumstances.[65] The key consideration, in this regard, is to ask what is driving the migratory movement. Forced migration that derives from deliberate and destabilising government policies such as ethnic cleansing, colonisation or conquest of indigenous populations, may well pose a human security risk for host populations. Likewise, where international and state responses fail to take account of the often impoverished circumstances of the host population in situations of mass refugee influx, the human security of the host population may be compromised. Instances where mass movement may have resulted in a negative impact on *societal* security have included flight of Rwandans following the 1994 genocide which effectively exported the conflict[66] and flight that creates volatile ethnic and political imbalances such as those arising from

[62] K. Koser, 'Irregular migration, state security and human security' (GCIM, 2005), 10.
[63] *Ibid.*, 11.
[64] See discussion in section II.B. *What is human security?*, above.
[65] As noted in the previous section, there is some evidence that migrant diaspora remittances fund and fuel conflict as well as evidence that migrant diasporas engage in transnational organised crime such as trafficking in persons: Commission on Human Security, *Human Security Now*, 51. However, diaspora funding of conflicts can arise both from voluntary remittances to support separatist or rebel groups, or it can arise from extortion of diaspora communities. See, e.g., International Crisis Group, 'Sri Lanka's Human Rights Crisis' (ICG, Asia Report No. 135, 2007).
[66] This flight included refugees as well as *génocidaires*, creating major security issues within the refugee population itself as well as in the wider population in Tanzania and the Democratic Republic of Congo.

successive conflicts in the Balkans.[67] However, while there are examples where (forced) migration has compromised human security, it would be overstating the case to describe migration writ large as a potential threat to human security.

The era of globalisation that has taken hold has marked unprecedented transnational movement of goods, services, finance, and ideas. Notwithstanding their undeniable significance and impact on the global economy, there is no doubt that the most visible form of globalisation is the movement of people; a phenomenon that pre-dates globalisation by millennia and has long excited utterances of fear and prejudice.[68] Much of this movement is short term, often for tourism or other forms of short-term temporary stay (e.g. visiting family), or for education. However, the visibility of the movement of people feeds the fears that are borne of a sense of social and economic, as well as cultural, insecurity. Yet, as Suhrke has noted, despite their visibility and the scapegoating that often results therefrom, '[c]ontemporary migration and refugee movements have infrequently been of a magnitude, speed, or nature to constitute a [real] security threat'.[69]

Nevertheless, with citizenries now being more attuned to new security fears and objectives, much has been written in this evolving discourse that suggests that the notion of 'human security' has fallen prey to misappropriation for the purposes of serving a strongly statist and populist national security agenda. The issue of human security has been used to highlight the view that the security of host populations is compromised by the presence of migrants. Thus, for example, the Canadian media reported the arrival by boat of 599 survival migrants of Chinese origin on the west coast of Canada as a threat to the human security of the Canadian population. As such, the language of 'threat' and 'security' fed effectively into a social and political discourse that peddled fear for the collective existence of the Canadian community and overshadowed any possibility for considering the threats to human security that might have prompted the departure of the Chinese survival migrants in the first place.[70]

[67] Suhrke, 'Human security and the protection of refugees', 97.
[68] See, e.g., B. Isaac, *The Invention of Racism in Classical Antiquity* (Princeton, NJ: Princeton University Press, 2004).
[69] Suhrke, 'Human security and the protection of refugees', 97.
[70] M. Ibrahim, 'The securitization of migration: a racial discourse', *International Migration,* 43 (2005), 163, 173–8.

Witness also the approach taken by former Australian Attorney General Philip Ruddock who, in defending draconian anti-terrorism laws, declared '[i]f we are to preserve human rights then we must preserve the most fundamental right of all – the right to life and human security'.[71] Ruddock appropriates 'human security' to serve a national security agenda, overlooking that the language of 'human security' has the individual as its conceptual focus in the same way that frameworks of international refugee, human rights and humanitarian law do.[72]

The problem with this elision of human and national security is that it ignores the original purpose of the human security paradigm, which was to apply to human circumstances a wide-angled lens of human security that would embrace human rights and human development. Therefore, co-opting the term 'human security' to feed nationalist and fear-driven sentiments of threats of the 'huddled masses' is not only misplaced, it is mischievous. As Ibrahim notes, the language of 'human security' is serving as a cipher for a racialised discourse in which certain intending migrants are 'othered',[73] and the 'paradox of the people-centred approach' is exposed:

> Instead of focusing on how to support migrants who are at risk, the new paradigm increases their vulnerability. Thus, this people-centred approach is detrimental to migrants as it leads one to question whose 'human security' is to be protected, citizen or migrant?[74]

Migration's competing interest is the human security of the host population. However, as the foregoing discussion suggests, this is where the securitisation debate comes unstuck; 'human security' becomes subsumed into 'national security' and, within the constructs of fear and threat, the human security of the migrant is lost. It is for this reason that it becomes imperative to examine human security issues at all stages of the migration cycle, rather than simply focusing on the 'human security' of the receiving or host population as new language that reinforces old prejudices. It is also why it is imperative that human security is analysed in the context of law, and in particular human rights law, not as an alternative to it.

[71] Address by the Hon. Philip Ruddock, (then) Australian Federal Attorney General, Law Institute of Victoria President's Luncheon Speech, 20 May 2004, available at www.liv.asn.au (last accessed 9 Sep. 2008).

[72] G. Noll, 'Securitizing sovereignty? States, refugees and the regionalization of international law', in Newman and van Selm (eds.), *Refugees and Forced Displacement* 277, 279.

[73] Ibrahim, 'The securitization of migration'.

[74] *Ibid.*, 169.

III. Charting a 'rights and security' framework

A. *Human rights and human security of survival migrants: opposing magnetic fields?*

Social and economic rights are a vital ingredient to ensuring the inherent dignity and equal and inalienable rights of all members of the human family, not least survival migrants. Yet, such is the accumulated (albeit contested[75]) power of the idea of sovereignty that international human rights law does not generally recognise the right of non-citizens to enter and reside in the territory of another state. Although the right to seek and enjoy asylum is to some extent an exception and occasionally aliens may be entitled to assert rights to enter and remain in the territory of another state on other grounds,[76] the sovereignty trump card coupled with national security still dominates migration discourse.

In addition to assumptions of an (absolute) right to exclude or expel non-citizens from their territory, states also assume the right to impose such conditions as they see fit for the duration of a non-citizen's stay. This often includes limitations or prohibitions on work rights, access to social security benefits, health care, education and housing. Many of these rights may be described as 'survival rights',[77] and are central to the life, livelihood and dignity of the migrant while she remains in the destination country; that is, survival rights are essential to her human security. Although predominantly practices of wealthy industrialised states, similar constraints are often imposed by developing countries on survival migrants in their territory.[78] In destination countries, many survival migrants, whether authorised or not, are exposed to labour conditions

[75] J.A.R. Nafziger, 'The general admission of aliens under international law', *American Journal of International Law,* 77 (1983), 804.

[76] See UN Human Rights Committee (HRC), *General Comment No. 15*: *The Position of Aliens under the Covenant,* 11 Apr. 1986, para. 5.

[77] M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford Monographs in International Law (Oxford: Clarendon Press, 1995), 194.

[78] See, e.g., Amnesty International, *Dominican Republic: A Life in Transit – The Plight of Haitian Migrants and Dominicans of Haitian Descent* (AI Index: AMR 27/001/2007); Amnesty International, *South Korea: 'Migrant Workers are also Human Beings'* (AI Index: ASA 25/007/2006); Amnesty International, *Thailand: The Plight of Burmese Migrant Workers* (AI Index: ASA 39/001/2005). Cf. E. Lester, 'Work, the right to work and durable solutions: a study on Sierra Leonean refugees in The Gambia', *International Journal of Refugee Law,* 17 (2005), 331, which examines the situation in The Gambia, where the right to work is regularly granted to refugees and asylum-seekers.

that are commonly described as dirty, dangerous and difficult, or degrading.[79] They are also denied many of the other basic services to which citizens are entitled. They may live in poor and often overcrowded housing, exposing them to the risk of disease and violence. Some states deploy strategies that deliberately enforce destitution as a means of curbing perceived 'abuse' of migration procedures.[80]

Notwithstanding the clear parallels between human rights and human security discourse, human rights lawyers and advocates have shown considerable reticence in engaging with the notion of 'human security', perceiving it as a risky exercise with little more than 'rhetorical appeal' that threatens to compromise the 'precision and legality of the human rights framework'.[81] Oberleitner evocatively describes the close yet problematic relationship between human rights and human security as 'porcupines in love'.[82] Further complicating the debate, 'human security' may even be an oxymoron whose two elements are inherently conflicted and, like opposing magnetic fields, are unable ever to come together as a unifying idea. The 'human' element tries but is unable to embrace the opposing magnetic force of 'security' whose conceptual origins are so state-centric that they prevent the concept from effectively refocusing on the individual.

In the debate on protection of non-citizens, there has been a similar reticence in engaging with human security discourse. The danger of employing the language of 'security' in the migration domain is that a people-centred focus morphs into a state-centric approach, such that 'human security' becomes a cipher for deploying a national security agenda that 'securitises' migration and refugee policy, and justifies harsh measures such as interdiction, carrier sanctions and extra-territorial detention and processing. At the same time, it invites the escalation of associated nationalist connotations; safeguarding an imagined national

[79] See, e.g., Human Rights Watch, 'Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia', Vol. 16, No. 9(C) (HRW, 2004); Statement by Mr Kari Tapiola, ILO Executive Director for Standards and Principles, on the occasion of the Celebration of the Entry Into Force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1 Jul. 2003, available at www.december18.net (last accessed 9 Sep. 2008).

[80] See, e.g., Taylor, 'Do on-shore asylum-seekers have economic and social rights?' and Cholewinski, 'Enforced destitution of asylum seekers in the United Kingdom'.

[81] Petrasek, 'Human rights "lite"?', 59.

[82] G. Oberleitner, 'Porcupines in love: the intricate convergence of human rights and human security', *European Human Rights Law Review,* 6 (2005), 588.

community[83] from the 'threat' of an imagined 'enemy'. Two prominent dissenting voices are Noll[84] and Suhrke.[85]

Noll sounds a sobering warning about the utility of the term 'human security' in the domain of the protection of non-citizens. Focusing his analysis on refugees, or more broadly 'protection seekers', he considers the language of 'human security' to be unhelpful as it 'merely colludes in the losses for individual sovereignty that contemporary refugee policies entail'.[86] As he notes, labels do matter and 'security' is not a neutral label; rather, in the discourse of international law 'security' has a predominantly collective connotation[87] whereby the collective interest permits the sacrifice of the interests of the individual. In Noll's view, the individual becomes voiceless in the security discourse.[88] As he observes:

> [a] further characteristic of the security concept is its trump function: invoking security concerns seemingly reduces the legal constraints put on actors and increases the leeway for discretion. Thus, 'securitizing' the discourse on flight and protection means introducing a bias that ultimately works against the individual.[89]

In another powerful appraisal of the term, Suhrke concludes that the risks in using such terminology are too high. In her examination of its application to refugees, she says:

> Applying a 'security' perspective to examine the needs of 'outsiders' and their relationship to the community typically involves assumptions of antagonistic relations and non-tradable interests. In other words, the negative effects often assumed to follow the 'securitization' of the discourse on refugee movements that was associated with 'societal security' in the 1990s are likely to occur even when the adjective is 'human' rather than 'societal'.[90]

Suhrke's fears are borne out by the misappropriation and misuse of the term in state-centric responses to the movement of people[91] or 'external' threats such as 'terrorism'. All these fear-driven responses play into the

[83] Anderson, *Imagined Communities*.
[84] Noll, 'Securitizing sovereignty?'.
[85] Suhrke, 'Human security and the protection of refugees'.
[86] Noll, 'Securitizing sovereignty?', 280.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] Suhrke, 'Human security and the protection of refugees', 107.
[91] See, e.g., Ibrahim, 'The securitization of migration'.

racialised and/or xenophobic 'othering' of individuals and populations on the move[92] that is replete with paternalistic connotation.[93]

Suhrke suggests that 'human security is not likely to encourage a discourse that facilitates protection and assistance'.[94] Perhaps what she means is that the idea of 'human security' cannot be permitted to compromise protection and assistance, which if framed in human rights terms should be firmly entrenched in any response to refugees, and indeed the movement of others. Thus, we return to the central question of whether the notions of 'human security' and 'human rights' can constructively coexist in a manner that gives effect to their common objective of placing the individual human being – for the purposes of this chapter, the survival migrant – at the centre of their sphere of concern. Suhrke suggests that international refugee and human rights law might be more effective 'weapons of choice' rather than 'fuzzy and potentially negative symbols' such as 'human security'.[95]

While both Noll's and Suhrke's reticence is both understandable and persuasively illustrates the pitfalls in adopting the human security paradigm, there may also be some risk in failing to engage in either the definitional or operational debate that surrounds the notion of 'human security'. It therefore behoves us to attempt to explore what possibilities there might be for applying the human security concept in a manner that yields constructive and protective outcomes. If the concept of human security can be brought to bear on a refugee or migration 'problem' normatively, it may have the effect of bringing the legal frameworks of international refugee and human rights law, and indeed humanitarian law where relevant, into sharper relief. In this way, it may serve a constructive purpose that cannot be achieved by resort to existing legal frameworks alone.[96] As such, there may be ways in which the human security approach can be engaged to have a positive normative effect that elicits better protective outcomes in law for survival migrants. If this is

[92] See, generally, E. Said, *Orientalism* (New York, NY: Random House, 1979).
[93] Noll, 'Securitizing sovereignty?', 281.
[94] Suhrke, 'Human security and the protection of refugees', 104.
[95] *Ibid.*, 104.
[96] Suhrke also raises the question of whether 'human security' serves a more effective purpose than recognition of 'vulnerability'. She advocates strongly in favour of the term 'vulnerability' ahead of 'human security': Suhrke, *ibid.*, 105. However, although as Noll has noted 'vulnerability' is 'not burdened with the military heritage and the collectivist bias of the security concept', it is nonetheless a concept that attracts its own complexities, connoting disempowerment and loss of agency: Noll, 'Securitizing sovereignty?', 282.

to happen, however, there are two imperatives. First, human security and human rights must be interwoven, or 'spliced', in a way that ensures that human security cannot be misappropriated into a state-centric assertion of 'securitisation' by the socially and economically more powerful. Second, human rights must not be subsumed into a 'fuzzy' human security discourse that trades the legal force of human rights for the 'rhetorical appeal' of human security; rather, human security can only add value to human rights law if it strengthens and enhances its reach and enforceability.

B. Competing rights, competing securities

For survival migrants, principles of sovereignty significantly circumscribe protection and enjoyment of social and economic rights both in the context of entry and stay in a destination country as well as return. States are considered to have the sovereign right to frame conditions of entry and residence, and regularly target social and economic rights as a deterrent tool designed to curb perceptions of 'abuse' of asylum and migration channels. A parallel objective is to prevent survival migrants from constituting a drain on public resources and services. In this sense, sovereignty may be regarded as having created a gap between the realities and legalities of human rights protection. Given the centrality of social and economic rights to survival migrants, this suggests that social and economic rights of survival migrants is an area where the human security framework may have some normative potential.

1. States and migrants

The phenomenon of migration evinces a set of competing claims with respect to rights and security.[97] Migrants claim 'free movement rights', including the rights to seek and enjoy asylum,[98] to leave any country including their own,[99] and to return to or enter their own country.[100] At the same time, states assert the sovereign 'right' or 'prerogative' to control their borders, and state sovereignty has ensured that there is

[97] See, e.g., K. Tamas and J. Palme, 'Transnational approaches to reforming migration regimes', in Tamas and Palme (eds.), *Globalizing Migration Regimes*, 9–10.

[98] Art. 14, UDHR.

[99] Art. 13(2), UDHR, Art. 12(2), International Covenant on Civil and Political Rights (ICCPR), GA res. 2200A (XXI), 999 UNTS 171; entered into force 23 Mar. 1976.

[100] See Art. 13(2), UDHR and Art. 12(4), ICCPR.

no right in international law to enter a country other than one's own.[101] States have also sought to ensure as far as possible that there is no right of asylum by declining to translate the right to seek and enjoy asylum into binding form,[102] even though some argue that it is a right that has now evolved into a principle of customary international law.[103] States also frequently assert that migrants, especially those who are undocumented or unauthorised, represent a threat to national security. And further, as has been noted above, some public commentators have even gone so far as to claim that the arrival of paltry numbers of undocumented migrants threatens the human security of an entire nation,[104] with scant concern being had for the human security of the migrants themselves.

In the competition between the rights and security of states and migrants, states remain undeniably the dominant force, despite the ineradicable character of migration as a human impulse. One illustration of this is the relative haste with which the heavily security-oriented Convention against Transnational Organized Crime 2000[105] and its Palermo Protocols on Trafficking[106] and Smuggling[107] have been ratified by states. The text of each of these instruments was adopted in November 2000 and all had entered into force in a little over three years from the date of adoption. This Convention and its Palermo Protocols, despite saving clauses that pay lip service to human rights and refugee law,[108] fail

[101] Art. 12, ICCPR. See, also, Nafziger, 'The general admission of aliens under international law'.

[102] See, generally, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law,* 3rd edn (Oxford: Oxford University Press, 2007), 358–65.

[103] See S.R. Chowdhury, 'A response to the refugee problems in post cold war era: some existing and emerging norms of international law', *International Journal of Refugee Law,* 7 (1995), 100, 105–6. See also A. Edwards, 'Human rights, refugees, and the right "to enjoy" asylum', *International Journal of Refugee Law,* 17 (2005), 293.

[104] For a discussion of the racialised security discourse in Canada, see Ibrahim, 'The securitization of migration'.

[105] Convention against Transnational Organized Crime 2000, GA res. 25; entered into force 29 Sep. 2003.

[106] 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol on Trafficking), GA res. 55/25; entered into force 25 Dec. 2003.

[107] 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol on Smuggling), 15 Nov. 2000, 40 *ILM* 335; entered into force 28 Jan. 2004.

[108] See Art. 14, Palermo Protocol on Trafficking and Art. 19, Palermo Protocol on Smuggling.

resoundingly to enjoin states parties to address the human security and social and economic rights causes and consequences of trafficking and smuggling. By way of comparison, the human rights-oriented 1990 International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers' Convention),[109] which sets out an extensive framework for the protection of the rights of all migrant workers, took thirteen years to come into force after its adoption and remains shamefully, and shamelessly, under-ratified.[110] In particular, not a single wealthy developed nation has yet ratified the MWC, their lack of interest in safeguarding the rights of all migrant workers attesting to their prevailing preoccupation with the dominant discourse of sovereignty.

2. Sovereignty, human rights and survival migration

However, even the human rights framework is not an especially 'safe haven' for survival migrants. In relation to the position of aliens under the International Covenant on Civil and Political Rights 1966 (ICCPR), the Human Rights Committee has stated that:

> Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.[111]

It is clear from this statement that although states' obligations towards non-citizens under the ICCPR are engaged, states may nevertheless condition entry. As the extract from the Human Rights Committee implies, this is especially so with regard to the supposedly 'non-justiciable' framework of economic, social and cultural rights – 'survival rights'.[112] In the migration sphere, the human rights paradigm, which is after all a creature of states, has long been tempered by sovereignty and therefore understood to accord considerable latitude to states in their treatment of non-citizens. As a result, to a significant extent, states are

[109] International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families, GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003.

[110] For more on the rights contained in the Migrants' Workers Convention, see chs. 7 and 8 by P. Oberoi and R. Cholewinski in this book respectively.

[111] HRC, *General Comment No. 15*: para. 6.

[112] Craven, *The International Covenant on Economic, Social and Cultural Rights*, 194.

permitted to impose conditions on entry and stay that deny basic rights to individuals within the territory of the state.[113]

3. The anti-discrimination norm and the survival migrant

Although the part of the human rights framework under primary consideration in this chapter falls under the ICESCR, the importance of the ICCPR and the views of its treaty body is that the anti-discrimination norm, a civil and political right, is pivotal in the adjudication of social and economic rights enjoyment by non-citizens. Frequently, denial of social and economic rights is grounded in discrimination on the basis of rights guaranteed under the ICCPR.[114]

On the basis of principles of sovereignty, the law has constructed, *inter alia*, the idea of 'permissible difference', born of the assumption that 'the interests of those already within the scope of the nation [automatically] outweigh the interests of those outside it'.[115] This has enabled states to make distinctions between rights enjoyed by citizens and non-citizens as well as between different groups of non-citizens. Distinctions that are regarded as 'permissible' are not considered to breach the anti-discrimination norm. As discrimination is not defined in either the ICCPR or ICESCR, the Human Rights Committee advises that guidance in determining the scope and content of the norm may be sought from the definitions of discrimination set out in the International Convention on the Elimination of All Forms of Racial Discrimination 1965[116] (ICERD)

[113] See, e.g., *Abdulaziz, Cabales, and Balkandali* v. *United Kingdom* [1985] EHRR 471, and most recently, *Nnyanzi* v. *United Kingdom* [2008] ECHR 282, para. 76. Cf. *R* v. *SSHD, ex parte Adam; R* v. *SSHD, ex parte Limbuela; R* v. *SSHD, ex parte Tesema* (Conjoined Appeals) [2005] UKHL 66, Nov. 2005, for an analysis of the human rights implications of denial of basic subsistence to asylum seekers. In that case, such denial was found to amount to inhuman or degrading treatment.

[114] See Arts. 2 and 26, ICCPR. There is a considerable amount of jurisprudence from the Human Rights Committee that resolves socio-economic rights cases through the lens of civil and political rights. A selection is provided here: *Mauritian Women* v. *Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (9 Apr. 1981) (work: right to family life); *Broeks* v. *The Netherlands* (172/1984), ICCPR, A/42/40 (9 Apr. 1987) (social security); *Neefs* v. *The Netherlands* (425/1990), ICCPR, A/49/40 vol. II (15 Jul. 1994) (social security); *Tadman et al.* v. *Canada* (816/1998), ICCPR, A/55/40 vol. II (29 Oct. 1999) (education); *Waldman* v. *Canada* (694/1996), ICCPR, A/55/40 vol. II (3 Nov. 1999) (education); *Diergaardt et al.* v. *Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 Jul. 2000) (education); *Love et al.* v. *Australia* (983/2001), ICCPR, A/58/40 vol. II (25 Mar. 2003) (employment).

[115] Lane, 'A philosophical view on states and immigration', 141.

[116] International Convention on the Elimination of All Forms of Racial Discrimination 1965, GA res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969.

and the Convention on the Elimination of All Forms of Discrimination against Women 1979[117] (CEDAW).[118] In the context of non-citizens, the work of the UN Committee on the Elimination of Racial Discrimination (CERD) is particularly informative.

In its General Recommendation 30 on Discrimination against Non-Citizens,[119] The CERD has pointed out that:

> human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.[120]

However, this baseline prohibition that derives from Article 1(1) ICERD is, almost in the same breath, qualified in Article 1(2), which provides that 'distinctions, exclusions, restrictions or preferences' made by a state party between citizens and non-citizens are not subject to the prohibition on racial discrimination. This qualification has been interpreted to mean that distinctions between citizens and non-citizens are permissible if they are pursuant to a 'legitimate aim' and 'proportional to the achievement of this aim'.[121] The jurisprudence of the European Court of Human Rights supports this view, and suggests that immigration control is a 'legitimate aim' as a means of maintaining public order[122] or regulating the domestic labour market.[123] In this sense, immigration control 'provides the medium through which other legitimate aims are promoted'.[124] The House of Lords has also held that 'decisions taken pursuant to the lawful operation of immigration control will be

[117] Convention on the Elimination of All Forms of Discrimination against Women 1979, GA res. 34/180, 18 Dec. 1979, 1249 UNTS 13; entered into force 3 Sept. 1981.

[118] See HRC, *General Comment 18*: *Non-Discrimination*, 10 Nov. 1989, paras. 6–7.

[119] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation 30*: *Discrimination against Non-Citizens*, 1 Oct. 2004.

[120] *Ibid.*, para. 3.

[121] CERD, General Recommendation 30, para. 4. See, also, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)* (*Belgian Linguistics* case), judgment of 23 Jul. 1968, Eur.Ct.H.R., 1968, Ser. A, No. 6, (1979–80) 1 EHRR 241, para. 9.

[122] See, e.g., *Boultif* v. *Switzerland*, Appl. no. 54273/00 [2001] ECHR 497 (2 Aug. 2001), para. 46.

[123] *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*.

[124] N. Blake and R. Husain, *Immigration, Asylum and Human Rights* (Oxford: Oxford University Press, 2003), cited in Goodwin-Gill and McAdam, *The Refugee in International Law*, 317.

proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis'.[125] Thus, assumptions of sovereign legitimacy and proportionality have had the effect of according states considerable latitude in developing immigration policies. This also suggests that at least some differential treatment between citizens and non-citizens on the basis of citizenship status would be permissible.

It also follows from this discussion that distinctions between different groups of migrants may be permissible. To this end, Article 1(3) of the ICERD provides that:

> [n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

To this extent, therefore, differential treatment in immigration matters between different groups of non-citizens is also permissible as long as it does not discriminate against a particular nationality in either purpose or effect.[126] Thus, subject only to disproportionate impact on a particular nationality, individuals in a selective migration programme may be treated differently on the grounds of, for example, immigration status, age, health status, linguistic ability, or education level without transgressing the prohibition on discrimination.

4. Non-derogable human rights and human security

The notion of 'human security' has assumed multiple identities and definitions. One of the views expounded has been that an objective definition of the concept could be founded on a combination of physical survival, non-derogable human rights, and protection of core identity.[127]

[125] *R (Razgar)* v. *SSHD* [2004] 2 AC 368, para. 20, per Lord Bingham. See, also, *Secretary of State for the Home Department* v. *Kacaj* [2002] Imm AR 213, para. 26. Note also *Rutili* v. *Ministre de l'Intérieur* [1975] ECR 1219 (ECJ), which suggests that interference with a right solely as a deterrence mechanism is not a legitimate aim. Goodwin-Gill and McAdam, *The Refugee in International Law*, 318, n. 241.

[126] See HRC, General Comment No. 18, para. 7. See, also, CERD Communication No. 31/2003: Slovakia, CERD/C/66/D/31/2003, 10 Mar. 2005. However, in two exceptional cases, policies barring East African Asians from entry to the United Kingdom in the 1970s and a policy screening and intercepting Roma asylum seekers in Prague airport in 2001 were found to target a particular racial group and therefore to breach the prohibition on racial discrimination: *East African Asians* v. *United Kingdom* (1973) 3 EHRR 76 and *R* v. *Immigration Officer at Prague Airport; ex parte European Roma Rights Centre* [2005] 2 AC 1 ('*Prague Airport* Case').

[127] Suhrke, 'Human security and the protection of refugees', 103.

Even though the breadth of this definition has been described as too inclusive to be analytically useful,[128] it still appears to leave behind the social and economic rights framework. However, while non-derogable human rights are classically understood to be those rights set out in the ICCPR and from which no derogation is permitted even in times of national emergency threatening the life of the nation,[129] there is no derogation provision in the ICESCR.[130] Furthermore, the Committee on Economic, Social and Cultural Rights has indicated on multiple occasions that the notion of non-derogable human rights also applies to social and economic rights.[131] The Committee has indicated that the 'core content' of each right, which is not subject to the flexibility that 'progressive realisation' accords states, is non-derogable. This non-derogable status in turn strengthens the justiciability and therefore enforceability of social and economic rights, at least to the extent of a right's core content, which includes the anti-discrimination norm.[132] Another approach may be to enlist the wide-angled lens of 'human security' as an interpretative tool with which to weigh up the social and economic consequences of human rights decisions where the 'progressive realization' obligation is engaged.

It is the 'progressive realization' characteristic of the economic, social and cultural rights paradigm that has led to the view that such rights are not justiciable. However open to dispute this position may be,[133] the courts have typically shied away from engaging with social and economic rights other than through the civil and political rights lens.[134] Although

[128] S. Tarry, '"Deepening" and "widening": an analysis of security definitions in the 1990s', *Journal of Military and Strategic Studies*, 2 (1999), available at www.jmss.org/1999/article3.html (last accessed 9 Sep. 2008).

[129] Art. 4, ICCPR.

[130] However, as Craven notes, lack of a derogation clause can lead to the possibility of inconsistencies arising in the interpretation of civil and political rights limitations as compared to economic, social and cultural rights: Craven, *The International Covenant on Economic, Social and Cultural Rights*, 26–7.

[131] See, e.g., CESCR, *General Comment No. 14*: *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 11 Aug. 2000, para. 47; CESCR, *General Comment No. 15*: *The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2002/11, 20 Jan. 2003.

[132] See, e.g., CESCR General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, para. 47.

[133] See, e.g., Craven, *The International Covenant on Economic, Social and Cultural Rights*, 28.

[134] The most notable exception to this is the South African Constitutional Court which, with the benefit of a Constitution that guarantees social and economic rights, has engaged with these issues, concluding that socio-economic rights are indeed justiciable. See, e.g., *Minister*

many would undoubtedly argue that 'fuzzy and potentially negative symbols'[135] of human security are a poor alternative in seeking to strengthen the operation of international legal standards in a domestic law context, it is at least arguable that the human security paradigm can serve to strengthen the law through the delivery of a different message; a message that exposes the hypocrisy of the double standard that shelters behind the law masquerading as justice. As Verwey has noted, 'there is certainly no right to do nothing'.[136] This is particularly so where the affected parties are non-citizens facing removal or deportation to human insecurity, constituted by critical, severe or pervasive threats to human life, livelihood or dignity, and whose social and economic rights claims can only be asserted through the lens of civil and political rights *non-refoulement* provisions.

5. The economic rights of survival migrants

With regard to the enjoyment of economic rights by non-citizens, ICESCR permits certain states to impose limitations. Article 2(3) of the ICESCR provides that:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

However, Article 2(3) was specifically designed to end the domination of certain economic groups of non-nationals during colonial times.[137] The purpose of this provision suggests two things. First, as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) suggest, it should be given a narrow construction.[138] It should not, therefore, apply to survival migrants, who were clearly not within the contemplation

of Health and others v. *Treatment Action Campaign and others (No. 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 Jul. 2002), para. 25.

[135] Suhrke, 'Human security and the protection of refugees'.

[136] W. Verwey, 'The establishment of a new international economic order and the realization of the right to development and welfare' *Indian Journal of International Law*, 21 (1981) 1, 22, cited in Craven, *The International Covenant on Economic, Social and Cultural Rights*, 146.

[137] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles), UN Doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, 9 (1987), 122–35, para. 43.

[138] *Ibid.* For discussions of these issues applied in the refugee context, see Edwards, 'Human rights, refugees, and the right "to enjoy" asylum' and Lester, 'Work, the right to work, and durable solution'.

of those concerned to contain the post-colonial economic power of colonising non-nationals. Second, developed or industrialised states are not entitled to determine to what extent they will guarantee economic rights to non-nationals. Implicit in this limitation is that there can be no justification for wealthy countries to restrict the economic rights of non-nationals. The significance of this exception in Article 2(3), from a broad perspective of social and economic rights enjoyment, is that economic rights are enabling rights that make it possible for survival migrants to realise their own social and economic rights to a significant extent, rather than leading to (overly simplistic) assumptions of welfare dependency.

In light of the foregoing, it may be that the human security paradigm, which would examine the consequential threats to lives, livelihoods, and dignity of a broad construction of Article 2(3), might usefully inform, and reinforce, the acknowledged desirability of a narrow construction of its terms. Thus, although the current state of human rights law is that states can limit the extent to which they are required to take into account social and economic rights violations in the context of return,[139] application of the human security lens to the interpretation of human rights obligations may open up new possibilities, and indeed new obligations. It may also serve to reinforce that non-citizens can and should be permitted to lead productive lives in destination countries.

6. Survival migrants and the scope of human rights law

A further limitation of international human rights law, to which the human security paradigm is not subject, is that a state's human rights obligations point principally to persons in the territory of a state party, subject to its jurisdiction, or otherwise within its power or effective control.[140] In this regard, the human security paradigm might usefully complement the human rights paradigm in effectively enhancing social and economic rights protection for survival migrants, be they refugees or the wider population of survival migrants and members of their families, by rethinking the dominance of 'traditional' conceptions of sovereignty and security that are highly territorial. In this sense, the 'human security'

[139] See, however, M. Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation,* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2007), which examines the possibilities for the grant of refugees status on the basis of socio-economic rights persecution.

[140] HRC, *General Comment No. 31*: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

paradigm might be able to soften some of sovereignty's harsher territorial elements by elucidating an appreciation that nations and their peoples cannot achieve true 'human security' at the expense of the human security of others. In this way, protecting the human rights of migrants might be cast as having positive human security consequences, not only for migrants themselves, but also for the nations and peoples who send and receive them. This approach might be termed 'common human security'[141] and would reflect a human-centred way of relieving (unnecessary) migration. However, this approach would still satisfy objectives of ethics, logic and morality by addressing the violations of human rights and compromises to human security that cause people to move without obstructing the movement that will always be necessitated by an imperfect world.

IV. From a right to die with dignity to a right to live with it

Having considered how a human rights and human security framework might look in theory, this section considers whether 'splicing' the human security paradigm and the human rights framework can in practice provide a means for enhancing the rights and dignity of the individual human being. To test the idea, I take an issue that is squarely on both the human rights and human security agendas – HIV/AIDS.

As a human security issue, HIV/AIDS has been given considerable prominence. The Commission on Human Security's 2003 report, *Human Security Now,* dedicated an entire chapter to HIV/AIDS and other serious health issues.[142] Describing HIV/AIDS as a 'global security emergency',[143] the report notes that 'it kills productive adults, impoverishes families, creates orphans, destroys communities and weakens fragile governments';[144] and it implores states to seek 'mutual health security through international cooperation'. Such international cooperation needs to ensure that private intellectual property rights cannot trump the imperatives of human security that the global pandemic

[141] The notion of 'common security' was formulated by the Palme Commission: Independent Commission on Disarmament and Security Issues, *Common Security: A Programme for Disarmament* (London: Pan Books, 1982), 6, cited in von Tigerstrom, *Human Security and International Law*, 12.

[142] Commission on Human Security, *Human Security Now*, ch. 6, 94–112.

[143] *Ibid.*, 105.

[144] *Ibid.*, 98.

demands.[145] Combating HIV/AIDS is also Goal 6 of the eight Millennium Development Goals, and includes amongst its targets universal access to anti-retroviral drugs by 2010.[146] Thus, HIV/AIDS is clearly located high on the global human security and development agendas.

HIV/AIDS is also high on the human rights agenda. However, one area where human rights may be said to have failed to respond adequately to the compelling human consequences of 'critical and preventable threats to human lives'[147] is in the area of health and survival migration. These consequences may arise from 'conscious but unintentional human agency or omission'.[148] As non-citizens facing deportation remain unable to assert their right to health other than through the use of the civil and political rights framework, sometimes with undeniably tragic consequences, the law has shown itself to lag significantly behind in its capacity to provide a just response to what is a human rights crisis of international significance.

Courts in Europe have adjudicated health issues in developing countries through the prism of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[149] (ECHR), which prohibits torture, cruel, inhuman or degrading treatment.[150] Article 3 carries with it the (absolute) prohibition on *refoulement* and provides a strong basis on which to enforce social and economic rights, albeit indirectly, given that many civil and political rights, including Article 3, have a social and economic character.[151]

[145] See, World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), ratified by WTO member countries in 1994 and affording twenty years of patent protection on a worldwide basis to technological inventions, including vaccines and medicines. Commission on Human Security, *ibid.*, 104.

[146] See UN Millennium Declaration, General Assembly Resolution 55/2, adopted 8 Sept. 2000.

[147] von Tigerstrom, *Human Security and International Law*, 34.

[148] D. Roberts, 'Human security or human insecurity? Moving the debate forward', 37 (2006) *Security Dialogue,* 249, 258. See also von Tigerstrom, *Human Security and International Law*, 34.

[149] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended.

[150] See, e.g., *N* v. *United Kingdom,* App. No. 26565/05 (27 May 2008); *B.B.* v. *France,* App. No. 30930/96 (9 Mar. 1998), *Karara* v. *Finland,* App. No. 40900/98 (29 May 1998); *S.C.C.* v. *Sweden,* App. No. 46553/99 (15 Feb. 2000); *Bensaid* v. *the United Kingdom* (2001) 33 EHRR 205; *Henao* v. *The Netherlands,* App. No. 13669/03 (24 Jun. 2003); *Ndangoya* v. *Sweden,* App. No. 17868/03 (22 Jun. 2004); *Amegnigan* v. *The Netherlands,* App. No. 25629/04 (25 Nov. 2004), *D* v. *United Kingdom* (1997) 24 EHRR 423. See also *Tatete* v. *Switzerland* (friendly settlement), App. No.41874/98 (6 Jul. 2000), and *MM* v. *Switzerland,* App. No. 43348/98 (14 Sep. 1998), unreported.

[151] *Airey* v. *Ireland*, judgment of 9 Oct. 1979, SeriesA no. 32, para. 26.

However, the price that is paid is a much higher evidentiary threshold for establishing social and economic rights violations. So, although the courts have on occasion concluded that the return of a person to a place where their health needs would not be adequately met would amount to 'inhuman or degrading treatment' in violation of Article 3, they have shown an increasing reluctance to doing so. An examination of two cases of non-citizens suffering from HIV/AIDS, each of which had very different outcomes, is informative.

In 1997, in the case of *D* v. *United Kingdom*,[152] the European Court of Human Rights held that the return of a criminal deportee[153] to St Kitts at the final and critical stages of the AIDS virus would amount to 'inhuman or degrading treatment'. This finding was made on the basis of evidence that D would not be able to obtain necessary medical treatment and lacked family support and would therefore be exposed to a real risk of dying under most distressing circumstances. This was held to be the case even though the Strasbourg Court found that the conditions to which he would be exposed would not in themselves amount to a breach of Article 3 by his country of origin. This means that the violation of Article 3 would occur by the very act of exposing D to the absence of medical treatment and the high risk of a most distressing death. The court was at pains to reserve for itself in Article 3 cases a sufficient degree of flexibility to enable the protection of an individual from inhuman or degrading treatment that was not attributable to the state.[154] However, it did so based on the 'very exceptional circumstances' of the case,[155] a standard which has since been affirmed in a number of cases[156] and has never since been found on the facts of any case before the Strasbourg Court.[157]

In the 2008 case of *N* v. *United Kingdom*,[158] the Strasbourg Court reaffirmed a different view of an HIV-positive rejected Ugandan asylum

[152] *D* v. *United Kingdom* (1997) 24 EHRR 423.

[153] Given that the focus of this chapter is on the rights of survival migrants, the question arises as to whether D can properly be described as a survival migrant. Although it is true that most survival migrants are so described on account of the causes of migration, there is no reason conceptually why the notion of 'survival migrant *sur place*' should not apply to a person in the circumstances of D. As is the case with refugees, it is equally possible that a person may become a survival migrant after having migrated.

[154] D v. *United Kingdom*, para. 49.

[155] *Ibid.*, para. 54.

[156] See n. 150 above.

[157] *N* v. *United Kingdom*, App. No. 26565/05 (27 May 2008), para. 34.

[158] *Ibid.*

seeker, upholding findings of the UK House of Lords[159] and the Court of Appeal.[160] N arrived in the United Kingdom on a false passport. Unbeknownst to her, she was HIV-positive at the time. She subsequently received treatment in the United Kingdom. As a result, her condition stabilised to the point that her medical assessment indicated that if she were to continue her treatment in the United Kingdom, she was 'likely to remain well for decades'.[161] She had already lost five of her six siblings to HIV/AIDS and the inevitable outcome were she returned to Uganda was that she would suffer an early death 'after a period of acute physical and mental suffering'.[162] Although treatment was available in Uganda, the formulation of her anti-retroviral drugs was not available and future variations would also be likely to include drugs that were not available.[163] Treatment was beyond her financial means and it was found that she would likely die in at most two years. Indeed, her position was described as being 'similar to having a life-support machine switched off'.[164]

Unanimously dismissing N's appeal, the House of Lords had held that the *non-refoulement* obligation arising under Article 3 of the ECHR did not entitle aliens to remain indefinitely for medical treatment unavailable in their home countries, even if the absence of such treatment would significantly shorten their lives. It also held that Article 3 only applied in 'very exceptional circumstances' and 'on compelling humanitarian grounds', concluding that N's circumstances did not constitute a 'special case'.[165] Extraordinarily, the Strasbourg Court and the House of Lords before it concluded that N's present state of health was not critical and that she was fit to travel, given that on her current treatment regime she could live for many decades. The courts reached this conclusion even though both courts knew that such treatment would not be accessible[166] to her in Uganda and its withdrawal would result in a rapid deterioration of her condition.

[159] *N* v. *Secretary of State for the Home Department* [2005] 24 UKHL 31; [2005] 2 AC 296.
[160] *N* v. *SSHD* [2003] EWCA Civ 1369; [2004] 1 WLR 1182.
[161] *N* v. *SSHD,* House of Lords, para. 73, per Lord Brown of Eaton-under-Heywood, citing expert medical evidence.
[162] *Ibid.,* para. 20, per Lord Hope of Craighead.
[163] *Ibid.,* para. 73.
[164] *Ibid.,* para. 4, per Lord Nicholls of Birkenhead.
[165] *Ibid.,* para. 9, per Lord Nicholls of Birkenhead.
[166] Note that 'accessibility' of health care is part of core content of the right to health: CESCR General Comment No. 14, para. 43. See, also, further elaboration of accessibility in para. 12, requiring non-discrimination, physical accessibility, economic affordability, and accessible information.

In the House of Lords, Lord Nicholls of Birkenhead was prepared to ask some difficult questions, to which he concluded there were no satisfactory humanitarian answers:

> If unavailability of appropriate medical care or family support was regarded as an exceptional circumstance for the purpose of article 3 in D, why is this not equally so in the case of other AIDS sufferers? In D's case there was the additional feature that D was dying. But the appellant's condition in the present case will rapidly become terminal, as soon as her life-preserving medication is discontinued. This prompts a further question: why is it unacceptable to expel a person whose illness is irreversible and whose death is near, but acceptable to expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen on deportation)?[167]

Lord Nicholls concluded that the difference between the cases of D and N was that states were not required under Article 3 to permit aliens to remain indefinitely in the United Kingdom for the purposes of receiving life-sustaining medical treatment. Thus, the (presumed) lack of imminence of N's impending death in Uganda and the likelihood that she could be a charge on the public purse for 'decades' appeared to provide the basis for distinguishing her case from D;[168] you can die with dignity, but you cannot live with it. However, as Lord Brown of Eaton-under-Heywood saliently observed:

> It is perhaps not … self-evidently more inhuman to deport someone who is facing imminent death than someone whose life expectancy would thereby be reduced from decades to a year or so. Nor, as already suggested, has there generally been a sound evidential basis for supposing that much if anything in the way of medical care or family support would be available to the applicants on return.[169]

Perhaps most significantly, a number of the Lord Justices drew a 'floodgates' conclusion that N's case was no different from that of many AIDS sufferers who arrived in the United Kingdom from countries where medical treatment for AIDS was not available or was not of the standard freely available in the United Kingdom, with Lord Hope doing

[167] *N* v. *SSHD,* House of Lords, para. 12, per Lord Nicholls of Birkenhead.

[168] See also *Karara* v. *Finland,* App. No. 40900/98 (29 May 1998); *MM* v. *Switzerland,* App. No. 43348/98 (14 Sep. 1998), unreported; *SCC* v. *Sweden,* 29 EHRR CD 245; *Henao* v. *The Netherlands,* App. No. 13669/03 (24 Jun. 2003); *Ndangoya* v. *Sweden,* App. No. 17868/03 (22 Jun. 2004); *Amegnigan* v. *The Netherlands,* App. No. 25629/04 (25 Nov. 2004).

[169] *N* v. *SSHD,* House of Lords, para. 91, per Lord Brown of Eaton-under-Heywood.

so most explicitly.[170] The court also concluded that withdrawal of her treatment that had improved her condition in the United Kingdom was not inhuman treatment and could not be considered exceptional even though it was acknowledged that it would shorten her life expectancy from 'decades' to 'two years'.

It was plain that members of the House of Lords were genuinely discomfited by the consequences of their decision. For Lord Nicholls of Birkenhead, the 'cruel reality' of N's case evoked 'a lasting sense of deep sadness'.[171] For Lord Hope of Craighead, it was 'easy to sympathise with her predicament', though he viewed 'austerity' to be truer to his judicial task, considering that it was for the Strasbourg Court 'to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention'.[172] For Lord Walker of Gestingthorpe, it was 'a very sad case' but 'unfortunately, not exceptional'.[173] Baroness Hale of Richmond asked '[h]ow are we to distinguish between the sad cases where we must harden our hearts and the even sadder cases where to do so would be inhumane?'[174] Lord Brown of Eaton-under-Heywood admitted that he 'would prefer not to have to make this decision'.[175]

Yet, all the Lord Justices found themselves unable to reach a conclusion that would favour N. Baroness Hale of Richmond underscored the very powerful 'humanitarian appeal of this case'.[176] As she noted further: '[n]one of us wishes to send a young woman, who has already suffered so much but is now well cared for and with a future ahead of her, home to the likelihood of an early death in a much less favourable

[170] 'It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the Convention would ever have agreed to. The better course, one might have thought, would be for states to continue to concentrate their efforts on the steps which are currently being taken, with the assistance of the drugs companies, to make the necessary medical care universally and freely available in the countries of the third world which are still suffering so much from the relentless scourge of HIV/AIDS', per Lord Hope of Craighead, para. 80.

[171] *N* v. *SSHD,* House of Lords, para. 10, per Lord Nicholls of Birkenhead.

[172] *Ibid.,* para. 25, per Lord Hope of Craighead.

[173] *Ibid.,* para. 55, per Lord Walker of Gestingthorpe.

[174] *Ibid.,* para. 59, per Baroness Hale of Richmond.

[175] *Ibid.,* para. 95, per Lord Brown of Eaton-under-Heywood.

[176] *Ibid.,* para. 67, per Baroness Hale of Richmond.

environment.'[177] But, like the other members of the bench, she concluded that her circumstances were not exceptional, noting too a comparable case before the Strasbourg Court.[178]

N's case went on appeal from the House of Lords to the European Court of Human Rights, with judgment delivered on 27 May 2008. The Strasbourg Court held, by fourteen votes to three, that there would be no violation of Article 3 were N removed to Uganda. In doing so, the majority emphasised the right of states to control entry, residence and removal of aliens, notwithstanding the absolute nature of Article 3, and drew several key principles from an examination of the case law:

1. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social, or other forms of assistances and services provided by the expelling state.
2. The fact that the applicant's circumstances, including her life expectancy, would be significantly reduced if she were removed from the United Kingdom is not sufficient in itself to give rise to a breach of Article 3.
3. The 'very exceptional' humanitarian standard of attainment set out in *D* v. *United Kingdom* required that the individual be 'critically ill', 'close to death', not 'guaranteed' any nursing or medical care *and* have 'no family … willing or able to care for [her]'.[179]

In reaching its conclusion, the majority also relied on the decision of the Strasbourg Court in *Soering* v *United Kingdom*, in which the Court asserted that inherent in the whole Convention is the obligation to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[180] Thus, notwithstanding the absolute character of the Article 3 prohibition on *refoulement*, the Court applied a somewhat alarmist 'fair balance' analysis concluding that any requirement that states alleviate social and economic disparities between countries through the provision of 'free and unlimited health care to all aliens

[177] *Ibid.*
[178] *Amegnigan* v. *The Netherlands*, App. No. 25629/04 (25 Nov. 2004).
[179] *N* v. *United Kingdom*, paras. 42–5.
[180] *Soering* v. *United Kingdom* (1989) 11 EHRR 439, para. 89. *N* v. *United Kingdom*, para. 44. Note, however, that the 'fair balance' being struck in *Soering* was between the fundamental right to be subject to the death penalty and the imperative that serious criminals not be able thereby to evade justice.

without a right to stay within its jurisdiction' as placing 'too great a burden on the Contracting States'.[181]

Consistent with the practice of the Strasbourg Court in health cases since its decision in *D* v. *United Kingdom,* and aware that withdrawal of anti-retroviral therapy would mean reversion to advanced stages of the illness entailing a direct threat to life, the majority apparently ignored the 'foreseeable consequences'[182] of return, tellingly drawing its conclusions in the present tense:

> She *is* fit to travel and will remain fit as long as she *continues* to receive the basic treatment she *needs*[183] … The applicant *is not … at the present time* critically ill.[184] (my emphases)

The majority further regarded as speculative (rather than predictive) the rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, even though it was based on expert medical evidence before the court. However, any such 'speculation' was certainly outdone by the majority's own speculation that 'the constantly evolving situation as regards treatment of HIV and AIDS worldwide' was sufficient to cast doubt on the expert evidence available on the foreseeable consequences of withdrawal of her treatment regime and the availability of services in Uganda.

The three dissenting judges of the Strasbourg Court were highly critical of the majority judgment regarding its reliance on earlier authorities as incomplete and misleading.[185] They also held that the 'floodgates' arguments that were clearly evident in the majority judgment as well as the House of Lords and Court of Appeal judgments were not only factually misconceived, but they were also legally irrelevant to an analysis of the Article 3 prohibition. The dissenting judges considered that there was no plausible basis on which to conclude that the case of D was 'very exceptional' and that the case of N did not present a fact scenario with 'equally compelling humanitarian considerations'.[186]

Confronting the courts in these cases is the problem that in the rich, developed world HIV is now a long-term but treatable illness, albeit a

[181] *N* v. *United Kingdom*, para. 44.
[182] *Chahal* v. *United Kingdom* (1996) 23 EHRR 413, para. 130.
[183] *N* v. *United Kingdom*, para. 47.
[184] *Ibid.,* para. 50.
[185] *N* v. *United Kingdom,* joint dissenting opinion of Judges Tulkens, Bonello and Spielmann, para. 6.
[186] *Ibid.,* para. 23.

terminal one, whereas in sub-Saharan Africa, for all but a tiny minority it is an imminent death sentence.[187] Reliance by the majority of the Strasbourg Court on the *Soering* 'fair balance' test exposes a cruel disparity between, on the one hand, its unwavering determination (quite properly) to protect even the most serious criminals from the death penalty and, on the other, its manifest unwillingness to heed the reality of the 'imminent death sentence' that HIV/AIDS litigants such as N face in many parts of the world. Baroness Hale of Richmond captures the cold hard reality of the world's most compelling contemporary pandemic:

> There are millions of people in the world who are HIV positive, many of them in sub-Saharan Africa; thousands of people arrive in this country every year without leave to enter or remain but are for one reason or another able to stay here for some considerable time during which they will usually receive the medical care they need; the anti-retroviral therapy now available here can, for as long as it continues, restore the compromised immune system to such an extent that life expectancy is greatly enhanced; for the fortunate few . . . at least some therapy may be available in their home countries, but for most it will remain only a theoretical possibility for many years to come.[188]

So, are we to conclude that human rights law demands that we 'harden our hearts', resign ourselves to its austerity, and submit to the law's (self-evidently erratic) promise of justice? The outcome of this case is, as the dissenting judges' opined, a 'clear set-back'.[189] There are unquestionably a range of human rights arguments that may be explored and elaborated further in seeking to counter the outcome of this case and others like it, and we should not tire of doing so. However, the outcomes of this case may also reflect inherent limitations of the human rights paradigm; however much we might wish it were otherwise, it is not a panacea for all injustice.

We are, periodically, warned against the 'analytical pitfall' of interpreting the content of human rights to mean everything, thereby ensuring that human rights mean nothing.[190] By the same token, however, if interpretation of the scope and content of human rights is made to do nothing, they mean even less. Either way, in terms of justiciability, there

[187] *N* v. *SSHD,* House of Lords, para. 66, per Baroness Hale of Richmond.
[188] *Ibid.,* para. 67, per Baroness Hale of Richmond.
[189] *N* v. *United Kingdom,* joint dissenting opinion, para. 17.
[190] See, e.g., D.P. Fidler, *International Law and Infectious Diseases,* Oxford Monographs in International Law (Oxford: Clarendon Press, 1999), 186, and S.D. Jamar, 'The international human right to health', *Southern University Law Review,* 22 (1994), 1, 53.

is a protection gap, created by sovereign presumptions that limit the application of human rights by resorting to the state as the primary referent object when it is perceived that human rights assertions risk getting out of hand. However, within this manifest protection gap, an opportunity may exist for the human security framework to assist in a 'managed expansion' of international human rights law. As Baroness Hale noted, the difficulty in these cases lies in understanding where conditions in the country of origin are able to be factored into the analysis.[191] If a human security lens is applied to this case, reflecting a rhetoric to which governments willingly subscribe at an international policy level,[192] there is a compelling argument that the legal systems of developed states should be obliged to do more than offer judicial expressions of regret, however sincere. Likewise, the courts should be expected to do more than permit budgetary considerations and constraints, as well as alarmist floodgates arguments, to inform the interpretation of fundamental human rights. They should instead be required to take greater account of the human implications of their decisions. The dimensions and consequences of the AIDS crisis are immense. The lives of millions are at stake, demanding massive and unconventional efforts.[193] New questions must be asked, and new and innovative ways sought. The law should not regard itself as a hermetically sealed exception to this imperative.

With this in mind, the real question would be not whether, in this instance, the United Kingdom was under a positive obligation to continue N's treatment on a long-term basis, but whether a state has an obligation to take steps to protect the human security of the individual concerned, either at an individual level or at the level of her community. This way, a proactive rather than defensive approach to cases such as these might compel the courts not only to recognise, but also to address, the serious threats to lives, livelihoods and dignity that would ensue on return of a person to a place where her human security would be compromised not least because, unable to benefit from necessary healthcare, she would face a 'critical, severe or pervasive threat to her life,

[191] *N* v. *SSHD,* House of Lords, para. 68, per Baroness Hale of Richmond.

[192] See, e.g., UK Department for International Development, *Fighting Poverty to Build a Safer World: A Strategy for Security and Development* (London: DfID, 2005).

[193] WHO Essential Drugs Monitor, No. 33 (2003), *WHO Pledges Massive Effort to Increase ARV Treatment,* available at http://mednet2.who.int/edmonitor/33/edm33_en.pdf (last accessed 9 Sep. 2008).

livelihood and dignity'.[194] Can the harm that would be caused to her be prevented or mitigated by human action?[195] Indisputably.

In asking how we are to distinguish between the sad 'harden our hearts' cases and the even sadder 'inhumane' cases, Baroness Hale of Richmond posed a compelling question, for which none of the Lord Justices could find an adequate answer in law,[196] and for which the Strasbourg Court's analysis was also left wanting. Her question suggests that there may well be a place for human security to assist in the search for an answer; one that is judicially defensible and just. Judicial decisions that integrate human security into their analysis may compel states to translate their rhetoric into real deliverables which would increase accessibility and availability of anti-retroviral drugs in the developing world where the full burden of the HIV/AIDS pandemic is yet to be felt. Thus, the argument that those subject to removal 'cannot in principle claim any entitlement to remain on the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state' should be recognised as a hollow expression of fear of the floodgates, which seamlessly permits the 'referent object' to revert to the state not the individual. It should be met with confirmation that demands on a state's resources should not be permitted to compromise a non-citizen's fundamental rights or dignity. Applying principles that comprise human security safeguards against 'critical, severe or pervasive threats to life, livelihood or dignity' and the core content of the human right to the highest attainable standard of health,[197] states should be obliged to ensure that anti-retroviral drugs are accessible and available on an equitable, affordable and non-discriminatory basis in countries of origin. Until that is the case, and in order to ensure it, states should be compelled to provide the minimum core content of care to any person within their territory and be prohibited by Article 3 from removing them.

This approach is not intended to create a 'pull factor' that would draw all AIDS sufferers to the developed world for treatment. However, it would recognise the symbiotic relationship in which developed states should be obliged to participate in responding to the world's most

[194] See discussion in section II.B. *What is human security?*, above.
[195] See *ibid.*
[196] *N* v. *SSHD*, House of Lords, para. 59, per Baroness Hale of Richmond.
[197] See CESCR General Comment No. 14, paras. 43–5.

compelling human rights and human security issues. States find solutions when they are under pressure. Human rights and human security should join forces to compel them to re-imagine the role and reach of the law.

V. Re-imagining migration as a symbiotic relationship between communities

Although it is increasingly well recognised that 'no single state can adequately manage migration', what remains less well recognised is that there is only a limited extent to which migration can be managed at all. Indeed, such is the fundamental nature of migration as a human impulse, as Lane has observed, it is an 'irresistible' and 'ineradicable' force 'which both precedes and in crucial respects supersedes modern states'.[198] Thus, the objective of sustainability rather than sovereign control should be the principal guide in the migration domain.

Although 'durable solutions' – denoting local integration, voluntary repatriation and resettlement – are classically associated with bringing refugee protection, as a surrogate international protection, to a close, there is no reason why a similar idea should not also serve as a guiding principle for the wider population of migrants. Local integration and voluntary repatriation are the most logical fit for the migrant experience, although on occasion resettlement has been an appropriate response, for example with regard to victims of international organised crime. In order to distinguish solutions for the broader population of survival migrants, the term 'sustainable solutions' is suggested.

Applying the human security lens to a human rights analysis of host country integration, return, or third country resettlement, 'sustainability' enables the circumstances of the migrants as well as their host population to be factored into the equation but in a manner that does not lose sight of the rights of the migrants themselves. Viewing migration as an ordinary cyclical process, this would mean ensuring that the migrant experience in each phase of the migration cycle is able positively to impact on the other phases. As such, the enjoyment of human rights and human security in the country of destination has three effects. It strengthens the migrant's

[198] Lane, 'A philosophical view on states and immigration', 131.

agency as well as her host social and economic environment.[199] It diminishes the migrant's vulnerability to smuggling and trafficking. It also enhances human rights and human security of families and communities in the country of origin,[200] through remittances and/or the likelihood of (voluntary) return and reconstruction. In this way a cyclical symbiosis is able to evolve whereby migration becomes a revolving doorway to sustainable solutions.[201] As Lane has noted:

> Once we see the state concern with immigration as less noble and fundamental, but rather the creature of circumstances and advantage that it is, we may be freed to consider among other things the real costs of the policies that are currently used to try to limit immigration … Those costs include the arbitrariness of the attempt to control flows which remain fundamentally beyond control, arbitrariness which severely damages the human security of migrant workers and inhibits their choices and opportunities.[202]

Applying this cyclical analysis to the case of N considered above, and with the real costs of immigration control measures in mind, we are freed to imagine the positive contribution that she may be able to make with decades ahead of her in the United Kingdom, her life, livelihood and dignity preserved. She would be able to contribute productively to her host community and potentially also contribute to her family and community in her country of origin through remittances. Until such time as she could sustainably return to a life of human security where her human rights would be respected, her presence in the country would serve as a reminder to the United Kingdom to do all within its power to minimise the costs of essential drugs and maximise accessibility and availability of the drugs in developing nations.

The foregoing discussion suggests that it may be appropriate to strike at the intersection of the human rights and human security discourses rather than attempt to subsume one into the other. However, only if the

[199] In the refugee context, Jacobsen makes similar arguments, suggesting that promoting the livelihoods of refugee populations can actually serve to enhance the human security not only of the refugee population itself, but also of the host community. K. Jacobsen, 'Livelihoods in conflict: the pursuit of livelihoods by refugees and the impact on the human security of host communities', in Van Hear and Nyberg Sorensen (eds.), *The Migration-Development Nexus* 71.

[200] See, e.g., Lester, 'Work, the right to work, and durable solutions' and N. Nyberg Sorensen, 'Migration, development and conflict', in Tamas and Palme (eds.), *Globalizing Migration Regimes*.

[201] Lester, *ibid*.

[202] Lane, 'A philosophical view on states and immigration', 141.

language of human security is harmonised with the rights discourse can it achieve its desired protective effect; the protection of the human security of the whole of humanity rather than a process of security trade-offs. Because of the challenges in enforcing economic, social and cultural rights in a given context, the human security framework may provide us with a wide-angled lens through which to examine social and economic problems that are not necessarily directly attributable to the state. This suggests that we may emerge with a hybrid framework of human rights and human security that retains its central focus on humanity rather than the state and its associated power structures.

However, we must 'handle with care'. While human security may be capable of providing an important paradigm for more comprehensive analysis and understanding of the phenomenon of migration, we must remain mindful of the notes of caution that the likes of Noll, Petrasek and Suhrke have sounded. We must also be alert to the risk of misappropriation of the discourse of human security for national security or racialised ends. As a final point, it would seem important to engage with the term 'human security' if for no other reason than to ensure that it is not permitted to become another tool to be used by the powerful industrialised world to insulate itself,[203] often selectively, from survival migrants and their realities.

[203] Noll describes three principal approaches to refugees and other movements by industrialised states: insulation, palliation, and intervention. See G. Noll, 'Securitizing sovereignty?', 284.

10

An insecure climate for human security? Climate-induced displacement and international law

JANE MCADAM AND BEN SAUL*

I. Introduction

Around the globe, large numbers of people face a credible risk of displacement – either within their own countries or abroad – due to climate change. Island nations across the Central Pacific, South Pacific and the Indian Ocean, as well as large tracts of land from Bangladesh to Egypt, risk partial or complete submergence by the middle of this century. Shoreline erosion, coastal flooding, increasing salinity and the particular vulnerability of small islands to rising sea levels and increased severe weather events[1] compromise their continued habitability, impacting upon agricultural viability, vital infrastructure and services, the stability of governance, and ultimately human settlement.[2]

Whether, and how, people displaced by climate change are protected by international law is unclear.[3] When faced with a novel challenge such as climate-induced displacement, international law might be brought to bear in different ways. To borrow from Roslyn Higgins (writing in the

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[1] G.C. Hegerl *et al.*, 'Understanding and attributing climate change', in S. Solomon *et al.* (eds.), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007); N. Stern, *The Economics of Climate Change: The Stern Review* (Cambridge: Cambridge University Press, 2007), vi–ix.

[2] N. Mimura *et al.*, 'Small islands', in M.L. Parry *et al.* (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007), 689.

[3] Since this chapter's focus is on protection arising under international law, it does not address separately the rights that might accrue to internally displaced persons due to their citizenship or legal residency.

context of terrorism), whether one regards climate-induced displacement 'as new international law, or as the application of a constantly developing international law to new problems – is at heart a jurisprudential question'.[4]

On the one hand, existing international legal principles might be applied to the situation of those displaced by climate change, regardless of any special characteristics of that affected group. In general, the fundamental protections of international human rights law and international humanitarian law apply to all people, irrespective of whether one is displaced or not (putting to one side certain, more limited, rights such as political participation), and regardless of whether one is internally or externally displaced. There may (or may not) be a compelling policy interest in avoiding the proliferation and fragmentation of legal regimes developed for increasingly specialised sub-groups.

Alternatively, existing legal principles might be elongated, adapted or particularised to respond to new circumstances, such as through creative interpretation (including through extrapolation by analogy). Thus, for example, norms developed to protect refugees have been adapted to address the similar situation (but for the fact of crossing an international border) of some internally displaced persons;[5] while women, children and the disabled are entitled to specialised treaty rights regimes at the same time as they fall within the protection of the general 'human' rights treaties such as the twin international covenants of 1966.[6]

A third strategy is to recognise the deficiency of existing legal norms when faced with a novel and pressing challenge, and to develop new norms in response – a route which is normally more difficult for lack of political will. That approach evidently carries risks, including that any agreement by states will reflect a lowest common denominator approach; or that any new standards will not be matched by the will

[4] R. Higgins, 'The general international law of terrorism' in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (London: Routledge, 1997), 13.

[5] See, Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (11 Feb. 1998).

[6] See respectively Convention on the Elimination of All Forms of Discrimination against Women 1979 (GA res. 34/180, 18 Dec. 1979, 1249 UNTS 13; entered into force 3 Sept. 1981); Convention on the Rights of the Child 1989 (GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990) (CRC); Convention on the Rights of Persons with Disabilities 2006 (GA res. 61/106, 13 Dec. 2006; entered into force 3 May 2008); International Covenant on Civil and Political Rights 1966 (GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976) (ICCPR); International Covenant on Economic, Social and Cultural Rights 1966 (GA res. 2200A (XXI), 16 Dec. 1966, 993 UNTS 3; entered into force 3 Jan. 1976) (ICESCR).

or capacity to implement them (carrying legitimacy costs for the law as a whole, and raising false hopes and expectations among affected groups); or, conversely, that efforts (and resources) favouring those displaced by climate change may dilute or overshadow existing legal standards and organisational mandates providing for the protection of other – perhaps more – vulnerable groups.

The last of these concerns, for instance, has been frequently expressed by the International Committee of the Red Cross in seeking to defend its treaty mandate to protect all civilians affected by armed conflict from any specialised regime which might seem to favour only those civilians who have been internally displaced[7] – some of whom, if they have found safety elsewhere in their country, may well be at less risk than those who remain at home but are caught up in the midst of hostilities. Equally, it is conceivable that those unable to move away from the negative effects of climate change – whether due to poverty, insecurity, disability, infirmity, or other factors – may well be in need of more assistance than those who are more mobile and better able to establish homes and livelihoods elsewhere.[8]

Those displaced by climate change (whether internally or externally) are plainly entitled to enjoy a range of civil, political, economic, social and cultural rights set out in international and regional human rights treaties and customary international law,[9] although the scope and application of particular rights may vary from context to context. Relevant protections stemming from international humanitarian law and accruing indirectly from international environmental law may also apply. For the moment, however, those displaced by climate change are not yet recognised in international law as an identifiable group whose

[7] International Committee of the Red Cross, 'ICRC position on internally displaced persons (IDPs)', May 2006.

[8] As a report prepared for the International Organization for Migration (IOM) correctly observed, 'the ability to migrate is a function of mobility and resources (both financial and social)', thus 'the people most vulnerable to climate change are not necessarily the ones most likely to migrate': O. Brown, *Migration and Climate Change*, IOM Migration Research Series No. 31 (Geneva: International Organization for Migration, 2008), 9.

[9] Since states are obliged to respect their human rights obligations with respect to all people within their territory or jurisdiction: see *Lopez Burgos* v. *Uruguay*, Communication No. R.12/52 (1981); Human Rights Committee, 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (21 Apr. 2004), para. 10; Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93 (18 Aug. 1998) para. 10; Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (21 Aug. 2003) para. 11.

rights are expressly articulated,[10] or as a formal legal category of people in need of special protection.

This chapter first outlines the phenomenon of climate-induced displacement, with a focus on displacement from small island states (particularly in the Pacific), on which the impacts of climate change are well documented and keenly felt[11] (although the challenges manifested there have parallels in vastly different contexts).[12]

This chapter next reviews how existing international law applies to those displaced or at risk of displacement from the effects of climate change. In doing so, it highlights the gaps or limitations in the relevant applicable regimes of international refugee law, human rights law, humanitarian law and environmental law. Attention is given to the prospects for legal protection in three different phases: pre-displacement (as rights are increasingly compromised and degraded); the moment of displacement and the upheaval which accompanies it; and post-displacement (in terms of what rights and legal status attach to displaced persons and what durable solutions are available).

Having identified the limitations of existing international law in responding to the needs of those displaced by climate change, this chapter then focuses on whether the concept of 'human security' could provide a useful framework for identifying and analysing the rights and interests at risk and for crafting responses to those risks. Viewing climate-induced displacement through a human security lens may bring significant strategic advantages, not least in helping to mobilise international action in support of the displaced, in holistically conceptualising the

[10] Cf. women, children, refugees, indigenous peoples, migrant workers, stateless persons.

[11] See, e.g., Mimura *et al.*, 'Small islands'; J. Barnett and W.N. Adger, 'Climate dangers and atoll countries', *Climatic Change*, 61 (2003), 321; N. Myers, 'Environmental refugees in a globally warmed world', *BioScience*, 43 (1993), 752. Nevertheless, further observational data is still needed, since many of the projections are based on the IPCC's first two studies based on simplistic scenarios (Mimura *et al.*, 'Small islands', 711), and understandings of adaptive capacity and adaptation options remain relatively underdeveloped: Mimura *et al.*, 'Small islands', 712.

[12] See, e.g., Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States (7 Dec. 2005), available at www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (last accessed 25 Oct. 2008); A.J. Dugmore, C. Keller and T.H. McGovern, 'Have we been here before? Climate change, and the contrasting fates of human settlements in the Atlantic Islands', Human Security and Climate Change, International Workshop, Asker, 21–23 Jun. 2005; M. Mortimore, *Adapting to Drought: Farmers, Famines and Desertification in West Africa* (Cambridge: Cambridge University Press, 1989).

needs of the displaced, and in supplying flexible political solutions which can respond to immediate needs and provide much-needed domestic legitimation for the reception of an exceptional category of foreigners who fall outside the contours of regular migration programmes. Such an approach may also supplement the relatively weak implementation, enforcement and institutionalisation of human rights norms in various contexts, and thus complement and reinforce existing legal protections.

On the other hand, a 'human security' approach may also counter-productively overshadow and undermine binding legal protections (particularly human rights) in practice, by substituting human rights standards and approaches for the discretionary, political 'human security' agenda. The form and content of a human security approach in a given situation is shaped by the political choices of powerful states and driven by the preferences and priorities of donors and international agencies – an agenda which is accordingly negotiable, highly variable and likely to generate gaps in protection. In an area that engages highly controversial questions of migration and border control for receiving states, pursuing a human security approach to climate induced-displacement is inevitably open to the usual risks of manipulation in the service of national immigration priorities and parochial domestic political confrontations about the admission of foreigners.[13]

II. The risk of climate-induced displacement

Almost twenty years ago, the UN's Inter-governmental Panel on Climate Change (IPCC) warned that the gravest effects of climate change would likely be on human migration, with millions of people uprooted by shoreline erosion, coastal flooding and agricultural disruption.[14] The impacts of climate change on habitat are being felt in different ways around the world. Rising sea levels are threatening the very existence of small island states, while Inuit communities in North America and Greenland fear displacement due to melting ice. Shoreline erosion, coastal flooding, increasing salinity, increased severe weather events,

[13] Japan has been criticised for using a 'human security' approach as a means of diluting its formal human rights treaty obligations: see B. Edstroem, 'Japan's foreign policy and human security', *Japan Forum*, 15 (2003), 209, 221; M. Fujioka, 'Japan's human rights policy at domestic and international levels: disconnecting human rights from human security', *Japan Forum*, 15 (2003), 287.

[14] Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (New York, NY: Cambridge University Press, 1990).

water scarcity, increasing temperatures and glacial melting compromise the continued habitability of different environments worldwide, impacting upon agricultural viability, infrastructure and services, the stability of governance and, ultimately, human settlement.

Yet despite renewed concerns this century, underscored by increasingly compelling scientific data,[15] climate-induced displacement has remained relatively unstudied by international lawyers. Existing academic literature on environmental displacement has tended to approach the issue from a scientific, political or sociological perspective,[16] but there has been little rigorous legal analysis of the issue. The few relevant legal articles that have addressed the issue have typically done so through a narrow refugee law lens, focusing on environmental displacement generally rather than climate-induced displacement in particular. Environmental displacement encompasses a much wider field, potentially covering all human movement related to changes in the natural environment which affect habitation, including localised ecological changes, unsustainable farming practices, corruption and mismanagement, political choices and so on, but which are not driven by global warming. The causes, effects, scale and solutions are different, although there may be an overlap in the applicable legal regimes (including soft law norms governing internal displacement). Furthermore, existing scholarship has generally sought to squeeze the notion of climate-induced displacement into the framework of the 1951 Convention relating to the Status of Refugees, as amended by its 1967 Protocol (1951 Refugee Convention),[17]

[15] Hegerl *et al.*, 'Understanding and attributing climate change'; Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report. Summary for Policymakers* (2007); Stern, *The Economics of Climate Change*.

[16] Myers, 'Environmental refugees in a globally warmed world'; N. Myers, 'Environmentally-induced displacements: the state of the art', in *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration* (IOM/UNHCR International Symposium, Geneva, 21–24 Apr. 1996); N. Myers, 'Environmental Refugees: An Emergent Security Issue' (13th Economic Forum, Prague, 23–27 May 2005); R. Black, 'Environmental refugees: myth or reality?' (2001) UNHCR *New Issues in Refugee Research*, Working Paper 34; S. Castles, 'Environmental change and forced migration: making sense of the debate' (2002) UNHCR *New Issues in Refugee Research*, Working Paper 70.

[17] 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954, read in conjunction with the Protocol relating to the Status of Refugees 1967 (GA res. 2198 (XXI), 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967). See, e.g., J.B. Cooper, 'Environmental refugees: meeting the requirements of the refugee definition', *New York University Environmental Law Journal*, 6 (1998), 480; D. Keane, 'The environmental causes and consequences of migration: a search for the meaning of "environmental refugees"', *Georgetown International Environmental Law Review*, 16 (2004), 209; C.M. Kozoll, 'Poisoning the well: persecution, the environment, and refugee status', *Colorado Journal of International Environmental Law and Policy*, 15 (2004), 271.

rather than re-thinking – or, importantly, theorising – the wider international legal frameworks through which it might be considered and addressed.

The absence of legal scholarship on climate-induced displacement is partly a symptom of the inherent difficulties in conceptualising the nature of the inquiry. For example, is climate-induced displacement properly conceived of as a refugee issue, a human rights issue, an environmental issue, a security issue, a migration issue or a humanitarian issue (the last two of which are not governed by hard law norms, and thus leave the problem to the political discretion of individual governments and responses outside the law)? Since 1985, the term 'environmental refugees' has been floating about,[18] but the choice of the term 'refugee' is highly controversial.[19] Although it provides a useful descriptor of displacement, it does not accurately reflect in legal terms the status of those who move.[20] Politically and legally, it is provocative, but it also reflects the law's inadequate response to dealing with displacement of this kind.

The analysis in this chapter proceeds on two premises: first, that climate change is real and caused primarily by humans.[21] The second premise is that the effects of climate change are likely to induce some level of human displacement in various parts of the world,[22] and, as the

[18] See, e.g., N. Myers and J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); E. El-Hinnawi, *Environmental Refugees* (UN Environment Programme, 1985); A. Suhrke and A. Visentin, 'The environmental refugee: a new approach', *Ecodecision* (1991), 73.

[19] Interestingly, the Australian Labor Party has used the term 'climate change refugees', implying a sense of legal recognition and obligation: *Our Drowning Neighbours: Labor's Policy Discussion Paper on Climate Change in the Pacific* (ALP, 2006).

[20] See, e.g., Keane, 'The environmental causes and consequences of migration'.

[21] In 2007, the Intergovernmental Panel on Climate Change observed that: '[m]ost of the observed increase in globally averaged temperatures since the mid-twentieth century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations', which has '*very likely* … contributed to a rise in mean sea level'. It is now more than 95% certain that global warming over the past 50 years is only explicable because of human activities. See, respectively, Intergovernmental Panel on Climate Change, 'Summary for Policymakers', in Solomon *et al.* (eds.), *Climate Change 2007: The Physical Science Basis* 10; Hegerl *et al.*, 'Understanding and attributing climate change', 729.

[22] R.V. Cruz *et al.*, 'Asia', in Parry *et al.* (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability*, 484, 488; W.N. Adger *et al.*, 'Assessment of adaptation practices, options, constraints and capacity' in Parry *et al.* (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability*, 733–4; R.J. Nicholls and R.S.J. Tol, 'Impacts and responses to sea-level rise: a global analysis of the SRES scenarios over the twenty-first century', *Philosophical Transactions of the Royal Society*, 364 (2006), 1073. See also a report written by EU foreign policy chief, Javier Solana, and European Commissioner for External Relations, Benita

IPCC has noted, 'migration is the only option in response to sea-level rise that inundates islands and coastal settlements'.[23]

The question of how many people are likely to be displaced by climate change has been extensively debated in the literature.[24] Estimates typically range from 50 to 250 million people by 2050, although there is a real need for further rigorous empirical research on this front.[25] Exact numbers remain controversial, partly because scientists cannot predict with precision how quickly sea levels will rise, but also because the calculation of numbers depends upon how the scope of the phenomenon is defined.[26]

This chapter therefore puts to one side contestation about the quantification of numbers, not least because their calculation depends

Ferrero-Waldner, urging EU member states to take urgent action against climate change 'threats', including increased migration: J. Solano, 'Before the flood', *The Guardian*, 10 Mar. 2008, available at http://commentisfree.guardian.co.uk/javier_solana/2008/03/before_the_ flood.html (last accessed 25 Oct. 2008); I. Traynor, 'EU told to prepare for flood of climate change migrants', *The Guardian*, 10 Mar. 2008, available at www.guardian.co.uk/environment/2008/mar/10/climatechange.eu (last accessed 25 Oct. 2008).

[23] Cruz *et al.*, 'Asia', 492. It has been argued that although adaptation to five metres of sea-level rise is technically possible, a lack of resources mean that realistically this is outside the scope of adaptation for many vulnerable States: R.S.J. Tol *et al.*, 'Adaptation to five metres of sea level rise', *Journal of Risk Research*, 9 (2006), 467.

[24] See Myers, 'Environmental refugees in a globally warmed world'; Intergovernmental Panel on Climate Change, *Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001). In 2005, Myers revised his estimate, suggesting that it could be up to 200 million: Myers, 'Environmental refugees: an emergent security issue'. Sir Nicholas Stern described this as a 'conservative' assumption: Stern, *The Economics of Climate Change*, 77. Myers has more recently revised this figure as closer to 250 million: interview with Christian Aid (14 Mar. 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (London: Christian Aid, 2007), 50 endnote 10. Christian Aid adopted this figure in its own estimates: 6. Cf Black, 'Environmental refugees: myth or reality?'; Castles, 'Environmental change and forced migration'. See, also, discussion in R. McLeman, 'Climate change migration, refugee protection and adaptive capacity-building', *McGill International Journal of Sustainable Development Law and Policy*, 4 (2008) 1–18; S. Byravan and S. Chella Rajan, 'Providing new homes for climate change exiles', *Climate Policy*, 6 (2006), 247.

[25] An EU-commissioned study of twenty-three vulnerable states addresses some of this, see www.each-for.eu.

[26] See text to notes 17–19 above. For example, are people forced to relocate after a cyclone (which may have been the partial result of changed weather patterns due to climate change) to be regarded as victims of a natural disaster (and therefore responded to through 'disaster' emergency response mechanisms, aid and assistance), or as forced migrants (and thus subsumed within the discourse and responses of 'forced migration')? A related numerical issue is whether the notion of 'displacement' encompasses loss of habitat alone, or extends to loss of livelihood (resulting, for example, from salt-encrusted agricultural plots or disappearing plant and animal species).

on different methods of projecting displacement; scientific uncertainty about precisely where and how the effects of climate change will manifest; unknowable human variables such as strategies to mitigate, adapt to, and cope with the effects of climate change in particular localities; and the classificatory issue of how to characterise those who move (as economic migrants, migrant workers, *de facto* refugees, or as some hybrid).[27] Just as the number of refugees in any given year has little bearing on the legal rights and entitlements of any particular refugee, so too should the legal treatment of those displaced by climate change not be dependent on the number of displaced persons at any given time.

As a legal study, this chapter focuses on the risks, processes and consequences of movement for those displaced, and the ensuing doctrinal analysis is not contingent on precise statistical figures. In practice, numbers may affect the capacity and willingness of states to uphold the legal rights of the displaced – one need only think of the millions of refugees languishing in refugee camps in protracted refugee situations, in contrast to the relatively few resettled permanently in third countries.[28]

Pragmatically, the prospect of a very large number of people displaced by climate change would certainly affect judgments by developed states about their own willingness to absorb the displaced into their own communities, and about the quality of protection such states are willing to offer, as well as the resources they are prepared to devote to the problem. Legal regimes must, of course, be realistic if they are to carry the support of the states that must implement them. But the legitimacy of legal regimes hinges not only upon the political limits imposed by states, but also on the quality (and humaneness) of treatment of those displaced; and the challenge for states will be to ensure that protection of

[27] These questions form part of McAdam's larger project on 'Weathering uncertainty: climate change "refugees" and international law', at www.gtcentre.unsw.edu.au/projects_partners/projects/irml/index.asp.

[28] Nevertheless, while international refugee law has developed techniques for dealing with mass influx situations, the underlying normative legal framework of protection remains the same irrespective of numbers. See, e.g., J.-F. Durieux and J. McAdam, '*Non-refoulement* through time: the case for a derogation clause to the Refugee Convention in mass influx emergencies', *International Journal of Refugee Law*, 16 (2004), 4.

displaced persons is not regressively degraded in proportion to increases in the number of displaced persons.

Ultimately, numbers may also influence the international, regional and national allocation of institutional responsibilities for climate-induced displacement – for instance, a larger number evidently requires more institutional resources, capacity and experience; it may demand more definitive or precise legal mandates; and it would likely necessitate more attention to coordination between institutions, governments and other relevant actors.

Certainly, there are credible signs that climate-related displacement is likely in particular localities.[29] For example, Bangladesh is exposed to considerable land submersion due to a lack of resources and technology to prevent it,[30] with 17 million people currently living less than one metre above sea level. For Kiribati and Tuvalu, whole-nation displacement may result, largely due to rising sea levels and fresh water contamination.[31] With this comes possible extinction of the legal personality of the state which hinges upon the existence of that territorial space and its habitability.

Although small island states emit less than 1 per cent of global greenhouse gases, their small physical size, exposure to natural disasters and climate extremes, very open economies and low adaptive capacity make them particularly susceptible, and less resilient, to climate change.[32] The IPCC suggests that the overall vulnerability of small island states stems from four inter-related factors: (a) the degree of exposure to climate change; (b) a limited capacity to adapt to projected impacts; (c) the fact that adaptation is not a high priority, in light of other pressing

[29] Intergovernmental Panel on Climate Change, 'Summary for policymakers', in Parry *et al.* (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability*, 14–15.

[30] S. Butzengeiger and B. Horstmann, 'Sea-level rise in Bangladesh and the Netherlands: one phenomenon, many consequences' Germanwatch, 2004; World Bank, *Bangladesh: Climate Change and Sustainable Development* (Report No. 21104 BD, 10 Oct. 2000), ch. 2; Cruz and others, 'Asia', 481, 484.

[31] Mimura *et al.*, 'Small islands'.

[32] *Ibid.*, 692–3. The report additionally lists the impacts of globalisation, pressures on infrastructure, a scarcity of fresh water and, in the Pacific, internal and external political and economic processes, including the imposition of Western adaptation models which are not readily transposable to the island context. These features have resulted in some small island states being recognised by the UN as Least Developed Countries.

problems;[33] and (d) uncertainty surrounding global climate change projections and their local validity.[34]

While climate change is not the sole contributing factor to island states' vulnerability,[35] a combination of poor socio-economic conditions (including high debt levels, failing economies, a malfunctioning of the rule of law, poor governance, corruption and transnational organised crime); natural resource and space limitations (including population growth, ecosystem degradation and competition for limited resources); and the impact of natural hazards such as tsunamis and storms, makes it difficult for such states to adapt to climate change.[36] For example, the cost of infrastructure and settlement protection is a significant proportion of their GDP, which most small island states cannot afford.[37] Thus, whereas another state without those additional pressures might be able to adapt to changes caused by climatic shifts, small island states are less able to mitigate or adapt to those variations and their impact is therefore disproportionately marked.[38] Ironically, the migration of skilled workers may further deplete human resources[39] (although they may make

[33] As Brown notes, of the fourteen National Adaptation Programmes of Action (an initiative supported by the United Nations Framework Convention on Climate Change, which aims to assist Least Developed Countries to rank their priorities for adaptation to climate change) that had been submitted by 10 March 2007, not one referred to migration or relocation as a possible policy response: Brown, 'Migration and climate change', 38. The fourteen states were: Bangladesh, Bhutan, Burundi, Cambodia, Comoros, Djibouti, Haiti, Kiribati, Madagascar, Malawi, Mauritania, Niger, Samoa and Senegal: see http://unfccc.int/national_reports/napa/items/2719.php.

[34] Mimura *et al.*, 'Small islands', 703, citing L. Nurse *et al.*, 'Small island states' in J.J. McCarthy *et al.* (eds.), *Climate Change 2001: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001), e.g., 17.1.2.

[35] Mimura *et al.*, 'Small islands', 690, 691. On whether the environment can ever be a sole cause of migration, see Black, 'Environmental refugees: myth or reality?'; Castles, 'Environmental change and forced migration'; J. Barnett, 'Security and climate change', *Global Environmental Change* (2003), 7, 11.

[36] See, J. Connell, 'Environmental change, economic development, and emigration in Tuvalu', *Pacific Studies*, 22 (1999), 1; J. Connell, 'Losing ground? Tuvalu, the greenhouse effect and the garbage can', 44 (2003) *Asia Pacific Viewpoint*, 89, cited in Mimura *et al.*, 'Small islands', 692, 711. There is also evidence that 'islands which have been subject to substantial human modification are inherently more vulnerable than those that have not been modified': 698.

[37] Mimura *et al.*, 'Small islands', 694; see, also, Stern, *The Economics of Climate Change*; C. Voigt-Graf, 'Fijian teachers on the move: causes, implications and policies' 44 (2003), *Asia Pacific Viewpoint*, 163; T.N. Rasmussen, 'Macroeconomic implications of natural disasters in the Caribbean', IMF Working Paper, WP/04/224 (Dec. 2004).

[38] See, e.g., in Brown, 'Migration and climate change', 18–19. Whereas the Netherlands can afford to raise the height of dykes or build new ones, Bangladesh lacks a similar capacity.

[39] Voigt-Graf, 'Fijian teachers on the move'.

a significant economic contribution through remittances, thereby increasing family resilience for those who remain).[40]

By now it is evident that the potential causes of displacement are very complex and interdependent, and make legal attribution of climate 'harm'[41] – and therefore responsibility – very difficult to establish. While climate change may only be one of a number of factors, it may be the one that 'breaks the camel's back'. This chapter does not deal in depth with the factual question whether movement is ever solely a product of climate change, or arises (as is most likely) from a combination of pressures resulting from the impacts of climate change on the environment, livelihoods, and communities, and the ways in which particular communities respond to those pressures – from effectively coping, to escalating into conflict over increasingly scarce land or water resources. It is assumed here that climate-*induced* – or, more accurately, climate-*related* – displacement will ordinarily be a product of a complex range of inter-related environmental processes and variable human responses.

As a contributing factor to displacement, the effects of climate change nonetheless warrant legal analysis. The two brief case studies below – the Inuit in the Arctic, and the Carteret Islanders in Papua New Guinea – illustrate how the effects of climate change on small communities in particular places disrupt their livelihoods and render them vulnerable to displacement. They also indicate how the effects of climate change are context-specific and cannot be generalised across all affected societies.

A. Inuit

In March 2007, the Inuit of the Arctic regions of the United States and Canada sought a declaration from the Inter-American Commission on Human Rights that the United States was responsible for irreparable changes to their environment.[42] They argued that the impacts of global

[40] M. Pelling and J.I. Uitto, 'Small island developing states: natural disaster vulnerability', 3 (2001), *Environmental Hazards*, 49. See, also, chs. 7 and 9 by P. Oberoi and E. Lester in this book, respectively.

[41] Some suggest that the 'coral reef crisis' is 'almost certainly the result of complex and synergistic interactions among global-scale climatic stresses and local-scale, human-imposed stresses (Buddemeier *et al.*, 2004)': Mimura *et al.*, 'Small islands', 699.

[42] Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States.

warming and climate change, caused by acts and omissions of the United States, violated their fundamental human rights, including their rights to the benefits of culture; to property; to the preservation of health, life, physical integrity, security and a means of subsistence; and to residence, movement and inviolability of the home.

Like many indigenous peoples, the Inuit have an intimate relationship with the land. Their culture, economy and identity depend upon the ice and snow. In a 200-page petition, representatives for the Inuit Circumpolar Conference outlined how animals on which the Inuit rely are disappearing, damaging their subsistence harvest and health; thawing permafrost is causing landslides and complicating food storage; and travel is increasingly dangerous and difficult due to unpredictable weather, with the warmer climate making traditional knowledge about the safety of sea ice unreliable, and more people drowning each year.

B. Carteret Islands

At the other end of the globe, inhabitants of Papua New Guinea's Carteret Islands are preparing to leave for mainland Bougainville, with rising sea levels making their traditional homeland uninhabitable.[43] Not only are the islands expected to be submerged by 2015, but the islanders' traditional livelihoods are also being destroyed due to salt water contamination, severe storms and the destruction of ecosystems on which they depend. The islands are only 1.5 metres above sea level, and at high tide areas that were once fertile agricultural plots are submerged by the sea. This incursion of salt water 30 to 40 metres inland, which began in the late 1970s, has made the islanders' traditional livelihoods and food sources impossible, with traditional crops of bananas and sweet potato no longer able to grow. The constant wet ground has also led to an increase in mosquitoes, which has led in turn to an increase in malaria.

The islanders' diet is limited now to fish, coconut and seaweed, supplemented by rice delivered from the mainland once every six

[43] See, e.g., J. Stewart, 'Rising seas force Carteret Islanders out of home', *Lateline*, ABC television (5 Feb. 2007). Transcript available at www.abc.net.au/lateline/content/2006/s1840956.htm (last accessed 25 Oct. 2008). Though described as 'among the world's first environmental refugees', they are more accurately characterised as internally displaced people, since their movement does not require the crossing of an international border. On 'refugee' terminology in this context, see below; K. Romer, '"Environmental" refugees?', *Forced Migration Review*, 25 (2006), 61. Much of the information here on the Carteret Islands comes from a talk given by islander Ursula Rakova (Brown Street Community Hall, Newtown, Sydney, 14 Sept. 2007).

months. These changes to diet have led to increased rates of diabetes and diarrhoea. The people of the Carteret Islands see their relocation to Bougainville as the only viable option, despite the fact that it means uprooting cultural, family and traditional ties, leaving an ancestral home, and raising considerable funds to privately purchase land to which to move. Some of the islanders have indicated that they would rather drown than move at all.

But are the Carteret Islanders, or the Inuit people, 'refugees', or simply victims of environmental catastrophe, and is this relevant to international responses? Do states have international legal obligations to 'protect' people displaced by climate change? Should flight from habitat destruction be viewed as another facet of traditional international protection, or as a new challenge requiring new solutions?

The answers to these questions are not straightforward, and depend upon a principled analysis of the obligations states have voluntarily accepted under an array of different treaties and practices.

III. Legal gaps

A. *International refugee law*

Whereas traditional refugee movement is typically sudden,[44] movement induced by climate change generally takes place over a long period of time as land becomes increasingly unsustainable. Even where displacement is inevitable, it occurs as part of a *process*, which means that the pressures relating to viable land may become part of the need for relocation.

Yet, people forced to move as a result of climate change do not fit the international legal definition of 'refugee', which applies to individuals already outside their country of origin who have a well-founded fear of persecution *because of* their race, religion, nationality, political opinion or membership of a particular social group.[45] As a result, the rights, entitlements and protection options for people displaced by climate change (and whose governments are unable or unwilling to protect them) are uncertain in international law, and there is no international agency or institutional focal point, such as the United Nations High Commissioner for Refugees (UNHCR), with a specific mandate to assist them.

[44] Durieux and McAdam, '*Non-refoulement* through time'.
[45] Art. 1A(2), 1951 Refugee Convention, read in conjunction with the 1967 Protocol.

There are a number of definitional obstacles in applying the threshold of the 1951 Refugee Convention to people displaced by climate change. First, the requirement of exile poses an instant problem for those who have not yet moved but are facing habitat destruction, or who have moved but have not crossed an international border. Many of those displaced by climate change will be 'internally displaced persons' (IDPs), the subject of soft law principles rather than binding treaty obligations. It is important to note that the Guiding Principles on Internal Displacement[46] expressly encompass people who have fled their homes due to natural or human-made disasters.

While the UNHCR has agreed to serve as the lead agency responsible for protection issues relating to IDPs, in partnership with other relevant agencies acting under the UN's 'cluster approach', it deals only with IDPs forced to move as a result of conflict.[47] There is thus an obvious institutional gap, additional to the normative gaps in the legal framework for those externally displaced by climate change. Ironically, if the effects of climate change on vulnerable states are not addressed, there is a danger that scarcity of resources and increasing food insecurity may lead to conflict, as has been suggested occurred in Darfur.[48] It would be the ultimate irony if UNHCR's mandate were triggered due to inaction, as a non-violent situation escalated to one of conflict.

A second obstacle to locating environmental displacement within the framework of international refugee law is characterising 'climate change' as *persecution*. Rising sea-levels, salination and increasingly frequent storms, earthquakes and floods may be harmful, but they do not constitute 'persecution' in accordance with the meaning it has been ascribed in international and domestic law.[49] Even if it were possible to establish legal causation in this way, the 1951 Refugee Convention poses an

[46] Guiding Principles on International Displacement.

[47] UNHCR Executive Committee, 'Policy Framework and Implementation Strategy: UNHCR's role in support of an enhanced inter-agency response to the protection of internally displaced persons', 4 Jun. 2007, UN Doc. EC/58/SC/CRP.18, para. 8.

[48] Ban Ki Moon, 'A climate culprit in Darfur' (16 Jun. 2007) at www.washingtonpost.com A15. Others dispute the link between climate change and conflict as 'more theoretically than empirically driven, and motivated by Northern theoretical and strategic interests rather than informed by solid empirical research': Barnett, 'Security and climate change', 9–10, referring also to J. Barnett, 'Destabilising the environment-conflict thesis', *Review of International Studies*, 26 (2000), 271; N. Gleditsch, 'Armed conflict and the environment: a critique of the literature', *Journal of Peace Research*, 35 (1998), 381.

[49] G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (Oxford: Oxford University Press, 2007), 90–134. Note, however, that Sweden has chosen to include a category of 'persons otherwise in need of protection' in its Aliens Act (which

additional hurdle for those displaced by climate change: namely, that persecution is *on account of* the individual's race, religion, nationality, political opinion or membership of a particular social group. Movement precipitated by climate change is inevitably indiscriminate, and an argument that such people might together constitute a 'particular social group' would be difficult to establish, for the reason that people must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.[50]

In the African context, where the regional OAU Convention contains a broader refugee definition than the 1951 Refugee Convention,[51] Edwards has queried whether seeking refuge on account of 'events seriously disturbing the public order' could encompass environmental catastrophes such as famine and drought.[52] While arguing that such an interpretation is theoretically possible, she notes that it is not supported by the *opinio juris* of African states. Although regional practice has been to permit people who cross an international border to flee a natural disaster to remain temporarily (e.g. Congolese fleeing eruption of Mount Nyiragongo in 2002 and fleeing to Rwanda), African

entered into force 31 Mar. 2006), encompassing, *inter alia*, people who are 'unable to return to the country of origin because of an environmental disaster': Swedish Aliens Act, ch. 4, s. 2(3). It is unclear if this would extend to people displaced by climate change, or whether it is intended only to cover people fleeing environmental disasters such as Chernobyl: see Brown, 'Migration and climate change', 39, referring to personal communication with Helené Lackenbauer (International Federation of Red Cross and Red Crescent Societies), who stated that parliamentary discussions of this category prior to the passing of the legislation referred to nuclear disasters.

[50] Goodwin-Gill and McAdam, *The Refugee in International Law*, 79–80. Note, however, Foster's remark that: 'it is clear that the poor can properly be considered a PSG, such that if being poor makes one vulnerable to persecutory types of harm, whether socio-economic or not, then a refugee claim may be established': M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007), 310 (note omitted). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing 'persecution' in the context of climate-induced displacement. Interestingly, the Marshall Islands and Kiribati have both eschewed the refugee label, fearing that it might lead to scattered, individual and uncoordinated resettlement breaking down cultural integrity, heritage and – fundamentally – the sense of a state and people: see discussion in Barnett, 'Security and climate change', 12–13, citing G. Fraser, 'Sea-level rise, hurricanes, it is no paradise on small islands', *The Earth Times*, 15 Nov. 2000; F. Pearce, 'Turning back the tide', *New Scientist*, 165 (2000), 44, 47; J.M. Adam and M. Loughry, 'We aren't refugees', *Inside Story*, 29 June 2009, available at http://inside.org.au/we-aren't-refugees/.

[51] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (10 Sept. 1969, 1001 UNTS 45; entered into force 20 Jun. 1974).

[52] A. Edwards, 'Refugee status determination in Africa', *African Journal of International and Comparative Law*, 14 (2006), 204, 225–27.

governments have never characterised this as an obligation arising under the OAU Convention.[53] At most, the practice can be seen as 'contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty'.[54] Whether there is yet sufficient *opinio juris* to support the development of this rule as regional custom, as opposed to a gesture of humanitarian goodwill, remains uncertain and is beyond the scope of the present chapter. It remains clear, however, that refugee law and climate-induced displacement is not an easy fit, whether in the international or regional context.

It is therefore more useful to ask how certain protective principles, such as the principle that no-one should be sent back to persecution or other forms of serious harm (*non-refoulement*) – and, importantly, how the status envisaged for refugees – might apply in the climate change context, rather than questioning how a person displaced by climate change might seek to characterise him/herself as a refugee under the 1951 Refugee Convention. This is where human rights law may assist.

B. *Human rights law*

International human rights law is of particular importance to climate-induced displacement for three reasons. First, it sets out minimum standards of treatment that states must afford to individuals within their territory or jurisdiction, and provides a means of assessing which rights are compromised by climate change and which national authorities have primary responsibility for responding to those rights at risk and for remedying past violations. Secondly, if those rights are at risk, human rights law may provide a legal basis on which protection may be sought (and granted) in another state (known as 'complementary protection').[55] Thirdly, if relocation occurs, human rights law requires minimum standards of treatment to be observed in the host state, and is thus relevant to the legal status afforded to those displaced.[56]

[53] Edwards, 'Refugee status determination in Africa', 227.

[54] *Ibid.* UNHCR similarly made clear that its assistance activities for people displaced by the Boxing Day tsunami did not fall within its formal protection mandate, but rather constituted 'time-limited humanitarian assistance' requested specially by the UN Secretary-General: UNHCR, 'Note on International Protection' UN Doc. A/AC.96/1008 (4 Jul. 2005, para. 36, cited in Edwards, 'Refugee status determination in Africa', 227.

[55] J. McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

[56] *Ibid.*, ch. 6.

1. Human rights law: standards of treatment

On the first issue, the effects of climate change potentially impinge upon enjoyment of the full range of internationally protected human rights. In the extreme case of the extinction of island states and the permanent displacement of their inhabitants, the fundamental right of a people to self-determination is threatened,[57] since the breakage of the link between the people and their land makes it difficult to sustain a continuing self-determination claim, unless a special regime of 'people in exile' were to be endorsed – and one can hardly imagine, for instance, Australia allowing the people of Tuvalu to subsist as an autonomous political entity within the territory of Australia, should Tuvaluans be relocated there. By extension, the right to have a nationality and not to become stateless is also affected if the state from which that nationality flows disappears.[58]

If the territory of a state becomes uninhabitable or disappears altogether due to rising seas, do its (former) inhabitants become stateless as a matter of international law? Despite literal, physical statelessness being the factual outcome, the two international statelessness treaties do not anticipate this eventuality and therefore people affected in this way are not protected by the international statelessness regime.[59] The legal definition of 'statelessness' is premised on the denial of nationality through the operation of the law of a particular state, rather than through the disappearance of a state altogether.[60] It deliberately embodies a very narrow and legalistic understanding of statelessness, and does not even extend to the situation of *de facto* statelessness, namely where a person formally has a nationality, but which is ineffective in practice. Thus, the instruments' tight juridical focus leaves little scope for arguing for a broader interpretation that would encompass people whose state disappears (unless, of course, the state formally withdrew nationality and through that act brought them within the legal concept of statelessness).

[57] See, Art. 1(1), ICCPR; Art. 1(1), ICESCR.

[58] See, Art. 15, Universal Declaration of Human Rights (GA res. 217A (XII), 10 Dec. 1948) (UDHR); Arts. 7 and 8, CRC; Art. 24(3), ICCPR; Art. 20, American Convention on Human Rights (22 Nov. 1969, 1144 UNTS 23; entered into force 18 Jul. 1978); Convention on the Reduction of Statelessness (30 Aug. 1961, 989 UNTS 175; entered into force 13 Dec. 1975).

[59] Convention relating to the Status of Stateless Persons (28 Sept. 1954, 360 UNTS 1171; entered into force 6 Jun. 1960); Convention on the Reduction of Statelessness.

[60] Art. 1(1), Convention relating to the Status of Stateless Persons: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.'

Rights of political participation and voting and political freedoms (expression, association and assembly)[61] also suffer if island states disappear, or if their stability is so affected by climate change that their political institutions and structures disintegrate, rendering them unable to positively provide for and protect rights. Similar concerns arise in relation to the ability of affected states to fulfil their obligations to provide for social, economic and cultural rights, from housing to health care to education.

So far as the right to life is concerned,[62] the Inter-American Commission on Human Rights has recognised that realisation of that right is necessarily linked to and dependent on the physical environment.[63] In serious cases, the cumulative effects of climate change on livelihoods, national economies and the stability of government structures may render vulnerable states unable to fulfil their positive obligations to protect life in some areas. Likewise, every person has the right to an adequate standard of living under human rights law, including adequate food, clothing, housing and the continuous improvement of living conditions,[64] and the right not to be deprived of means of subsistence.[65] These can all be seen as necessary components of the right to life, which are compromised where global warming leads to the destruction of people's ability to hunt, fish, gather or undertake subsistence farming.

People also have the right to enjoyment of the highest attainable standard of physical and mental health,[66] which may be compromised due to the effects of climate change on human health. The IPCC, for example, has projected that climate change-related exposures are likely to affect the health of millions of people, especially in states with low adaptive capacity, through increased instances of malaria; diarrhoea-related disease; cardio-respiratory diseases; malnutrition; and increased deaths, disease, and injury due to heat waves, floods, storms, fires and droughts.[67]

[61] Arts. 19, 21, 22 and 25, ICCPR.
[62] Art. 6, ICCPR.
[63] *Report on the Human Rights Situation in Ecuador,* OAS Doc. OEA/Ser.L/V/II.96, ch 8; *Yanomami case* (case 7615 of 5 Mar. 1985), cited in annual report of the Inter-American Commission on Human Rights, 1984–85, OAS Doc. OEA/Ser.L/V/II.66, Doc. 10 rev.1.
[64] Art. 11, ICESCR.
[65] Art. 1(2), ICCPR; Art. 1(2), ICESCR.
[66] Art. 12, ICESCR.
[67] Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in Parry *et al.* (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability*, 7.

Ethnic, religious, linguistic or indigenous[68] minorities must also be allowed to enjoy their own culture, practise their own religion and use their own language,[69] all of which may be jeopardised by climate-induced displacement and the severing of those minorities from the roots of their practices. In particular, the Inter-American Commission on Human Rights has acknowledged that 'the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities'.[70] It has been argued that interference with these rights may lead to forced assimilation, which the right to culture is intended to prevent.[71]

More specifically, under the 2007 United Nations Declaration on the Rights of Indigenous Peoples, it is recognised (though not in legally binding terms) that indigenous peoples have the right to maintain their distinctive and spiritual relationship with traditional lands and waters,[72] enjoy legal rights in land,[73] and have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.[74] Further, indigenous peoples have the right to redress 'for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been … damaged without their free, prior and informed consent'.[75] To the extent that forced displacement arises from 'damage' caused by climate change to indigenous lands, there may be a right to redress in 'the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'.[76]

These are just some examples of the ways in which climate-induced displacement may *prima facie* engage concerns about the protection of human rights, and the analysis can arguably be extended in relation to many other rights. Here it is not suggested that the process of climate

[68] Art. 30, CRC.
[69] Art. 27, ICCPR.
[70] *Maya, Indigenous Communities of the Toledo District (Belize Maya)* Case 12.053, Inter-American Commission on Human Rights (2004), para. 120.
[71] See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* 76, OAS Doc. OEA/Ser.L/V/II.62, Doc. 10, rev. 3 (1983), para. II.B.15.
[72] Art. 25, Declaration on the Rights of Indigenous Peoples (GA res. A/RES/61/295, 13 Sept. 2007).
[73] *Ibid.*, Art. 26.
[74] *Ibid.*, Art. 29.
[75] *Ibid.*, Art. 28(1).
[76] *Ibid.*, Art. 28(2).

change itself is somehow responsible for rights violations; rather, the emphasis is on the effects of climate change in rendering states weak and unable to fulfil their obligations to protect and ensure rights; and on the adverse effects of climate change on the ability of individuals and groups to exercise their rights and seek legal protection and enforcement of them.

There is a separate question whether, for instance, major carbon-emitting states could be held responsible for violating the rights of those who live in areas susceptible to climate-induced displacement, and here international law is unlikely to be of assistance. One problem is that, under human rights law, states generally only have obligations to people already within their territory or jurisdiction (where the state is acting extraterritorially). Thus the United States or China might be considered responsible for their own carbon emissions which breach the human rights of persons within their territory or jurisdiction, but it is far more difficult to characterise carbon impacts on distant populations as violations of their human rights duties.[77]

At a stretch, the notion of being within a state's jurisdiction might be extended to encompass the impacts of a state's conduct wherever it is felt, but that takes the scope of human rights obligations well beyond the accepted jurisprudence which requires that the state exercise 'effective control' in order to be held responsible.[78] If states are not responsible for the human rights impacts of aerial bombardment in a war zone because such activity does not constitute effective control over the victims of the bombing on the ground,[79] then it would seem very difficult indeed to claim that, by permitting the emission of carbon in a factory in Guangdong, China is somehow exercising jurisdiction (that is, effective control) over distant Pacific islanders who suffer the effects of those emissions as carbon particles drift around the world. Much depends on the conceptualisation of 'control' for jurisdictional purposes; the notion may well vary depending on the particular human right at stake. In any event, the background problem of causation remains a pragmatic obstacle.

[77] On the question of causation and state responsibility, see R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden/Boston, MA: Martinus Nijhoff, 2005), ch. 5.

[78] See inconsistencies with respect to the precise meaning of 'effective control': *Banković* v. *Belgium* (2001) 11 BHRC 435; *Ilaşcu* v. *Moldova and Russia* (2005) 40 EHRR 46.

[79] *Banković, ibid.*

2. Human rights law as a basis for seeking protection in a third country

The second key issue under human rights law is whether it provides a legal basis on which international protection may be sought by those displaced, analogous to the manner in which refugees gain protection abroad from persecution in their country of origin. As noted above, refugee law *stricto sensu* does not apply here, due to the artificiality in attempting to characterise climate-induced displacement as a form of persecution. Do the principles of complementary protection, based on human rights law, therefore provide a solution?

'Complementary protection' describes protection granted by states on the basis of an international protection need outside the 1951 Refugee Convention framework. Such protection may be based on a human rights treaty, such as the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[80] or the Convention on the Rights of the Child, or on more general humanitarian principles, such as providing assistance to persons fleeing from generalised violence.[81] Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the 1951 Refugee Convention.

Even if a person forced to move due to climate change manages to reach the territory of another country, only a handful of human rights principles are presently recognised as giving rise to a protection obligation on the receiving state's part – in other words, preventing that person's return through the expanded principle of *non-refoulement*.[82] Although *non-refoulement* under treaty and customary international law now encompasses non-return to persecution, arbitrary deprivation of life, torture or cruel, inhuman, or degrading treatment or punishment,

[80] Art. 3, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987).

[81] See, generally, McAdam, *Complementary Protection in International Refugee Law*.

[82] On this, see *ibid*.; Goodwin-Gill and McAdam, *The Refugee in International Law*, 345–54; E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion' in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

this does not necessarily mean that it will assist a person displaced by climate change.

First, climate-induced displacement cannot meet the international definition of torture (defined as the infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession).[83] Secondly, although climate-induced displacement jeopardises a number of human rights (as discussed above), current jurisprudence suggests that breaches of those rights will be insufficient to found a protection claim. Although it has been recognised that, in theory, any human rights violation under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) could give rise to a *non-refoulement* obligation,[84] in most cases 'it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach' of a human right.[85] This is because, unlike the absolute prohibition on returning someone to torture or inhuman or degrading treatment, most other human rights provisions permit a balancing test between the interests of the individual and the state, thus placing protection from *refoulement* out of reach in all but the most exceptional circumstances.[86]

While it may be attempted therefore to re-characterise the violated human right – for example, violation of the right to an adequate standard of living – as a form of inhuman treatment, which *is* a right giving rise to international protection, it is doubtful whether such violations which are not inflicted by the state the individuals fled will be seen as giving rise to protection, or be regarded as constituting the kind of ill-treatment recognised to date as giving rise to a protection obligation on the part of a third state.[87] Courts have carefully circumscribed the meaning of 'inhuman or degrading treatment' so that it cannot be used as a remedy for general poverty, unemployment, or

[83] See, respectively, Art. 7, ICCPR; Arts. 3 and 1, UNCAT.

[84] *R* v. *Special Adjudicator, ex parte Ullah* [2004] UKHL 26, paras. 24–5 (Lord Bingham), 49–50 (Lord Steyn), 67 (Lord Carswell); *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64.

[85] *Kacaj* v. *Secretary of State for the Home Department* [2002] EWCA Civ 314, para. 26.

[86] See ch. 14 by V. Vandova *et al.* in this book, which considers the efforts of certain states to introduce a balancing test between the interests of the individual in *refoulement* cases even in the context of torture and other cruel, inhuman or degrading treatment and punishment.

[87] *Ex parte Ullah*; Human Rights Committee, 'General Comment 15: The Position of Aliens under the Covenant' (11 Apr. 1986), para. 5; see also Human Rights Committee, 'General Comment 18: Non-Discrimination' (10 Nov. 1989).

lack of resources or medical care except in the most exceptional circumstances.[88]

Further, the traditional Western approach of individualised decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting states over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of those displaced may require group-based rather than individualised solutions. Additionally, unlike traditional protection, which responds to flight from harm that is inflicted or sanctioned by the home state, protection sought for climate-induced displacement is the inverse: people may demand protection *in* industrialised states precisely because they are seen to have a responsibility to assist those who have suffered as a result of their emissions over time.[89]

C. *International environmental law*

While the jurisdictional scope of human rights law may limit its value in preventing or responding to climate-induced displacement, international environmental law is in some respects more promising. The global atmosphere and climate are a 'common resource' of vital interest to humanity.[90] International environmental law requires states to implement programmes for mitigating greenhouse gas emissions;[91] to prevent, reduce and control pollution of the atmosphere and the marine

[88] *D* v. *United Kingdom* (1997) 24 EHRR 423; *N* v. *Secretary of State for the Home Department* [2005] UKHL 31; *HLR* v. *France* (1997) 20 EHRR 29, para. 42; see also the views of Committee against Torture, as in *AD* v. *The Netherlands*, Communication No. 96/1997 (24 Jan. 2000), UN Doc. CAT/C/23/D/96/1997, para. 7.2. See discussion in Goodwin-Gill and McAdam, *The Refugee in International Law*, 350–1.

[89] This is a variation on the argument made in the Inuit petition; see also Byravan and Chella Rajan, 'Providing new homes for climate change exiles'.

[90] See, Recommendations of the International Meeting of Legal and Policy Experts, Ottawa Canada, 19 *EPL* (1989), 78.

[91] E.g., Principle 21, Declaration of the United Nations Conference on the Human Environment (UN Doc. A/CONF/48/14/Rev.1, 16 Jun. 1972) (Stockholm Declaration); Convention on Long-Range Transboundary Air Pollution (13 Nov. 1979, 1302 UNTS 217; entered into force 16 Mar. 1983); Convention for the Protection of the Ozone Layer (22 Mar. 1985, 1513 UNTS 513; entered into force 22 Sept. 1988); UN Framework Convention on Climate Change (9 May 1992, 1771 UNTS 107; entered into force 21 Mar. 1993); Kyoto Protocol to the Framework Convention on Climate Change (11 Dec. 1997; entered into force 16 Feb. 2005).

environment;[92] and to conserve biodiversity.[93] The latter are relevant where displacement is due to a loss of livelihood or resources resulting from disappearing plant and animal species.

In general customary international law, every state has an obligation not knowingly to allow its territory to be used for acts that are contrary to the rights of other states.[94] Such a principle is particularised in the environmental field as an obligation on states to refrain from using their territory in a way that causes environmental harm beyond their borders, and the customary law principles of responsibility for transboundary environmental harm (of any kind) are well established.[95] As the principle was stated in the *Trail Smelter Arbitration*:

> … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[96]

Further specificity is provided by the concept of sustainable development, which imposes limits on the manner of realising any emergent 'right' to development. For example, Principle 2 of the Rio Declaration mentions the responsibility of states to ensure that their sovereign right to exploit their resources does 'not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', implying limitations on carbon emissions and the damage they may cause by displacing vulnerable populations. Principle 3 indicates that the right to development 'must be fulfilled so as to equitably meet developmental and environmental needs of future generations', again suggesting limits on emissions which jeopardise the ability of future generations to live and develop in a healthy environment.

[92] E.g., Principle 21, Stockholm Declaration; Principle 2, Declaration of the United Nations Conference on the Human Environment (UN Doc. A/CONF/151/26/Rev.1 (1992)) (Rio Declaration); UN Framework Convention on Climate Change; Kyoto Protocol; Arts. 192–5, UN Law of the Sea Convention (10 Dec. 1982, 1833 UNTS 3; entered into force 16 Nov. 1994).

[93] E.g., Biological Diversity Convention (5 Jun. 1992, 1760 UNTS 79; entered into force 29 Dec. 1993).

[94] *Corfu Channel* case (*UK* v. *Albania*) 1949 ICJ 4, 22.

[95] See, e.g., *Trail Smelter Arbitration (United States* v. *Canada)* 1938–41 3 RIAA 1905; Principle 21, Stockholm Declaration; Principle 2, Rio Declaration; see also the International Law Commission's draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (2001), in *Report of the ILC* (2001) GAOR A/56/10; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ 226, para. 29.

[96] *Trail Smelter Arbitration*, 1965.

The essential difficulty in establishing responsibility for the damage caused by carbon emissions comes in identifying causation: which state(s) can be regarded as causing what damage to whom? Nonetheless, such obligations are beginning to provide a basis for some attempts to respond to climate change damage. In a recent claim brought by Inuit people, lawyers argued that that principle provided a context for assessing states' human rights obligations with respect to global warming, because the emission of greenhouse gases in one state causes harm in others.[97] This carries a presumption that states should, at a minimum, engage in international efforts to address global warming, and by failing to ratify the Kyoto Protocol, states like the United States cannot be said to be doing so. Indeed, almost all environmental law agreements uphold a duty to cooperate.[98] Mere ratification is not enough; states must ensure that the international system is sufficiently strong to protect human rights, which means that if this cannot be achieved through international collaboration alone, domestic measures must be taken to ensure that such rights are protected. As Judge Weeramantry stated in the *Danube Dam* case:

> The protection of the environment is … a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] … for numerous human rights such as the right to health and the right to life itself.[99]

While this statement does not necessarily suggest that there exists an independent human right to healthy environment, it provides a persuasive, logical underpinning to the realisation of human rights more generally, premising their fulfilment on the threshold question of whether the physical environment is capable of sustaining humans as rights-bearers. Indeed, despite formally recognising the links between human rights and the environment since at least 1972, when the Stockholm Declaration was adopted, international law does not expressly contain a human right to environment, although a number of human rights necessarily require an environment of a certain quality in order to be fulfilled.[100]

[97] Earthjustice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights' (1 Mar. 2007), 3.

[98] See e.g., Principle 24, Stockholm Declaration; Principles 7 and 27, Rio Declaration.

[99] *Case Concerning the Gabčikovo-Nagymaros Project (Hungary* v. *Slovakia)* 1997 ICJ 92 (Separate Opinion of Judge Weeramantry), para. A(b).

[100] Asia Pacific Forum, 'Human Rights and the Environment: Background Paper', *APF,* 12 (2007), 26. See, also, D. Shelton, 'Environmental rights', and P. Alston, 'Peoples' rights: their rise and fall', in P. Alston (ed.), *Peoples' Rights* (Oxford: Oxford University Press,

Moreover, two regional human rights treaties, the 1981 African Charter on Human and Peoples' Rights[101] and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (American Additional Protocol),[102] do contain a right to environment. Article 24 of the African Charter provides that all peoples 'shall have the right to a general satisfactory environment favourable to their development', interpreted by the African Commission on Human and Peoples' Rights as obliging states to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.[103] That this provision is expressed as a right attaching to 'peoples', rather than as an individual human right, means that the right is focused on safeguarding specific groups sharing a common cultural heritage (such as indigenous peoples), supporting international human rights principles that seek to safeguard the cultural and linguistic integrity of such groups.

By contrast, the American Additional Protocol provides in Article 11 that: 'Everyone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment.' Though this is phrased as an individual right, it is not subject to individual petition to the Inter-American Commission on Human Rights.[104] Accordingly, the most that can be said is that international law recognises a close link between the protection of the environment and realising human rights.[105]

2001); Meeting of Experts on Human Rights and the Environment, Final Text (16 Jan. 2002) (see also background papers at www.unhchr.ch/environment (last accessed 25 Oct. 2008)); P. Birnie and A. Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002), 252–67.

[101] African Charter on Human and Peoples' Rights (27 Jun. 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); entered into force 21 Oct. 1986).

[102] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (17 Nov. 1988, OAS Treaty Series 69) (Protocol of San Salvador).

[103] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights* v. *Nigeria* Communication No. 155/96 (2001), para. 54, available at www1.umn.edu/humanrts/africa/comcases/155–96.html (last accessed 25 Oct. 2008).

[104] Art. 19(6), American Additional Protocol.

[105] Ramcharan suggests that the right to life implies a right to environment and a concomitant obligation on States 'to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings': B. G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht/Boston, MA:

An environmental law approach has other limitations in addressing climate-induced displacement. First, the plane of legal responsibility is primarily between states, and individuals enjoy lesser legal capacity than under human rights law. Secondly, there is considerable difficulty in quantifying the harm caused by the carbon emissions of any particular state, and identifying causation between emissions and detrimental effects, when all states have contributed to emissions at some point. Thirdly, there remain difficulties in establishing the accountability of corporations for carbon emissions in a legal system in which states remain the primary duty-bearers.

Creative arguments have, however, been made on the causation issue. Some scholars have suggested that people living in areas which are likely to be rendered uninhabitable due to climate change should have the early option of migrating to other countries, in numbers roughly proportionate to the host countries' cumulative greenhouse gas emissions.[106] According to their calculations, this would mean that, per year, the United States (as the highest emitter) would take in 866,000 people, while Italy (as the tenth highest emitter) would take 8,600. While these figures may initially seem high, they are comparable to the actual numbers of immigrants already absorbed by those states each year.

This approach attempts to apportion responsibility for climate-induced displacement according to the state's share of responsibility for carbon emissions. While a seemingly neat solution, it hardly accounts for the complexity of contributory causes in any given displacement situation or the human rights of those displaced, and overlooks the role of intervening factors and other human actors in determining how the effects of climate change manifest themselves in a particular place. Such a blunt approach is also unlikely to garner genuine political support.

D. International humanitarian law

International humanitarian law may be relevant in situations where climate-related displacement is connected with international or non-international armed conflict. As others have suggested,[107] there is

Martinus Nijhoff, 1985) 13, as (mis)cited in Asia Pacific Forum, 'Human rights and the environment', 34.

[106] Byravan and Chella Rajan, 'Providing new homes for climate change exiles', 249.

[107] See, D. Zhang *et al.*, 'Global climate change, war, and population decline in recent human history', Proceedings of the National Academy of Sciences of the United States of America, vol. 104, no. 49 (4 Dec. 2007); International Alert, 'A climate of conflict: the

considerable potential for armed conflicts to arise from the effects of climate change, in particular by increasing competition over scarce resources such as agricultural land and water supplies. Again, while the causes of any conflict are multiple and complex, climate change may be a contributing factor in some situations.

While humanitarian law provides for the protection of civilians affected by conflict, rules are relatively sparse when it comes to the specific protection of those displaced by conflict. Humanitarian law permits the evacuation or relocation of civilians for specified safety or security purposes,[108] and provides for their return after the causes of displacement no longer exist. It prohibits unlawful displacement of civilians, although it says little expressly about remedies (including restitution or compensation) for losses suffered as a result of displacement.

It is, however, noteworthy that the International Committee of the Red Cross has attempted to identify customary rules on the treatment of displaced persons in armed conflict, including a right to voluntary return in safety to one's home after the reasons for displacement cease to exist, and a right to have one's property respected.[109] In addition, there are other efforts currently underway to develop the law concerning restitution and compensation for those affected by armed conflict,[110] although the focus is not on developing broader principles relating to return and reintegration of those displaced by conflict (as, for example, UNHCR has established principles on return, repatriation, reintegration and resettlement of refugees).

In the context of climate-induced displacement connected with conflict, the essential point is that humanitarian law pays little attention to the causes of conflict or displacement. Consistent with its humanitarian emphasis on neutrality, humanitarian law applies equally to all civilians

links between climate change, peace and war' (London, Nov. 2007); J. Barnett, 'Security and climate change: towards an improved understanding', paper at an International Workshop on Human Security and Climate Change (Oslo, 20–21 Jun. 2005); Barnett, 'Security and climate change'.

[108] See, e.g., Art. 49(2), Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949, 75 UNTS 287; entered into force 21 Oct. 1950); Art. 17(1), 1977 Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (8 Jun. 1977, 1125 UNTS 609; entered into force 7 Dec. 1978).

[109] J.-M. Henckaerts and L. Dowald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2004), ch. 38: 'Displacement and displaced persons' (rules 129–33).

[110] See the work of the International Law Association's International Committee for the Compensation of Victims of War at www.ila-hq.org.

affected by conflict, regardless of the reasons underlying their displacement. Consequently, while humanitarian law provides basic protections for those displaced during an armed conflict, it does not provide particularised rules for those displaced in conflicts generated by climate change.

E. Institutional framework

Finally, the absence of an institution with responsibility for climate-induced displacement also poses a challenge. Although the United Nations Environment Programme introduced the issue of environmental displacement on to the international agenda over twenty years ago,[111] there remains no international organisation charged with official responsibility for the issue.

While UNHCR might seem the obvious contender, it is already responsible for over 20 million refugees and other people of concern (including asylum-seekers, returnees and IDPs). Each year it relies on donations and the goodwill of states to provide it with funds to carry out its work in over 100 countries, and it has experienced significant budgetary crises over the years. Is it the appropriate agency to tackle the issue of climate-induced displacement? From a legal standpoint, it presently has no mandate to do so, although the General Assembly is empowered to entrust UNHCR with additional functions, just as it allocated the protection of certain IDPs to UNHCR in the 1990s (for example, in the Balkans).[112]

From a practical point of view, there are real doubts whether UNHCR has the resources, expertise and capacity to assume a protection or assistance function for over double the number of people for whom it already cares. Nonetheless, UNHCR is seen as the institution with the greatest experience in the area, as when it assisted after the Indian Ocean tsunami in 2004, even though it was not formally mandated to do so. On the other hand, the root causes for displacement are very different. UNHCR is already overburdened and financially under-resourced to carry out its existing protection functions. Tellingly, when created in 2008, the UN website on climate change did not feature a single human rights-related agency on its list of UN partners.[113]

[111] See El-Hinnawi, *Environmental Refugees*.
[112] Goodwin-Gill and McAdam, *The Refugee in International Law*, 32–5, 485–8.
[113] See http://un.org/climatechange. The Office of the High Commissioner for Human Rights is now listed.

Nevertheless, UNHCR may play a crucial role in harnessing action at the international level. At the meeting of states at UNHCR's Executive Committee in 2007, the High Commissioner for Refugees, António Guterres, told states that: 'We see more and more people forced to move because of extreme deprivation, environmental degradation and climate change', noting that:

> … natural disasters occur more frequently and are of greater magnitude and devastating impact. Almost every model of the long-term effects of climate change predicts a continued expansion of desertification, to the point of destroying livelihood prospects in many parts of the globe. And for each centimeter the sea level rises, there will be one million more displaced. The international community seems no more adept at dealing with these causes than it is at preventing conflict and persecution.

While recognising that answers to this complex dilemma go well beyond UNHCR's own mandate, he considered it UNHCR's 'duty to alert states to these problems and help find answers to the new challenges they represent'.[114]

Because there are numerous cross-cutting and intersecting issues raised by climate-induced displacement which relate to a variety of different institutional mandates (such as protection, human rights, indigenous rights, cultural rights and the environment), there is a risk that the concept will be dealt with in an *ad hoc* and fragmented manner – if at all – rather than through a single organisation with a focused, holistic approach.

On the other hand, precisely because of the complexity of climate-induced displacement, an inter-agency approach with a central UN focal point or coordinator – perhaps the Office for the Coordination of Humanitarian Affairs (OCHA) – would be the more pragmatic, palatable, and resource-efficient approach. As needed, the additional expertise of inter-governmental agencies such as the International Organization for Migration (IOM) could be tasked with specific functions, subject always to appropriate supervision of the human rights implications of their activities.

IV. A human security approach?

The forgoing analysis has highlighted some of the limitations in existing international law in responding to the threat, occurrence and

[114] Opening Statement by Mr António Guterres, United Nations High Commissioner for Refugees, at the Fifty-eighth Session of the Executive Committee of the High Commissioner's Programme (Geneva, 1 Oct. 2007).

consequences of climate-induced displacement. The question then becomes whether any other concepts may assist in confronting the challenge – in particular, the emerging concept of human security – in order to help fill some of the gaps in the international legal framework.

A. Human security – environmental security

The basic concept of human security is now well known.[115] As mentioned in Chapter 1 of this book, the concept seeks to change 'traditional security approaches by conceiving of security issues not just in terms of state security, but primarily in terms of human needs'.[116] In ensuing debates about the content of human security, different proponents of the concept have emphasised a variety of elements and commentators remain divided on the value, content, breadth and emphasis of the concept.[117]

The environment was listed among the seven core components of human security initially articulated by the UN Development Programme (UNDP) in its *Human Development Report* of 1994.[118] According to the 2003 Report of the Commission on Human Security (CHS), human security is achieved not only by the absence of violent conflict, but through 'human rights, good governance, access to education and healthcare and ensuring that each individual has opportunities to fulfil his or her own potential'. Achieving this requires reducing poverty, ensuring economic growth, preventing conflict and achieving freedom from want, freedom from fear, and the freedom of future generations to inherit a *healthy natural environment.*[119]

Structurally, the Commission accordingly called on the Security Council to broaden its understanding of threats to security beyond those already recognised in the 1990s as attracting the Council's mandate

[115] For an overview of the emergence and development of the human rights discourse, see ch. 1 by A. Edwards and C. Ferstman in this book.

[116] D. Newman, 'A Human Security Council? Applying a "human security" agenda to Security Council reform', *Ottawa Law Review*, 31 (2000), 213; see also UNDP, *Human Development Report 1994* (New York, NY: Oxford University Press, 1994), 22–3; Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission* (Oxford: Oxford University Press, 1995), 79–80.

[117] See J. Dedring, 'Human security and the UN Security Council', in *Conflict and Human Security: A Search for New Approaches of Peace-building* (2004), PISHU English Research Report Series No. 19, 47–52; Acharya, 'Human security: East versus West', 447.

[118] The other six core components of human security are economic, food, health, personal, community and political: UNDP, *Human Development Report 1994*, 24.

[119] Commission on Human Security, *Human Security Now*, 4.

(such as mass refugee movements, HIV/AIDS and serious rights violations).[120] It also called for human security to be 'mainstreamed in the work of global, regional and national security organisations'.[121] An implicit consequence of the new security agenda is the potential for triggering the Security Council's enforcement powers under Chapter VII of the UN Charter in response to non-traditional threats.

In the lead-up to the United Nation's 60th anniversary year, in December 2004 the UN High-Level Panel on Threats, Challenges and Change supported a wide view of the scope of threats to security, stating that: 'Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security.'[122] It then identified six major global threats to security, with environmental degradation included among them.[123] Most of these were recognised as threats to security in the practice of the Security Council from the 1990s onwards.[124]

The most radical expansion of the security agenda has been regarding economic and social concerns, such as environmental degradation, as threats to peace or security. In late March 2005, in his report on progress towards the Millennium Development Goals, *In Larger Freedom*, then UN Secretary-General Kofi Annan supported this widening of the security agenda.[125] According to the Secretary-General, the 'new security

[120] *Ibid.*, 131.

[121] *Ibid.*, *Human Security Now*, 131; see also S. Ogata and J. Cels, 'Human security: protecting and empowering the people', *Global Governance*, 9 (2003), 273.

[122] Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, Dec. 2004), 2.

[123] The threats were identified as: (a) economic and social threats (including poverty, infectious disease and environmental degradation); (b) inter-state conflict; (c) internal conflict (including civil war, genocide and large-scale atrocities); (d) weapons of mass destruction; (e) terrorism; and (f) transnational organised crime: Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility.*

[124] See, e.g., UN Security Council res. 713 (1991) and 724 (1991) (Balkans); 733 (1992) (Somalia); 788 (1992) (Liberia); 748 (1992) (Lockerbie bombing); 841 and 875 (1993) (Haiti); 688 (1991) (Kurds); 1265 (1999) and 1296 (2000) (civilians); 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), and 1539 (2004) (children); 1325 (2000) (women); 1308 (2000), preamble (HIV/AIDS); 1502 (2003) (humanitarian workers); 1467 (2003) (arms and mercenaries); 255 (1968) and 984 (1995) (nuclear weapons); 1540 (2004) (weapons of mass destruction); see also UN Security Council Presidential Statement, UN Doc. S/24111 (1992) (including environmental threats); M. Odello, 'Commentary on the United Nations High-Level Panel on Threats, Challenges and Change', *Journal of Conflict and Security Law*, 10 (2005), 231, 232–7.

[125] UN Secretary-General's Report, 'In Larger Freedom: Towards Development, Security and Human Rights for All', UNGA (59th Session), 21 Mar. 2005, UN Doc. A/59/2005.

consensus' reflected a commitment to 'freedom from want' and 'freedom from fear', and recognised that 'threats are interlinked, that development, security and human rights are mutually independent'.[126] Like traditional inter-state wars, these wider threats 'can have equally catastrophic consequences', causing death, lessening life chances on a large scale, and undermining the state.[127] The former Secretary-General believed not only that poverty and human rights violations are threats to human development, but they can also precipitate traditional security threats such as war:

> While poverty and denial of human rights may not be said to 'cause' civil war, terrorism or organised crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development.[128]

The same arguments can be made in relation to environmental degradation and conflict over resource scarcity exacerbated by climate change. Examples of human insecurity given by the Secretary-General included the 1 billion people living below the extreme poverty level of $1 per day; the 20,000 people who die from poverty each day; the victims of HIV/AIDS, an illness which has killed 20 million people and infected 40 million; and the 25 million IDPs and 12 million refugees. In his view, the world has the resources, knowledge and technology necessary to end poverty and ensure development.[129] The Secretary-General also highlighted that 'millions' have already been forced to abandon their lands, farming and nomadism, as a result of the environmental degradation of a billion hectares of land worldwide, and predicted that hundreds of millions more are at risk of becoming 'environmental refugees'.[130] In light of the reference to IDPs, one might add to this list the prospect of climate-induced displacement, which engages similar 'security' issues.[131]

[126] UN Secretary-General's Report, 'In Larger Freedom', annex para. 6(a).
[127] *Ibid.*, para. 78.
[128] *Ibid.*, para. 16.
[129] *Ibid.*, para. 27.
[130] *Ibid.*, para. 58.
[131] The International Organization for Migration, in conjunction with the Greek Chairmanship of the Human Security Network, recently held a conference examining the links between human security and climate-induced movement: 'Background Paper' for 'Climate Change, Environmental Degradation and Migration: Addressing Vulnerabilities and Harnessing Opportunities' Conference, 19 Feb. 2008, organised by the Greek Chairmanship of the Human Security Network with the International Organization for Migration, available at www.iom.int/jahia/Jahia/pid/1944 (last accessed 25 Oct. 2008).

In September 2005, in its World Summit Outcome in the follow-up to the Millennium Summit, the UN General Assembly endorsed the human security approach. The Summit Outcome recognised the need to build a new security consensus and to translate it into action (including addressing root causes of insecurity) and acknowledged that 'development, peace and security and human rights are interlinked and mutually reinforcing'.[132] In calling for a definition of human security, the Summit Outcome acknowledged that ambiguity affects the concept and it resolved to work towards clarifying it. The Human Security Network, a high level group of like-minded countries which maintain dialogue on human security issues, has also considered climate-induced displacement.[133]

Perhaps the greatest concern of the human security paradigm is its lack of clarity and conceptual confusion, which may encourage states to exploit the concept for their own purposes, including playing it off against existing legal norms or, more likely, ignoring it as a diffuse and incoherent bundle of different human problems.

B. Advantages of a human security approach

What is gained by elevating problems such as climate-induced displacement to the field of 'human security', or to put it another way, to 'securitise' the problem? First, there is considerable conceptual attraction in re-focusing international attention on grave daily human needs and away from the high politics of 'national security' and narrow military or geo-strategic concerns. Indeed, strategically, one aim of treating issues as security threats is to invoke a sense of crisis and urgency about those issues, in the same way that war or military violence heightens international concern, and hopefully triggers international action to confront the problem.

Human security is, therefore, partly a rhetorical or polemical attempt to capture the attention of international civil society, including through the global media, which is typically more interested in the sensational, televisual spectacles of war or terrorism than the uneventful daily grind of poverty, malaria or poor sanitation. The phrase neatly encapsulates a

[132] UN General Assembly (60th Session), 2005 World Summit Outcome, UN Doc. A/60/L.1 (20 Sept. 2005), paras. 8–9. See, also, GA res. A/60/L.1 (2005), para. 4: 'We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, *respect for nature* and shared responsibility, are essential to international relations.' (emphasis added).

[133] See above, n. 132.

sense of compassion ('human') and realpolitik ('security'), which serves the useful polemical purpose of being difficult to oppose. Securitisation is premised on a tacit 'admission of a moral deficit', since it endorses an approach which frames developmental issues in terms of their potential impact on Western security interests.[134]

A further impulse underlying the new security agenda is a cultural and political reaction against Western domination of the international security discourse, and an attempt to retrieve or reclaim the agenda in the interests of the developing world. In focusing on military violence, security discourse has disproportionately reflected the interests of developed states, which are not beset by the same economic and social problems faced by developing countries and are thus less concerned about them. Moreover, developed countries have historically wielded the greatest military power and have had a greater stake in regulating military violence by, or against, themselves.

A security agenda which speaks and appeals to the billions of people living in developing countries could arguably enhance the legitimacy of the security agenda and boost the standing of institutions such as the UN Security Council. Such efforts are particularly pertinent in the context of climate-induced displacement, since historically the largest carbon-emitters have been developed states, whereas those who are experiencing the effects of climate change most acutely – and who have least capacity to adapt to it – are developing or smaller countries, whose interests are not necessarily reflected in the high politics of the Security Council.

Paradoxically, this criticism of international security policy is an *attack* on international law as 'discipline of crisis' (rather than a 'politics of everyday life'),[135] and simultaneously an *affirmation* of that sense of crisis. International law has historically focused on reducing violence and on 'the public realm, of war and conflict and violence',[136] obscuring other sources of insecurity, such as the less spectacular harm of poverty or disease. Others have argued that repetitive media images of chaos, catastrophe and disorder shape narrow conceptions of security, focused on state sovereignty, the inviolability of borders, and national interests.[137] As Koskenniemi writes:

[134] Busumtwi-Sam, 'Development and human security', 266.
[135] H. Charlesworth, 'International law: a discipline of crisis', *Modern Law Review*, 65 (2002), 377, 387.
[136] *Ibid.*, 386.
[137] A. Orford, 'The politics of collective security', *Michigan Journal of International Law* 17 (1996), 373, 395, 401.

> It is hard to justify the attention given and the resources allocated to the 'fight against terrorism' in the aftermath of the attacks on New York and Washington in September 2001 in which nearly 3,000 people lost their lives, while simultaneously six million children under five years old die annually of malnutrition by causes that could be prevented by existing economic and technical resources. What becomes a 'crisis' in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process.[138]

The concentration on terrorism at the expense of more pressing human needs illustrates the extent to which the Council reflects the interests of a few powerful states – an 'instrumentalisation' of the Council[139] – rather than the values of the international community as a whole. Death by terrorism or paramilitaries is vastly more significant in the security calculus than death by tuberculosis, famine or as a result of the failure to respond to the gradual harm caused by climate change. By contrast, as UNDP argues: 'For most people today, a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event.'[140] This statement remains accurate even after 9/11, which involved localised acts against a limited class of targets.

A consequence of the human security agenda is its implicit potential for activating the enforcement powers of the Security Council. Treating development issues as threats to security may increase the legitimacy of the Security Council in the eyes of those who criticise its narrow emphasis on regulating physical violence, and provide a vital new mechanism through which states can be compelled to respond to the climate change challenge. Just as the Security Council imposed Resolution 1373 (2001), which effectively placed the obligations of the 1999 Terrorist Financing Convention upon even non-party states to that treaty,[141] so too could an emboldened Security Council (for example) demand universal compliance with the Kyoto Protocol, or binding measures taken in response to the challenge of climate-induced displacement or

[138] M. Koskenniemi, 'What is international law for?', in M. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) 95–6.

[139] N. Krisch, 'Hegemony and the law on the use of force', paper at ESIL Conference, Florence, 13–15 May 2004, 18–19; see, also, N. Krisch, 'The rise and fall of collective security: terrorism, US hegemony, and the plight of the Security Council', in C. Walter, S. Vöneky, V. Röben and F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty* (Heidelberg: Springer, 2004), 879.

[140] UNDP, *Human Development Report 1994*, 22.

[141] International Convention for the Suppression of the Financing of Terrorism (9 Dec. 1999; entered into force 10 Apr. 2002).

gaps in the existing regulatory frameworks addressing internal or external displacement.

C. *Critiques of human security*

The promise of a human security response to climate-induced displacement is tempered by the costs of such as approach. Conceptually, the idea of human security is startling in its breadth and ambition. Some central criticisms are that 'human security' is ahistorical and not new but faddishly relabels existing concepts;[142] that it is too vague or ambiguous to be operatively useful; that it is an unrealistic panacea which claims too much and delivers too little; and that it reflects a new imposition of Western liberal individualism on different cultures.[143]

There is certainly concern that prioritising everything means prioritising nothing.[144] Indeed, there is a lingering sense that human security is a messy concoction of disparate problems, which have little in common but a slender rhetorical connection. By lumping together climate-induced displacement with every other human problem now re-characterised as a human security issue, there is a serious risk of specific needs of that group evaporating into the ether of the numerous other pressing issues competing for international and donor attention. Recently, the Human Security Network has prioritised climate change and human security under the chairmanship of Greece.[145] Although that may focus attention on climate-induced displacement, it illustrates the point that the concept of human security is highly vulnerable to political selectivity in its application, and one wonders whether other pressing human needs are now not being addressed because of the prioritisation of climate displacement.

There is also a radical critique that human security masks hegemonic relations in important ways:

> Discourses of extended security have been interpreted by the major aid donors in such a way as to preserve the legitimacy of the existing

[142] Dewi Fortuna Anwar argues that what are now regarded as non-traditional security threats have long been considered the primary security concerns of most South and Southeast Asian countries: 'Non-Traditional Security in Asia: 2nd Regional Plenary Meeting', Report of Meeting, Institute of Defence and Strategic Studies (Singapore, 3–4 Dec. 2004), 7.

[143] For critical approaches, see, e.g., R. Paris, 'Human security: paradigm shift or hot air?', *International Security*, 26 (2001), 67; Yuen Foong Khong, 'Human security: a shotgun approach to alleviating human misery', *Global Governance*, 7 (2001), 231.

[144] Yuen Foong Khong, 'Human security', 232–4.

[145] See www.humansecuritynetwork.org/menu-e.php.

> structures, institutions, and processes of the global political economy, to avoid any meaningful reform, and to distract attention away from the contradictions of contemporary neoliberal globalisation that may be complicit in the generation of insecurities for vulnerable individuals and groups worldwide.[146]

Such criticism is pertinent to climate-induced displacement if the focus of the new security response centres on managing the consequences of climate change (that is, by resettling the displaced, housing, feeding them, and so on) rather than on the root causes which precipitated displacement (that is, the failure of major Western economies and emerging powers such as China and India to control their carbon emissions, precisely because of their preference for immediate economic growth).

Further, there is a realist view that developmental issues have been securitised precisely because of the threat they are predicted to pose to (traditional) national security in the long term.[147] The US National Security Strategy implicitly endorses the human security idea: 'A world where some live in comfort and plenty, while half of the human race lives on less than $2 a day, is neither just nor stable. Including all of the world's poor in an expanding circle of development – and opportunity – is a moral imperative and one of the top priorities of U.S. international policy'.[148] At the same time, threats to human security are redirected towards national security interests. For example, a 2003 Pentagon report found that climate change should be elevated to a US national security concern because of its 'potentially dire consequences', including resource constraints (particularly food, water and energy shortages) provoking widespread conflict.[149] The focus here has shifted from the human security of those most seriously affected by those resource constraints (vulnerable populations largely living outside the United States) to the national interests of one state (and its desire to arrogate resources to itself). The concept of human security is not always benign, but may be manipulable in the service of national self-interest.

Recent research in Asia has increasingly questioned how and why some issues become 'securitised' and who is doing the securitising,[150]

[146] Busumtwi-Sam, 'Development and human security', 254.

[147] *Ibid.*, 259–60.

[148] US President, The National Security Strategy of the United States', ch. VII, 17 Dec. 2002, available at www.whitehouse.gov/nsc/nss.html (last accessed 25 Oct. 2008).

[149] P. Schwartz and D. Randall, 'An abrupt climate change scenario and its implications for United States national security', Report to the Pentagon (Oct. 2003), 3.

[150] 'Non-traditional security in Asia: 2nd Regional Plenary Meeting', Report of Meeting, Institute of Defence and Strategic Studies (Singapore, 3–4 Dec. 2004); 'Non-traditional security in Asia: the dynamics of securitization', Report of Workshop, Institute of

and whether securitisation politicises or depoliticises developmental issues.[151] For instance, securitising migrants and the displaced may actually make them more vulnerable and insecure.[152] In another context, if refugees who endanger the 'security' of the country of refuge can be returned to persecution under the exception to *non-refoulement* in refugee law,[153] then those who threaten human security might be denied protection. Potentially, this could dramatically widen the grounds for lawfully returning a person to persecution – or refusing resettlement in the case of climate-induced displacement – allowing states to send back those who transmit disease, degrade the environment, or generate poverty.

By *securitising* non-traditional threats, proponents of human security reaffirm and revalidate the emphasis of international law on issues of spectacle and crisis, by merely redefining (rather than challenging) that emphasis. As a result, internationally important issues which hover beneath the 'human security' threshold may increasingly struggle for attention. Thus those displaced by climate change may come to be privileged over those displaced for other reasons – or indeed over those not displaced at all but facing graver risks than the displaced (which may include those left behind without sustainable livelihoods in places badly affected by climate change).

D. Human security may undermine human rights

A human security agenda may have a number of potentially adverse consequences for international law. In relation to international human rights law, the idea of human security is not particularly useful or meaningful, and may even counter-productively distract governments from fulfilling their existing legal obligations. International human rights law (including economic, social and cultural rights) already covers much of the essential subject matter of human security.[154] Human rights

Defence and Strategic Studies (Singapore, 2–4 Sept. 2004); J. Laki, 'Non-traditional security issues: securitization of transnational crime in Asia', IDSS Working Paper No. 98 (Jan. 2006).

[151] S. Mallick and R. Sen, 'The incidence of corruption in India: is the neglect of governance endangering human security in South Asia?', IDSS Working Paper No. 103 (Jan. 2006).

[152] Tasneem Siddiqui, in 'Non-traditional security in Asia: 2nd Regional Plenary Meeting', 15.

[153] Art. 33(2), 1951 Refugee Convention.

[154] See, e.g., L. Doswald-Beck, 'Human security: can it be attained?', *American Society of International Law Proceedings*, 97 (2003), 93; see also J. Almqvist, 'Rethinking security and human rights in the struggle against terrorism', paper presented at the European Society of International Law Forum Workshop on 'Human Rights under Threat' (Florence, 27 May 2005), 7 (questioning whether 'human security is entirely

are binding legal rules designed to lift people out of poverty by guaranteeing an adequate standard of living, health care, education and employment; by protecting political participation, freedom of expression and cultural life; and by ensuring liberty and security of person and generally aiming to preserve and respect human dignity and autonomy. Legally, states are internationally responsible for ensuring and protecting human rights, although the ideal breaks down in the face of chronic state weakness. But that does not mean that human security becomes a useful way of remedying state failure; rather, the emphasis should then shift onto the international community to assist or pressure weak or abusive states to better implement human rights (rather than diverting international and national energy towards a vague security project).

The rhetoric of human security may obscure or displace these existing legal standards and replace them with a more ambiguous, non-binding, discretionary political agenda for realising human security. In international politics, everything is negotiable, which means that anything can also be traded away in the bargaining process. The 2005 World Summit is an example in point, where progress towards binding targets on achieving the Millennium Development Goals was subject to last-minute devaluation and diminution by some non-committal, powerful states. By contrast, hard-won agreement on basic human rights was secured long ago. Emphasising human security overshadows legal rights and potentially unravels them.

Proponents of human security seek to deflect these concerns by asserting that human rights and human security are complementary. According to the Commission on Human Security, 'human security helps identify the rights at stake in a particular situation'.[155] Similarly, von Tigerstrom argues that the concept that may assist in 'the interpretation and development of legal norms', and is a narrower (and therefore, presumably, more targeted) idea connected to the most basic human rights of survival, livelihood and basic dignity.[156] Yet, such arguments are superfluous, since human rights law itself is already capable of

comfortable with human rights-based approaches and so whether it endorses the complete body of international human rights law').

[155] Commission on Human Security, *Human Security Now*, 10.

[156] B. von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Oxford/Portland, OR: Hart Publishing, 2007) 42. She relies on S. Alkire, 'Conceptual framework for human security (excerpt: Working Definition and Executive Summary)' (16 Feb. 2002), available at www.humansecurity-chs.org/activities/outreach/frame.pdf 2, 6. Von Tigerstrom also states that in some respects, the human security approach goes further than human rights law: 43.

identifying when rights are applicable in a particular context, and indeed has developed a sophisticated and nuanced international and comparative jurisprudence for doing so.

The new security agenda may be viewed precisely as a reaction against increasing dissatisfaction with human rights norms, seen by some as floundering in the face of numerous challenges: weak enforcement institutions and under-implementation at the national level; the pursuit of civil and political rights at the expense of economic, social and cultural rights, or developmental rights; cultural relativist challenges to their universality and indivisibility; the inherent ambiguity of rights themselves; debilitating rights-litigiousness in some countries; and the politicisation of judiciaries expected to enforce rights. In this light, the human security agenda may be directed towards reclaiming the core objective of human rights – human dignity – through prisms other than a predominantly rights-based one.

Even so, it is important to acknowledge that the drafters of the main international human rights treaties deliberately incorporated the substance of 'human security' into human rights law. The political ideal of 'freedom from fear' was first articulated as one of four freedoms in a speech by US President Franklin D Roosevelt in 1941, though it referred in a limited way to the need to reduce global armaments to eliminate aggression.[157] The preamble to the 1948 Universal Declaration of Human Rights thus states that 'freedom from fear and want' is part of 'the highest aspiration of the common people', while the preambles of the ICCPR and ICESCR similarly refer to 'the ideal of free human beings enjoying freedom from fear and want'. The idea that freedom from fear is an international value deserving of protection has also been advanced by UNDP as an aspect of human development,[158] and the new African Court on Human and People's Rights 'will address the need to build a just, united and peaceful Continent free from fear, want and ignorance'.[159] Some of the drafters of the UDHR also understood the right to liberty and 'security' of person (in Article 3) as extending

[157] US President F. Roosevelt, State of the Union Address, 77th US Congress, 6 Jan. 1941, (1941) 87 Congressional Record, pt I. The 'four essential human freedoms' were freedom of speech, freedom of worship, freedom from want and freedom from fear. The ideal was also popularised in a wartime painting by Norman Rockwell, *Freedom from Fear* (1943).

[158] UNDP, Human Development Report 1994, 23.

[159] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Jun. 1998; entered into force 1 Jan. 2004).

beyond mere freedom from arbitrary detention to encompass any harm to the physical integrity of the person. It was arguably intended to protect against many of the key threats to 'human security', in which case the human security agenda may well be a return to the past – a re-articulation of the content of the right to security of person which was debated in 1945.

E. Gaps in human rights protection

As noted earlier, human rights law is not particularised to address the circumstances of those specifically displaced by the effects of climate change. There are, however, the 1998 UN Guiding Principles on Internally Displaced Persons, which seek to apply existing human rights, refugee, and humanitarian law norms to the special needs and circumstances of internally displaced persons. To that extent, a non-binding template exists which can assist in framing a response to those internally displaced by climate change, since those Guidelines cover any form of human-induced displacement.

The larger difficulty comes in dealing with those externally displaced by climate change, in circumstances where they do not qualify as refugees or for protection from return to torture or cruel, inhuman or degrading treatment. Here a genuine gap in human rights protection may arise in the sense that such people are not entitled to any permanent legal status or durable solutions in the country to which they move, and will be unlikely to meet national immigration law admission criteria.

However, it does not follow that a diffuse, politicised 'human security' response will provide a permanent solution for people in this category over time. Rather, a more fruitful and enduring path may be to further develop and extend the existing legal standards relating to 'complementary protection',[160] grounded in the human rights treaties, so that legal status accrues not only to those leaving their countries for fear of persecution or torture, but also due to the effects of climate change on survival, the sustainability of livelihoods, the maintenance of basic human health, and the overriding preservation of human dignity.

To this end, it is worthwhile recalling that although climate-induced displacement challenges the contemporary assumptions which the international community has made about protection needs, those

[160] See, McAdam, *Complementary Protection in International Refugee Law* on the existing scope of complementary protection in international law.

assumptions were not self-evident when the international legal protection regime began to be constructed in the 1920s. The strong human rights imperative which we now associate with refugeehood only emerged in the language of protection in the 1940s, twenty years after the international community first attempted to regulate the flow of externally displaced people. Similarly, this is not the first time that the world has been faced by mass displacement. At the end of the World War II, some 66 million people were displaced across Europe by a multitude of causes, with millions more in China.[161] At that time, the international community 'responded with vision and imagination to tackle what must have seemed like an intractable problem'.[162] The law must therefore respond to the changing causes of displacement without being hamstrung by what appear to be the legal limits of protection at any given moment.

V. A responsibility to protect?

Alongside – or perhaps within – the human security concept sits the emerging doctrine of the 'responsibility to protect' (R2P),[163] which emphasises that while the primary responsibility for the protection of a state's people lies with the state itself, the sovereign principle of non-intervention must yield to an *international* responsibility to protect where a population is suffering serious harm (whether due to internal war, insurgency, repression or state failure) and the state is unwilling or unable to halt or avert it.[164]

R2P sets a high threshold for any international action by requiring the existence of war crimes, crimes against humanity or genocide, rather than dealing with other (and not necessarily lesser) threats to human dignity. Its focus is on extreme violence, rather than on poverty, environmental degradation and so on, and the doctrine is therefore a somewhat narrow vision of human threats. Restricting the threshold of R2P to cases of extreme violence was strategically necessary to attract sufficient support of states, many of whom would not tolerate intervention in other cases.

[161] UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 13.
[162] Christian Aid, *Human Tide: The Real Migration Crisis* (2007), 3.
[163] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), xi.
[164] *Ibid.*, xi.

If, over time, the R2P framework could be expanded beyond violent threats to encompass other serious risks such as climate-induced displacement, then R2P could potentially assist in conceptualising the problem, to the extent that the effects of climate change drive state failure which then results in serious harm to a population. But, at present, the difficulty in applying R2P in such a way is that it is primarily designed to respond to direct human-made harms inflicted on a population by particular actors (states or private groups), rather than dealing with longer-term, diffuse, accumulating and multi-causal phenomena like climate change.

Assuming for the moment that R2P could be so extended, through political agreement over time, to populations affected by climate change, the doctrine encompasses three specific responsibilities: the responsibility to prevent (that is, to address the root causes); the responsibility to react (to respond with appropriate measures such as sanctions or military intervention); and the responsibility to rebuild (to provide assistance with recovery, reconstruction and reconciliation).[165]

This schema might be applied to climate-induced displacement to recognise a responsibility of the international community to address carbon emissions seriously; to take appropriate and effective measures to protect those displaced by climate change (and indeed those affected by climate change but not displaced by it); and to rebuild, sustainably, communities displaced by climate change, by providing permanent and durable solutions.

Like human security, R2P falls short of a legal norm but is intended to guide state action in responding to serious threats to communities. R2P has considerable support among states, and there is a concerted effort by some governments, NGOs and international organisations to 'operationalise' it so as to transform the theoretical doctrine into working programme of action.

R2P is more promising than 'human security' in addressing climate-induced displacement because it is a relatively well defined and circumscribed doctrine, built around the existing planks of international law and intended to harmonise with the role of the UN Security Council under the UN Charter, rather than to subvert it. As a concept it is more precise and workable than the nebulous idea of 'human security', from which concrete standards do not yet flow.

On the other hand, some of the criticisms of human security cross over to taint R2P – foremost that it is a discretionary political agenda,

[165] *Ibid.*

subject to political whims and pragmatic tendencies, and which lacks the binding force of hard law, at least until such time as it crystallises (if ever) into customary law norms. Soft norms evidently constrain action too, though the tendency (particularly in the human rights field) is to take them less seriously than harder rules. The other danger inherent in R2P is its militant tendencies towards protecting human rights through violence, which is an inapt paradigm for climate-induced displacement.

VI. Conclusion

The status, treatment and protection of people displaced due to the effects of climate change, such as the Inuit in the Arctic or the Carteret Islanders, are uncertain under international law. There are no specific rules or special categories for those displaced by the effects of climate change, although existing principles of international refugee law, human rights law, humanitarian law and environmental law may provide some measure of protection. This chapter has been concerned not so much with finding ways to hold individual states accountable for breaches, but rather to pinpoint their responsibilities to demonstrate how forced movement due to climate change should be addressed from a legal perspective. It is intended to guide action, in terms of showing that there is a need to do something, as well as to shape what is done.

An alternative framework of analysis is to deploy the emerging concept of 'human security' in dealing with climate-induced displacement. To a large extent, human security is a 'political project … built on the already existing precedents within international law'.[166] Political projects to build support for human rights norms are always welcome, but there is a danger that the development of the political project – which often takes on a life of its own – will come to overshadow, dilute or erode the norms which it is supposed to be uplifting.

In our view, human rights law offers a more useful framework for analysing rights at risk, although the implications of that analysis in terms of assisting and protecting the displaced remain less certain. A complementary protection analysis – seeking to identify rights to which the principle of *non-refoulement* might extend – provides one option, and while it may not lead to satisfactory results on the current

[166] H. Owens and B. Arneil, 'Human security paradigm shift: a new lens on Canadian foreign policy', *Canadian Foreign Policy*, 7 (1999) 1, 9 (emphasis added), cited in von Tigerstrom, *Human Security and International Law*, 4.

jurisprudence, there is considerable potential for the progressive development of human rights law principles to address the needs of those displaced by climate change.

It is dangerous to see the law as *the* solution; ultimately, even getting acknowledgment of legal obligations requires a political response. At this stage, the law may assist us by setting out the minimum standards that inform states' responsibilities towards impending climate-induced displacement, providing a principled legal framework for examining states' responses and a threshold against which their actions may be assessed.

11

Human security and trafficking of human beings: the myth and the reality

RYSZARD PIOTROWICZ

I. Introduction

This chapter considers the relevance of human security to people trafficking. It concludes that human security as an idea may be helpful in guiding states' behaviour with regard to the victims of traffickers but rejects the criticism that the existing legal regime with regard to trafficking is unreasonably skewed in favour of state security at the expense of the victims of trafficking.

Trafficking of human beings (human trafficking) is a major threat to the security of people and states the world over. The essence of trafficking is that a person is taken from one country to another (or from one region to another region in the same country), by one or more of a variety of means involving some kinds of force and/or deception, with the aim of exploiting that person's labour at the destination (and sometimes in transit too).[1]

The practice has been linked with and compared to slavery,[2] and it certainly can involve aspects of slavery, in particular with regard to the

[1] The now widely accepted definition is contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol) to the UN *Convention on Transnational Organised Crime* 2000, GA res. 55/25, which entered into force on 25 Dec. 2003. At the time of writing it had 118 parties. Art. 3(a) provides: '"Trafficking in Persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

[2] C. Rijken, *Trafficking in Person: Prosecution from a European Perspective* (The Hague: TMC Asser Press, 2003), 74–9; H. Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Modern Studies in European Law (Oxford and Portland, OR: Hart Publishing, 2007), 135–6. Indeed, Art. 7(2)(c) of the Statute of the International Criminal Court, UN Doc. A/CONF.183/9, refers to 'enslavement' as a crime

restrictions placed on the freedom of movement of the individual and the fact that victims may not receive appropriate payment for their labour. Typically, human trafficking will entail the recruitment of a person for some employment in another country, though often the real nature of the work, or the conditions of the work, will be concealed from the victim. The individual will then travel to the destination country, directly or via transit states, perhaps crossing borders illegally. Trafficked individuals will not usually be permitted to retain possession of their travel/identity documents; another way of exerting control over victims.

The types of work for which people are trafficked are well known. While attention is most frequently drawn to trafficking for the sex industry, it seems that the practice extends well beyond that: people have been trafficked to work in agriculture, in sweat shops, for marriage (often as a sham so that the woman can be forced into the sex industry), for domestic labour, for adoption, and even so that their organs can be harvested for transplants.[3]

The legal ramifications of human trafficking are complex because several different areas of municipal and international law may be applicable at the same time. In municipal law, the victim, by working illegally, may on the face of it have breached employment law and migration conditions. In some countries, trafficked persons working in the sex trade may also have breached so-called vice/morality laws or have committed public order offences. The reality is that trafficked people do not control their own destinies and it is therefore inappropriate to treat them as the villains of the piece.[4] That particular classification is better reserved for the traffickers who, in addition to exploiting the labour of their victims, may subject them to a variety of practices as a means of intimidation and exerting control, typically physical violence, sexual violence, psychological pressures, enforced drug taking and deprivation of liberty. In any civilised legal system such practices constitute crimes including kidnapping, rape, grievous bodily harm, assault and theft. From a civil law dimension one can readily identify the torts of battery, assault and false imprisonment in many cases of human trafficking.

against humanity, enslavement meaning 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.

[3] US Department of State, *Trafficking in Persons Report 2008: Major Forms of Trafficking in Persons*, available at www.state.gov/g/tip/rls/tiprpt/2008/105377.htm (last accessed 25 Oct. 2008).

[4] Accordingly, the Trafficking Protocol contains limited obligations for transit and destination states with regard to assistance for, and protection of, people who have been trafficked (Art. 6).

At international law, human trafficking is widely regarded as a breach of basic human rights.[5] It is debatable to what extent this is accurate, given that human trafficking is, on the face of it, a criminal activity perpetrated normally by private citizens against other individuals. To treat trafficking as a human rights violation as such requires overcoming the accepted notion that human rights obligations operate vertically, between states and those subject to their jurisdiction, and accepting some kind of horizontal application.[6] It is nevertheless the case that trafficking has at least a human rights dimension, most notably where the state is unwilling or unable to take effective action against it,[7] or where the law of international protection comes into play (where a person may need to remain in the destination state because of reasonable fears of traffickers in the home country).[8] Human trafficking is also regarded by many states as a threat to their security because of the challenges posed by organised crime and because it may subvert immigration control. Most notably, human trafficking may also be a crime under international law.[9] The ways in which trafficking requires awareness of several areas of law has been recognised.[10]

[5] See, e.g., the Council of Europe Convention on Action against Trafficking in Human Beings 2005, ETS No. 197, the Preamble of which provides that trafficking is 'a violation of human rights and an offence to the dignity and the integrity of the human being'. The UN High Commissioner's *Recommended Guidelines on Human Rights and Human Trafficking 2002* provide (Guideline 1): 'Violations of human rights are both a cause and a consequence of trafficking in persons …', UN Doc. E/2002.68/Add.1.

[6] On trafficking as a crime rather than a human rights violation, see R. Piotrowicz, 'Trafficking of human beings and their human rights', in R. Cholewinski, R. Perruchoud and E. MacDonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: TMC Asser Press, 2007), 275, 278–81.

[7] This arises because of the state's obligation to ensure respect for human rights, an obligation that includes liability for the acts or omissions of others where the state can be shown to have been remiss. This is discussed further below.

[8] See R. Piotrowicz, 'Victims of people trafficking and entitlement to international protection', *Australian Year Book of International Law*, 24 (2005), 159–79. See further discussion below.

[9] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183//9, 17 Jul. 1998, 2187 UNTS 90; entered into force 1 Jul. 2002: Art. 7(1)(c), which declares enslavement to be a crime against humanity: see above n. 2. Also relevant is Art. 7(1)(g), which provides that rape, sexual slavery and enforced prostitution may be crimes against humanity. While trafficking is not listed specifically as a war crime, several sexual offences are (again rape, sexual slavery and enforced prostitution), each of which could be relevant to trafficking: Art. 8(2)(b)(xxii) and (e)(vi).

[10] A recent and detailed treatment of this aspect of human trafficking is A. Edwards, 'Traffic in human beings: at the intersection of criminal justice, human rights, asylum/migration and labor', *Denver Journal of International Law and Policy*, 36 (2007), 9–52.

Within this legal context, where does human security come into play? The essence of human trafficking here is the aspect of forced migration and the risks and harms to which trafficked people are exposed while being trafficked. It is important to bear in mind that trafficking may involve many different actors: the recruiter, those who provide transport and accommodation, those who facilitate crossing international frontiers, those who take control over the victims at their destination. The process of transnational trafficking therefore frequently, if not always, entails establishing control over the victim while she is in her own state of residence or nationality, then moving her to a different state. This means that, from the dimension of human security, we have to consider the needs of victims as both citizens and non-citizens, depending on which stage of the trafficking process has been reached. There are implications not only for destination states but also the transit and source states. Central to this discussion is the fact that human trafficking is primarily a private enterprise, albeit with occasional state involvement, neglect or incompetence playing a role. Yet analyses of human security focus on the responsibility of states so the issue becomes: what can and should source, transit and destination states do to promote human security in response to the threat posed by human trafficking?

II. Human security and the legal regime on trafficking

In the view of this writer, there is no such thing as an obligation upon states to provide human security.[11] Furthermore, there is disagreement about the precise content of this non-obligation, so it is difficult to say exactly how states are not bound. The aim here is not to repeat the rather extensive debate about the nature and status of human security, a debate that by its very existence demonstrates the lack of certainty about content and status. Rather, the idea is to consider how human security may impact upon human trafficking.

Uncertainties aside, perhaps a useful starting point is the report of the United Nations Commission on Human Security, *Human Security*

[11] This proposition is debateable with some scholars asserting that the raft of human rights guarantees collectively constitute a right to human security, not least Art. 9 of the International Covenant on Civil and Political Rights 1966 (adopted 16 Dec. 1966, entered into force 23 Mar. 1976); 999 UNTS 171) (ICCPR) (the right to security and liberty of person); or that the notion of human security is itself developing into a human right. For an overview of these views, see ch. 1 by A. Edwards and C. Ferstman in this book.

Now.[12] This report provided that human security should 'protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment'.[13] It continued:

> It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.[14]

Now, there is no treaty or rule of customary international law that encapsulates such an obligation on states. But there is an international instrument: the passage quoted above could just about be read as a description of the Universal Declaration of Human Rights 1948,[15] a non-binding instrument which contains many rights since recognised as legally binding, most notably in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966.[16] Of course, many of the obligations contained in the latter instrument are not absolute but aspirational, rather as the notion of human security may be said to be aspirational. Human security does not, at least for the time being, create new obligations for states but it suggests a way in which we ought to look at existing obligations, and this has particular ramifications for human trafficking.[17]

State security is seen sometimes as antithetical to human security, as if there is a tension, or even incompatibility, between the two.[18] The Commission on Human Security's Report claims that human security 'broadens the focus from the security of borders to the lives of people

[12] UN Commission on Human Security, *Human Security Now*, New York, 2003.
[13] *Ibid*., 4.
[14] *Ibid*.
[15] Universal Declaration of Human Rights 1948 (adopted 10 Dec. 1948; GA res 217A (III)) (UDHR).
[16] International Covenant on Economic, Social and Cultural Rights 1966 (adopted 16 Dec. 1966, entered into force 3 Jan. 1976; 993 UNTS 3) (ICESCR).
[17] H. R. Friman and S. Reich, 'Human trafficking and human security', in: H. R. Friman and S. Reich (eds.), *Human Trafficking, Human Security and the Balkans* (Pittsburgh, PA: University of Pittsburgh Press, 2007), 136, 153: '… a human security approach reveals that progress is still possible through taking steps to ease freedom from want, freedom from fear, and the weaknesses of rule of law that help to drive the practice of human trafficking.'
[18] See, e.g., B. von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Oxford and Portland, OR: Hart Publishing, 2007), 62: 'The core of the human-centred approach in human security is the normative priority of people's security, especially in relation to states' security.'

and communities inside and across these borders'.[19] It refers to human security, however, as *complementing* state security in several ways. Human security:

- is concerned primarily with the individual rather than the state;
- addresses threats to people's security that would not necessarily be regarded as threats to state security;
- is concerned with the actions of non-state actors as well as those of the state; and
- involves not only protecting people but empowering them to fend for themselves.[20]

The idea behind these propositions is that the state, which has been seen as having a monopoly in ensuring security of its population, cannot necessarily always do so, but a state's inability should not hinder or impede efforts by other actors to achieve security. Some of the threats identified have direct relevance to human trafficking. For example, transnational terrorism may be funded in part by the proceeds of organised crime, including trafficking. Population movements, themselves seen as a source of human insecurity,[21] may be motivated and prompted by the financial rewards to be gained from trafficking. Impoverishment and illiteracy are widely recognised to be factors that contribute to vulnerability to trafficking. The links are certainly there.[22]

Human security looks to provide strategies for the protection and empowerment of individuals. In the case of human trafficking, the threats are those of physical, sexual and psychological violence, economic exploitation, dislocation or disorientation through being in a foreign country, perhaps an inability to speak the language, deprivation of identity documents (leading sometimes even to *de facto* statelessness), and separation from one's family and supportive social network. If human security is to empower and protect the victims of trafficking, how can it do so? This will require various actions by states according to whether they are source, transit or destination countries, the aim being:

[19] Commission on Human Security, *Human Security Now*, 6.
[20] *Ibid.*
[21] For more on inter-linkages between migration and human security, see ch. 7 by P. Oberoi in this book.
[22] See, e.g., M. Dottridge, *Kids as Commodities? Child Trafficking and What To Do About It* (Geneva: International Federation Terre des Hommes, 2004), 28–31.

- To discourage human trafficking by addressing the risk factors and deterring traffickers, in particular by addressing the factors that encourage trafficking, such as poverty and poor or limited education.
- To make human trafficking more difficult to execute, through effective border controls.
- To deal effectively with traffickers in source, transit and destination countries, through establishing an adequate legal regime, sufficiently funded, for the detection, prosecution and punishment of traffickers.
- To assist victims in destination countries with regard to their immediate physical needs and personal security, and subsequently with regard to facilitating their repatriation or enabling them to remain in the destination country. In practice this means adequate medical treatment, access to competent translators and interpreters, access to legal advisors (whether or not the victim is also a witness in a prosecution), as well as basic social security provision.
- Cooperation amongst the states affected.

The *legalisation* of human security – i.e. the identification of the already existing legal aspect of human security rather than its crystallisation as a distinct rule of international law in its own right – can be achieved to some extent by recourse to existing laws and this is particularly pertinent to human trafficking, which is addressed by several areas of law. In the context of human trafficking, it is perhaps unreasonable to criticise the so-called state-centred approach of the international community to trafficking. Much of the writing on trafficking asserts that it is too much concerned with migration control and punishing the perpetrators of trafficking rather than helping the victims as such.[23] But while it may be virtually a truism to argue that the two are obviously linked, and that furthermore by treating trafficking as a crime first of all, states are in any case helping victims indirectly by deterring and punishing trafficking,

[23] That is indeed the focus of the Trafficking Protocol. Other instruments, however, stress the importance, even primacy of human rights considerations. See, e.g., the Council of Europe Convention on Action Against Trafficking in Human Beings 2005, the Preamble of which provides, in part: 'Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives.' Furthermore, one of the main purposes of the convention is 'to protect the human rights of the victims of trafficking' (Art. 1(1)(a)). Similarly, the Recommended Principles on Human Rights and Human Trafficking 2002 of the UN High Commissioner for Human Rights provide: 'The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims' (Principle 1).

I suggest there is merit in taking a less critical approach. For a start, it is simply unrealistic to expect states not to take migration control seriously. There are very good (state) security and electoral reasons for doing so. The more that states act effectively against traffickers, the less likely they (the traffickers) are to persist with their activities (although that is not to suggest they will all become good law-abiding citizens; they will be more likely to diversify their activities into some less regulated or less risky criminal activity). There is nothing *prima facie* wrong with states deciding, as they did with the Trafficking Protocol, to address trafficking primarily as a transnational crime rather than a threat to human rights. The real problem, as far as the Trafficking Protocol is concerned, is the weakness of its provisions for the protection of victims. Crucially, it does not expressly provide that people who have been trafficked are not to be treated as criminals, even if they have on the face of it broken some national laws, for instance with regard to immigration or employment.[24] Rather, it suggests, through the measures to be taken to assist victims, that they should not be blamed for the situation in which they find themselves, thus merely implying that victims should not be prosecuted for apparent breaches. One problem here is that traffickers can use the threat of sanctions by national law authorities as one means of establishing and maintaining control over their victims. To this limited extent at least, the Trafficking Protocol does acknowledge some interest of the human beings involved separately from the interests of the state but it could have gone further.

The recognition that human trafficking can be a crime against humanity or a war crime might be taken as further evidence that trafficking is currently insufficiently victim-oriented because this development once again focuses on the criminal aspect of trafficking rather than the human rights dimension. Or does it? I would suggest the opposite. The essence of international criminal law is that it seeks to hold individuals accountable for very serious crimes, usually directly or indirectly aimed at causing human suffering. In doing so, international criminal law aims to ensure that the accused are held accountable for serious violations of human rights, perpetrated in particular during armed conflicts (although crimes against humanity can in principle occur outside an armed conflict). Human rights guarantees for victims

[24] Part II of the Trafficking Protocol, entitled 'Protection of victims of trafficking in persons', contains very few explicit measurable obligations. See, further, A. Gallagher, 'Human rights and the New UN Protocols on Trafficking and Migrant Smuggling: a preliminary analysis', *Human Rights Quarterly*, 23 (2001), 975, 990–1.

are provided for elsewhere, most notably in the 1949 Geneva Conventions on the protection of victims of armed conflict and their two Protocols of 1977.[25] These instruments provide very important legal protections for human beings and they focus directly on the victim rather than the state (so much so that they are not even concerned with which state is to blame for starting an armed conflict). They simply aim to alleviate human suffering.[26] They might be considered instruments of human security *par excellence*. They enjoy universal acceptance, yet they are regularly flouted and breached, at the cost of immense human suffering. So it is not necessarily a human-centred approach that will make a difference to people who have been trafficked, because we arguably have one already.

Of course, human security is supposed to be about more than 'just' protection of human rights although, if states adhered to their human rights obligations more conscientiously, there might be much less debate about the need for human security. To the extent that the concept of human security encourages states to fulfil their current obligations in good faith, it can play a role in promoting the general well-being of victims of trafficking.

It is precisely in the context of human trafficking that it is appropriate to recognise the legitimacy of a state-centred approach, simply because trafficking is so much a private criminal enterprise: it is not, on the face of it, the state's fault – although factors contributing to its occurrence,

[25] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 Aug. 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 Aug. 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 Aug. 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.

[26] Thus common Art. 3 provides, in part: 'Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely…'. This principle of humanity is so fundamental that the Conventions each contain a provision that, in the event of a state denouncing the Convention, it would remain bound by this principle of humanity. See, e.g., Geneva Convention I, Art. 63: parties will remain bound 'by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience'.

such as poor education, poverty, armed conflict and the failure to maintain the rule of law, may be attributed, to some extent, to the failure of the state. Trafficking then is not usually a two-way process involving the state and its residents. Rather, it is three-way, the third player being the trafficker. States do not traffic (corrupt border officials notwithstanding); states' involvement is indirect. For that reason, the use of transnational and national criminal law to tackle trafficking is a legitimate tactic so long as it takes appropriate account of the rights and needs of the victims. So what are those rights?

There are two principal areas in which states can be responsible for protecting the human rights of victims of trafficking. The first is where they become directly involved – usually where a victim seeks international protection in a destination country (i.e. she reasonably fears a serious violation of her basic rights should she return to her home state). The second is related to this: the obligation of states under international human rights law to ensure the protection of certain basic rights which are threatened by non-state actors. It is this obligation that may create duties for states to protect others who are at risk from the criminal activities of traffickers.

There is little doubt that destination states may have international protection obligations towards people who are at risk of being trafficked or in some other way placed at serious risk should they return to their home state. This could be because a person has already been freed or has escaped from traffickers and/or has given evidence against them. In such cases the traffickers may pose a threat to the safety of the victim should she return to her home country. The nature of the protection obligation depends on the precise circumstances: in some situations the victim may qualify for refugee status and the attendant benefits,[27] although because of the narrowness of the definition in the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol[28] (1951 Refugee Convention), this is unlikely to occur very often.[29] Another option is that a victim might be entitled to complementary (subsidiary)

[27] UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of being Trafficked*, UN Doc. HCR/GIP/06/07, 7 Apr. 2006.

[28] 1951 Convention relating to the Status of Refugees, adopted 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954, read in conjunction with the 1967 Protocol relating to the Status of Refugees, GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967.

[29] See R. Piotrowicz, 'Victims of people trafficking and entitlement to international protection'.

protection in recognition of the fact that, although she does not qualify for refugee status, she nevertheless cannot be obliged to return to her home state because of the threat to her human rights that exists there.[30] It is now widely accepted that states can have international protection obligations even where the threat posed is by non-state actors, such as traffickers, rather than the individual's own state.[31]

These obligations may exist with regard to destination and transit states but, of course, would not apply to the source country. However, source and destination states are bound by the obligation to 'ensure respect' for human rights, and this may go beyond what they themselves directly do: in other words, the failure by a state to prevent certain acts against the basic interests of those within its jurisdiction may amount to a breach by the state of its own obligation towards the victim. Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[32] provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.' But the question then arises: what are these rights? Does the obligation to 'secure' rights for everyone mean just with regard to the acts or omissions of the state, or does it include acts or omissions by non-state actors, including traffickers? Does the prohibition on inhuman and degrading treatment apply just to the state's own acts or is the state in breach if a private individual, such as a trafficker, subjects another individual to such treatment?

Clearly not every serious criminal act is a breach of the state's human rights obligations: when someone is raped or murdered it is treated as a crime, not a human rights violation, unless there is some element of state responsibility. The ECHR imposes obligations only on states; to that extent, it is not relevant to categorising criminal acts perpetrated by one citizen on another as human rights violations. However, where the state is in some way responsible for the act – for example, indirectly by failing to have in place a legal regime that addresses the particular mischief, for instance to enable the effective prosecution of rape – then it may be

[30] See, e.g., the European Union's Qualification Directive: Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[31] This is acknowledged, e.g., in Art. 6(c) of the EU Qualifications Directive. See, further, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (Oxford: Oxford University Press, 2007), 98–100.

[32] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953.

responsible for a human rights violation, viz, failing to give effect to its positive obligation to 'secure' respect through its laws for the rights of the victim.[33]

The International Covenant on Civil and Political Rights 1966[34] is more explicit than the ECHR. Its Preamble provides, in part: '… the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.' Article 2(1) then stipulates: 'Each State Party to the present Covenant undertakes to respect and ensure respect to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …' There are certainly some situations where states will be held accountable, if not for the specific harm suffered by an individual, then for the failure to have in place an effective system to prosecute and punish certain acts, such as rape.[35] This could also be the case with regard to trafficking, where the state of origin is aware that the practice is taking place but fails to take effective action to address the matter. While there may be some problems in identifying precisely how far a state's responsibility for the criminal acts of non-state actors within its jurisdiction extends, there is certainly some scope here to promote the security of victims of trafficking.

Let us return to the four ways in which the Commission on Human Security Report identified how human security may complement state security, and consider how the law may actually promote human security:

A. Human security is concerned primarily with the individual rather than the state

Both international law and municipal law address the needs of the trafficked individual. While the Trafficking Protocol is primarily concerned with trafficking as a crime, it acknowledges that the trafficked person is to be treated as a victim, not as a criminal. Recent international instruments focus on the human rights of trafficked people as much as on the criminal dimension of the act. Furthermore, the law of international protection

[33] D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 19–22.

[34] International Covenant on Civil and Political Rights 1966, GA res. 200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976.

[35] See, e.g., *M.C.* v. *Bulgaria*, European Court of Human Rights, Applic. No. 39272/98, especially para. 185 (Judgment of 4 Dec. 2003).

may work in such a way that transit or destination states are obliged to permit trafficked people to remain in their territory (or at least not to return them to the source state) where it is shown that they face a real risk of a serious breach of their rights, for instance by being re-trafficked. That is not to say that the legal regime is perfect; it certainly is not. But it is difficult to see what human security adds here.

B. Human security addresses threats to people's security that would not necessarily be regarded as threats to state security

There is some merit in this. In as much as human security is concerned with challenges such as impoverishment and illiteracy, it is quite true that the law with regard to trafficking does not seem to have so much to say about this. On the other hand, when one studies the causes of trafficking, poverty and poor education seem to be prominent. These ills are rather poorly addressed by human rights law, although there is soft law that acknowledges the need to address the causes of trafficking.[36] This may be an area where it is in any case futile to consider the legal dimension because states are unlikely to accept obligations that require them to commit resources they may never possess.

C. Human security is concerned with the actions of non-state actors as well as those of the state

International law and municipal law are similarly concerned with the actions of non-state actors as well as the state. The law of international protection now includes threats posed by non-state actors. National criminal laws are obvious tools for taking on the challenge posed by human trafficking. Of relevance here are not only trafficking-specific laws but also others such as criminal law, immigration law or social security law. If there were no such laws, then no amount of declarations and reports on human security would be of much assistance in preventing trafficking. But, of course, human security may add something non-legal to the mix and this is something of which lawyers may be

[36] See, e.g., the UN High Commissioner's *Recommended Principles on Human Rights and Human Trafficking 2002*. Principle 4 provides: 'Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.' Principle 5 provides: 'States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.'

too readily dismissive. Many lawyers tend to assume that, in any issue, law is the only thing that matters but there can be many other factors motivating states' actions. While, in the view of this writer, one cannot speak of human security as a legally binding concept, the notion may nevertheless have an impact on some states' behaviour.

D. Human security involves not only protecting people but empowering them to fend for themselves

The concept of empowerment resembles ideas of the law of tort, which enables individuals to sue for breaches of their rights by other individuals. Obviously relevant to human trafficking are false imprisonment, assault and battery. Of course, we need to be realistic here: the average trafficking victim will have neither the financial resources nor the expertise to engage in such a course of action; to succeed in this requires financial and practical support from the state and/or interested non-governmental organisations (NGOs), but the idea is a reasonable one; suing one's trafficker could well help some victims to regain control over their own lives and destinies. A different but related matter is that of victims giving evidence against their traffickers in the course of criminal prosecutions. In the EU this is addressed by a Directive,[37] which allows victims of trafficking to receive short-term residence permits in the destination state in return for giving evidence against their traffickers. For various reasons this Directive is rather flawed,[38] but these flaws are not connected to the principle behind the Directive, which is that victims should be enabled to remain in the destination state, at least for some time, while a prosecution takes place.

III. Conclusion

In suggesting that there is no obligation of human security as such, I am not asserting that states do not have to do anything with regard to

[37] Council Directive 2004/81/EC of 29 Apr. 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

[38] Principally because it requires the trafficked person to take the risky act of giving evidence in court against alleged traffickers with no guarantee that the witness will not be returned to her home state where she may be at risk of retribution: R. Piotrowicz, 'European initiatives in the protection of victims of trafficking who give evidence against their traffickers', *International Journal of Refugee Law*, 14 (2002), 263, 270–3.

people who have been trafficked. In fact, I have sought to demonstrate that there is already a substantial body of law in place to address the human security and human rights needs of people who have been trafficked. One might even suggest that there is more than enough law around. The problem is more one of the willingness of states to give effect to their existing obligations in a way that better assists those who have been trafficked.

Human security is an idea, not a binding rule of law. But if states are influenced by the idea and do the right thing, does it really matter whether they do it because of a legal obligation or just because they want to do something humane? If, on the other hand, states are not willing to be influenced by the idea, then let us remind them of their legal obligations. In other words, human security is a nice idea, it may in time come to acquire some legal status (the kind recognised by legal advisors in foreign ministries rather than the kind advocated by academics who do not have to advise governments), but if it does not, it will not make much practical difference to victims of trafficking. As things currently stand, the best way to ensure human security is in a strong state effectively bound by the rule of law and able and willing to enforce that law too.[39] With regard to trafficking and its victims, this means states should apply the law, while remembering that the law is not the only relevant factor in addressing human trafficking.

[39] This notion is to some extent accepted in the Commission on Human Security Report, which provides: 'Human security and state security are mutually reinforcing and dependent on each other. Without human security, state security cannot be attained and vice versa. Human security requires strong and stable institutions.' UN Commission on Human Security, *Human Security Now,* 6.

PART IV

National security and the ‘war on terror’

12

A distinction with a legal difference: the consequences of non-citizenship in the 'war on terror'

CRAIG FORCESE

I. Introduction

Much ink has been spilled since 11 September 2001 (9/11) about 'lesser evils': that sometimes a small evil must be done to avert a larger evil.[1] That may be true. No political leader may responsibly urge *fiat justitia et pereat mundus* (let justice be done, though the world perish). But the lesser evil remains just that, an evil, and it is not always clear when a lesser evil graduates to a more significant wrong.

Underlying this point is a concern with the utilitarian impulse of national security. Guarding national security is, by definition, a majoritarian project: it serves the interest of the greatest number, enabling a state's inhabitants to continue their affairs in safety. Serving the interests of the majority may easily become conflated with serving the greater good. In extreme instances, maximising the good for the greatest number may justify injustices done to a minority. That minority may be large (citizens of Japanese origin interned in the United States and Canada during World War II) or relatively small (suspected terrorists tortured for intelligence). Nevertheless, the result is the same: the rights of the few are sacrificed in the name of securing the rights of the many.

Both historically and at present, the minority in question often comprises non-citizens or new citizens from ethnic or religious minority backgrounds. Alternatively, there may be a geography of rights observance: rights are violated abroad in the name of preserving them at home. States may accept collateral injuries to foreigners to a much

[1] See, e.g., M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Toronto: Penguin Canada, 2004).

greater extent and in much greater number than they will allow equivalent harm to their own nationals.

To the extent that these actions focus on non-nationals, they single out a constituency with a tenuous legal status in the law of the state in question. This chapter explores this contention by focusing on the security response of certain democratic states to Islamist terrorism. It does so in three parts. First, it examines the concept of nationality in international law and the rights and standards of treatment associated with it. Second, it considers the implications for non-nationals of measures introduced under the so-called 'war on terror', focusing in particular on the militarisation of anti-terrorism, the legal apparatus established by the United States in relation to 'enemy combatants', and questions concerning the interrogation of non-nationals. Last, it analyses the substantial reliance of several states in their security policies on immigration law, a body of law often quite permissive of truncated due process standards.[2] The chapter concludes that recourse to these legal procedures reflects a form of legal expediency, permitting the government in question to act without the full panoply of rights protections and oversight required for citizens. The result may be a nominal adherence to law, but one in which the law may not reflect many of the underlying values of fairness and substantive justice that animate the 'rule of law' as it is commonly understood in many modern western democracies.

II. The patchwork quilt of rights for non-nationals

A. The concept of nationality in international law

International law says surprisingly little about nationality. In its 1923 Nationality Decrees in Tunis and Morocco decision, the Permanent Court of International Justice put it this way: 'in the present state of international law, questions of nationality are … in principle within the reserved domain.'[3]

1. Acquiring nationality

Still, there is an outer limit to the deference international law accords states in determining their own nationality rules. First, international human rights law creates a right to nationality. In language embellishing

[2] See, also, ch. 13 by D. Moeckli in this book.
[3] (1923) PCIJ Reports, Series B, No. 4, 24.

that found in the Universal Declaration of Human Rights 1948 (UDHR)[4] and the International Covenant on Civil and Political Rights 1966 (ICCPR),[5] the Convention of the Rights of the Child 1989 provides that a child shall have 'the right from birth … to acquire a nationality … States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.[6]

Second, a state's decision to extend nationality to an individual may be challenged 'where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred'.[7] The International Court of Justice's (ICJ) famous *Nottebohm* case presents the clearest pronouncement on a state's discretion to award nationality.[8] In that decision, the ICJ characterised nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'. It is, in the ICJ's words, 'the judicial expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the State conferring nationality than that of any other State'.[9] Absent this closer link, or 'genuine connection', a state asserting a link of nationality to a person (at least) for the purpose of then claiming diplomatic protection cannot insist on recognition of its claim.[10] *Nottebohm* has been interpreted (perhaps doubtfully) as obliging the existence of a real and effective link between a person and a state extending nationality to that person, even in instances where the person has only one nationality.[11]

[4] Art. 15, UDHR, GA res. 217A (III), UN Doc. A/810 71 (UDHR), adopted 10 Dec. 1948.

[5] Art. 24(3), International Covenant on Civil and Political Rights 1966, GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976 (ICCPR).

[6] Art. 7, Convention of the Rights of the Child 1989, GA res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990.

[7] J. Dugard, *First Report on Diplomatic Protection*, International Law Commission, 52nd Sess. UN Doc. A/CN.4/506 (2000), 35.

[8] *The Nottebohm Case*, 1955 ICJ Reports 4.

[9] *Ibid.*, 23.

[10] *Ibid.* For more on diplomatic protection, see ch. 16 by L. McGregor in this book.

[11] Dugard, *First Report on Diplomatic Protection*, 37 ('The *Nottebohm* case is seen as authority for the position that there should be an "effective" or "genuine link" between the individual and the State of nationality, not only in the case of dual or plural nationality (where such a requirement is generally accepted), but also where the national possesses only one nationality.'). Whether the principles expressed in the case reach that far is doubtful. See, e.g., the fuller discussion in C. Forcese, 'Shelter from the storm:

2. Losing nationality

International law is less detailed on the circumstances in which states may strip a person of their nationality. Certainly, statelessness sits poorly with international law. Indeed, while they have attracted relatively few ratifications, two treaties are specifically designed to limit statelessness: the 1954 Convention relating to the Status of Stateless Persons[12] and the 1961 Convention on the Reduction of Statelessness.[13] Among other things, the latter treaty provides that a 'Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless'.[14]

On the other hand, international law guards inadequately a right by individuals to voluntarily relinquish an existing nationality. The UDHR indicates that persons are free to 'change their nationality'.[15] However, the right to change nationality found in the Declaration is not replicated in the ICCPR.[16] Further, while the right to change citizenship has also received some attention from publicists over the years,[17] there is no compelling argument that it is customary international law.[18] Certainly, state practice does not demonstrate a widely held view that nationalities may be changed. A large number of states apparently refuse to recognise renunciations of their nationalities.[19] They also deny the existence of

rethinking diplomatic protection of dual nationals in modern international law', *George Washington International Law Review,* 37 (2005), 469.

[12] UN Convention relating to the Status of Stateless Persons 1954, 360 UNTS 117, entered into force 6 Jun. 1960 (1954 Statelessness Convention).

[13] UN Convention on the Reduction of Statelessness 1961, 30 Aug. 1961, 989 UNTS 175, entered into force 13 Dec. 1975 (1961 Convention).

[14] Art. 8, 1961 Convention. For more on the statelessness issue, see ch. 2 by M. Manly and L. Van Waas in this book.

[15] See UDHR, Art. 15(2).

[16] The ICCPR specifies in Art. 12 that 'everyone shall be free to leave any country including his own', but does not include reference to a change of nationality.

[17] See discussion in C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (The Hague: Martinus Nijhoff Publishers, 2001), 13 (noting that some international scholars have proposed the existence of an international right to change one's nationality).

[18] See Z. Deen-Racsmany, 'The nationality of the offender and the jurisdiction of the International Criminal Court', *American Journal of International Law,* 95 (2001), 606, n. 16 (suggesting that the propensity of some states to deny their nationals the power to renounce their citizenship is not prohibited by international law, subject to an exception where the desire to renounce is driven by fear of persecution).

[19] See, e.g., J. Sallot, 'No ban for dual passports, Graham says', *The Globe and Mail,* 13 Aug. 2003 (noting that Canada will not ban dual nationality because many Canadian dual nationals are unable to renounce their foreign citizenships under the laws of these states); Australian Department of Foreign Affairs and Trade, *Travel Information for Dual*

dual nationality, prompting regular warnings in the travel advisories of Western countries to their dual nationals.[20]

International law therefore authorises persons to acquire intentionally the nationality of a state through naturalisation (assuming the genuine link threshold is met), but not to discard actively a once-valid nationality no longer wanted. The result may be dual nationality by default, produced by what this chapter terms 'clinging' nationalities. Clinging nationalities arise in circumstances in which those who wish to leave behind the nationality of their country of ancestry, birth or subsequent naturalisation are prevented from doing so by the laws of that state.

B. Standards of treatment of non-nationals

Persons of foreign nationality obviously often travel and reside as expatriates in states where they have no nationality ('foreign states'). Customary international law recognises – and has recognised for more than a century – that foreign states must not treat these visiting or resident aliens in a manner that violates certain international baseline standards of treatment.[21] These baseline standards include important substantive guarantees. Thus, in customary international law, a state 'is responsible … for injury to a national of another state caused by an official act or omission that violates (a) a *human right* that … a state is obligated to respect for all persons subject to its authority; [and] (b) a *personal right* that, under international law, a state is obligated to respect

Nationals – What could it mean for you when travelling overseas?, available at www.dfat.gov.au/consular/dualnat.html (last accessed 15 Sept. 2008) ('Many countries have laws that prevent citizens giving up their nationality, either under any circumstances at all, or except by a formal act of renunciation').

[20] See, e.g., Australian Department of Foreign Affairs and Trade, *Travel Advice for Syria*, available at www.smartraveller.gov.au/zw-cgi/view/Advice/Syria (last accessed 15 Sept. 2008) (observing that 'Australian citizens who also hold Syrian citizenship should be aware that Syrian authorities regard them as Syrian citizens while in Syria'). See, also, Canadian Department of Foreign Affairs, *Travel Report: Syria*, available at www.voyage.gc.ca/dest/report-en.asp?country=283000#8 (last accessed 15 Sept. 2008) (observing that 'Canadians who also have Syrian nationality or who are eligible for Syrian citizenship may be subject to compulsory military service and other aspects of Syrian law. Holding dual nationality may limit the ability of Canadian officials to provide consular services').

[21] See, e.g., *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n. 2 (2d Cir. 2007) citing F. Griffith Dawson and I. L. Head, *International Law, National Tribunals and the Rights of Aliens* (New York, NY: Syracuse University Press, 1971), 10 (describing the 'International Minimum Standard of Justice' as 'the standard of substantive and procedural treatment which aliens purportedly should receive in "civilised" states and which they thus should receive abroad under international law').

for individuals of foreign nationality'.[22] As discussed below, these substantive standards also indisputably incorporate non-discrimination obligations, barring treatment of aliens in relation to, *inter alia*, legal rights that falls below the standard employed for nationals.[23]

1. Human rights

The rules on treatment of non-nationals predate international human rights law.[24] The latter now incorporates protections once guaranteed exclusively by the 'minimum' treatment standards (discussed below), but does so without diminishing the content of customary minimum treatment. For this reason, the substantive customary treatment standard is transgressed where a state violates 'those rights which the state is obligated to respect for all persons subject to its authority, whether pursuant to international human rights agreements to which it is party or under the customary law of human rights'.[25] Specifically, a:

> State's responsibility to individuals of foreign nationality under customary law includes the obligation to respect the civil and political rights articulated in the principal international human rights instruments – the Universal Declaration [UDHR] and the International Covenant on Civil and Political Rights – as rights of human beings generally … but not political rights that are recognized as human rights only in relation to a person's country of citizenship, such as the right to vote and hold office, or the right to return to one's country.[26]

2. More specific guarantees

2.1 Non-discrimination All the chief human rights instruments bar discrimination on enumerated grounds, including national origin. However, the classic customary international law applying to aliens also includes its own limitations on differential treatment. At the very least, states owe aliens national treatment.[27] A state must treat a foreign

[22] *Restatement (Third) of the Foreign Relations Law of the United States* (St Paul, MN: American Law Institute Publishers, 1987), para. 711 (emphasis added).

[23] For more on the principle of non-discrimination in the context of the 'war on terror', see ch. 13 by D. Moeckli in this book.

[24] Restatement (Third) of the Foreign Relations Law of the United States, note 2.

[25] *Ibid.*, comment b.

[26] *Ibid.*, comment c.

[27] See, J. Currie, *Public International Law* (Toronto: Irwin Law, 2001), 311 ('[i]n general, "western" developed states have favoured the … minimum international standard approach. … In contrast, several developing states continue to advocate the national treatment standard as the correct approach to defining the basic level of treatment due to

national no worse that it treats its own nationals, a guarantee that supplements the anti-discrimination prohibitions in international human rights law. Thus, '[d]iscrimination against aliens in matters that are not themselves human rights may nonetheless constitute a denial to the individual of the equal protection of the laws'.[28]

Notably, however, this limitation on discriminatory treatment does not apply to some rights.[29] For example, non-nationals may be expelled from national territories, a practice recognised as legitimate in international human rights law.[30] As discussed below, measures taken in the name of anti-terrorism have sometimes relied heavily on this permissible basis of distinction between nationals and non-nationals.

2.2 Other standards of minimum treatment National treatment is simply a non-discrimination principle. It sets no affirmative standards for state behaviour, leaving aliens open to abuse where states choose to treat their own citizens equally poorly. To allay these concerns, developed countries have grafted onto national treatment additional 'minimum treatment' standards. Minimum treatment – setting a baseline below which state conduct must not fall – may reflect the current requirements of customary international law.[31]

foreign nationals'). The most famous proponent of national treatment was the Argentine diplomat Calvo, who argued that aliens have only those rights and privileges extended to nationals, and that they must seek relief for any grievances in national courts. The so-called 'Calvo Doctrine' was influential in Latin America, but 'never has received widespread support elsewhere, primarily because its drastic curtailment of the institution of diplomatic protection would leave aliens without even nominal procedural safeguards under the existing international order'. R. Lillich, 'The current status of the law of state responsibility for injuries to aliens', in R. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, VA: University Press of Virginia, 1983), 4.

[28] Restatement (Third) of the Foreign Relations Law of the United States, para. 711, comment f. See, also, *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 832 (9th Cir. 1987) (noting, in a case concerning an alleged taking by Mexico of foreign-owned property, that '[i]nternational law requires that aliens not be discriminated against or singled out for regulation by the state').

[29] See, e.g., Restatement (Third) of the Foreign Relations Law of the United States, reporter's note C.

[30] Art. 13, ICCPR.

[31] D. Vagts, 'Minimum standard', *Encyclopedia of Public International Law* (Amsterdam: North-Holland Pub. C., 1997), 408, 409 ('[i]t is probable that an international tribunal would now conclude that aliens still have claims to a minimum standard of personal protection'); I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Clarendon Press, 1998), 527 ('A majority of states represented at the Hague Codification Conference supported the international [minimum] standard, and this standard is probably affirmed in the Declaration of the United Nations General Assembly adopted

Exactly how poor a state's behaviour must be to breach minimum treatment is uncertain. Traditionally, minimum treatment precluded a 'denial of justice'.[32] In the era prior to the emergence of modern human rights, 'denial of justice' had a broad meaning, and included any internationally cognisable injury befalling an alien.[33] It captured, for instance, due process violations in criminal proceedings, arbitrary government use of force and constraints on liberties such as the freedoms of speech and religion, internal travel within a country, and the right to marry.[34] Many of these concepts are now covered by international human rights law. Given this evolution, 'denial of justice' has taken on a more intuitive meaning in modern parlance, and is now defined as an injury 'consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil'.[35] By the beginning of the last century, it was established that:

in 1962 on Permanent Sovereignty over Natural Resources. The standard has also enjoyed the support of many tribunals and claims commissions'); J. Brierly, *The Law of Nations,* 6th edn (New York, NY: Oxford University Press, 1963), 279 ('[f]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law'). See, also, *Case Concerning Certain German Interests in Polish Upper Silesia* [1926] PCIJ, ser. A, No. 7 (which implicitly rejected the national treatment approach in recognising 'the existence of a common or generally accepted international law respecting the treatment of aliens … which is applicable to them despite municipal legislation').

[32] See discussion in, e.g., M. Shaw, *International Law,* 5th edn (Cambridge: Cambridge University Press, 2003), 735.

[33] Restatement (Third) of the Foreign Relations Law of the United States, para. 711, comment a. See, also, Brierly, *The Law of Nations*, 286 ('[t]he term 'denial of justice' is sometimes loosely used to denote *any* international delinquency towards an alien for which a state is liable to make reparation … There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state … [including] corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it').

[34] Restatement (Third) of the Foreign Relations Law of the United States, para. 711, rep. note 2.

[35] *Ibid.,* comment a. Brierly, *The Law of Nations,* 286 (denial of justice in its 'more proper sense is an injury involving the responsibility of the state committed by a court of justice'); see, also, *United States* v. *Romano*, 706 F.2d 370, 375 (2d Cir. 1983) ('In international law an alien may assert a denial of justice only upon a demonstration of grave or serious defects, such as a refusal to grant rights reasonably to be expected by an accused in a criminal trial').

> Undoubtedly the absence of any impartial tribunal from which justice may be sought, the arbitrary control of the courts by the government, the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner, or the use of the courts as instruments to oppress foreigners and deprive them of their just rights may each and all be regarded as equivalent to a denial of justice.[36]

By the end of the twentieth century, a state was responsible as a matter of customary international law if it failed:

> to provide to an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal systems of the world. That such remedy might not be available because under domestic law the state or an official is immune from suit does not diminish the state's responsibility under international law.[37]

In addition to the 'denial of justice' requirements, there may also be a supplemental, more generic standard of conduct that must be met as part of minimum treatment. In *Neer* v. *Mexico*, a 1926 decision of the US-Mexico Claims Tribunal,[38] a US national was killed by Mexicans, provoking only a desultory investigation by the Mexican authorities. In discussing the merits of the claim provoked by this half-hearted response, the Tribunal observed that: 'the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.'[39]

C. *Extraterritorial standards of treatment for non-nationals*

The minimum treatment rules outlined above provide standards of treatment that must be met by states in their treatment of aliens found within their borders. These rules do not, however, indicate how aliens must be treated by states acting extraterritorially; that is, in territories outside that state's sovereign control. This question has become an acute one in the campaign against terror, given the extent to which the

[36] E.M. Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims* (New York, NY: Banks Law Publishing Co., 1916), 335–36 (footnotes omitted).
[37] Restatement (Third) of the Foreign Relations Law of the United States, para. 711 comment e.
[38] *Neer* v. *Mexico* (1926) 4 RIAA 60.
[39] *Ibid.,* para. 4.

United States and its allies have waged that campaign in places like Afghanistan and Iraq, and housed detainees in off-shore camps like those at Guantanamo Bay, Cuba.

The short answer to this question of extraterritorial standards might plausibly be that persons have human rights, regardless of their precise location. However, a state's international human rights obligations may have geographic limitations, tied to the uncertain concept of 'jurisdiction' within human rights treaties. One particularly important question in the post-9/11 context has been the jurisdictional reach of human rights treaties, not least the ICCPR. The ICCPR ranks among the most important human rights treaties in the international system. It obliges state parties to meet a lengthy list of elemental human rights.

Whether the ICCPR has any extraterritorial reach – that is, applicability in imposing obligations on a state when acting outside of that state's borders – has sparked animated discussion among states and commentators in national security contexts.[40] As a strict matter of logic, a state should not be able to authorise its personnel to commit human rights abuses abroad that a state cannot inflict within its own territory.

An attenuated version of this view has prevailed in several international institutions. For instance, the UN Human Rights Committee – the treaty body created by the ICCPR and charged with monitoring its application – has noted that: 'a State party must respect and ensure the rights laid down in the Covenant to anyone within *the power or effective control* of that State Party, *even if not situated within the territory* of the State

[40] See, e.g., Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, *Situation of Detainees at Guantánamo Bay* (15 Feb. 2006), UN Doc. E/CN.4/2006/120 (concluding that the ICCPR has extraterritorial reach). See, also, Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay, Cuba,* 13 Mar. 2002, *ILM* 2002, vol. 41, 532–5: the detainees at Guantanamo Bay 'remain wholly within the authority and control of the United States government' and 'jurisdiction is, therefore, exercised over them'. But see also discussion in M.J. Dennis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: application of human rights treaties extraterritorially in times of armed conflict and military occupation', *American Journal of International Law,* 99 (2005), 119 (rejecting the notion that the ICCPR has extraterritorial reach and canvassing opinions on this matter).

Party.'[41] Rights are guaranteed 'to those *within the power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.[42] The Committee has applied this approach in its case law – for example, by allowing a complaint against Uruguay brought by an individual kidnapped in Argentina by the Uruguayan security forces.[43] In its review of state reports on compliance with the ICCPR, the Committee has also suggested that state obligations extend to a state's armed forces stationed abroad.[44]

In 2004, the International Court of Justice referred to the Human Rights Committee's jurisprudence in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[45] In that advisory opinion, it concluded that a state's ICCPR obligations had extraterritorial reach: 'the Court considers that the *International Covenant on Civil and Political Rights* is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[46]

[41] UN Human Rights Committee (HRC), *General Comment 31: Nature of General Legal Obligations Imposed on States Parties under the Covenant*, para. 12, UN Doc. A/59/40 (2004) (noting that Article 2(1)'s references to jurisdiction and territory 'does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it').

[42] *Ibid.*

[43] *Lopez* v. *Uruguay*, HRC, Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (1981). See, further, *Lilian Celiberti de Casariego* v. *Uruguay*, Comm. No. 56/79 and *Montero* v. *Uruguay*, Comm. No. 106/81.

[44] See, e.g., HRC, Concluding Observations of the Human Rights Committee: Netherlands, para. 8, UN Doc CCPR/CO/72/NET (2001) (relating to the 'alleged involvement of members of the [Netherlands] State party's peacekeeping forces in the events surrounding the fall of Srebrenica, Bosnia and Herzegovina, in Jul. 1995'). The UN Committee against Torture, established under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987, (UNCAT) has made similar comments. See, also, Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture on the United States of America', UN Doc. CAT/C/USA/CO/2, 18 May 2006, paras. 15 and 26. See, further, Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture on the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories', UN Doc. CAT/C/CR/33/3, 25 Nov. 2004, para. 4(b).

[45] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ General List No. 131 (9 Jul. 2004), *ILM* 43 (2004), 1009, para. 111.

[46] *Ibid.*, para. 111. See, also, International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*, ICJ General List No. 116, 19 Dec. 2005, para. 216.

The situation is much more confused in the jurisprudence of the European Court of Human Rights, interpreting the territorial reach of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[47] The court's jurisprudence does open the door to an effective control standard, analogous to that articulated by the ICJ and treaty bodies.[48] On the other hand, the UK House of Lords' decision in *Al-Skeini*[49] casts substantially more doubt on the precise extraterritorial reach of ECHR parties' human rights obligations. In that decision, the Law Lords rejected a generous read of the jurisdictional provisions in the ECHR (analogous to those in the ICCPR). At best, the Convention's extraterritorial reach is restricted to places where the state's level of control is analogous to that exercised over its embassies abroad – a category that a majority of Law Lords agreed included a military base.[50]

D. Conclusion

The analysis in this section suggests that non-nationals have rights while present in foreign states. These rights may even be more robust in some areas than those of nationals if one accepts 'minimum treatment' as more than a non-discrimination principle. That said, differential treatment of aliens is permissible at least in relation to the right of aliens to be present in the foreign jurisdiction (that is, immigration matters). Further, the discussion suggests that states' extraterritorial obligations under human rights instruments are far from certain. As a practical matter, this may leave states relatively unencumbered in their extraterritorial treatment of foreigners. These two observations are explored in detail in relation to the campaign against terrorism in the sections that follow,

[47] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended.

[48] See *Loizidou* v. *Turkey* (Merits), (1997) 23 EHRR 513 (applying a state party's obligations under the ECHR extraterritorially to foreign state territory 'found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully in the latter state'). But, see also *Bankovic* v. *Belgium*, 41 *ILM* 517 (ECHR, 12 Dec. 2001) (concluding that the victims of the bombing of a foreign state were not within the 'jurisdiction' of the bombing European countries).

[49] *Al-Skeini and others (Respondents)* v. *Secretary of States for Defence* [2007] UKHL 26.

[50] *Ibid.* In so doing, the House of Lords expressed disapproval for *Issa* v. *Turkey* (Merits) (2004), 41 EHRR 567. Instead, the Law Lords preferred earlier ECHR jurisprudence, including *Bankovic* v. *Belgium*, *ILM* 41 (2002) 517 (ECHR, 12 Dec. 2001).

first in relation to militarised anti-terrorism and second in the context of immigration proceedings.

III. Militarised anti-terrorism and non-nationals

One phrase more than any other captures the reaction of the international community to the catastrophic events of 9/11: the 'war on terror'. A reasonably apt descriptor of the initial post-9/11 assault against the Taliban and Al Qaeda in Afghanistan, the term has since morphed into a cultural meme, one used to describe the defining preoccupation of international (and much domestic) relations in the early twenty-first century.

But the 'war on terror' is more than metaphor. The struggle against the tactics of violence employed by Islamic jihadists has been militarised since 9/11 to an extent unknown prior to that day. Certainly, states have responded to terrorism using military force in the past. The Israeli experience is a case in point, as are US air or missile strikes in the wake of the 1986 Berlin discotheque terrorist bombing, the 1993 assassination attempt against former President George H.W. Bush, and the 1998 embassy attacks in East Africa. Compared to the contemporary period, however, these uses of force were modest in both scale and duration. None involved 'regime change' or (the rather unique Israeli experience aside) the invasion or occupation of territories. Post-9/11, the latter two strategies have had pride of place among the tactics deployed by the United States and its allies in places like Afghanistan and Iraq.[51]

Notably, militarised anti-terrorism has been practiced at foreign theatres of conflict – military force has been employed in Afghanistan (spilling over to Pakistan and elsewhere in South Asia and the Middle East), not in up-state New York or downtown London. The consequences of this strategy have, therefore, been borne largely by the nationals of these foreign locales, and not the citizens of Western democracies engaged in the campaign against terrorism (beyond those directly involved in the armed and other governmental forces). The fact that the venue hosting militarised anti-terrorism is a foreign one from the perspective of the states most actively prosecuting

[51] For a fuller discussion on use of force in anti-terrorism, see C. Forcese, 'De-militarizing counterterrorism: anti-terrorism, human rights and the use of force', in C. Forcese and N. Laviolette (eds.), *Human Rights of Antiterrorism* (Toronto: Irwin Law Books, 2008).

the campaign has affected the treatment of non-nationals in two ways. First, the use of military force has altered the legal doctrines applicable in gauging the propriety of state behaviour. Second, the extraterritorial nature of these actions has precipitated the controversies about the jurisdictional reach of state human rights obligations alluded to above.

A. *International humanitarian law as the* lex specialis

Situations of armed conflict trigger the application of the specialised legal regime of international humanitarian law (IHL).[52] The core thrust of IHL is to protect persons who do not take part in the fighting. These people include civilians and medical and religious military personnel and also those who have stopped participating in hostilities, such as wounded, shipwrecked and sick combatants, and prisoners of war. These 'protected' persons are entitled to important rights, including the right to be treated humanely in all circumstances. IHL bars, for instance, the killing or wounding of a surrendered enemy. Prisoners of war are to be treated in keeping with a series of detailed rules, and IHL also spells out important standards for civilians under the authority of an enemy power.[53]

To enhance protection of civilians, IHL limits attacks to combatants and military objectives and outlaws methods of warfare that do not discriminate between combatants and civilians. IHL does accept,

[52] IHL applies in situations of 'armed conflict', whether international or non-international. An 'armed conflict' is not carefully defined in either conventional or customary international law. In its jurisprudence, the International Criminal Tribunal for the former Yugoslavia bifurcates the armed conflict threshold between international (as in inter-state) conflicts and non-international conflicts – that is, conflicts between states and non-state actors. In the latter case, the existence of an armed conflict requires 'protracted' armed violence. In the former instance, mere 'resort' to armed force suffices. See *Prosecutor* v. *Dusko Tadic*, Case No. IT-94–1-AR72, reprinted in *ILM* 35 (1996) 32, para. 70.

[53] See, in particular, 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949 [GC I]; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949 [GC II]; 1949 Convention relative to the Treatment of Prisoners of War, 12 Aug. 1949 [GC III]; 1949 Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949 [GC IV]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts [AP I]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 Jun. 1977 [AP II].

however, what are colloquially termed 'collateral' casualties – civilians injured unintentionally in a legitimate attack on military objectives. This standard is very different from that established by international human rights law, which is much more absolute in its protection of the right to life. Moreover, IHL accepts that violence can be intentionally directed at persons other than protected persons; that is, at other combatants.[54]

Human rights principles that protect (absolutely) the right to life do not apply in their full form in situations of armed conflict, being instead interpreted in a manner that accommodates the use of lethal force in the circumstances permitted by IHL.[55]

From this, it follows that the campaign against terror is much less protective of the right to life of persons located in theatres where that campaign has been militarised.

B. Nationality-limited due process rights

Moreover, if captured, a lawful combatant in an international conflict cannot be prosecuted by the detaining state for bearing arms in the

[54] AP I, Art. 43 (noting that 'armed forces' 'have the right to participate directly in hostilities').

[55] It now seems clear that the mere existence of an armed conflict should not be viewed as automatically displacing other rules of international law. For instance, international humanitarian law does not totally replace the more comprehensive rights guarantees of international human rights law. In its 1996 *Advisory Opinion on the Use or Threatened Use of Nuclear Weapons*, ICJ Rep. (1996) 226, para. 24, the International Court of Justice (ICJ) rejected arguments that the ICCPR was 'directed to the protection of human rights in peacetime, and that all questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict'. It held instead that 'the protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency'. *Ibid.*, para. 25. Under Art. 4, key human rights are non-derogable even in the most extreme circumstances. The ICJ amplified this position in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ General List No. 131 (9 Jul. 2004), *ILM* 43 (2004) 1009, para. 106. In both of these decisions, the ICJ interpreted human rights and international humanitarian law harmoniously. It suggested that the ICCPR's 'right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'. *Legality of the Threat or Use of Nuclear Weapons*, para. 25, referred to in the *Israeli Wall* case, para. 105. The content of the right to life is mutable, in other words. Under this reasoning, a violation of international humanitarian law may also constitute a violation of the ICCPR, but the ICCPR does not vitiate a combatant's privilege to use deadly force against another combatant.

conflict and conducting hostilities, if done in a manner otherwise lawful under international humanitarian law.[56] The above noted concept of lawful combatancy is associated with what is called 'combatant's privilege'.[57]

Who is entitled to combatant's privilege is a pressing issue in the post-9/11 era. There is no express concept of 'unlawful' or 'illegal' combatant in the Geneva Conventions or the Additional Protocols, notwithstanding the use of these terms in the post-9/11 era.[58] It is clear, however, that in international conflicts, prisoner of war status and treatment (and the accompanying privilege from prosecution) are denied to spies, mercenaries and, by default, to any sort of combatant not listed as entitled to them in the Geneva Conventions. It is also true that civilians who 'take a direct part in hostilities' may be the object of attack.[59] For these reasons, the civilian combatant loses protected status, and at the same time enjoys no combatant's privilege.[60] They may, therefore, be prosecuted for their acts of violence.

[56] Art. 99, GC III provides: 'No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law'. Combatant's privilege also has customary international law status.

[57] For a discussion of combatant's privilege, see R. Goldman and B. Tittemore, 'Unprivileged combatants and the hostilities in Afghanistan: their status and rights under international human rights and humanitarian law', in American Society of International Law, *Task Force Papers* (Dec. 2002); K. Dormann, 'The legal situation of "unlawful/unprivileged combatants"', *International Review of the Red Cross,* 849 (2003) 45 ('(lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime. They can be prosecuted only for violations of international humanitarian law, in particular for war crimes'); J. Bialke, 'Al-Qaeda and Taliban unlawful combatant detainees, unlawful belligerency, and the international laws of armed conflict', *Air Force Law Review,* 55 (2004), 9; K. Watkin, 'Warriors without rights? Combatants, unprivileged belligerents, and struggle over legitimacy', *Occasional Paper Series*, Harvard Program on Humanitarian Policy and Conflict Research (2005), 12.

[58] There is a debate as to whether the concept exists *per se* anywhere in IHL. See, e.g., *Public Committee* v. *Government of Israel* (2006) HCJ 769/02 (Israeli Supreme Court), paras. 27 *et seq.* (rejecting the notion that IHL currently creates a special *sui generis* class of 'unlawful combatants', but agreeing that civilians who engage in hostilities are not entitled to the protections otherwise accorded to them by IHL).

[59] Art. 51, AP I.

[60] Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2005) 29 ('A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy'). The concept of combatant's privilege only really applies to international conflicts. In non-international conflicts, those who take up arms against the government enjoy no privileges from

It is this limitation on combatant's privilege that has sparked one of the most notorious examples of differential treatment between nationals and non-nationals in US law. In November 2001, President Bush issued an order on the trial of 'non-citizens in the war against terrorism'.[61] Directed at persons believed to be members of Al Qaeda, the order authorised the defence secretary to establish 'military commissions' for the trial of these individuals, when declared 'enemy combatants'.

These commissions were widely derided as failing to meet basic due process standards.[62] They were challenged successfully on constitutional grounds before the US Supreme Court in *Hamdan* v. *Rumsfeld*.[63] Among other things, the court invoked Common Article 3 of the Geneva Conventions (concluding it applied to what it characterised as the non-international conflict between the United States and Al Qaeda). The court held that, whatever else this provision signifies, it usually requires a trial according to an ordinary courts-martial process.[64]

In response, the US Congress passed the Military Commissions Act of 2006.[65] The military commissions system established by the Act applies exclusively to 'alien unlawful enemy combatants'[66] – that is, to persons who are not citizens of the United States and who: (1) have purposefully and materially supported hostilities against the United States or its co-belligerents but are not lawful enemy combatants; or (2) have been determined to be unlawful enemy combatants by a Combatant Status Review Tribunal.[67] The latter tribunal is itself constituted to determine the status of only foreign nationals detained at Guantanamo Bay naval base.[68] The Military Commission Act strips US federal courts of *habeas corpus* jurisdiction over these individuals,[69] a provision that has not survived constitutional scrutiny by the US Supreme Court in

prosecution and no prisoner of war status. Goldman and Tittemore, 'Unprivileged combatants and the hostilities in Afghanistan', 6.

[61] 'Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism', 66 Fed. Reg. 57833 (13 Nov. 2001).

[62] See, e.g., Human Rights Watch, *Briefing Paper on US Military Commissions* (23 Jun. 2006), available at http://hrw.org/backgrounder/usa/gitmo0705 (last accessed 11 Jan. 2009).

[63] *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006).

[64] *Ibid.*, 2797.

[65] Pub. L. No. 109–366, 120 Stat. 2600 (17 Oct. 2006).

[66] 10 USC, para. 948c.

[67] *Ibid.*, para. 948a.

[68] P. Wolfowitz, 'Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal', US Department of Defense (7 Jul. 2004).

[69] 10 USC, para. 950j.

Boumediene.[70] It also permits the used of evidence produced via cruel, inhuman and degrading treatment, in certain circumstances.[71]

Meanwhile, US citizens who in all respects (other than their nationality) meet the definition of unlawful enemy combatants are subject to a very different legal system. Citizens charged with crimes identical to those faced by non-citizens detained at Guantanamo Bay are subject to the jurisdiction of civilian courts or courts-martial, where they are entitled to full procedural due process protections, including rules on the admissibility of evidence that would almost certainly exclude that extracted via coercion.[72]

The incompatibility of the military commission system with the non-discrimination requirement and minimum standards of treatment of non-nationals guarded by customary international law and discussed above was a matter taken up in *amicus* pleadings in the *Boumediene* case before the US Supreme Court.[73] That brief urged specifically that the inability of aliens detained at Guantanamo Bay to access the civilian court system through the *habeas corpus* process was impermissibly discriminatory, and a violation of other guarantees owed aliens under the minimum treatment guarantee. While the court ultimately concluded that the limitations on the *habeas* right were unconstitutional, it did not address international law issues *per se*. Moreover, other questionable practices under the military commission system – including the admissibility of evidence produced through coercion – were not before the court, and their legitimacy remains to be decided.

C. Differential protections against coercive interrogation

As this chapter suggests, differential treatments of nationals and non-nationals have also characterised practice in relation to the

[70] *Boumediene* v. *Bush*, 553 US ___ (2008).

[71] Information obtained by harsh methods short of torture may be admissible, if adjudged reliable and of sufficient probative value and its admission would be in the interest of justice. For the period prior to the enactment of the Detainee Treatment Act of 2005 (30 Dec. 2005), this potentially admissible information includes that obtained through cruel, inhuman and degrading treatment. See 10 USC, para. 948r.

[72] See, e.g., *Chavez* v. *Martinez*, 538 US 760, 773 (2003) (the due process clause under the Fifth Amendment of the US Constitution would govern an inquiry into whether 'police torture or other abuse that results in a confession' was constitutionally permissible).

[73] *Amicus Curiae* Submission of Canadian Parliamentarians and Professors of Law, *Boumediene* v. *Bush*; *Al Odah* v. *United States*, Nos. 06–1195 and 06–1196 (United States Supreme Court), available at www.mayerbrown.com/public_docs/probono_Canadian_Parliamentarians Professors.pdf (last accessed 15 Sept. 2008). This author was co-counsel in that pleading.

protection against coercive interrogation and torture, a key flashpoint in debates about state practices in the campaign against terrorism. A central question in these debates has been the geographical reach of the prohibition against torture and other cruel, inhuman and degrading treatment.

1. The United States and coercive interrogation of non-nationals

For instance, at his confirmation hearing on 6 January 2005, the then soon-to-be Attorney General of the United States was asked by senators whether 'it is legally permissible for US personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture'.[74] The question was directed specifically at US obligations under Article 16 of the UNCAT. Article 16 supplements that treaty's bar on torture by requiring states to prohibit cruel, inhuman or degrading treatment and punishment (CIDTP).[75]

[74] Senator Durban, Senate Judiciary Committee Confirmation Hearing (6 Jan. 2005), available at www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ex=1117339200&en=55029dea737888fa&ei=5070&pagewanted=56 (last accessed 15 Sept. 2008).

[75] CIDTP is not defined in either the UNCAT or the ICCPR. It is commonly viewed as egregious treatment that falls short of outright torture. See, e.g., Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/3452, Art. 1, UN Doc. A/10034 (1975) ('Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'); Restatement (Third) of Foreign Relations Law of the United States, para. 702, Reporters' Note 5 (1987) (citing *Ireland* v. *United Kingdom*, 25 ECtHR, ser. A. para. 167 (1978) for the proposition that '[t]he difference between torture and cruel, inhuman, or degrading treatment or punishment "derives principally from a difference in the intensity of the suffering inflicted"'). See, also, *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322, 1348 (ND Ga. 2002) ('Generally, cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of "torture" or do not have the same purposes as "torture"'). No clear standard determines, however, how outrageous this conduct must be to constitute CIDTP. The UN General Assembly has urged that the term be 'interpreted so as to extend the widest possible protection against abuses, whether physical or mental'. Code of Conduct for Law Enforcement Officials, adopted by A/RES/34/169 of 17 Dec. 1979, Art. 5, Commentary (c). However, the UN Human Rights Committee – the treaty body established by the ICCPR – has declined to 'draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment [barred by Art. 7 of the ICCPR]; the distinctions depend on the nature, purpose and severity of the treatment applied; UN Human Rights Committee, *General Comment 20: Art. 7*, UN Doc. HRI\GEN\1\Rev.1 (1994), para. 4. It has further observed that 'what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex,

In response, Alberto Gonzales noted the reservation entered by the United States upon its ratification of the treaty in 1994: 'the United States considers itself bound by the obligation under article 16 … only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the [US Constitution's] Fifth, Eighth, and/or Fourteenth Amendments.'[76] He then urged 'that aliens interrogated by the US outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment'.[77] In a follow-up letter to US Senator Feinstein, Gonzales asserted squarely that '[t]here is no legal prohibition under the [UNCAT] on cruel, inhuman or degrading treatment with respect to aliens overseas'.[78]

Notably, this position has ramifications that extend beyond the UNCAT. The United States' reservation was replicated during US ratification of the ICCPR, in relation to that treaty's CIDTP provision in Article 7. Given the parallel reservations, the Attorney General's approach to the UNCAT would presumably also inform his interpretation of US obligations under the ICCPR.

The net effect is to recast US international obligations as territorially limited, and therefore permissive of harsh interrogation of foreigners in off-shore locations. Of course, it would not automatically follow that the international community would give the desired effect to these instruments. Article 19 of the Vienna Convention on the Law of Treaties 1969[79] permits reservations to treaties, but only so long as they are not

age and state of health of the victim.' *Vuolanne* v. *Finland*, UN HRC Comm. No. 265/87. For a discussion of how the Human Rights Committee and the UN Committee Against Torture have approached CIDTP, see C. Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law Books, 2008) and C. Forcese, 'A new geography of abuse? The contested scope of U.S. cruel, inhuman and degrading treatment obligations,' *Berkeley Journal of International Law*, 24 (2006), 908.

[76] See reservations of the United States upon accession to the UNCAT, available on the UN Treaty Database at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp (last accessed 15 Mar. 2008).

[77] A. Gonzales, Senate Judiciary Committee Confirmation Hearing (6 Jan. 2005) (emphasis added).

[78] Statement of Senator Dianne Feinstein, 'Nomination of Alberto Gonzales to be Attorney General of the United States', *Congressional Record* 151 (1 Feb. 2005), 8, available at http://feinstein.senate.gov/05speeches/cr-gonzales.htm (last accessed 15 Sept. 2008 03/08).

[79] 1969 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331; entered into force 27 Jan. 1980.

barred by the Convention itself and are not 'incompatible with the object and purpose of the treaty'.[80]

The precise 'object and purpose' of the ICCPR has been considered in a General Comment issued by the Human Rights Committee. In its words: '[t]he object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify.'[81] Reviewing the US reservation to the ICCPR with an eye to this standard, the Human Rights Committee has:

> regret[ed] the extent of the [US] State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to … article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.[82]

State parties to the ICCPR have also objected to the US reservation to Article 7. Article 4 of the ICCPR establishes that certain rights may not be derogated from, even in times of national emergency. Article 7, in its entirety, is listed as one of the provisions from which derogations may not be made. Several European states have pointed to the derogation rules found in Article 4 to object to the US reservation in Article 7. Logically, a reservation cannot be used to suspend or limit a right that is given such robust protections that no derogations are permissible under the treaty itself. A reservation, employed in this manner, can be plausibly regarded as incompatible with the object and purpose of the Covenant.[83]

[80] *Ibid.*, Art. 19.

[81] UN Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant* (52nd Sess., 1994), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6, 161 (2003), para. 7.

[82] Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Sess., 1413th mtg. para. 14, 4, UN Doc. CCPR/C/79/Add.50 (1995).

[83] See ICCPR declarations and reservations, available at www2.ohchr.org/english/bodies/ratification/4.htm#reservations (last accessed 11 Jan. 2009), under 'Objections' and 'Denmark', 'Netherlands', 'Norway', 'Spain' and 'Sweden'. Finland and (less clearly) Portugal, meanwhile, consider the US reservation an impermissible use of a country's domestic law to justify non-compliance with an international obligation. While UNCAT does not include the same derogation provision as does the ICCPR, an argument can be made that a reservation to the CIDTP provision under UNCAT is also a violation of the object and purpose of that treaty.

In fact, the Gonzales position was repudiated, at least in part, by Congress in the Detainee Protection Act of 2005.[84] That Act bars infliction of cruel, inhuman and degrading treatment 'regardless of nationality or physical location' of the detainee, and further underscored that '[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section'.[85] In signing this law, President Bush indicated, however, that the statute would be construed 'in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power'.[86] Put another way, the Administration takes the view that the President's constitutional authority over the military (and presumably paramilitaries such as the CIA) cannot be truly limited by these statutory reforms.[87]

2. Canada, torture and detainee transfers in Afghanistan

The question whether Canada owes human rights obligations to persons outside of Canada has arisen. Since 2006, there has been sustained public debate in Canada concerning transfers of Taliban fighters captured by the Canadian Forces to Afghan authorities. Human rights groups and others expressed concern in 2006 and 2007 about Afghanistan's record on torture of prisoners and what that record might bode for transferees.[88]

The Canadian Government's response to these concerns was confined to a (now amplified) detainee transfer 'arrangement'.[89] That instrument specifies that both Canada and Afghanistan will 'treat

That said, state objections to the reservations are likely of limited significance. For a discussion of these issues, see Forcese, 'A new geography of abuse?', 908.

[84] Pub. L. No. 109–148, 119 Stat. 2739.

[85] *Ibid.,* s. 1003.

[86] G.W. Bush, *President's Statement on Signing of H.R. 2863* (30 Dec. 2005), available at www.whitehouse.gov/news/releases/2005/12/20051230–8.html (last accessed 15 Sept. 2008).

[87] For a discussion of the strengths and weaknesses of the Detainee Treatment Act, see 'Recent Developments: Detainee Treatment Act of 2005', *Harvard Human Rights Journal*, 19 (2006), 257.

[88] D. Pugliese, 'Soldiers risk war crimes charges', *Ottawa Citizen,* 10 Apr. 2006.

[89] See Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan (version dated 18 Sept. 2005) (2005 version), available at www.theglobeandmail.com/bnfiles/Afghanistan/canadian.pdf (last accessed 15 Sept. 2008) and supplemental arrangement (version dated 3 May

detainees in accordance with the standards set out in the Third Geneva Convention'.[90] The arrangement also indicates that transferees may not be subjected to the death penalty and that the International Committee of the Red Cross (ICRC) is to have a right to visit detainees at any time while they are in custody. The arrangement also alluded to a role to be played by the Afghanistan Independent Human Rights Commission on the question of detainees, without providing any precise details.

In its initial form in 2005, this arrangement was condemned by commentators as inadequate under international law.[91] Moreover, the arrangement compared unfavourably with those of other NATO members: unlike the agreements struck between Afghanistan and other NATO countries, the Canadian arrangement included no follow-up monitoring of transferred detainees by Canadian officials themselves.

In early 2007, a legal challenge against the Canadian Forces prisoner exchange practices was brought by human rights groups in the Canadian Federal Court.[92] With allegations of detainee abuse in the hands of Afghan authorities a recurring press story, and faced with an application in the Federal Court case for an interlocutory injunction on further prisoner transfers, the Canadian Government concluded a revised transfer arrangement with Afghanistan in May 2007.[93]

Under the amendments, the prohibition on torture and cruel, inhuman or degrading treatment is emphatic[94] and the precise role of the Afghan Independent Human Rights Commission in monitoring detainees is clearer.[95] Further, Canadian officials are to have 'full and

2007) (2007 version) available at www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/agreement_detainees_030507.pdf (last accessed 15 Sept. 2008).

[90] 2005 version, para. 3.

[91] See, e.g., M. Byers, *Legal Opinion on the December 18, 2005 Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan* (7 Apr. 2006), available at www.liu.xplorex.com/?p2=/modules/liu/publications/view.jsp&id=1740 (last accessed 15 Sept. 2008).

[92] *Amnesty International* v. *Canada*, 2008 FC 336, on appeal to the Federal Court of Appeal at the time of writing. This application for judicial review urged extraterritorial application of the Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982 (UK) 1982, c. 11, to the actions of the Canadian Forces in Afghanistan.

[93] Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan (2007 version).

[94] 2007 version, para. 4. The 2005 version simply pledged Canada and Afghanistan to 'treat detainees in accordance with the standards set out in the Third Geneva Convention', para. 3.

[95] The AIHRC is to have full and unimpeded access to transferred detainees. 2007 version, para. 2.

unrestricted access to any persons transferred by the Canadian Forces to Afghan authorities while such persons are in custody'.[96] The Canadian Government is to be notified before transferred prisoners are tried, released, transferred to another state, or if they undergo any 'material change of circumstances … including any instance of alleged improper treatment'.[97] The Afghan Government also agrees to record-keeping obligations, to limiting the number of detention facilities in which detainees will be held, and to an investigative procedure should allegations of mistreatment come to the attention of the Canadian Government.

At the time of this writing, however, concerns about maltreatment of transferees persisted, as did the court challenge to Canada's practices. One of the Canadian Government's key defences in the Federal Court challenge is that its obligations under international law do not apply to the transfer of detainees between the Canadian Forces and the Afghans in Afghanistan itself.[98]

This last issue remains unresolved. At the trial level, the Federal Court dismissed the case on the basis that the Canadian Constitution did not reach the actions of Canadian Forces in Afghanistan.[99] It did so, however, based on an almost certainly unsustainable misconstrual of recent Canadian Supreme Court jurisprudence on this matter. Put simply, the Supreme Court has concluded that the Canadian Charter of Rights and Freedoms applies extraterritorially to the extent that Canada's international human rights obligations are offended by the extraterritorial actions of a Canadian official.[100] The core issue likely to determine the outcome of the detainee transfer case on appeal, therefore, will be whether these international obligations are triggered by the transfer of Afghan detainees to Afghan authorities. As already noted, the extraterritorial reach of human rights instruments (and their scope in a situation of armed conflict) is a matter of some complexity, and it is difficult to predict outcomes at this juncture.[101]

[96] *Ibid.*

[97] *Ibid.*, para. 3.

[98] See Memorandum of Fact and Law in Respect of the Respondent's Motion to Strike Application, *Amnesty International Canada* v. *Canada (Canadian Forces)*, Federal Court File No. T-324–07 (on file with the author).

[99] *Amnesty International* v. *Canada*, 2008 FC 336, on appeal to the Federal Court of Appeal at the time of this writing.

[100] See *Hape* v. *Canada*, 2007 SCC 26 and *Canada (Justice)* v. *Khadr*, 2008 SCC 28.

[101] The most obvious international human rights provision at play in the case is found in Art. 3 of UNCAT, which bars a party from expelling, returning, or extraditing a person to 'another

IV. Non-nationals, the campaign against terrorism and the immigration paradigm

The chapter to this point suggests that differential (and sometimes egregious) treatment of non-nationals has been a defining quality of the current campaign against terrorism.

This chapter turns next to the treatment of foreign nationals *within* certain Western democracies, a territorial zone where the doctrines of non-discrimination and minimum treatment might be expected to limit mal-treatment of aliens. However, in the campaign against terror, non-nationals have been regularly subjected to doubtful standards in one of the few areas where international law anticipates this differing treatment: immigration proceedings. Article 13 of the ICCPR describes the circumstances in which aliens may be removed from states in which they are not nationals:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[102]

State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. This Article is obviously directed at classic, inter-state transfers in immigration and extradition law. How it operates in relation to battlefield detainees is an open question. This matter is rendered even more uncertain, given that the *lex specialis* applicable to the situation is IHL, and Art. 3 would have to be interpreted in a manner that is not inconsistent with IHL. (On this issue, it seems doubtful that IHL contains a doctrine incompatible with a limitation on transfers where torture is likely.) A further jurisdictional issue will concern the reach of UNCAT. There is some reason to conclude that whatever the territorial/jurisdictional reach of the ICCPR, discussed above, the UNCAT standard is more territorially limited (although it still reaches occupied territories outside of the state's sovereign territory). For discussion, see Forcese, 'A new geography of abuse?'. Even if the court reaches the merits on an Art. 3 analysis, the final issue is whether the 'arrangement' between the Canadian Forces and the Afghan Government renders Canada compliant with its Art. 3 obligations. On some level, this 'arrangement' amounts to a diplomatic assurance, of the sort that states sometimes now invoke to vitiate the claim that there are 'substantial grounds to believe' that the assuring state will torture. The Canadian Supreme Court has expressed suspicions of such assurances, doubting their reliability. *Suresh* v. *Canada* (2002) 1 SCR 3, para. 124. In the Afghan case, it will not help the Canadian position that instances of torture in Afghan facilities have been alleged in relation to transferred detainees. See, e.g., G. Smith, 'From Canadian custody into cruel hands,' *Globe and Mail,* 23 Apr. 2007.

[102] See, also, Arts. 20 (no expulsion merely for breach of work contract); 22 (prohibition on collective expulsion) and 23 (right to consular or diplomatic assistance prior to expulsion) of the 1990 International Convention on the Rights of Migrant Workers and

Of key importance in Article 13 is that removals must be conducted 'in accordance with law'. On this issue, questions about the legality of removals have been raised, especially (but not exclusively) in relation to 'extraordinary renditions'.

A. *Extraordinary renditions*

Extraordinary rendition – removals without formal extradition or deportation – is not a new practice in the United States. The procedure was employed by US officials pre-9/11 to remove expeditiously persons wanted abroad for suspected involvement in terrorism.[103] It is now conducted on a much vaster scale, and its focus has shifted from rendition to 'justice' to rendition to interrogation (often in circumstances where torture is likely).[104] Estimates made in 2005 suggested that 150 people had been rendered by the United States since 9/11.[105] News reports name several states – all of whom have been accused by the US State Department of employing torture[106] – as the countries to which individuals have been rendered. These nations include Egypt, Jordan, Morocco and Syria.[107] These actions have fuelled particular controversy in Europe[108] and, after the extraordinary rendition of Canadian citizen Maher Arar, also in Canada.

Members of their Families, GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 Jul. 2003. Note, however, that neither the United States nor Canada have signed or ratified this instrument.

[103] See, e.g., Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard Against Torture* (Apr. 2005), available at www.hrw.org/reports/2005/eca0405 (last accessed 15 Sept. 2008); Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'* (Oct. 2004), available at www.chrgj.org/docs/TortureByProxy.pdf (last accessed 15 Sept. 2008). See, also, ch. 15 by C. Ferstman in this book.

[104] Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy,* 5.

[105] J. Mayer, 'Outsourcing torture', *The New Yorker,* 14 Feb. 2005, available at www.newyorker.com/archive/2005/02/14/050214fa_fact6 (last accessed 15 Sept. 2008). In 2007, CIA director Michael Haydon claimed that the number of rendered persons is closer to 100. See W. Pincus, 'CIA Chief complains about Agency's critics in Europe', *Washington Post,* 17 Apr. 2007.

[106] US State Department, *Human Rights Country Reports* (2005) (under the headings 'Morocco', 'Egypt', 'Jordan' and 'Syria').

[107] Mayer, 'Outsourcing torture'.

[108] Indeed, it would appear that European intelligence services at least tacitly assisted in some renditions. See, e.g., H. Stark, 'Berlin "helped CIA" with rendition of German citizen', *Der Spiegel,* 11 Jan. 2007; C. Whitlock, 'German lawmakers fault abduction

Notably, the key countries named as recipients of persons rendered by US authorities all put barriers in the path of citizenship renunciations; they are practitioners of the 'clinging' nationality concept discussed above. Thus, Morocco and Jordan require that the government pre-approve any renunciations of citizens' nationalities.[109] Egypt also requires such permission, and those who fail to obtain it will have dual nationality by default.[110] For its part, Syrian nationality is very difficult (and perhaps impossible) to shed. According to a 2001 investigation by the US Office of Personnel Management, Syrian nationals of military age may not renounce their citizenship. Further, where renunciation is permitted under the law, the Syrian Information Office reported that:

> it is so complicated that it is best not to attempt the process. In effect, according to that Office, the process is complicated in order to discourage renunciation of Syrian citizenship. Former citizens of Syria probably maintain an unofficial dual citizenship status and would be subject to Syrian law as citizens should they return to Syria.[111]

The clinging citizenship rules of these countries mean that even emigrants inclined to renounce their original nationality may find it difficult to do so. These emigrants are, therefore, particularly vulnerable to rendition practices which exploit a migrant's nationality of origin to facilitate transfer to regimes hospitable to coercive interrogation techniques. The case of Maher Arar is illustrative of this pattern. Mr Arar emigrated to Canada during his youth and at all material times had Canadian and a residual Syrian nationality. While transiting via the United States to Canada on an international trip, he was detained by US officials who chose to remove him to Syria. This removal – conducted via a private aircraft – was made over Mr Arar's protest, in utter disregard of his Canadian state of residence and in violation of US immigration law and obligations under UNCAT proscribing removal where a person is likely to be tortured in the receiving state.[112] In Syria, Arar was tortured, interrogated on alleged terrorist links and detained for upwards of a year, before ultimately being released to

probe', *Washington Post,* 4 Oct. 2006; Tr. Wilkinson, 'Details emerge in Italian abduction', *Los Angeles Times,* 10 Jan. 2007.

[109] United States Office of Personal Management, *Citizenship Laws of the World* (Mar. 2001) 104, 138, available at www.multiplecitizenship.com/documents/IS-01.pdf (last accessed 15 Sept. 2008).

[110] *Ibid.,* 69.

[111] *Ibid.,* 192.

[112] See, e.g., Art. 3 of UNCAT.

return to Canada. His fate fuelled a detailed judicial inquiry in Canada, which confirmed the facts of his maltreatment, while firmly rejecting government suspicions of any affiliation between Arar and terrorism.[113]

B. Legal removals

Renditions are, however, only the most dramatic illustration of expedient use of nationality rules deployed for national security purposes. Several Western democracies have also used regular immigration law to deal with the security threat said to be presented by non-nationals.

1. Detention pending removal

Among the most notable features of immigration proceedings is detention (at least nominally pending removal). The US Patriot Act, for example, amended US immigration law to permit detention of aliens certified as a terrorist risk, pending removal, or for successive six-month periods 'if the release of the alien will threaten the national security of the United States or the safety of the community or any person'.[114] In the past, however, the US Government has preferred to use stringent enforcement of more conventional immigration rules rather than resorting to this special anti-terrorism provision.[115] Conventional violations that have been employed to deal with persons suspected of terrorism affiliations include remaining past the expiration of visas, entering the United States without inspection or entering the country on invalid papers.

This policy – also called 'preventive charging'[116] – has been controversial in the United States. Almost 800 persons with suspected terrorism connections were detained on conventional immigration law grounds in the immediate wake of 9/11. A 2003 US Department of Justice report

[113] For a comprehensive description of these events, see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa, Public Works and Government Services Canada, 2006), available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07–09–13/www.ararcommission.ca/eng/AR_English.pdf (last accessed 15 Sept. 2008).

[114] 8 USC, para. 1226a.

[115] US Department of Justice, *Questions Submitted by the House Judiciary Committee to the Attorney General on* USA Patriot Act *Implementation*, Ques. 36, 17 (2002), available at www.fas.org/irp/news/2002/10/doj101702.html (last accessed 15 Sept. 2008).

[116] R. Chesney, 'The sleeper scenario: terrorism-support laws and the demands of prevention', *Harvard Journal on Legislation*, 42 (2005), 31.

reviewing this record concluded that administrative practices associated with these detentions produced unduly lengthy periods of incarceration, and in some instances unsatisfactory conditions of detention.[117] The median length of detention between arrest and release or removal from the United States was in the range of 100 days.[118]

Prolonged detention on immigration grounds is not unique to the United States. In Canada, the Minister of Immigration and the Minister of Public Safety may together sign a certificate declaring a foreign national or permanent resident inadmissible to Canada on, *inter alia*, grounds of security.[119] Once the ministers issue the 'security certificate', the non-national may be held in detention on national security grounds pursuant to a warrant.[120] The detention is reviewed by a special designated judge of the Federal Court within forty-eight hours. In this review, the court will order that the detention be extended if the judge is 'satisfied' that the person continues, among other things, to be a danger to national security.[121] If the judge is so satisfied, the matter is revisited every six months.

In practice, detention of persons held on the basis of feared terrorist affiliations has been prolonged. In part because these individuals have resisted deportation to states that may torture them, the men subject to security certificates have spent time behind bars for long periods: by the beginning of 2007, the average period of detention for the men still imprisoned at that time was almost six years.[122] This is a period of detention longer than the average sentence for *convicted* attempted murderers in Canada.[123] Most of these men have since been released, but subject to very strict conditions on their liberty that come close to house arrest. The structure of Canada's immigration law means that if the government is ultimately unsuccessful in deporting terror suspects (not least, because of the risk that they will be tortured upon return to

[117] Office of the Inspector General, United States Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003), 195 *et seq.*, available at www.usdoj.gov/oig/special/0306/chapter10.htm (last accessed 15 Sept. 2008).

[118] *Ibid.*, estimated from fig. 9, 105.

[119] Immigration and Refugee Protection Act (IRPA), S.C. 2001, c.27, s. 77.

[120] *Ibid.*, s. 81.

[121] *Ibid.*, s. 82.

[122] This figure was calculated in relation to the three men still detained as of January 2007.

[123] See Statistics Canada, *Sentenced Cases and Outcomes in Adult Criminal Court, by Province and Yukon Territory (Canada)* (2003 data), available at www40.statcan.ca/l01/cst01/legal21a.htm (last accessed 15 Sept. 2008).

the states from which they come), this detention and/or strictly conditioned release could endure indefinitely.

The legality of indefinite detention or conditional release of foreigners has not been squarely engaged by the Canadian courts to date. It has, however, been addressed in the United Kingdom. After the 9/11 attacks, the United Kingdom amended its immigration law to allow for the indefinite detention of terror suspects where those persons could not be deported because, for instance, they would face a real risk of being tortured in the country to which they would be removed.[124] Indefinite detention of this kind offends Article 5 of the ECHR, guaranteeing a right to liberty except in certain circumstances. Like the ICCPR, the ECHR permits, however, derogations from the liberty right 'in time of war or other public emergency threatening the life of the nation … to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the state's] other obligations under international law'.[125]

For this reason, at the same time as it amended its immigration law, the United Kingdom claimed a derogation from the ECHR (and also the ICCPR) because:

> there exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.[126]

The legality of the United Kingdom's derogation from Article 5 of the ECHR and of the indefinite detention provision was adjudicated by the House of Lords in *A and others* v. *Secretary of State for the Home Department*.[127] In that case, the Law Lords deferred to the government's position and accepted that the terrorist threat constituted a 'war or other public emergency threatening the life of the nation'. However, they held that the indefinite detention of foreign nationals was a disproportionate response to that threat. The Law Lords concluded that there was no

[124] Anti-terrorism, Crime and Security Act 2001 (UK), 2001, c. 24, s. 23.
[125] Art. 15, ECHR.
[126] The Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001 No. 3644 available at www.opsi.gov.uk/si/si2001/20013644.htm (last accessed 15 Sept. 2008).
[127] *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56.

reason to presume that foreign nationals (as opposed to UK nationals) presented the greatest threat and therefore found the measures to be disproportionate and discriminatory, and not 'strictly required by the exigencies of the situation', thereby breaching Articles 5 and 14 of the ECHR.

In response to *A and others*, the UK Parliament enacted the Prevention of Terrorism Act 2005 permitting the imposition of 'control orders' directed at the activities of both foreign and UK nationals suspected of terrorist activity.[128] A control order is an instrument imposing obligations on a person 'for purposes connected with protecting members of the public from a risk of terrorism'.[129] It comes in two species: non-derogating control orders (those that do not constitute a violation of the ECHR) and derogating control orders (those that would amount to a violation of the European treaty, unless a proper derogation was entered).

Non-derogating orders may be made by the Home Secretary, subject to limited judicial supervision, and endure for up to twelve months and longer with extensions. Derogating measures require a more substantial judicial review and blessing and last for up to six months and longer with extensions. Control orders may, in other words, be renewed indefinitely.

Moreover, significant penalties are attached to disregard of these provisions: persons who violate control orders are subject to up to five years' imprisonment on conviction on indictment.[130]

Restrictions on liberty imposed via control orders are significant, although they do not amount to outright incarceration.[131] On its face, this law does not anticipate differential treatment between nationals and aliens. Notably, however, as of May 2007, a modest majority of persons subjected to control orders were foreign nationals.[132]

[128] Prevention of Terrorism Act 2005, ch. 2.

[129] *Ibid.*, s. 1.

[130] *Ibid.*, s. 9.

[131] For an overview of the measures imposed via control orders, see Lord Carlile of Berriew QC, *Third Report of The Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (18 Feb. 2008), available at http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary (last accessed 15 Sept. 2008).

[132] N. Morris, 'The big question: what are control orders, and are they effective against terrorism?', *The Independent* (25 May 2007), available at www.independent.co.uk/news/uk/crime/the-big-question-what-are-control-orders-and-are-they-effective-against-terrorism-450244.html (last accessed 15 Sept. 2008) (reporting that nine of seventeen control orders were in force against foreign nationals).

2. Truncated due process in national security-related immigration proceedings

A second controversial feature of immigration procedures motivated by national security concerns (and the UK control order regime) has been truncated due process rights. Where an accused is charged under criminal law, the state must provide him or her with a fair trial before an independent and impartial tribunal.[133] The fair trial obligation includes important procedural guarantees, extending to the accused an ability to mount an effective defence and confront the witnesses against him or her.[134] On the other hand, where a person is subjected to non-criminal proceedings (including immigration proceedings), international law contains fewer, emphatic procedural guarantees.[135]

The distinction between due process standards in criminal and administrative proceedings has been followed in jurisdictions such as Canada and the United Kingdom. To date, limitations on due process in immigration proceedings have had an important impact on the ability of non-citizens to meet the government's case against them. Most of the information produced by the government to justify removal of non-citizens on national security grounds is withheld from them, in the interest of national security confidentiality. Solutions to this conundrum have come in the form of compromises to classic fair trial practices.

For instance, before 1997, a decision in the United Kingdom to deport an individual on national security grounds was strictly an executive decision, made by the Home Secretary. The latter would base his or her determination on all relevant material, including information that was withheld from the named person on national security grounds. Where the government asserted national security confidentiality, the deportation decision was referred to a panel (dubbed the 'Three Wise Men') that reviewed the Home Secretary's determination and made recommendations on whether the removal order should stand.[136]

[133] See, e.g., Art. 10, UDHR; Art. 14, ICCPR.

[134] See, e.g., Art. 14, ICCPR.

[135] Many of the precise procedural rights found in Art. 14 of the ICCPR are limited to adjudication of 'criminal charges'. See Art. 14(2).

[136] For an overview of the origins of the UK national security removal system, see Treasury Solicitors Department, 'Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO)', available at www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf (last accessed 15 Sept. 2008).

This system was challenged successfully in *Chahal* v. *United Kingdom* before the European Court of Human Rights.[137] Although finding that the special advisory panel provided an important safeguard against arbitrariness and therefore there was no breach of Article 5(1),[138] the court concluded that the UK system nonetheless violated Article 5(4) of the ECHR because it precluded court review of national authorities in the terrorism context and because it denied lawyers the ability to challenge secret information being put against their clients.[139]

In direct response to *Chahal*, the UK Parliament enacted the Special Immigration Appeals Commission Act 1997 (SIAC Act).[140] This statute created the Special Immigration Appeals Commission (SIAC), a superior court of record sitting in panels comprising a High Court judge (or other holder of high judicial office), an immigration adjudicator and a lay member with security and intelligence expertise. SIAC hears asylum and immigration appeals, as well as citizenship revocation cases, involving national security. In addition, the SIAC Act authorises the appointment of a 'special advocate' – that is, 'a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his [or hers] are excluded'.[141] In fact, the government may not rely on 'closed' – that is secret – information at the hearings if no special advocate is appointed.[142]

Critics of the new approach argue that individuals still do not know the full case against them and therefore it cannot be fair. Special advocates 'give a veneer of legality' to this fundamentally unfair system.[143] One former special advocate who resigned in protest writes that his 'role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial'.[144]

[137] *Chahal* v. *United Kingdom*, EHRR 23 (1997) 413.
[138] *Ibid.*, paras. 122 and 123.
[139] *Ibid.*, paras. 124–133.
[140] Special Immigration Appeals Commission Act 1997 (UK), 1997 c. 68.
[141] *Ibid.*, s. 6.
[142] The Special Immigration Appeals Commission (Procedure) Rules 2003 (UK), SI 2003 No. 1034, 37(2) [SIAC Rules].
[143] Amnesty International, '*Justice Perverted under the Anti-terrorism, Crime and Security Act 2001*', AI Index: EUR 45/029/2003 (11 Dec. 2003).
[144] I. Macdonald QC, *The Role and Experiences of a Special Advocate in Suspected Terrorist Detentions* (19 Jun. 2007 version) (on file with the author), para. 24.

Critics often direct their fiercest objections at rules that preclude special advocates from meeting with the interested party once exposed to the secret material.[145] These complaints have been echoed by parliamentary committees. In July 2007, the UK Joint All Parliamentary Committee on Human Rights issued a strongly worded report describing the special advocate system as '"Kafkaesque" or like the Star Chamber'.[146] On the specific issue of special advocates and communication with named persons, it made the following recommendation:

> In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person … With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the special advocate and the person concerned or their legal representative after the special advocate has seen the closed material.[147]

The Committee also criticised the level of disclosure made by the government to the interested person – concluding that secrecy is sometimes excessive – and also the low burden of proof the government must satisfy to make out its case.

Despite these objections to the UK system, Canada has enacted a directly analogous special advocate system. This change followed a challenge to Canada's 'security certificate' immigration proceeding under that country's Charter of Rights and Freedoms. In *Charkaoui* v. *Canada*, the Supreme Court unanimously held that the then-security certificate procedure 'unjustifiably violate[d] section 7 of the

[145] See, e.g., Amnesty International, *Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001*, AI Index: EUR 45/017/2002 (5 Sept. 2002), 16; Amnesty International, *United Kingdom – Human Rights: A Broken Promise*, AI Index: EUR 45/004/2006 (23 Feb. 2006); E. Metcalfe, '"Representative but not responsible": the use of Special Advocates in English law', *JUSTICE Journal*, 2 (2004) 17; Liberty, *Evidence submitted by Liberty* (Feb. 2005) in UK House of Commons, Constitutional Affairs Committee, 'The Operation of the Special Immigration Appeals Commission (SIAC): Written Evidence' (7 Feb. 2005), HC 323-II, 28; Macdonald QC, *The Role and Experiences of a Special Advocate*, para. 15.

[146] UK House of Commons and House of Lords, 'Joint Committee on Human Rights – Nineteenth Report' (16 Jul. 2007) available at www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15709.htm (last accessed 15 Sept. 2008).

[147] *Ibid.*

Charter[148] [guaranteeing 'fundamental justice' in respect of life, liberty or security of the person] by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests'.[149] 'Fundamental justice', reasoned the court, 'requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case'.[150] While acknowledging that the government may have legitimate reasons to claim secrecy and section 7's protections 'may not be as complete as in a case where national security constraints do not operate',[151] the court held that if section 7 'is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.'[152]

The court also held that the security certificate process was not saved by section 1, the provision of the Charter permitting rights violations where justified in a free and democratic society. In *Charkaoui*, the court held that the government had demonstrated no reason why it had failed to adopt a model involving examination of government witnesses by a security-cleared advocate. The court showed evident enthusiasm for such an approach, pointing in particular to the experience of the United Kingdom with special advocates (while at the same time noting some of the controversies the latter system has generated).

Subsequently, the Canadian Parliament enacted special advocate legislation mirroring that employed in the United Kingdom,[153] and the first Canadian special advocates were appointed in February 2008.[154] By the time of this writing, new constitutional challenges to this system were being prepared, attacking (not least) the strictures on communication imposed on special advocates once they have seen the secret evidence.

[148] Section 7 of the Canadian Charter of Rights and Freedoms provides: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[149] *Charkaoui,* 2007 SCC 9, para. 3.

[150] *Ibid.*, para. 61.

[151] *Ibid.*, para. 27.

[152] *Ibid.*, para. 61.

[153] An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, SC 2008, c. 3.

[154] Department of Justice (Canada), Press Release: Special Advocates for Bill C-3 (Security Certificates under the *Immigration and Refugee Protection Act*) (22 Feb. 2008), available at www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32223.html (last accessed 15 Sept. 2008).

3. The moveable border and the extension of immigration doctrine to citizens

The discussion above highlights how fair trial guarantees have been relaxed in national security-related immigration proceedings relative to what would be required of governments in criminal proceedings. Perhaps not surprisingly, therefore, at least some states have moved to broaden the range of persons who might be subject to immigration law.

The UK Parliament, for example, enacted new citizenship rules in 2002 that permit the government to 'deprive a person of a citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom or one of its overseas territories'.[155] In 2006, these rules were altered to allow a revocation of citizenship where the government is persuaded that it is conducive to the public good.[156] The one limitation is that these revocation orders may not be made if they would render the person stateless.[157] The latter caveat presumably limits the availability of the revocation order to those with an extant dual nationality and thus is most likely to be applied against naturalised UK citizens who retain (or have been forced by a 'clinging' nationality to retain) the nationality of their countries of origin.

Under this rule, extremist Muslim cleric Abu Hamza al-Masri – born in Egypt – was stripped of his UK nationality, and then processed through the immigration system for removal.[158] Similarly, citizenship revocation rules were invoked in efforts to strip Guantanamo Bay detainee David Hicks – an Australian by birth – of his newly acquired British nationality.[159]

V. Conclusion

In sum, the observations made in this chapter point to doctrines in international and domestic law that leave states less constrained in

[155] Nationality, Immigration and Asylum Act 2002 (c. 41), s. 40.

[156] Nationality, Immigration and Asylum Act 2006 (c. 13), s. 56.

[157] For more on statelessness, see ch. 2 by M. Manly and L. Van Waas in this book.

[158] See, J. Bennotto, 'Blunkett faces tough fight to deport extremist cleric', *The Independent,* 7 Apr. 2003, available at http://findarticles.com/p/articles/mi_qn4158/is_20030407/ai_n12692074 (last accessed 15 Sept. 2008).

[159] See, *Secretary of State for the Home Department* v. *Hicks* [2006] EWCA Civ 400 (Court of Appeal, Civil Division). For its part, Australia enacted similar rules in 2007, permitting the government to revoke Australian citizenship if the government considers 'that it would be contrary to the public interest for the person to remain an Australian citizen'. Australian Citizenship Act 2007, No. 20 (2007), s. 34.

their treatment of non-nationals in the 'war on terror' than of citizens. While international law holds out the promise of minimum standards of treatment of aliens and, for all individuals, human rights, the reach of these guarantees is limited by constrained notions of jurisdiction (tied often to geography) and important substantive restrictions.

Jurisdictionally, the extraterritorial reach of these protections is contested, rendering them of limited (or at least more limited) importance in a campaign against terrorism that is waged, in large measure, off-shore. Substantively, where that campaign has been militarised, the guarantees offered by international human rights law are attenuated by international humanitarian law, a body of legal principle much less absolutist in its protection of life and security of the person than is human rights law.

Further, even within states, the reach of minimum protection guarantees and human rights norms are curtailed when it comes to the rights of aliens within foreign states. Immigration law constitutes a core exception to principles of non-discrimination between nationals and non-nationals, and the administrative procedures associated with immigration law do not attract the robust due process guarantees associated with criminal law. In the result, removal processes provoked by national security concerns can be deployed to permit detention of non-nationals – sometimes prolonged – and highly secretive procedures that fall short of full fair trials.

With the exception of the notorious US practice of extraordinary rendition and aggressive views on the (non-)reach of human rights law to off-shore interrogation, all of these reduced protections for non-nationals arguably comport with the letter of the law, both domestic and international. There is compliance with the rule of law, in a formal sense. Heed should be paid, however, to Dyzenhaus's forceful warning that in perceived emergencies, democratic states often create 'grey holes' – that is, zones in which the law applies nominally, but in such a limited procedural or substantive manner as to render legal limitations on executive power meaningless. He cautions that, in these circumstances, the facade of the rule of law is maintained, but in a manner that creates a simple 'rule by law' and not adherence to fundamental moral values.[160]

[160] D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

Recourse to law permitting differential and less rights-sensitive treatment of non-nationals in the conduct of the 'war on terror' is a prime candidate for the 'rule by law' critique, one whose reach risks being extended aggressively by laws permitting citizen revocations. In the current security climate, guarding against this development will occupy lawyers and policy-makers well into the foreseeable future.

13

Immigration law enforcement after 9/11 and human rights

DANIEL MOECKLI*

I. Introduction

In January 2002, the US Department of Justice announced the so-called Absconder Apprehension Initiative (AAI).[1] The AAI is a programme designed to locate, arrest and deport those the US Government describes as 'absconders': that is, foreign nationals who have been ordered to be deported but have failed to leave the United States.[2] Over 300,000 such persons were thought to be in the United States at that time.[3] However, these 'absconders' were not to be pursued equally under the AAI. Rather, the US authorities declared that, in order to assist the campaign against terrorism, they would focus on the enforcement of deportation orders against approximately 6,000 'priority absconders' who 'come from countries in which there has been Al Qaeda terrorist presence or activity'.[4] Although the government never explicitly identified these countries, those treated as 'priority absconders' came from a

* This chapter is a revised version of ch. 6 of my book, *Human Rights and Non-discrimination in the 'War on Terror'* (Oxford: Oxford University Press, 2008). All URLs were last accessed on 25 Oct. 2008.

[1] Deputy Attorney General, *Memorandum for the INS Commissioner, the FBI Director, the Director of the US Marshals Service and US Attorneys re Guidance for Absconder Apprehension Initiative*, 25 Jan. 2002 (Absconder Memo), available at http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf. For a detailed analysis of the Absconder Apprehension Initiative, see K. Lapp, 'Pressing public necessity: the unconstitutionality of the absconder apprehension initiative' *New York University Review of Law and Social Change*, 29 (2005), 573.

[2] Absconder Memo, 1.

[3] *Ibid.*

[4] *Ibid.* See, also, 'DOJ focusing on removal of 6,000 men from Al Qaeda haven countries', *Interpreter Releases*, 79 (2002), 115.

list of states all of which – except for the Philippines – have predominantly Arab and/or Muslim populations.[5]

As I will demonstrate, the AAI is just one in a series of immigration enforcement initiatives adopted in recent years by Western states in the name of preventing terrorism. Typically, these initiatives target particular groups of foreign nationals based on their country of origin or nationality. The purpose of this chapter is to examine the impacts that these immigration measures have on human rights, in particular the right to non-discrimination. To do this, the chapter looks at the post-9/11 immigration policies of three Western democracies: the United States, the United Kingdom and Germany, all of them states with relatively large immigrant communities.[6]

In section II, I show how governments, building on the historic link between the administration of immigration control and national security, have turned immigration law and policy into one of their central tools in the 'war on terror'. The 'securitisation' of migration and refugee policy permeates both the international and national level, manifesting itself in the tightening of immigration laws, the rigorous enforcement of these laws, and the subordination of the immigration machinery to national security agencies. Automatically associating foreign nationals with the terrorist threat, these changes have profound impacts for the human rights of immigrants in Western states.

As section III demonstrates, not all immigrants have been equally affected by these changes. Just like any other preventive anti-terrorism policy, the use of immigration powers must inevitably rely on profiles of the potential terrorists. With the dominant depiction of the current terrorist threat being linked to wider cultural differences, characteristics such as nationality, national origin, and, at least indirectly, race, ethnicity and religion have become the key components of such profiles. Thus, as

[5] The list of targeted states/territories included: Afghanistan, Algeria, Egypt, Iran, Jordan, Lebanon, Morocco, Pakistan, Palestine Territories, the Philippines, Saudi Arabia, Somalia, Sudan and Syria. Lapp, 'Pressing public necessity', 584.

[6] In the United States, 11 per cent of the population are foreign born. US Census Bureau, *US Census 2000*, 'Profile of General Demographic Characteristics', available at http://censtats.census.gov/data/US/01000.pdf. In England and Wales, approximately 9 per cent of the population are foreign (non-UK) born: Office for National Statistics, *Census, April 2001*, available at www.statistics.gov.uk/census/default.asp. In Germany, around 9 per cent of the population are foreign nationals: Statistisches Bundesamt Deutschland, *Ausländische Bevölkerung nach Bundesländern, 2006*, available at www.statistik-portal.de/Statistik-Portal/de_jb01_jahrtab2.asp; P. Stalker, *A-Z of Countries of the World* (Oxford: Oxford University Press, 2005).

evidenced by numerous policies adopted by the United States, the United Kingdom and Germany, contemporary immigration law enforcement efforts focus on those immigrants who come from predominantly Arab and/or Muslim states.

Section IV examines whether the differences in treatment based on country of origin or nationality, race, ethnicity and religion that such selective immigration enforcement efforts involve, are compatible with the right to non-discrimination as guaranteed by international human rights standards and national law. The answer to this question depends, in particular, on the applicable standard of review and on whether singling out immigrants from predominantly Arab and/or Muslim states can be deemed a proportionate means to prevent and investigate terrorist activity.

II. Immigration law and policy as an anti-terrorism tool

States have often responded to national security threats, including terrorist activities, by trying to keep out of their territory potentially dangerous foreign nationals and by removing, or imposing certain restrictions on, those already in the country. In the wake of 9/11, the use of immigration powers for national security purposes has received further impetus.

A. Before 9/11

According to the traditional conception of security, it is the state that is the principal object of security, as well as its guarantor, with other states constituting the main source of security threats. This 'national security' model of security centres on the defence of the state's borders and institutions from external aggression, invariably seen as somehow linked to other states. Therefore, governments have always used the control of immigration as a central tool for the protection of national security.

During the so-called Red Scare in the wake of World War I, for instance, the US authorities relied heavily on immigration laws, in particular the Alien Control Act of 1918, to exclude, detain and deport perceived left-wing radicals.[7] Similarly, immigration powers were one of the most important weapons employed in the anti-communist

[7] Migration Policy Institute, *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (2003) 115–20.

'witch-hunt' of the McCarthy era of the 1950s.[8] The United Kingdom reacted to the outbreak of World War I with the introduction of the Aliens Restriction Act 1914, granting the executive virtually unfettered power to exclude foreign nationals and restrict their freedom of movement,[9] and with the creation of a machinery of immigration control wedded to the state's security apparatus.[10] After the war, the 1914 legislation was extended and deployed against, among others, suspected communists.[11] More recently, the UK government used immigration powers for national security purposes by deporting a number of Iraqis and Palestinians at the start of the 1991 Gulf War.[12] Finally, the internment of 'enemy aliens' has been, in many states, a regular feature during times of war.[13] These are just some of the examples demonstrating that '[t]he administration of immigration control has since its inception been inextricably linked with national security'.[14]

This close link has also been evident in the specific field of counter-terrorism, even prior to 9/11. Despite the rise of the concept of human security in the mid-1990s, counter-terrorism policies have remained squarely within a traditional security paradigm.[15] Immigrants have long been caught up in this paradigm as objects against which states perceived they need protection. Extensive border control powers, for example, were already part of the series of UK Prevention of Terrorism (Temporary Provisions) Acts passed between 1974 and 1989,[16] as well as of the Terrorism Act 2000.[17] In Germany, the authorities reacted to the 1972 terrorist attack at the Munich Olympics by issuing deportation orders against Palestinians considered to be security risks.[18] Finally, in the

[8] S.M. Akram, 'Scheherezade meets Kafka: two dozen sordid tales of ideological exclusion', *Georgetown Immigration Law Journal,* 14 (1999) 51, 55–8.

[9] S.S. Juss, *Immigration, Nationality and Citizenship* (London: Mansell, 1993), 37.

[10] L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Oxford University Press, 1994), 167.

[11] K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain* 1914–1945 (Oxford: Clarendon Press, 2000), 93, 134, 208–9.

[12] See *R* v. *Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All ER 319.

[13] For the United States, see Enemy Alien Act, 1 Stat 577, 50 USC ss. 21–24. For the United Kingdom, see A.W.B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992).

[14] Lustgarten and Leigh, *In from the Cold*, 165.

[15] See, further, ch. 1 by A. Edwards and C. Ferstman in this book.

[16] See, e.g., Prevention of Terrorism (Temporary Provisions) Act 1974, s. 8.

[17] Terrorism Act 2000, s. 53 and Sch. 7.

[18] See BVerfGE 35, 382 – *Ausländerausweisung* (decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) quashing the deportation orders because of violations of due process rights and the right to family life).

United States, the anti-terrorism law adopted after the Oklahoma City bombing of 1995, the Antiterrorism and Effective Death Penalty Act, which is still in force today, mainly consists of measures that are exclusively applicable to immigrants.[19]

B. After 9/11

In the wake of 9/11, this link between counter-terrorism measures and immigration control policies has been further reinforced, both at the international and the national levels. The alternative human security approach, popularised in the mid-1990s and gaining momentum leading up to 9/11, has been pushed aside for a reinvigoration of traditional national security ideals, as terrorism has become a priority.

At the international level, Security Council Resolution 1373, the centrepiece of the UN's response to 9/11, requires all member states to adopt a number of immigration measures designed to prevent terrorism.[20] In particular, states are required to establish effective border controls and to regulate the issuance of identity papers and travel documents,[21] ensure that those who have participated in, or planned, terrorist acts are not granted refugee status,[22] and make sure that refugee status is not abused by those involved in terrorism.[23] In order to implement these obligations, the Counter-Terrorism Committee (CTC), the body monitoring compliance with Resolution 1373, has asked states to introduce legislation covering all these aspects as well as to put in place effective and coordinated executive machinery, including customs, immigration, and border controls, to prevent the movement of terrorists.[24] After the London bombings of 7 July 2005, the Security Council reaffirmed these requirements in its Resolution 1624, calling on all states 'to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening'.[25]

In accordance with these requirements, numerous states, including those considered in this chapter, have considerably tightened their

[19] Anti-Terrorism and Effective Death Penalty Act of 1996, Public Law No. 104–132, 110 Stat 1214 (1996) (codified as amended in scattered sections of USC).
[20] SC Resolution 1373, 28 Sept. 2001, UN Doc. S/RES/1373 (2001).
[21] *Ibid.*, para. 2(g).
[22] *Ibid.*, para. 3(f).
[23] *Ibid.*, para. 3(g).
[24] *Note Verbale* of the Chairman of the CTC, 26 Oct. 2001, Ref. SCA/20/01(6).
[25] SC Resolution 1624, 14 Sept. 2005, UN Doc. S/RES/1624 (2005), para. 2.

immigration laws in recent years. In the United States, the US Patriot Act made changes to the immigration law that are designed to improve border controls[26] and enhance the powers of the immigration authorities.[27] In particular, the definition of terrorism contained in the Immigration and Nationality Act, and thus the class of non-citizens who can be barred from claiming asylum and removed, has been greatly expanded.[28] Furthermore, the Attorney General and the immigration authorities have been given wider authority to indefinitely detain immigrants who allegedly endanger national security.[29] In the United Kingdom, the Immigration, Asylum and Nationality Act 2006 introduced a number of changes designed to provide the government with additional tools to deal with persons considered national security threats. Thus, the act authorises the Home Secretary to deprive persons of their British citizenship (or right of abode) if s/he is 'satisfied that deprivation is conducive to the public good'.[30] Once stripped of their citizenship, these persons will naturally be subject to deportation powers. Next, the Act provides that in cases where deportation orders are made on national security grounds, an appeal can only be brought after removal.[31] Finally, the Act makes it easier to deny asylum claims of suspected terrorists by significantly widening the scope of the exclusion clause of the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention),[32] while at the same time restricting the scope of appeals against rejection of an asylum claim on these grounds.[33] In Germany, large parts of the Anti-Terrorism Act introduced after 9/11 are aimed exclusively at immigrants, increasing border control powers, creating new grounds for

[26] US Patriot Act, Public Law No. 107–56, ss. 401–405.
[27] *Ibid.*, ss. 411–418.
[28] *Ibid.*, s. 411. For a discussion of these changes, see R. Germain, 'Rushing to judgment: the unintended consequences of the USA Patriot Act for bona fide refugees', *Georgetown Immigration Law Journal,* 16 (2002), 505.
[29] US Patriot Act, s. 412; Disposition of Cases of Aliens Arrested Without Warrant, 8 CFR, s. 287.3(d) (2001). See, D. Moeckli, 'The selective "war on terror": executive detention of foreign nationals and the principle of non-discrimination', *Brooklyn Journal of International Law,* 31 (2006), 495.
[30] Immigration, Asylum and Nationality Act 2006, ss. 56–57.
[31] *Ibid.*, s. 7.
[32] *Ibid.*, s. 54.
[33] *Ibid.*, s. 55. The UK Parliamentary Joint Committee on Human Rights has expressed a number of concerns about the national security-related amendments of the Immigration, Asylum and Nationality Act 2006. Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters: Third Report of Session 2005–06* (HL 75-I, HC 561-I) paras. 153–85.

exclusion and expulsion, and providing for enhanced data sharing in the field of immigration.[34] In addition, shortly after the terrorist attacks in Madrid of 11 March 2004, the *Zuwanderungsgesetz* (Immigration Act)[35] was passed, further extending the government's power to expel foreign citizens on national security grounds.[36] For example, the authorities are now allowed to expel foreign nationals who 'endorse or promote terrorist acts' or incite hatred against sections of the population.[37] The Act has also introduced a new summary procedure for the removal of immigrants who allegedly pose a terrorist threat.[38]

The crucial role that immigration policy plays in contemporary efforts against terrorism is also evidenced by the rigorous enforcement of these new, as well as pre-existing, immigration powers for anti-terrorism purposes as an alternative (or adjunct) to the instigation of criminal proceedings. The US Government has explicitly stated that it regards immigration law enforcement as one of the central planks of its fight against terrorism.[39] Accordingly, the filing of immigration charges and, conversely, the offering of immigration benefits (such as special visas and relief from removal) as a reward for cooperation are now common tools

[34] *Gesetz zur Bekämpfung des internationalen Terrorismus*, 9 Jan. 2002, BGBl I, 361, Arts. 6, 11–16. For a good overview and critical analysis of these changes, see, D. Bender, '"Verpolizeilichung"des Ausländerrechts? – Die ausländerrechtlichen Massnahmen des Gesetzgebers nach dem 11 September 2001', *Kritische Justiz,* 36 (2003), 130.

[35] Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 30 Jul. 2004, BGBl I, 1950. The Zuwanderungsgesetz introduced two new pieces of legislation, the Aufenthaltsgesetz (Residence Act) and the Freizügigkeitsgesetz/EU (Act on the Freedom of Movement/EU), and made amendments to different existing laws. See, generally, G. Renner and W. Kanein, *Ausländerrecht: Kommentar*, 8th edn (München: CH Beck Verlag, 2005).

[36] *Aufenthaltsgesetz*, Arts. 53–55. On the terrorism-related aspects of the *Zuwanderungsgesetz*, see M. Pelzer, 'Zurück zum Fremden-Polizeirecht? Anti-Terror-Gesetzgebung im Zuwanderungsgesetz', *Bürgerrechte & Polizei,* 80 (2005), 21; R. Marx, 'Terrorismusvorbehalte des Zuwanderungsgesetzes', *Zeitschrift für Ausländerrecht und Ausländerpolitik,* 24 (2004), 275; M. Schmid-Drüner, *Der Begriff der öffentlichen Sicherheit und Ordnung im Einwanderungsrecht ausgewählter EU-Mitgliedstaaten* (Baden-Baden: Nomos, 2007) 311–20.

[37] *Aufenthaltsgesetz*, Art. 55(8)(a), (b).

[38] *Ibid*., Art 58a. See, Renner and Kanein, *Ausländerrecht*, 520–528; Marx, 'Terrorismusvorbehalte des Zuwanderungsgesetzes', 278–280.

[39] M.B. Sheridan, 'Immigration law as anti-terrorism tool', *Washington Post*, 13 Jun. 2005 (quoting statement by M.J. Garcia, Head of Immigration and Customs Enforcement, that immigration laws are 'an incredibly important piece of the terrorism response.') See, also, M.A. Taylor, 'Immigration enforcement post-September 11: safeguarding the civil rights of Middle Eastern-American and immigrant communities', *Georgetown Immigration Law Journal,* 17 (2002), 63, 64, 73.

used in terrorism investigations in the United States.[40] Furthermore, immigration law powers have been used in hundreds of cases to detain foreign nationals in connection with terrorism investigations.[41] The US immigration authorities have also considerably tightened their policies concerning, for example, the closing of deportation hearings to the public, denial of bond, and enforcement of deportation orders in cases allegedly involving national security.[42]

Likewise, after the London bombings, the then British Prime Minster announced a tougher stance on immigration law enforcement: 'The rules of the game have changed. If you come to this country from abroad, don't meddle with extremism, because if you do, or get engaged with it, you are going to go back out again.'[43] Part of this new approach has been the publication of a list of certain, widely defined, 'unacceptable terrorism behaviours' that will be treated as grounds for exclusion and deportation from the United Kingdom.[44] That the British authorities may readily use their increased immigration powers as a comfortable alternative to the criminal law has been demonstrated in the so-called 'Ricin case': the four Algerians acquitted by the jury from terrorist charges in this case were subsequently detained pending deportation.[45] Importantly, the UK Government has made clear its intention to deport foreign terrorist suspects even to states that are notorious for practising torture. As part of this strategy, it intervened in several cases before the European Court of Human Rights involving deportations,[46] arguing that the court should reverse its seminal ruling in *Chahal* v. *United Kingdom*.[47] In the *Chahal* case, the court had held that, even if someone is a threat to national security, they may not be removed to a state where they would face a real risk of being subjected to torture or inhuman

[40] N.V. Demleitner, 'Immigration threats and rewards: effective law enforcement tools in the "war" on terrorism?', *Emory Law Journal*, 51 (2002), 1059.

[41] See Office of the Inspector General of the US Department of Justice (OIG), *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003).

[42] See, e.g., Taylor, 'Immigration enforcement post-September 11', 77–81.

[43] P. Wintour, 'Blair vows to root out extremism', *The Guardian*, 6 Aug. 2005.

[44] Home Office, Press Release: 'Tackling terrorism behaviours unacceptable in the UK', 24 Aug. 2005. See, also, the original consultation document: Home Office, *Exclusion or Deportation from the UK on Non-Conducive Grounds*, 5 Aug. 2005.

[45] A. Travis, 'Seven Algerians held pending deportation after raids', *The Guardian*, 16 Sept. 2005.

[46] *Ramzy* v. *The Netherlands*, Application No. 25424/05; *A* v. *The Netherlands*, Application No. 4900/06; *Saadi* v. *Italy*, Judgment of 28 Feb. 2008, Application No. 37201/06.

[47] *Chahal* v. *United Kingdom* (1997) 23 EHRR 413.

treatment.[48] In its judgment of February 2008 in *Saadi* v. *Italy*, the Grand Chamber of the European Court of Human Rights rejected the UK Government's attempt to overturn *Chahal*.[49] The second prong of the government's efforts to overcome the restraints of *Chahal* is the seeking of diplomatic assurances from the states of origin of terrorist suspects that those deported will not be subjected to ill-treatment. The United Kingdom has concluded agreements that systematise the use of such diplomatic assurances with Jordan,[50] Libya,[51] Lebanon[52] and Algeria;[53] negotiations to conclude similar agreements with other states are proceeding.[54] To give further support to this policy, the UK Government, together with several other states, launched an initiative within the Council of Europe to develop an international instrument that would set minimum standards for the use of diplomatic assurances.[55] The Council of Europe's Group of Specialists on Human Rights and the

[48] *Ibid.*, paras. 79–80.

[49] See, D. Moeckli, '*Saadi v Italy*: The rules of the game have *not* changed', *Human Rights Law Review* 8 (2008), 534.

[50] Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, 10 Aug. 2005. The Special Immigration Appeals Commission (SIAC) held that this memorandum effectively reduced the risk of torture in case of a deportation to Jordan. *Omar Othman (aka Abu Qatada)* v. *Secretary of State for the Home Department*, SC/15/2005, 26 Feb. 2007. In April 2008, the Court of Appeal upheld the SIAC's decision on this point. *Othman (Jordan)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 290.

[51] Memorandum of Understanding Between the General People's Committee for Foreign Liaison and International Co-operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, 18 Oct. 2005. The SIAC ruled that this memorandum is not a sufficient safeguard against torture. *DD and AS* v. *Secretary of State for the Home Department*, SC/42/2005 and SC/50/2005, 27 Apr. 2007. This decision was upheld by the Court of Appeal in April 2008. *AS and DD (Libya)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 289.

[52] Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, 23 Dec. 2005.

[53] *Hansard*, HL Vol. 696, Col. WA 181 (4 Dec. 2007) (Minister of State, Foreign and Commonwealth Office (Lord Malloch-Brown)).

[54] *Ibid.*

[55] Council of Europe, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight against Terrorism, Report on first meeting, 16 Dec. 2005, Doc. DH-S-TER(2005)018.

Fight against Terrorism, however, rejected this proposal because, among other reasons, it believed that 'such an instrument could be seen as weakening the absolute nature of the prohibition of torture or as a Council of Europe legitimisation of the use of diplomatic assurances'.[56] The United Kingdom has now turned to the European Union in its efforts to receive international endorsement of its diplomatic assurances policy.[57]

In Germany, where enforcement of the immigration laws is entrusted to the *Länder* (federal states), the authorities have aggressively used their wide powers under the *Zuwanderungsgesetz* to exclude and deport foreign nationals on national security grounds. In 2005, it was estimated that several hundred, or even up to 2,000, suspected terrorists would be deported under the new powers.[58] The Government of Bavaria has established a specific working group, the so-called *Arbeitsgruppe BIRGiT*,[59] which is tasked with 'making Islamist extremists leave the country'.[60] In that *Land* alone, the authorities deported forty-five individuals described as 'Islamist extremists and hate preachers' or 'dangerous Islamists' between November 2004 and June 2007; twenty-five others were awaiting deportation.[61] In Bremen, the government used immigration law to prevent the so-called 'Taliban of Bremen', Murat Kurnaz, a Turkish citizen who had been born and raised in Germany, from returning after his release from Guantanamo Bay – a decision that was later overturned by a Bremen administrative court.[62]

[56] Council of Europe, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight against Terrorism, Report on second meeting, 3 Apr. 2006, Doc. DH-S-TER(2006)005.

[57] See Human Rights Watch, *Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture* (2008) 10.

[58] See, Pelzer, 'Zurück zum Fremden-Polizeirecht?', 23.

[59] *Arbeitsgruppe BIRGiT (Beschleunigte Identifizierung und Rückführung von Gefährdern aus dem Bereich des islamistischen Terrorismus/Extremismus)* is part of the *Bayerisches Staatsministerium des Innern* (Bavarian Ministry for the Interior). For a description of the Working Group's activities and procedures, see W. Buggisch and W. Knorz, 'Terrorismusbekämpfung einmal anders: Die AG BIRGiT und das Ausländerrecht als Instrument zur Bekämpfung des islamistischen Terrorismus und Extremismus', *Kriminalistik*, 4 (2006) 226.

[60] See the website of the Working Group, at www.stmi.bayern.de/sicherheit/ innere/sicherleben/detail/11749/ ('Die Arbeitsgruppe hat die Aufgabe, islamistische Extremisten konsequent zur Ausreise zu bringen.').

[61] Bayerisches Innenministerium, 'Pressemitteilung Nr 238/07: 70 Ausweisungsbescheide gegen Gefährder, 45 Aufenthaltsbeendigungen', 11 Jul. 2007.

[62] Verwaltungsgericht der Freien Hansestadt Bremen, decision of 30 Nov. 2005, Case No. 4 K 1013/05.

These developments at the legislative and law enforcement levels go hand in hand with significant institutional changes, increasingly subordinating the immigration machinery to the fight against terrorism. Perhaps the clearest example of this is the dissolution of the US Immigration and Naturalization Service, the federal agency once responsible for immigration, and the integration of most of its components into the newly created Department of Homeland Security, whose primary objective is the prevention of terrorist attacks in the United States.[63] This major administrative reorganisation is emblematic of the fact that immigration policy has now become merely one aspect of the provision of 'homeland security'. Furthermore, since 9/11, the traditional separation between, on the one hand, immigration and, on the other, criminal law enforcement responsibilities has been increasingly blurred through the enhanced involvement of criminal law enforcement officers in immigration enforcement.[64] It is similarly revealing that in the UK counter-terrorism and immigration responsibilities were, at least for the first few years after 9/11, entrusted to one and the same Minister of State.[65] In Germany, the Federal Government established in 2005 a coordination mechanism that is designed to facilitate the transfer of information from the security services to the immigration authorities.[66] In particular, this body will advise the immigration authorities of cases of foreign nationals who potentially have a 'terrorist background'.[67]

Several elements explain the increased reliance on immigration powers as a means to counter terrorism. First, governments may see immigration control as a particularly effective tool because it allows them to bypass the safeguards of the criminal justice system, including access to courts and assistance of a lawyer. The procedural safeguards that apply in the immigration setting are generally less strict; both under the British Immigration, Asylum and Nationality Act 2006 and the

[63] T.W. Donovan, 'The American immigration system: a structural change with a different emphasis', *International Journal of Refugee Law,* 17 (2005), 574.

[64] Migration Policy Institute, *America's Challenge*, 80–86.

[65] The post, entitled 'Minister of State for Citizenship, Immigration and Counter-Terrorism', was held, first, by Beverley Hughes and, later, by Des Browne.

[66] The Working Group, called *Arbeitsgruppe 'Statusrechtliche Begleitmassnahmen' (AG Status)*, is based in the *Gemeinsames Terrorismusabwehrzentrum* (Common Centre for the Defence from Terrorism). See, Bundesministerium des Innern, *Praktiker-Erfahrungsaustausch im Rahmen der Evaluierung des Zuwanderungsgesetzes am 30. und 31. März 2006*, 66–68; 'Informationsaustausch zwischen Sicherheitsbehörden und BAMF', *Asylmagazin* 12/2006, available at www.asyl.net.

[67] *Ibid.*

summary removal procedure introduced by the German *Zuwanderungsgesetz*, for example, the scope of judicial review on appeal is severely limited.[68] Second, and related to this, it will normally be easier for the law enforcement authorities to meet the threshold for the use of immigration powers than to substantiate a terrorism charge. For an expulsion, for example, it must only be demonstrated that the person in question has engaged in some loosely defined behaviour that is taken as indicative that he or she poses a threat to national security.[69] Third, the broad discretion that the judiciary generally accords governments in the field of immigration law, discussed in section III.A below, means that there is wide scope for selective enforcement of the respective powers.

While these rationales have already influenced governmental anti-terrorism policies for some time, after 9/11, two additional elements have further reinforced the trend towards the use of immigration measures as an anti-terrorism tool. First, the contemporary terrorist threat is generally portrayed as inherently linked to a fundamental civilisational challenge from abroad.[70] This has led states to rely increasingly on anti-terrorism strategies that are targeted at those who try to enter the country or have entered recently. Such policies are not only designed to incapacitate potential terrorists, but also to deter them from entering, or staying, in the first place. Second, the adoption of measures that are directed against immigrants is a politically convenient way of reacting to national security crises.[71]

To conclude, immigration policy has been radically reshaped in the wake of 9/11. Immigration control now not only commonly serves as an additional weapon in the anti-terrorism arsenal but has been almost completely subordinated to counter-terrorism policy. This 'securitisation' of migration and refugee policy has profound impacts on the situation of immigrants to the Western world and their human rights. The use of immigration law as a means to prevent terrorism automatically associates immigration with the terrorist threat and thus contributes to the social construction of immigrants, including refugees and asylum-seekers, as suspected terrorists. This portrayal of immigrants as potential terrorists, in turn, makes restrictions of their fundamental rights appear

[68] Immigration, Asylum and Nationality Act 2006, s. 55; *Aufenthaltsgesetz*, Art. 58a.
[69] For the United Kingdom, see Home Office, Press Release: 'Tackling terrorism behaviours unacceptable in the UK'. For Germany, see *Aufenthaltsgesetz*, Art. 55(8).
[70] See D. Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'* (Oxford: Oxford University Press, 2008), 49–54.
[71] See *ibid.*, 54–55.

more acceptable. The UN Special Rapporteur on the Human Rights of Migrants noted in 2003 that: '[d]uring the period under review, the Special Rapporteur has observed that the strengthening of security policies and the tendency to consider migration as a matter falling under State security plans pose a threat to the human rights of migrants.'[72] She later reinforced this observation by pointing out that: '[t]he concept that immigration is a security issue has continued to gain ground since 11 September 2001 and has taken precedence over all other issues, including human rights. The erosion of rights sometimes caused by anti-terrorist measures affects immigrants in particular.'[73] The myriad immigration restrictions adopted in the name of preventing terrorism impact upon a whole range of migrants' fundamental rights. The expansion of the category of non-citizens who can be barred from claiming asylum on national security grounds, for instance, affects the right to seek asylum; registration for immigration purposes impacts upon the right to privacy; immigration detention restricts the right to liberty; exclusion based on 'unacceptable terrorism behaviours' may affect the freedom of expression; deportation may touch upon the right to family life and the freedom from torture. Yet even though the human rights of all immigrants have come under increased pressure after 9/11, one category of foreign nationals is considered especially suspect and thus made to bear the brunt of the immigration restrictions introduced in the 'war on terror'.

III. Selectivity in the enforcement

Just as the tightening of immigration laws and policies as a reaction to national security crises has a long history, so have the selective design and enforcement of such restrictions. After the events of 9/11, the trend towards selectivity has intensified.

A. Before 9/11

Among the key factors driving immigration policies of the contemporary state have always been considerations as to the national or ethnic origin, race, and religion of the immigrant population. In the United

[72] *Report of the Special Rapporteur on the Human Rights of Migrants*, 12 Aug. 2003, UN Doc. A/58/275, para. 6.

[73] *Report of the Special Rapporteur on the Human Rights of Migrants*, 22 Sept. 2004, UN Doc. A/59/377, para. 55.

States, explicit policies of favouring some ethnic groups over others go as far back as the late nineteenth century, when Congress passed a string of selective exclusion laws, directed primarily at Chinese immigrants.[74] Efforts to influence the ethnic composition of the immigrant population have continued to characterise US immigration law in the twentieth century, ranging from a quota system based upon the national origins of the existing US population (decidedly favouring immigrants from Northern European states) to the so-called 'diversity visa program'.[75] In the United Kingdom, post- World War II immigration policy was also largely designed to limit non-white immigration, with the Commonwealth Immigrants Acts of 1962 and 1968 and the Immigration Act 1971 as the cornerstones of this policy.[76] Similarly, German immigration laws have always rested on the axiom that *Deutschland ist kein Einwanderungsland* ('Germany is not a country of immigration').[77] These laws draw distinctions between different categories of immigrants according to their ethnic ties, most clearly reflected in their expansiveness toward ethnic German immigrants from Eastern Europe and their restrictiveness toward non-German immigrants.[78] Finally, the same kinds of distinctions are manifest in the European Union's common visa scheme, dividing the world into two categories of states: those whose nationals require a visa to enter the Union ('black list') and those whose nationals' entry is considered desirable ('white list'); almost all the states with a predominantly black or Muslim population are on the 'black list'.[79]

[74] J.C. Ting, '"Other than a Chinaman": How U.S. immigration law resulted from and still reflects a policy of excluding and restricting Asian immigration', *Temple Political and Civil Rights Law Review,* 4 (1995), 301.

[75] S.H. Legomsky, 'Immigration, equality and diversity', *Columbia Journal of Transnational Law,* 31 (1993), 319.

[76] Juss, *Immigration, Nationality and Citizenship*, 39–48; I.A. Macdonald and F. Webber (eds.), *Immigration Law and Practice in the United Kingdom*, 6th edn (London: LexisNexis Butterworths, 2005), 6–9.

[77] C. Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999), 62–5.

[78] D. Kanstroom, 'Wer Sind Wir Wieder? Laws of asylum, immigration, and citizenship in the struggle for the soul of the new Germany', *Yale Journal of International Law,* 18 (1993), 155.

[79] R. Cholewinski, 'Borders and discrimination in the European Union', in M. Anderson and J. Apap (eds.), *Police and Justice Co-operation and the New European Borders* (The Hague: Kluwer, 2002) 81; E. Guild, 'The border abroad – visas and border controls', in K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders* (The Hague: Kluwer, 2003), 87.

In recent years, more subtle forms of race and national origin bias made at the law enforcement level have become increasingly significant, gradually replacing these explicit, *de jure* classifications. Today, it is often on the basis of immigration laws that are neutral on the surface that certain ethnic groups are singled out.[80] In the United States, the Supreme Court has, to some extent, sanctioned such selectivity, holding that in the enforcement of the immigration laws – as opposed to criminal law enforcement – ethnic appearance may be lawfully considered as a relevant factor, as long as it is not the only criterion used.[81] The US immigration authorities therefore regularly rely on ethnicity and national origin when stopping persons in the border area[82] or enforcing other immigration powers.[83] Similarly, the UK Race Relations Act includes a clause permitting authorities to discriminate on grounds of nationality or ethnic or national origin (but not race) in carrying out asylum, immigration and nationality functions if authorised by a minister[84] – a provision described as 'incompatible with the very principle of non-discrimination' by the UN Committee on the Elimination of Racial Discrimination.[85]

It is especially during national security crises that states have turned to race, national or ethnic origin and, in some cases, religion as proxies to define certain groups of immigrants as particularly suspect. During World War II, for example, the United States interned Japanese nationals, as well as US citizens of Japanese ancestry, in their tens of thousands, whereas Germans and Italians were spared blanket internment.[86] More recently, the US authorities introduced special reporting requirements for Iranian students during the Tehran hostage crisis of 1979[87] and

[80] See K.R. Johnson, 'Race and immigration law and enforcement: a response to "Is there a Plenary Power doctrine?"', *Georgetown Immigration Law Journal,* 14 (2000), 289.

[81] *United States* v. *Brignoni-Ponce* 422 US 873, 886–87 (1975) (holding that '[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor' in making a stop in the border area).

[82] Johnson, 'Race and immigration law and enforcement', 294.

[83] Ting, '"Other than a Chinaman"', 310–12; J.F. Couch, B. King, W.H. Wells and P.M. Williams, *Nation of Origin Bias and the Enforcement of Immigration Laws by the Immigration and Naturalization Service*, Independent Institute Working Paper No. 38, Jun. 2001.

[84] Race Relations Act 1976 (as amended), s. 19(D).

[85] UN Committee on the Elimination of Racial Discrimination, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 10 Dec. 2003, UN Doc. CERD/C/63/CO/11, para. 16.

[86] See, *Korematsu* v. *United States* 323 US 214 (1944); Migration Policy Institute, *America's Challenge*, 122–31.

[87] See, *Narenji* v. *Civiletti* 617 F2d 745 (DC Cir, 1979).

photographing and fingerprinting requirements for all entering Iraqi and Kuwaiti nationals during the 1991 Gulf War.[88]

In the specific field of counter-terrorism, similar patterns had already emerged prior to 9/11. Hillyard has demonstrated how the far-reaching border control powers of the British anti-terrorism laws passed in the 1970s and 1980s disproportionately affected Irish/Catholic people travelling between Britain and Ireland.[89] In the United States, the immigration powers of the Antiterrorism and Effective Death Penalty Act of 1996 were almost exclusively deployed against Arabs and Muslims.[90]

B. After 9/11

The 9/11 attacks have led states to make country of origin or nationality, race, ethnicity and religion key components of their immigration law enforcement efforts: immigration authorities direct their increased powers listed in section II above primarily at those who match a profile based on a combination of these elements, often conflating nationality with religion and race by targeting immigrants from states with significant Muslim and Arab populations.

This is most clearly evidenced in the immigration law enforcement strategy of the US authorities, which have adopted a series of policies and practices that single out certain immigrants based on their country of origin or nationality and, at least indirectly (through the choice of the targeted countries), their race, ethnicity and religion.

First, in November 2001 the US Department of Justice initiated a project to interview 'aliens whose characteristics were similar to those responsible for the attacks'.[91] Under this so-called Voluntary Interview Program, male immigrants, who were not suspected of any criminal activity, were selected for questioning on the sole basis of fulfilling the following 'common-sense criteria':[92] they were of a certain age, had

[88] Human Rights Watch, *Freedom of Expression and the War: Press and Speech Restrictions in the Gulf and F.B.I. Activity in U.S. Raise First Amendment Issues*, 28 Jan. 1991.

[89] P. Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993), 13–67.

[90] M.J. Whidden, 'Unequal justice: Arabs in America and United States antiterrorism legislation', *Fordham Law Review,* 69 (2001), 2825; Akram, 'Scheherezade meets Kafka'.

[91] US General Accounting Office (GAO), *Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001*, GAO-03–459, Apr. 2003, 1.

[92] V. Dinh, 'Freedom and security after September 11', *Harvard Journal of Law and Public Policy,* 25 (2002), 399, 403 (Dinh was serving as Assistant Attorney General when the programme was initiated).

entered the United States after January 2000, and originated from countries 'in which intelligence indicated that there was an Al Qaeda terrorist presence or activity'.[93] Although the authorities did not identify these countries, almost all of the 8,000 men eventually interviewed were Arab and/or Muslim.[94] In late 2002, in anticipation of the attack against Iraq, the programme was extended to question several thousand Iraqi-born people.[95]

Second, in June 2002 the National Security Entry-Exit Registration System was announced, imposing fingerprinting, photographing and registration requirements for all males who are citizens of, or were born in, certain designated countries. These requirements apply not only to those from designated countries entering the United States but also to those already present within the United States, through a 'call-in' registration.[96] By January 2003, the list of states whose nationals are automatically defined as posing an 'elevated national security risk' and are therefore subject to special registration had grown to twenty-five. All of them – except for North Korea – are states with predominantly Arab and/or Muslim populations.[97]

Third, the years following 9/11 have seen a massive rise in deportation orders for immigrants from predominantly Muslim countries, whilst the corresponding figure for other immigrants has remained more or less stable.[98] For example, although the total number of deportation orders in the United States decreased by about 16 per cent in the first year after 9/11, the number of Egyptians who were ordered to be deported increased by 201 per cent and that of Jordanians by 144 per cent.[99] This

[93] GAO, *Homeland Security*, 7–8.

[94] Migration Policy Institute, *America's Challenge*, 41.

[95] *Ibid.*, 42.

[96] Attorney General John Ashcroft, 'Attorney General prepared remarks on the National Security Entry-Exit Registration System', 6 Jun. 2002. For an analysis, see Migration Policy Institute, *America's Challenge*, 42–45.

[97] The list includes the following states: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen. 68 Fed. Reg. 2363 (16 Jan. 2003); 67 Fed. Reg. 77136 (16 Dec. 2002); 67 Fed. Reg. 70526 (22 Nov. 2002); 67 Fed. Reg. 67766 (6 Nov. 2002); US Immigration and Customs Enforcement, 'Special Registration Groups and Procedures', available at www.ice.gov/pi/specialregistration/archive.htm.

[98] For the period from 30 Sept. 2001 to 30 Sept. 2003, a rise of 3 per cent in the total number of deportation orders was recorded; the number of deportation orders against citizens from twenty-four predominantly Muslim states increased by 31 per cent: C. Simpson, F. McRoberts and L. Sly, 'Immigration crackdown shatters Muslims' lives', *Chicago Tribune*, 16 Nov. 2003.

[99] *Ibid.*

national origin bias is also evident in the *enforcement* of deportation orders: as explained in the Introduction to this chapter, the AAI, launched in January 2002, prioritised the enforcement of deportation against those 2 per cent of deportable persons who originate from Arab and/or Muslim countries.

Fourth, on the eve of war with Iraq, the Department of Homeland Security announced that, as part of its so-called Operation Liberty Shield, all asylum-seekers 'from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated' would be automatically detained, without the opportunity to have the need for their detention individually assessed.[100] Although the authorities refused to disclose the list of affected states, the available information indicates that nearly all of them were states with a predominantly Muslim population.[101]

Fifth and finally, the vast majority of those arrested in the post-9/11 preventive detention campaign were immigrants from states with a predominantly Muslim population, primarily Pakistan, Egypt, Jordan and Yemen.[102] These hundreds of Muslim men were arrested on minor immigration charges that would not normally warrant arrest, they were detained for exceptionally long periods, and held in conditions of confinement not imposed on similarly situated detainees.[103]

In European countries, including the United Kingdom and Germany, immigration authorities also increasingly rely on the country of origin or nationality, race, ethnicity and religion to select the targets of their enforcement efforts – although generally in a less explicit manner than the US authorities. In the United Kingdom, the immigration detention powers of the law adopted as a reaction to the 9/11 attacks, the Anti-Terrorism, Crime and Security Act (ATCSA) 2001, were used exclusively against Muslim men coming from such countries as Algeria, Morocco and Egypt.[104] Likewise, the more recently adopted tougher stance on exclusion and deportation has primarily affected citizens of Middle

[100] Department of Homeland Security, Press Release: 'Operation Liberty Shield', 17 Mar. 2003.

[101] Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, 2004, available at www.humanrightsfirst.org.

[102] OIG, *The September 11 Detainees*, 21; Migration Policy Institute, *America's Challenge*, App. E, 1.

[103] See OIG, *The September 11 Detainees*.

[104] A. Gillan, 'Who are held, and why?', *The Guardian*, 17 Dec. 2004.

Eastern and North African states,[105] in particular Islamic clerics described as 'hate preachers'.[106]

In Germany, the immigration authorities in some of the *Länder* have adopted a policy of requiring immigrants from several specified countries to go through an additional, particularly stringent, national security vetting process before they can be granted a residence permit or renewal thereof. In Bavaria, applicants for a residence permit have to complete a special security evaluation questionnaire if they come from states that are associated with 'an increased probability that potential perpetrators of terrorist acts originate from there'.[107] The Bavarian Government has refused to disclose the list of these so-called 'problem states', citing national security reasons.[108] The Government of Hamburg has instructed its immigration authorities to subject immigrants from certain Arab and African states aged between 16 and 40 to an especially strict vetting procedure, including automatic background checks by the intelligence services for possible connections with terrorist organisations.[109] The government estimated that about 8,700 foreign nationals would be affected by this special procedure.[110] In Saxony, 'persons of Arab origin' are required to complete a special questionnaire when applying for a residence permit; this questionnaire is then passed on to the intelligence service for verification.[111] As far as expulsion is concerned, German authorities have, as explained before, explicitly defined the targets of their aggressive policy of deportation as 'Islamist extremists' or 'dangerous Islamists'.[112] Among those deported have been a number of so-called 'hate preachers', including the high-profile cases of

[105] Amnesty International, *Human Rights: A Broken Promise*, 23 Feb. 2006, 31–41.

[106] S. Knight, 'Row over new rules for deporting hate preachers', *Times Online*, 24 Aug. 2005.

[107] Bayerischer Landtag, Antwort des Staatsministeriums des Innern vom 16.01.2003 auf eine schriftliche Anfrage der Abgeordneten Köhler Elisabeth vom 04.12.2002, Drucksache 14/11340 ('*Befragt werden Personen aus Staaten, bei denen mit erhöhter Wahrscheinlichkeit davon ausgegangen werden muss, dass aus ihnen mögliche Täter terroristischer Anschläge einreisen.*')

[108] *Ibid.*

[109] 'Hamburg verschärft das Aufenthaltsrecht', *Die Welt*, 18 Feb. 2004.

[110] *Ibid.*

[111] 'Sachsen: Fragebögen für Sicherheitsüberprüfung', *Asylmagazin* 4/2005, available at www.asyl.net/Magazin/4_2005a.htm.

[112] See section II.B. above. For a critique of the 'dangerous Islamist' classification, see C. von Denkowski, 'Einstufung als (islamistische) Gefährder und (heimliche) Folgeeingriffe', *Kriminalistik*, 5 (2007), 325.

the self-styled 'caliph of Cologne', Metin Kaplan,[113] and the imam of a Frankfurt mosque, Said Khobaib Sadat.[114]

Various factors explain why the selective enforcement of immigration laws against those coming from countries with predominantly Arab and/or Muslim populations has become one of the central weapons in the anti-terrorism arsenal. Most importantly, the now dominant approach to combating terrorism, of which the use of immigration control measures is a typical manifestation, focuses on the prediction and prevention of risks and thus inevitably relies on profiles of potential terrorists.[115] Such profiles are constructed in a process that is shaped by the threat perceptions and policy objectives prevalent among the higher levels of government, the intelligence agencies and the police, which, in turn, both influence and are influenced by the preoccupations of the mass media.[116] Since the terrorist threat is now generally depicted as being reflective of wider cultural differences, nationality, national or ethnic origin, race and religion have become the central elements of contemporary terrorist profiles.[117] Immigrants who match these criteria are therefore treated as particularly suspect. In addition, the focus of immigration law enforcement is also determined by questions of political feasibility. Governments may, for example, be reluctant to direct enforcement efforts, such as registration programmes, against citizens of powerful Western states, thereby jeopardising diplomatic relations. The use of terrorist profiles that are based on such highly political considerations is particularly widespread in the field of immigration. This is no coincidence; as the following section demonstrates, the executive has traditionally enjoyed virtually unfettered discretion to selectively enforce its powers in this field.

IV. Conformity with the right to non-discrimination

Selective immigration law enforcement efforts adopted for anti-terrorism purposes such as those described in the previous section treat different

[113] Oberverwaltungsgericht Münster, decision of 26 May 2004, Case No. 8 A3852/03.A; Verwaltungsgericht Köln, decision of 12 Oct. 2004, Case No. 12 L 1418/04.

[114] Verwaltungsgericht Frankfurt am Main, decision of 26 Jan. 2006, Case No. 5 E 5870/04.A.

[115] See, Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'*, 51–55.

[116] See, e.g., P. Schlesinger and H. Tumber, *Reporting Crime: The Media Politics of Criminal Justice* (Oxford: Oxford University Press, 1994); E.S. Herman and N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York, NY: Pantheon Books, 1988); M. Welch, *Scapegoats of September 11th: Hate Crimes & State Crimes in the War on Terror* (New Brunswick, NJ: Rutgers University Press, 2006), ch. 3.

[117] Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'*, 52–5 and 200–6.

categories of foreign nationals differently based on their country of origin or nationality, race, ethnicity, religion or a combination of these elements. This section assesses the compatibility of such differential treatment with the human right to non-discrimination.

All the major human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),[118] which has been ratified by the United States, the United Kingdom and Germany, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[119] ratified by the United Kingdom and Germany, prohibit discrimination on all the grounds listed above. Discrimination based on race, colour, descent, or national or ethnic origin is also prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[120] which has been ratified by all the states at issue. In addition, to the extent that foreign nationals fall within the scope of protection of the 1951 Refugee Convention, the explicit prohibition of discrimination on the grounds of race, religion, or country of origin contained in that Convention applies.[121] Although the United States has not signed the 1951 Refugee Convention, it has ratified the 1967 Protocol relating to the Status of Refugees, which obliges states to apply the substantive provisions of the 1951 Refugee Convention to all refugees.[122] The prohibition on the grounds of race and religion is also part of customary international law.[123] Importantly, non-discrimination is also guaranteed by the national laws of all the states at issue. The United States and Germany have codified this guarantee in their written

[118] Arts. 2 and 26, International Covenant on Civil and Political Rights 1966 (ICCPR), GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976.

[119] Art. 14, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended.

[120] Arts. 1(1), 2(1)(a) and 5 (in particular), International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), GA res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969.

[121] Art. 3, 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

[122] 1967 Protocol relating to the Status of Refugees, GA res. 2198 (XXI), 16 Dec. 1966, adopted 31 Jan. 1967, 606 UNTS 267; entered into force 4 Oct. 1967.

[123] See, e.g., *South-West Africa Cases (Second Phase)*, ICJ Reports (1966), 3, 293 (Tanaka, J, dissenting). *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), 16, 76, 130.

constitutions.[124] In the United Kingdom, equality before the law is considered to be a fundamental principle of justice,[125] and the prohibition of discrimination of the ECHR has been incorporated into domestic law by way of the Human Rights Act 1998.

States are permitted to make certain distinctions between citizens and non-citizens in the context of immigration.[126] However, this does not mean that those subject to a state's immigration powers do not enjoy the protection of the non-discrimination guarantee. Instead, all the relevant non-discrimination standards, including those contained in national laws, apply not only to citizens but also to foreign nationals, irrespective of whether their presence in the host state is lawful or not.[127] As a consequence, measures relating to the control of immigration and the expulsion of foreign nationals may not involve differential treatment based on grounds such as country of origin or nationality, race, ethnicity or religion.[128] For the ICERD, the UN Committee on the Elimination of Racial Discrimination has expressly stated that the prohibition of discrimination on the basis of race, colour, descent, or national or ethnic origin extends to the field of immigration and that states thus have to ensure that immigration and deportation policies do not discriminate among non-citizens based on any of these grounds.[129] Further, it has made it clear that the prohibition of discrimination of the ICERD also applies to measures taken in the fight against terrorism.[130]

That the right to non-discrimination is especially prone to violation when states rely on immigration control to counter terrorism has been highlighted by the European Commission against Racism and

[124] See, US Constitution, Fourteenth and Fifth Amendments; Grundgesetz, Art. 3.

[125] See, e.g., *Arthur JS Hall* v. *Simons* [2002] 1 AC 615, 688.

[126] See, UN Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant* (1986), para. 5; ICERD, Art. 1(2).

[127] See, *ibid.*, paras. 2, 5; UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens* (2004), UN Doc. CERD/C/64/Misc.11/rev.3, paras. 2–4. For the United States, see *Plyler* v. *Doe* 457 US 202, 210 (1982) and *Zadvydas* v. *Davis* 533 US 678, 693 (2001). For the United Kingdom, see *Khawaja* v. *Secretary of State for the Home Department* [1984] AC 74, 111. For Germany, see BVerfGE 30, 409 (412).

[128] See, e.g., UN Human Rights Committee, Concluding Observations: Germany, 4 May 2004, UN Doc. CCPR/CO/80/DEU, para. 21.

[129] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, paras. 9, 25. See, also, UN Committee on the Elimination of Racial Discrimination, Concluding Observations: Libya, 10 May 2004, UN Doc. CERD/C/64/CO/4, para. 11.

[130] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, para. 10.

Intolerance (ECRI). In its Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism, it asked states to pay particular attention to ensuring that no discrimination on grounds such as race, colour, religion, nationality, or national or ethnic origin ensues from legislation and regulations – or their implementation – in the areas of border control, expulsion, deportation and issuing of visas.[131] Similarly, in its Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights has stressed that '[m]igrants, asylum seekers and other non-nationals are especially vulnerable to discrimination in emergency situations resulting from terrorist violence' and that states 'must therefore remain vigilant in ensuring that their laws and policies are not developed or applied in a manner that encourages or results in discrimination'.[132] More specifically, the Inter-American Commission has made it clear that:

> to the extent that [immigration control] operations may incorporate criteria, such as national or social origin, that may potentially constitute the basis for discrimination, the content and execution of such operations must be based upon objective and reasonable justifications that further a legitimate purpose, regard being had to the principles which normally prevail in a democratic society, and they must be reasonable and proportionate to the end sought.[133]

As becomes apparent from the Inter-American Commission's comment, the fact that the immigration enforcement measures considered here involve distinctions on the basis of country of origin or nationality, race, ethnicity and religion does not necessarily mean that they violate the prohibition of discrimination. Government actions inevitably classify persons; the crucial question is whether these classifications are justified or not. According to the jurisprudence of all the relevant human rights bodies and courts, a difference in treatment only violates the right to non-discrimination if persons who are *in a comparable position* are treated differently and the differential treatment is *not supported by objective and reasonable grounds*.[134] But before these two issues are

[131] European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 8*, 17 Mar. 2004, Doc. CRI (2004) 26.

[132] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 Oct. 2002, Doc. OEA/Ser.L/V/II.116, paras. 411–412.

[133] *Ibid.*, para. 412.

[134] See, e.g., UN Human Rights Committee, *General Comment No. 18: Non-Discrimination* 1989, para. 13; *Belgian Linguistics Case (No. 2)* (1968) 1 EHRR 252, para. 10.

considered, it is necessary to determine the standard that courts should apply to review the immigration law enforcement practices at issue.

A. *Standard of review*

National courts have traditionally exercised great deference towards the executive and the legislature as far as policies towards foreign nationals are concerned, particularly with regard to their admission and exclusion.[135] US courts have generally referred to Congress's plenary power over immigration policies[136] and British courts to the royal prerogative in the field of immigration to justify this deference.[137]

However, this does not mean that courts will automatically exercise self-restraint whenever immigration law issues are concerned. In fact, the case law of the courts of the third state considered in this chapter, Germany, demonstrates that there is nothing in principle that would prevent the application of the normal principles of judicial review to immigration matters. German courts, including the *Bundesverfassungsgericht*, have never viewed national sovereignty as requiring an unfettered government power over migration.[138] In the United States, both commentators[139] and courts[140] have in recent years started to advocate a similar position, characterising the plenary power doctrine, which had emerged in a time of expressly racially discriminatory immigration

[135] For the United States, see *Chae Chan Ping* v. *United States* 130 US 581, 604–605 (1889); *Harisiades* v. *Shaughnessy* 342 US 580, 588–89 (1952); *Mathews* v. *Diaz* 426 US 67, 81 (1976). For the United Kingdom, see, e.g., *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2002] EWCA Civ 158, paras. 86–87.

[136] For a summation of the plenary power doctrine, see *Kleindienst* v. *Mandel* 408 US 753, 766–69 (1972); *Fiallo* v. *Bell* 430 US 787, 792 (1977).

[137] The two leading cases are *Musgrove* v. *Chun Teeon Toy* [1891] AC 272 (PC) and *Attorney-General for the Dominion of Canada* v. *Cain* [1906] AC 542 (PC). For a critical analysis of the royal prerogative in the field of immigration, see C. Vincenzi, *Crown Powers, Subjects and Citizens* (London: Pinter, 1998), ch. 4.

[138] For an overview, see G.L. Neuman, 'Immigration and judicial review in the Federal Republic of Germany', *New York University Journal of International Law and Politics,* 23 (1990), 35.

[139] See, e.g., L. Henkin, 'The Constitution and United States sovereignty: a century of Chinese exclusion and its progeny', *Harvard Law Review,* 100 (1987), 853, 858–63; G.L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, NJ: Princeton University Press, 1996), 118–138; N. Morawetz, 'Rethinking retroactive deportation laws and the due process clause', *New York University Law Review,* 73 (1998), 97, 122–31.

[140] See, especially, the Supreme Court's decisions in *INS* v. *Chadha* 462 US 919 (1983); *INS* v. *St. Cyr* 533 US 289 (2001); *Zadvydas* v. *Davis* 533 US 678 (2001).

policies (described in Part III above), as increasingly out of step with current realities and understandings of the appropriate role of the courts. A parallel shift in attitude is observable in the United Kingdom.[141] In the wake of 9/11, governments may try to reverse this trend towards greater judicial involvement by arguing that, in the face of the current terrorist threat, they should be allowed to exercise their immigration powers without interference by the courts. In this vein, after the London attacks, the then British Home Secretary explicitly warned judges not to challenge his decision to deport terrorist suspects.[142] However, the mere fact that a case touches upon national security interests is clearly not a sufficient justification for a deferential standard of review.[143]

In the specific context of selective immigration law enforcement policies and practices that have been adopted for anti-terrorism purposes, three further elements support close judicial scrutiny.

First, even though these initiatives have been adopted in an immigration law context, most of them should properly be considered as criminal law enforcement efforts and thus be subject to the normal principles of judicial review. This is perhaps most obvious with the US Voluntary Interview Program, whose sole purpose appeared to be the gathering of information for criminal investigations into terrorism.[144] Also a programme such as the AAI has little to do with immigration law enforcement or expedited deportation. In fact, the relevant Department of Justice guidelines make clear that arrests of absconders can be carried out without the presence of any immigration agents,[145] that absconders should be treated as criminal suspects,[146] that their names should be entered into a federal criminal database,[147] and that they should be interviewed about their knowledge of terrorist activity.[148] Enforcement efforts of a clearly criminal law nature such as these

[141] See, e.g., S.H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987), chs. 4–5; D. Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (London: Thomson/Sweet & Maxwell, 2004), ch. 8 (containing a good overview of case law).

[142] A. Travis, 'Clarke confronts judges on terror law', *The Guardian*, 7 Sept. 2005.

[143] See, e.g., D. Feldman, 'Human rights, terrorism and risk: the roles of politicians and judges', *Public Law* (2006) 364.

[144] GAO, *Homeland Security*, 3.

[145] Absconder Memo, 4.

[146] *Ibid.*, 2, 4.

[147] *Ibid.*, 2.

[148] *Ibid.*, 4. See also Lapp, 'Pressing public necessity', 601–3.

cannot escape close judicial scrutiny simply because they are targeted at immigrants rather than citizens.

Second, even if these initiatives were characterised as immigration law enforcement, strict scrutiny would be called for. This is because where courts have in fact accorded the executive broad discretion in this area, they have largely limited it to the treatment of foreign nationals who have not yet formally entered the country. In other words, governments are given wide latitude to determine the criteria for admission, but once an immigrant has entered and begun to develop social ties, courts tend to apply a more stringent review.[149] In the present instance, almost all selective enforcement efforts have targeted foreign nationals who had already been residing in the country concerned, in many cases for years or even decades. As explained in section III.2, even the US initiative that comes closest to admission control, the special registration programme, encompassed not only citizens of specified states entering the United States but also those already present within the United States. The same applies to the German security vetting process, which is also used in the case of applications for the *renewal* of residence permits.

Third, whereas the case law of national courts and international human rights bodies concerning distinctions based on *nationality* is inconsistent (only the European Court of Human Rights automatically subjects them to strict scrutiny),[150] differential treatment on the grounds of *race*, *ethnicity* and *religion* is uniformly treated as suspect and as entailing strict scrutiny.[151] This explains why the former US Attorney General, John Ashcroft, claimed that the government's enforcement efforts have been targeted according to nationality: 'We have not identified people based on their ethnic origin. We have identified individuals who are not citizens, but based on the country which issued their

[149] For Germany, see, e.g., BVerfGE 76, 1 (46) – *Familiennachzug*. For the United States, see *Landon* v. *Plasencia* 459 US 21, 32 (1982) (holding that 'an alien seeking initial admission to the United States requests a privilege' but that 'once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly'.)

[150] *Gaygusuz* v. *Austria* (1996) 23 EHRR 364, para. 42.

[151] For the ECHR, see *Timishev* v. *Russia*, Application Nos. 55762/00 and 55974/00, 13 Dec. 2005, para. 58 and *Hoffmann* v. *Austria* (1993) 17 EHRR 293, para. 36. For the United States, see *Loving* v. *Virginia* 388 US 1, 11 (1967). For the United Kingdom, see *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, para. 9. For Germany, see BVerfGE 85, 191 (205–206) – *Nachtarbeitsverbot.*

passports.'[152] Yet a closer look at these initiatives reveals that, in fact, they do not rely on nationality but rather on *national origin* – and thus on a criterion closely linked to race. This is, in part, already apparent from the official definitions of the target groups. The Voluntary Interview Program, for example, encompassed 'Iraqi-born' people,[153] while the special registration programme covered not only citizens of, but also those born in, the designated states.[154] This explicit reliance on national origin is compounded by the selection of the targeted countries of origin, suggesting that this criterion has served as a mere proxy for race and religion: both the immigration enforcement efforts based on specific lists of suspicious countries and those, like the detention initiatives, where such lists have not been drawn up, have been directed almost exclusively at people originating from predominantly Arab and/or Muslim countries. In contrast, citizens of Western states where Al Qaeda has demonstrably also been active[155] have been spared the same treatment. Thus, the nationality criterion has served to single out a group of people whose common defining characteristics are ultimately their race and religion. Distinctions based on these immutable characteristics must inevitably entail strict judicial scrutiny.

B. Comparability

The immigration law enforcement efforts considered here involve a difference in treatment between, on the one hand, those foreign nationals who originate from predominantly Arab and/or Muslim states and, on the other, those who come from other countries. For a discrimination challenge to succeed, it must be established that these two groups are in a comparable, that is, analogous or relevantly similar, situation, judged in relation to the purpose of the differential treatment.[156] In the present instance, the selective enforcement of immigration powers serves as a means for the identification and prevention of terrorist activity. In

[152] Department of Justice, 'Attorney General John Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees', 27 Nov. 2001, available at www.fas.org/irp/news/2001/11/ag-112701.html.

[153] Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (Sept. 2003), 40.

[154] Migration Policy Institute, *America's Challenge*, 42–43.

[155] See section C.1. below.

[156] See, e.g., J. Tussman and J. tenBroek, 'The equal protection of the laws', *California Law Review*, 37 (1949), 341, 346 (for the United States); *A* v. *Secretary of State for the Home Department* [2004] UKHL 56, para. 235 (for the United Kingdom).

relation to this aim, the two groups are in an analogous situation. First, potential terrorists, including Islamist terrorists, may not only be citizens of Arab or Muslim countries but also of other states. As I will explain in detail in the following section, many of those so far identified as having been involved in Islamist terrorist activities have, in fact, come from Western states. Second, persons belonging to both groups could, theoretically, be targeted equally through immigration law enforcement efforts, since all foreign nationals are subject to the host state's immigration powers. Thus, the two groups are in a comparable situation and their differential treatment can only be compatible with the right to non-discrimination if it is supported by an objective and reasonable justification.

C. *Objective and reasonable justification*

As I have pointed out in section IV.A, above, there are good reasons to argue that the differences in treatment examined here should be characterised as classifications based on race and religion. According to the jurisprudence of both international human rights bodies and national courts, differential treatment based solely on these grounds is automatically suspect and will always be difficult to justify. The UK House of Lords, for example, has held that racial stereotyping by immigration officers is impermissible even if it is based on assumptions that may very likely be true.[157] Consequently, even if it could somehow be established that non-citizens of Arab origin or Muslim denomination are more likely to be involved in terrorism than other foreign nationals, courts might overturn selective immigration enforcement measures that are clearly based on these criteria.

If, on the other hand, the government position is followed, according to which the distinctions at issue are based on the immigrants' country of nationality, the question as to whether the differential treatment may be justified needs to be examined more closely. The inquiry as to the existence of an objective and reasonable justification is generally divided into the following two sub-tests.[158] First, does the difference in treatment pursue a legitimate aim? Second, is there a reasonable relationship of proportionality between the difference in treatment and the legitimate

[157] *R (European Roma Rights Centre)* v. *Immigration Officer at Prague Airport* [2004] UKHL 55, paras. 82 (Baroness Hale), 113 (Lord Carswell).

[158] See, e.g., UN Human Rights Committee, *General Comment No. 18: Non-Discrimination*, para. 13; *Belgian Linguistics Case (No. 2)*, para. 10.

aim sought to be realised? As far as the first requirement is concerned, the aim of the immigration law enforcement efforts at issue is the prevention of terrorist attacks. Undoubtedly, this constitutes a legitimate, even compelling, governmental interest. The decisive question is therefore whether singling out citizens of predominantly Arab and/or Muslim states for enhanced immigration enforcement efforts is a proportionate means of achieving this aim. It is helpful to examine the question of proportionality in two steps, relating, first, to the suitability and effectiveness of the selective enforcement efforts at issue and, second, to their possible negative effects.

1. Suitability and effectiveness

It is doubtful in two respects that the kind of immigration law enforcement measures described in this chapter are a suitable and effective, and thus proportionate, means to detect and prevent terrorist activity. First, there are inherent limits to the usefulness of a strategy that relies on immigration law powers to counter terrorism. Second, a person's country of origin or nationality is not an appropriate criterion to target the enforcement of these powers for anti-terrorism purposes.

The first problem is due to the fact that immigration control systems are not able – or even intended – to identify international terrorists. The restrictive measures provided by these systems can only be deployed effectively as far as intelligence and criminal law agencies provide information as to potential targets.[159] Thus, the general strengthening and strict enforcement of immigration laws are, in themselves, unlikely to disrupt the activities of foreign terrorists – unless, perhaps, a state goes as far as completely closing its borders and expelling all foreign nationals. As a senior Western intelligence official put it, 'tightening immigration control doesn't help you that much until the intelligence side gives you a name, and then it helps you track them'.[160] This statement is reinforced by the findings of the 9/11 Commission, which concluded that the attacks of that date were made possible mainly by the intelligence agencies' failure to properly assess and share information.[161] Furthermore, many immigration law enforcement efforts, including the AAI and the use of immigration charges to hold potential terrorists, are only

[159] Migration Policy Institute, *America's Challenge*, 31.
[160] *Ibid.*, 17.
[161] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004), ch. 13.

directed at those who are in violation of immigration law. Yet foreign terrorists are not necessarily illegally in the country they are planning to attack. In fact, a study of 373 Islamist terrorists arrested or killed in Europe and the United States between 1993 and 2004 showed that only 6 per cent of them had entered the respective host country illegally.[162] Finally, even as far as immigration control measures do affect terrorists, their effectiveness is very limited: exclusion and deportation merely relocate the structural components of terrorism rather than to seriously disturb or eliminate them.[163] The British Newton Committee, a committee of Privy Counsellors set up to review the operation of the ATCSA, therefore concluded:

> Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism … While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.[164]

In summary, while the use of immigration powers may be, for the reasons explained in section II above, an attractive and convenient option for governments to react to terrorist threats, it is also a largely ineffective one.

The second concern, relating to the suitability and effectiveness of the *selective enforcement approach*, derives from the fact that a lack of reliable and specific information on terrorists cannot be compensated for by the use of stereotypes. Such a broad criterion as a person's country of origin or nationality is not narrowly tailored enough to target effectively immigration law enforcement efforts for anti-terrorism purposes. To subject all nationals of certain states to enhanced scrutiny and particularly harsh treatment clearly runs counter to the principle of proportionality. This is all the more true given that there is no evidence for a possible connection between a person's nationality and his or her likelihood to be involved in terrorism. The mere fact that someone comes from a country where there has been Al Qaeda presence or activity can hardly be regarded as a compelling indication of dangerousness. After

[162] R.S. Leiken and S. Brooke, 'The quantitative analysis of terrorism and immigration: an initial exploration', *Terrorism and Political Violence,* 18 (2006), 503, 510.

[163] Demleitner, 'Immigration threats and rewards', 1069.

[164] Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (HC 100, 2003), para. 195.

all, as highlighted by Legomsky, immigrants are not representatives of the countries they leave behind: 'Countries don't immigrate. People do.'[165] Thus, reliance on a stereotypical, overbroad criterion instead of specific information relating to individuals makes the selective enforcement efforts at issue unsuitable and disproportionate means of countering terrorism. It is for this reason, for example, that the UN High Commissioner for Refugees has expressed concern about the mandatory detention of asylum seekers based on nationality under the US Operation Liberty Shield: 'Detention of asylum seekers … should be based on an individualized assessment of the security risk the person poses. Blanket mandatory detention based on nationality varies from accepted international human rights norms and standards.'[166]

It is, in any event, difficult to discern the logic behind the selection of the states whose nationals have been targeted by the measures under consideration. As explained in section III.2, the immigration law enforcement efforts of all three states considered have concentrated almost exclusively on (primarily male) citizens of around twenty to twenty-five Arab and/or Muslim states where there has, allegedly, been al Qaeda presence or activity. Yet, at the same time, a list compiled by the US Department of State of 'Countries Where Al Qaeda Has Operated' comprised forty-five states, including numerous Western countries such as France, Germany, Switzerland, the United Kingdom and the United States, while excluding some of the Middle Eastern states singled out by the initiatives at issue, such as Syria.[167] Furthermore, the study of Islamist terrorists referred to above showed that less than half of these terrorists were born in the Middle East and that 41 per cent of them were nationals of Western states; there were more Britons than Yemenis, Sudanese or Libyans and twice as many French nationals as Saudis.[168] Therefore, if a link between the country of nationality and terrorist involvement was to be made, then nationals of Western states would have to be targeted as well. In this sense, the selective immigration law enforcement efforts at issue are not only over-inclusive in that they rely

[165] Legomsky, 'Immigration, equality and diversity', 334.

[166] UNHCR, Press Release: 'UNHCR appeals for protection of asylum seekers in the United States', 20 Mar. 2003.

[167] The list was posted on 10 Nov. 2001 on the State Department website, at http://usinfo.state.gov/products/pubs/terrornet/12.htm, but later removed. An exact capture is available at www.fred.net/tds/Osama_bin_Laden_and_al_Qaeda_2001nov10/12.htm.

[168] Leiken and Brooke, 'The quantitative analysis of terrorism and immigration', 508. See, also, R. Leiken and S. Brooke, 'Al Qaeda's second front: Europe', *International Herald Tribune*, 15 Jul. 2005.

on the broad, disproportionate criterion of country of nationality: they are also under-inclusive in that they fail to include within their scope a large portion of potential terrorists. To conclude, the perception that terrorism is part of a wider cultural conflict, as well as considerations of political feasibility, have led states to use a proxy for terrorist threats that is overbroad, under-inclusive, and inappropriate.

It is therefore not surprising that there is no evidence that would suggest that these selective enforcement measures have been effective. For example, not one of the tens of thousands of immigrants registered under the US special registration programme has been charged with terrorist activity.[169] Similarly, the mass of information resulting from the Voluntary Interview Program has not even been properly analysed, and the project has apparently not produced any investigative leads.[170] Of the few individuals who were taken into custody based on the interviews, most were charged with minor immigration violations; none of these cases seem to have any connection to terrorism.[171] This lack of effectiveness reinforces the conclusion that there is no compelling link between the traits relied on for these law enforcement initiatives and terrorist activity.

2. Negative effects

A proportionality assessment of the sort of immigration law enforcement practices described in this chapter must also take account of their wider implications. The available evidence suggests that such selective enforcement methods may have serious negative impacts on community relations and thus ultimately prove to be an impediment to anti-terrorism efforts.

These counter-productive effects are, again, best documented for the selective enforcement programmes implemented by the US authorities. A series of interviews carried out by an independent research institute with representatives of Arab and Muslim communities in the United States demonstrates that these groups feel targeted and isolated by the government's policies described above.[172] One interviewee stated that the cumulative effect of all these measures for the Muslim community had been 'isolating instead of integrating'.[173] The special registration

[169] Lawyers Committee for Human Rights, *Assessing the New Normal*, 39.
[170] GAO, *Homeland Security*, 6, 16.
[171] *Ibid.*, 6.
[172] Migration Policy Institute, *America's Challenge*, 87–90.
[173] *Ibid.*, 90.

programme has even prompted an exodus of some immigrant groups from the United States; in one Brooklyn neighbourhood alone, an estimated 15,000 Pakistanis left.[174] This also shows that selective immigration law enforcement efforts impact upon a much wider group than only those directly affected by them: by singling out a particular category of foreign nationals, they intimidate, alienate and stigmatise all those who share the relevant characteristics.

This sense of intimidation and alienation within certain immigrant communities has important consequences in terms of their readiness to cooperate with law enforcement agencies – cooperative law enforcement depends upon mutual trust.[175] Given that the collection of intelligence in investigations into international terrorist networks also depends on good sources in immigrant communities,[176] this may be extremely costly in the longer term. As a former CIA counter-terrorism official has pointed out: '[W]hen we alienate the communities, particularly immigrant communities, we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities.'[177] It is precisely for this reason that in the United States several local police departments refused to participate in the Voluntary Interview Program; such selective enforcement efforts, they argued, could jeopardise the trust with immigrant communities that they had built up over the years.[178]

Even more fundamentally, measures singling out immigrants who originate from Middle Eastern and Muslim states for particularly harsh treatment contribute to the construction of the concept of a 'clash of civilizations'.[179] Through their choice of the targeted countries of nationality, they reinforce the notion that terrorism is but a manifestation of a broader cultural and religious conflict. It is exactly this notion that, in turn, is one of the most powerful arguments used by Islamist terrorist organisations themselves to recruit new members, including second- and third-generation immigrants in Western states.[180]

[174] Lawyers Committee for Human Rights, *Assessing the New Normal*, 39.
[175] E.g., D. Harris, 'The stories, the statistics, and the law: why "driving while black" matters', *Minnesota Law Review,* 84 (1999), 265, 307–9.
[176] See, Migration Policy Institute, *America's Challenge*, 17.
[177] Lawyers Committee for Human Rights, *Assessing the New Normal*, 38.
[178] F. Butterfield, 'A nation challenged: the interviews; police are split on questioning of Mideast men', *New York Times*, 22 Nov. 2001.
[179] See, S.P. Huntington, 'The clash of civilizations?', *Foreign Affairs,* 73 (1993), 22.
[180] See, J. Burke, *Al-Qaeda: Casting a Shadow of Terror* (New York, NY: Tauris & Co. Ltd, 2003), 238–40.

3. Result

Immigration law enforcement efforts focusing on citizens of predominantly Arab and/or Muslim states treat two groups differently who are in a comparable situation: immigration law enforcement agencies could equally target foreign nationals originating from other states for anti-terrorism purposes. Because these measures serve criminal (rather than immigration) law enforcement purposes and because they will often affect immigrants who reside in the host country, courts should employ strict scrutiny to review discrimination challenges to them. Thus, the differential treatment they involve could only be justified if it is supported by compelling reasons.

Yet in a terrorism context there are no objective and reasonable grounds for making distinctions between different categories of foreign nationals according to their country of origin or nationality. Even though singling out people for special treatment based on their nationality is always problematic from a discrimination perspective, it may be understandable that a state considers a non-citizen's country of nationality a relevant factor of a risk assessment if it is involved in an armed conflict with that country. Thus, a US court held during the Tehran hostage crisis that there was a 'rational basis' for a regulation requiring Iranian students to report to the immigration authorities.[181] For the purpose of the fight against terrorism, however, a person's nationality is irrelevant. The purported 'war on terror' is not an inter-state conflict, and policies that aim at excluding or removing all nationals of certain states are grounded in a traditional conception of security that is unhelpful in the context of contemporary international terrorism. This is a conception that emphasises territory instead of people and thus implies that terrorism can somehow be linked to certain states, that all nationals of these states can be treated as unitary actors and that the threat can be addressed through the protection of the borders. Yet, in reality, immigration law enforcement can only contribute to the prevention of terrorism if it is based on a detailed, individualised appreciation of the threat and concrete information. Enforcement efforts that rely on broad stereotypes such as nationality or national origin, in contrast, are unsuitable and ineffective, and thus disproportionate, means to counter terrorism. As a consequence, they violate the right to non-discrimination as guaranteed by international human rights standards and national law.

[181] *Narenji* v. *Civiletti* 617 F2d 745, 748 (DC Cir, 1979).

V. Conclusion

With the portrayal of contemporary terrorism as a war-like phenomenon rooted in fundamental cultural differences and, thus, as primarily emanating from abroad, the reinforcement of the borders and the removal of potential security risks from the country may seem a logical response. It is a way of reacting to national security crises that has a long tradition. It is, at the same time, a way of reacting that is characteristic of the risk management approach that underlies today's crime-fighting strategies in general.[182] The use of deportation powers to counter terrorism may be seen as the archetypical manifestation of this approach: relocating rather than resolving potential threats, deportation is primarily aimed at producing a short-term sense of security. Yet the impression of security created by the adoption of immigration restrictions is – even in the short term – a false one. With the huge numbers of people crossing borders every day,[183] it is – at least for a society that wants to stay relatively open – a close to impossible task to filter out potential terrorists. As is widely acknowledged, even vastly expanded immigration powers and border controls could not have prevented the 9/11 hijackers from entering the United States.[184] In the longer term, and certainly from a global perspective, risk management strategies such as deportation may actually be counterproductive, since potential terrorists may be better able to operate from the states to which they are deported.[185]

The use of immigration laws as an anti-terrorism tool is also typical of the risk management approach in another respect: since prediction and prevention of risks is at the heart of this approach, it relies on profiles of the potential targets. As the figure of the contemporary terrorist lacks particular psychological or behavioural characteristics, these profiles are inevitably vague.[186] Thus, individual-focused law enforcement practices, based on specific information, are replaced with the targeting of whole

[182] See, e.g., M. Feeley and J. Simon, 'Actuarial justice: the emerging new criminal law', in D. Nelken (ed.), *The Futures of Criminology* (London: Sage, 1994), 173; R.V. Ericson and K.D. Haggerty, *Policing the Risk Society* (Oxford: Clarendon Press, 1997); D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001), especially chs. 5 and 7.

[183] E.g., each year more than 500 million people enter the United States: Office of Homeland Security, *The National Strategy for Homeland Security*, Jul. 2002, available at www.whitehouse.gov/homeland/book/nat_strat_hls.pdf, p. 21.

[184] E.g., Migration Policy Institute, *America's Challenge*, 8–11.

[185] Demleitner, 'Immigration threats and rewards', 1093.

[186] See, Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'*, 52 and 201.

groups, based on broad characteristics. In the immigration control context, it is particularly the country of origin or nationality that has come to be seen as an indicator of a propensity to terrorism. Through the exclusion and removal of all those accordingly defined as posing a heightened security risk, states try to shift the responsibility of dealing with these risks back to the state that is blamed for their production: the 'home' state. Rather than addressing the terrorist threat in a comprehensive, coherent, and principled manner, immigration enforcement practices that follow this logic are mainly designed to play to domestic political concerns. As a consequence, they involve differences in treatment that are not based on objective and reasonable grounds and are therefore incompatible with the right to non-discrimination.

14

Protection of non-citizens against removal under international human rights law

VESSELINA VANDOVA*

I. Introduction

The challenges posed by terrorism are not new. Nonetheless, in the past century states have had to confront the exceptionally complex danger of organised transnational terrorism. In response to this terrorist threat, governments have sought different ways of complying with their responsibilities to protect those within their jurisdiction and they have done so by reference to national security. In contrast to the concept of national security, human security is much wider and encompasses the security of *all* individuals. One of the widely accepted components of human security is the protection of internationally recognised human rights such as the rights to life, freedom from ill-treatment, and liberty, all of which clearly have an impact on the human security of the individual.

A number of measures adopted in recent years in the areas of deportation, expulsion and extradition compromise the human rights and the human security of non-citizens. For example, some states have argued that the dangers to non-citizens on return, including the risk of torture and ill-treatment, should be balanced against the risk which the individual presents to the host country. Other states have returned persons to countries known for torturing terrorist suspects, relying solely on diplomatic assurances that ill-treatment will not take place. Other governments have used more indirect ways to facilitate removals, for example by requiring the individual to prove to an unreasonably high standard that if returned he or she would be at risk of ill-treatment; others still, have withheld crucial evidence from removal proceedings on the basis of national security.

* Opinions expressed herein are those of the author and do not reflect the opinions of Interights. Thanks are due to Dr Silvia Borelli for her comments on preliminary drafts of this chapter.

People who are removed on the grounds of involvement with terrorism may face severe consequences in the country of destination. Often, they may face deprivation of liberty and physical abuse precisely because they have been suspected of involvement in terrorism. In the following sections, I discuss a number of cases of people who upon return have been arbitrarily detained, tortured or ill-treated in custody, persecuted, or subjected to unfair trials. Apart from issues relating to the treatment in the receiving state, removal may have other lifelong adverse consequences on individuals and members of their families left behind in the removing state, and may result in serious economic hardship for the family if the removed individual was the primary provider.

Removal of individuals may be described using a variety of legal terminology, including expulsion, deportation or extradition.[1] In addition, removals are commonly referred to using non-legal or quasi-legal expressions such as irregular transfer, disguised extradition, and rendition.[2] Whatever the terminology used, the common element of all these practices is that they involve removing an individual from the territory, jurisdiction or custody of one state and transferring him or her into that of another. In this chapter, unless reference is made to a specific form or method of transfer (for instance, extradition), the general term 'removal' is used to encompass all forms of transfer of individuals between states.[3]

This chapter will examine the important role of international law in protecting the fundamental rights of non-citizens in the face of removal.

[1] The dividing line between expulsion and deportation is unclear, except in the specific context of the use of the term 'deportation' in international humanitarian law: See, J.M. Henckaerts and L.B. Sohn, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995), 4–6. Similar procedures may bear differing labels in different legal systems. In contrast, 'extradition' refers to the formal procedure, normally involving judicial examination, leading to the legal surrender by one state to another of an individual accused or convicted of an offence present within the jurisdiction of the first state. On the law of extradition, see R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edn (Oxford: Oxford University Press, 1992), 950 ff.

[2] Some forms of removal (in particular extradition, unless there exists a prohibition of extradition of citizens under the domestic law of the state) may be available to states in relation to any individual, irrespective of whether they are a citizen or a foreign national. However, other forms of removal affect almost exclusively non-citizens; this is the case with expulsion and deportation, given the right under international law of individuals to reside in the state of their nationality, and the corresponding prohibition of expulsion of nationals. On renditions, see ch. 15 by C. Ferstman in this book.

[3] The term 'return' is also used to denote situations where the person is removed from the territory of one state and transferred back to the country of nationality or origin. It is the most common practice of removal, and therefore 'return' is frequently used interchangeably with 'removal'.

The cornerstone of this system of protection is the principle of *non-refoulement*, which prohibits removal wherever fundamental rights are at risk and thus provides the basic protection against the dangers to human security associated with removal. Although developed initially in the field of international refugee law, the concept of *non-refoulement* is now of much wider applicability and the term is regularly used to refer to any obligation which requires a state not to expel, deport or extradite an individual from its territory to another state, or more generally, not to transfer an individual into the custody of another state, where there exists a real risk that if the individual is so transferred, expelled, deported or extradited, his or her fundamental rights will be violated. Section II outlines the applicable international human rights standards, distinguishing these from refugee, humanitarian and extradition law regimes, and argues that the protection provided by human rights law is the widest and most comprehensive.[4] Section III is devoted to several key challenges to international legal protection against removal in the context of counter-terrorism, and examines whether international human rights law provides sufficient protection against the dangers to the human security of non-citizens associated with removal.

II. Protection against removal of non-citizens

A. Protections against removal under other branches of international law and the need for comprehensive protection

As a matter of international law, there is no general obligation requiring a state to allow non-citizens to enter its territory, nor is there any general obligation not to expel or deport non-citizens or to refuse extradition.[5] However, the power of the state to expel, deport, extradite or otherwise remove non-nationals is neither absolute nor unqualified. In particular, strong guarantees against removal to a risk of violation of fundamental rights are entrenched in the international refugee protection system, where, as already mentioned, the principle of *non-refoulement* first developed.[6] However, international norms relating to refugees provide

[4] See, also, ch. 6 by B. Miltner in this book.

[5] See, e.g., *Soering* v. *United Kingdom,* App. No.14038/88, ECtHR, judgment of 7 Jul. 1989, para. 85.

[6] The principle of *non-refoulement* is found in all international and regional instruments relating to the protection of refugees, and is also widely accepted as having attained the status of customary international law. See Art. 33, Convention Relating to the Status of Refugees, Geneva, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954; as

only limited protection to those individuals who are removed from the territory of a state on suspicion of being involved in terrorist activities. Quite apart from the general limitation derived from the fact that the application of international refugee law as a whole is limited *ratione personae* to asylum-seekers and recognised refugees as defined in the relevant instruments,[7] under Article 32(1) of the 1951 Refugee Convention, states are permitted to expel persons qualifying as refugees on the basis of reasons of 'national security or public order'. Further, the protection against expulsion or *refoulement* contained in Article 33 of the 1951 Refugee Convention is limited to instances where the refugee would face a threat to his or her life or freedom as a result of persecution for one of the specified reasons,[8] and, even in those circumstances, a refugee is not protected against expulsion or *refoulement* if there are 'reasonable grounds' to regard him or her as a danger to the security of the country in which he or she is located or if, having been convicted of a particularly serious crime, he or she 'constitutes a danger to the community of that country'.[9]

Protections against removal are also embodied in the rules of extradition law, although these are in the form of exceptions to the obligation of the state where the individual is located to comply with the extradition request. Extradition agreements most often permit states to refuse extradition of a fugitive found on their territory if in the receiving country there is a risk of imposition of the death penalty, life imprisonment without possibility of parole, of torture or ill-treatment, or of persecution on discriminatory grounds.[10] International humanitarian

amended by the Protocol Relating to the Status of Refugees, 4 Oct. 1967, 606 UNTS 267; entered into force 4 Oct. 1967 (1951 Refugee Convention); Art. 2(3), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 UNTS 45; Cartagena Declaration on Refugees, 22 Nov. 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, 190–93 (1984–85), Conclusion 5. On the customary status of the principle, see, e.g., Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, adopted by the Ministerial Meeting of States Parties, Geneva, 12–13 Dec. 2001, UN Doc. HCR/MMSP/2001/09, preambular para. 4.

[7] See Art. 1, 1951 Refugee Convention; Art. I, OAU Convention on Refugees.

[8] See Art. 33(1), 1951 Refugee Convention.

[9] Art. 33 (2), 1951 Refugee Convention.

[10] See the European Convention on Extradition, Paris, 13 Dec. 1957, ETS No. 24, Art. 11 (death penalty); UN Model Treaty on Extradition, UN. Doc. A/RES/45/116, Annex (14 Dec. 1990), Arts. 3 (mandatory grounds for refusal) and 4 (optional grounds for refusal). See also Art. XIII of the *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers of the Council of Europe on 11 Jul. 2002 at the 804th meeting of the Ministers' Deputies, available at

law also contains a number of rules which limit the ability of a state to transfer certain categories of individuals to the custody of another state during an international armed conflict. Geneva Conventions III and IV contain particular sets of guarantees concerning the transfer of prisoners of war[11] and other protected persons, including protected alien civilians;[12] those rules ensure that when such individuals are transferred they are protected by the minimum standards of treatment contained in the Conventions. However, due to the limited scope of application of international humanitarian law, the prohibitions of transfer of protected persons under the Geneva Conventions are only applicable to those individuals who are transferred in the context of an international armed conflict.

B. Protection against removal under human rights law: general principles

Under human rights law, the protections against removal where an individual faces a risk of violation of his or her fundamental rights in the country of destination are of much wider scope than the protection afforded under other branches of international law. For example, they are applicable to all persons irrespective of the particular status of the individual in question and regardless of the particular circumstances of the proposed removal. Furthermore, it is generally recognised that protections deriving from human rights law apply both in times of peace and during armed conflict, and that certain fundamental rights, among which are the right to life and freedom from ill-treatment, are non-derogable even in times of most serious public emergency.[13]

www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf (last accessed 8 Sept. 2008), and the EU Framework Decision on the European arrest warrant and surrender procedures between Member States (EAW), 13 Jun. 2002, OJ L 190 of 18.07.2002, 1, recital 13.

[11] Art. 12(2), Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, 75 UNTS 135.

[12] Art. 45(1) and (3), Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, 75 UNTS 287. Note also the express prohibition of transfer of persons protected under Art. 45(4) of Geneva Convention IV. In relation to protected persons located in occupied territory, transfer from occupied territory to the territory of the occupying power or that of any other state is absolutely prohibited: see, Art. 49(1), Geneva Convention IV.

[13] See, Art. 4(2), International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976 (ICCPR), and Human Rights Committee, *General Comment No. 29: States of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add11 (2001), para. 7; and see below section III.A.1.

In comparison with international refugee law in particular, the protections against removal under international human rights law are substantially wider, as they apply to nationals as well as to foreigners, and apply even if the equivalent protection under refugee law can be denied due to the actions of the individual in question. More importantly, the protections against removal under international human rights law are also substantially wider than those under refugee law in that they are not restricted to situations where the individual faces a risk to his or her 'life or freedom' on one of the specified grounds of discrimination. Rather, under international human rights law an individual is protected whenever there exists a real risk of violation of one of the individual's core fundamental rights in the country of destination, regardless of the motivation behind such violation.[14]

Some human rights instruments contain an express prohibition of removal where the individual in question would face a risk of violation of a particular right in the state of destination. This is the case, for instance, with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[15] and with the recently adopted International Convention for the Protection of All Persons from Enforced Disappearance.[16] Further, some regional human rights treaties of a general scope contain provisions formulated in a manner similar to the prohibition of *refoulement* in refugee law, based on a risk of persecution on particular grounds.[17]

In addition to these express prohibitions of removal, a number of human rights instruments of general scope which do not contain any express prohibition of *refoulement* have been interpreted by their respective monitoring bodies as containing an obligation not to remove individuals to countries where they would be exposed to a real risk

[14] As to the rights which may give rise to a *non-refoulement* obligation, see below, sections II.C. and III.C.

[15] See, Art. 3, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987 (UNCAT).

[16] See, Art. 16(1), International Convention for the Protection of All Persons from Enforced Disappearance, 13 Dec. 2006 (not yet in force); see also Art. 8, Declaration on the Protection of All Persons from Enforced Disappearances, adopted by GA res. 47/133 of 18 Dec. 1992, UN Doc. A/47/49 (1992). See, also, Principle 5, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (recommended by Economic and Social Council res. 1989/65 of 24 May 1989), prohibiting removal to states where an individual risks facing specified violations of the right to life.

[17] See, e.g., Art. 22(8), American Convention on Human Rights, 22 Nov. 1969, 1144 UNTS 123.

of violation of certain fundamental rights in the receiving state. Although neither the International Covenant on Civil and Political Rights (ICCPR) nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[18] contain any explicit provision on *non-refoulement*, specific provisions have been interpreted as containing an inherent prohibition of removal.

The pioneer case in this regard is *Soering* v. *United Kingdom* before the European Court of Human Rights, which concerned an extradition request transmitted by the United States to the United Kingdom relating to a young man accused of murder, in relation to whom the death penalty was sought. The court focused not on the potential application of the death penalty *per se*, but on the risk that, if extradited, convicted and sentenced to death in the United States, the applicant would have been subjected to the so-called 'death row phenomenon', consisting of prolonged detention prior to execution. It found that in the circumstances of the case and in light of the personal characteristics of the applicant, subjecting him to such treatment would amount to 'inhuman and degrading treatment' contrary to Article 3 of the ECHR. The Court proceeded to find that, in those circumstances, the United Kingdom would have breached its obligations under that provision if it was to extradite the applicant. In particular, having referred to the express prohibition of *refoulement* contained in Article 3 of UNCAT, the Court observed:

> The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent

[18] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222, ETS No. 5; entered into force 3 Sept. 1953, as amended (ECHR).

> obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.[19]

The lead of the European Court was promptly followed by the United Nations Human Rights Committee (HRC); initially in its General Comment No. 20 where the HRC, in discussing the implications of Article 7 of the ICCPR, noted in a somewhat laconic manner that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[20] The principle was subsequently reaffirmed and applied in a series of decisions on individual communications under the Optional Protocol to the ICCPR,[21] and has recently been restated in General Comment No. 31, where the HRC formulated the principle in the following terms:

> the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm … either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[22]

As for other instruments, despite the existence of an expressly narrow prohibition in Article 22(8) of the American Convention of Human Rights, the Inter-American Commission on Human Rights has been prepared to read a wider prohibition of removal to a risk of violation of fundamental rights into specific provisions of the American

[19] *Soering*, para. 88.

[20] Human Rights Committee, *General Comment No. 20. Art. 7*, reproduced in UN Doc. HRI/HEN/1/rev.1 (2004).

[21] See, e.g., *Kindler* v. *Canada,* Comm. 470/1991, Views of 30 Jul. 1993; UN Doc. CPR/C/48/D/470/1991, paras. 13.1 and 13.2; see also the earlier decision on admissibility, summarised therein at para. 6.2. See, also, *Ng* v. *Canada,* Comm. 469/1991, Views of 5 Nov. 1993; UN Doc. CCPR/C/49/D/469/1991, para. 14.1; *Cox* v. *Canada,* Comm. 539/1993, Views of 31 Oct 1994; UN Doc. CCPR/C/52/D/539/1993, paras. 17.1–17.3; *G. T.* v. *Australia,* Comm. 706/1996, Views of 4 Nov. 1997, UN Doc. CCPR/C/61/D/706/1996, paras. 8.1, 8.2 and 8.4.

[22] Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 Mar. 2004, UN Doc. CCPR/C/21/Rev. 1/Add.13, para. 12.

Convention, in an approach paralleling that taken by the Human Rights Committee and the European Court.[23]

C. *Potential violations of rights posing an obstacle to removal*

The most clearly established prohibition of removal under international human rights law concerns those cases where there exists a risk of torture or cruel, inhuman or degrading treatment or punishment in the receiving state. As emphasised by the UN Special Rapporteur on Torture, 'the principle of *non-refoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment', which imposes on states the:

> essential responsibility … to prevent acts of torture and other forms of ill-treatment being committed, not only against persons within any territory under their own jurisdiction, … but also to prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture.[24]

In addition to the specific provisions expressly prohibiting removal to a risk of torture or ill-treatment contained in a number of international human rights instruments,[25] the existence of the prohibition has been consistently recognised by human rights bodies, as illustrated by the cases discussed above.[26] Further, it is generally accepted that the prohibition constitutes customary international law and has acquired *jus cogens* status.[27] The prohibition of removal to a real risk of torture or

[23] See, e.g., Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), para. 36. See also the decision of the Inter-American Commission in *Haitian Centre for Human Rights* v. *United States of America (Haitian Interdictions)*, Case 10.675, Report No. 51/96, 13 Mar. 1997, OAS Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

[24] *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1 Sept. 2004, UN Doc. A/59/324, paras. 28 (first quote) and 27 (second quote).

[25] See Art. 3, UNCAT; Art. 13(4), Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 12 Sep. 1985; OAS Treaty Series No. 67; Art. 19(2), Charter of Fundamental Rights of the European Union, 7 Dec. 2000, *OJ* [2000] C 364/1.

[26] See above, Section II.B.

[27] On the customary nature of the prohibition, see, e.g., E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 78–177. On the *jus cogens* status of the prohibition of torture, see ICTY, Case No. IT-95–17

ill-treatment is not limited to situations where there is a risk that the abuses will be perpetrated by, or at the instigation of, agents of the state; in some circumstances, a danger of torture or other ill-treatment at the hands of private actors may be sufficient to bring the prohibition of removal into play.[28]

In addition, the prohibition of removal to torture or ill-treatment applies not only to cases where the individual will be exposed to proscribed treatment in the original country of destination, but also where, if removed, he or she would be in danger of then being transferred to another country or territory where such a risk exists.[29] Also, the fact that within the receiving country certain areas are considered safer than others for the returned individual is not *per se* sufficient to exclude that a 'real risk' of violation exists. In such cases, the European Court has held that in order to demonstrate the absence of a real risk of violation, the authorities of the sending state must ensure that certain guarantees are in place; in particular, they must demonstrate that the person to be removed will be able to travel to the safe area, to gain admittance and settle there in safety, and that he or she will not end up in a part of a country where he or she is at risk.[30]

A second, clearly established, prohibition of removal under international human rights law concerns those cases where the individual faces a risk of violation of his or her right to life in the state of

Prosecutor v. *Furundzija*, Judgment of Trial Chamber II, 10 Dec. 1998; 38 ILM 317, paras. 153–55; Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2 (24 Jan. 2008), para. 1.

[28] See *H.L.R.* v. *France*, App. No. 24573/94, ECtHR [GC], *Reports 1997-III*, para. 40; *Salah Sheekh* v. *The Netherlands*, App. No. 1948/04, ECtHR, judgment of 11 Jan. 2007, para. 137. The Committee Against Torture has held that in 'the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3.' *Elmi* v. *Australia,* Comm. 120/1998, Views of 14 May 1999, UN Doc. CAT/C/22/D/120/1998, para. 6.5; cf. *H.M.H.I.* v. *Australia,* Comm. 177/2001, Views of 1 May 2002, UN Doc. CAT/C/28/D/177/2001, para. 6.4.

[29] See, e.g., Committee against Torture, *General Comment No. 1. Implementation of Article 3 of the Convention in the Context of Article 22*, 21 Nov. 1997 (contained in UN Doc. A/53/44, Annex IX), para. 2; see also *Korban* v. *Sweden,* Comm. 88/1997, Views of 16 Nov. 1998, UN Doc. CAT/C/21/D/88/1997, paras. 6.5 and 7. In the same sense, see Human Rights Committee, *General Comment No. 31*, para. 12.

[30] *Salah Sheekh* v. *The Netherlands*, para. 141. See also *Chahal*, paras. 104–5, where the so-called 'internal flight' option indicated by the government was not considered to be sufficiently reliable.

destination.[31] In this regard, the European Court has held in a number of cases that considerations similar to those in relation to Article 3 of the ECHR 'might apply to Article 2 of the Convention … where the return of an alien puts his or her life in danger'.[32] It has recognised that the real risk of extra-judicial killing by state authorities in the state of destination might give rise to an obstacle to extradition under Article 2,[33] as well as that an obstacle may be posed by the existence of a real risk emanating from persons or groups of persons who are not public officials, if it has been shown that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection.[34]

Cases concerning a risk of imposition of the death penalty in the receiving country have principally raised issues under the prohibition of return to torture or cruel, inhuman or degrading treatment or punishment.[35] This is due to the fact that, in relation to alleged violations of the right to life as a consequence of the imposition of the death penalty, the scope of the prohibition of removal is to some extent conditioned by the scope of protection of the right to life under the relevant human rights instrument. In this regard, human rights bodies have generally held that, in circumstances where the death penalty is in theory permissible under the relevant instrument, there will be no violation solely on the basis that the individual risks being exposed to the death penalty if transferred to the third state.[36] However, even for states parties to

[31] See, e.g., Human Rights Committee, *A. R. J.* v. *Australia*, Comm. 692/1996, Views of 11 Aug. 1997, UN Doc. CCPR/C/60/D/692/1996, para. 6.8. See also Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989; Art. 13(4), Inter-American Convention to Prevent and Punish Torture.

[32] See *Hakizimana* v. *Sweden*, App. No. 37913/05, ECtHR, decision on admissibility of 27 Mar. 2008; see also *Bahaddar* v. *The Netherlands*, App. No. 25894/94, *Reports* 1998-I, opinion of the Commission of 22 May 1995, at pp. 270–71, paras. 75–78; *Sinnarajah* v. *Switzerland*, App. No. 45187/99, ECtHR, decision on admissibility, 11 May 1999.

[33] *Shamayev and Others* v. *Georgia and Russia*, App. No. 36378/02, ECtHR, judgment of 12 Apr. 2005, para. 372.

[34] See, e.g., *Gonzalez* v. *Spain*, App. No. 43544/98, ECtHR, decision on admissibility of 29 Jun. 1999, in which an individual wanted on charges of drug trafficking, alleged that, if extradited, he and his family would be at risk of being killed as a result of his collaboration with the authorities. The court held that on the facts the applicant had not in fact been exposed to the risk alleged.

[35] See, e.g., *Soering*, para. 104; *Kindler* v. *Canada*, paras. 15.2–15.3; *Ng* v. *Canada*, paras. 16.1–16.2.

[36] See, e.g., *Soering*, para. 101; see also *Kindler* v. *Canada*, para. 15.1; *Ng* v. *Canada*, para. 15.

instruments which allow, in principle, the imposition of the death penalty, the removal of an individual to face it is permissible only if the conditions under which the death penalty may lawfully be imposed under the relevant instrument are complied with strictly in the receiving state, and this is so even if that state is not bound by the relevant instrument.[37] Further, as a consequence of the progressive movement towards the abolition of the death penalty, under a number of instruments the very fact that an individual may be sentenced to death or executed in the receiving country now constitutes *per se* an obstacle to the ability of states to extradite or otherwise remove to retentionist states. Moreover, as far as the ICCPR is concerned, the HRC has held that, in relation to those states parties which have not ratified the second Optional Protocol but which have abolished the death penalty domestically, there will be a violation of an individual's right to life under Article 6(1) of the ICCPR if the individual in question is transferred to that state if there is a real risk that the individual will be subjected to capital punishment.[38]

A third situation where a state may not lawfully remove an individual from its territory is where there exists a real risk that the individual will be the victim of certain violations of his or her right to a fair trial in the receiving state.[39] Although in relation to this type of situation the jurisprudence of human rights bodies is less well established, it is clear that in some circumstances the existence of a risk of a serious violation of the right to fair trial constitutes an obstacle to removal. For instance, although the HRC has not expressly recognised the possibility of reliance on potential violations of the right to a fair trial in order to avoid

[37] E.g., the European Court has held that where there is a risk that the death penalty will be imposed after proceedings which do not respect fundamental principles relating to fair trial, the imposition of capital punishment would not be 'in accordance with law' as required by Art. 2 of the ECHR and, accordingly, the removal of the individual to the requesting state is prohibited: see *Bader and others* v. *Sweden*, App. No. 13284/04, ECtHR, judgment of 8 Nov. 2005, para. 42.

[38] *Roger Judge* v. *Canada*, Comm. 829/1998, Views of 5 Aug. 2002, UN Doc. CCPR/C/78/D/829/ 1998, para. 10.4 (emphasis in original). See the earlier dissenting opinion of Professor Pocar in *Kindler* in the same sense.

[39] Note that some support for the relevance of the 'right to fair trial' as an obstacle to extradition or transfer may be found in the fact that the 1990 UN Model Treaty on Extradition lists among the 'mandatory grounds for refusal of extradition' the fact that the extraditee 'has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14' (Art. 3(f)). See, also, Art. XIII (4) of the Council of Europe, *Guidelines on Human Rights and the Fight against Terrorism*.

removal, it has refused to accept arguments, urged upon it by some states, that the prohibition of removal 'only arises in cases involving violations of the most fundamental rights and *not* in relation to possible violations of due process guarantees'.[40] Similarly, the European Court has consistently held that, given the prominent place which the right to a fair trial in criminal proceedings holds in a democratic society, it cannot be excluded 'that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'.[41] Although that formulation has been reaffirmed on a number of occasions, in no case to date has the European Court in fact concluded on this basis that extradition or removal of an individual would breach a member state's obligations.[42]

In this regard, it appears that only particularly grave violations of the right to fair trial may constitute an obstacle to removal. For instance, the European Court has found in the specific circumstances of the *Soering* case that the lack of availability of legal aid for collateral challenges does not necessarily rise to this level;[43] on the other hand, the Court has given as an example of a 'flagrant denial' a situation in which the applicant, who had been tried *in absentia*, would have been unable to obtain a retrial in the requesting country and would have had to serve the sentence handed down *in absentia*.[44] Similarly, a trial of a civilian by military courts or trial by a court which is not independent or impartial could constitute an obstacle to removal.

[40] *A.R.J.* v. *Australia*, para. 6.15 (emphasis in original).

[41] *Soering*, para. 113.

[42] *M.A.R.* v. *United Kingdom*, App. No. 28038/95, ECtHR, decision of 16 Jan. 1997; *Mamatkulov and Askarov* v. *Turkey*, App. Nos. 46827/99 and 46951/99, *Reports 2005-I* [GC], paras. 88–90; *Tomic* v. *United Kingdom*, App. No. 17837/03, decision of 14 Oct. 2003; *F* v. *United Kingdom*, App. No. 17341/03, decision on admissibility of 22 Jun. 2004; *Ismoilov and others* v. *Russia*, App. No. 2947/06, judgment of 24 Oct. 2008, para. 156. In *Bader* v. *Sweden*, although the European Court held that the applicant risked suffering such a 'flagrant denial' of the right to a fair trial in the receiving state, that finding was made in the context of Arts. 2 and 3 and the Court concluded that his extradition was precluded on the basis that, as a result of the 'flagrant denial', he was at risk of being subjected to the death penalty in circumstances which did not comply with Art. 2(2) of the ECHR.

[43] See *Soering*, para. 113.

[44] *Einhorn* v. *France*, App. No. 71555/01, decision on admissibility of 16 Oct. 2001, para. 33.

III. Key challenges to effective protection against removal in the context of the 'war on terror'

A. Challenges to the prohibition of removal to a risk of torture or ill-treatment

1. Maintaining the absolute nature of the prohibition

As noted above, the obligation not to return or otherwise transfer an individual to a country where he or she may be the victim of torture or ill-treatment constitutes an integral part of the absolute prohibition of torture and ill-treatment and enjoys the same *jus cogens* status and essential characteristics as that prohibition, in particular non-derogability.[45] Accordingly, the prohibition of *refoulement* to torture or ill-treatment is likewise absolute, and may not be subject to any limitations, exceptions or derogations under any circumstances, including where the state is faced with the threat of terrorist attacks. Further, as noted above, the protection against removal applies to all individuals whatever their conduct in the past and regardless of the threat which they may be feared to pose to public safety or national security.[46] Accordingly, the fact that an individual is suspected of involvement in terrorism or is even believed to be imminently preparing a terrorist attack cannot justify *refoulement* to torture or ill-treatment. In this regard, the Committee against Torture has held that:

> the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another state, the state party is under [an] obligation not to return the person concerned to that state. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.[47]

Within the context of the European system, the European Court from the very beginning of its elaboration of the prohibition of removal to torture and ill-treatment has emphasised its absolute nature.[48] In *Chahal* v. *United Kingdom*, a case concerning a Sikh terrorist suspect, the Court, whilst acknowledging 'the immense difficulties faced by States in

[45] See above, section II.C.
[46] *Ibid.*
[47] Committee against Torture, *Tapia Paez* v. *Sweden,* Comm. 39/1996, Views of 28 Apr. 1997, UN Doc. CAT/C/18/D/39/1996, para. 14.5. See also *Seid Mortesa Aemei* v. *Switzerland,* Comm. 34/1995, Views of 9 May 1997, UN Doc. CAT/C/18/D/34/1995, para. 9.8.
[48] *Soering,* para. 88.

modern times in protecting their communities from terrorist violence',[49] reaffirmed the absolute nature of the prohibition.[50] Noting that the protection against removal to torture and ill-treatment under the ECHR is broader than that afforded by the 1951 Refugee Convention, the Court held that 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'.[51] The Court also expressly rejected the proposition that 'there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state's responsibility under Article 3 is engaged'.[52]

The holding in *Chahal* has been repeatedly and consistently reaffirmed in a number of subsequent cases. Notwithstanding this, since 9/11, some European states have attempted to call into question the absolute nature of the prohibition of removal to a risk of torture or other ill-treatment. In *Saadi* v. *Italy*, a case involving an attempt by Italy to deport on national security grounds a Tunisian national resident in Italy who was suspected of involvement in terrorism,[53] the United Kingdom intervened, arguing that, in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the ECHR, and therefore had to be altered and clarified.[54] While accepting that the protection against torture and inhuman or degrading treatment or punishment was absolute, the United Kingdom emphasised the fact that in the event of expulsion, any ill-treatment would be inflicted by the receiving state, and not by the expelling state. In those circumstances, it argued, although the extraditing state was bound by an obligation not to remove an individual from its territory where there was a real risk of torture or ill-treatment in the receiving state, that obligation was a positive obligation of protection implicitly derived from Article 3 of the ECHR and, in the case of such positive obligations, 'the applicant's

[49] *Chahal* v. *United Kingdom*, App. No. 22414/92, judgment of 15 Nov. 1996, para. 79.
[50] *Ibid.*, para. 80.
[51] *Ibid.*
[52] *Ibid.*, para. 81.
[53] The applicant, who had been convicted in absentia by Tunisian courts of terrorism-related crimes and sentenced to twenty years' imprisonment, had argued that he would risk real and serious ill-treatment and lengthy incarceration if deported to Tunisia, where he claimed that the practices of torture and unfair trials against terror suspects were systematic and well documented. See *Saadi* v. *Italy*, App. No. 37201/06, judgment of 28 Feb. 2008 [GC].
[54] *Ibid.*, para. 122.

rights must be weighed against the interests of the community as a whole'.[55] Specifically, it was argued that the gravity of the threat that the individual in question would pose to the community, if allowed to remain in the territory of the state, was a factor to be balanced against the possibility and the nature of the potential ill-treatment in the receiving state, thereby making it possible to consider all the particular circumstances of the case and to weigh the rights secured to the individual under Article 3 against those secured to all other members of the community by Article 2.[56]

Having again recognised that 'States face immense difficulties in modern times in protecting their communities from terrorist violence' and that therefore it could not 'underestimate the scale of the danger of terrorism today and the threat it presents to the community', the Court emphasised that those considerations could not, in any circumstances, 'call into question the absolute nature of Article 3'.[57] The Court rejected the proposition put forward by the United Kingdom that a distinction had to be drawn in Article 3 between treatment inflicted directly by a state party and treatment that might be inflicted by the authorities of another state, and that protection against the latter could be weighed against the interests of the community as a whole. It observed:

> [I]t is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.[58]

Similarly, the United Kingdom's argument that the risk to the community should be balanced against the risk of ill-treatment was firmly rejected by the Grand Chamber as 'misconceived'. It noted that:

> The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.[59]

[55] *Ibid.*, para. 120.
[56] *Ibid.*, para. 122.
[57] *Ibid.*, para. 137.
[58] *Ibid.*, para. 138.
[59] *Ibid.*, para. 139.

2. Limiting reliance on diplomatic assurances

In recent years, certain governments' search for a solution to rid society of non-citizens who pose or are perceived to pose threats to a state's national security has lead them to seek 'diplomatic assurances' from the receiving state ('DAs' or 'assurances') in order to ensure that the rights of the transferred individual will be respected by the authorities of the receiving state. In this context, DAs have been provided either on a case-by-case basis in relation to specific individuals, in the form of unilateral declarations of the receiving state at the request of the sending state,[60] or through the stipulation of memoranda of understanding between the states concerned.[61]

For many years prior to 9/11, the practice of seeking DAs in relation to the treatment of individuals removed from the territory of the state has been and still is a relatively common occurrence in international relations. For instance, in the context of transnational cooperation in criminal matters, states have requested assurances from the receiving state that the death penalty will not be imposed or carried out, that life imprisonment without parole will not be sought or imposed, or that the trial will comply with certain fundamental standards.[62] However, since 9/11, some governments have sought to obtain DAs as a mechanism to ensure that the removed individual will not be subjected to ill-treatment, and they have tended to seek assurances predominantly from states known for their use of torture and ill-treatment. Unsurprisingly, in a number of documented instances DAs have not been respected and transferred persons have been treated in violation of the prohibition against torture and other forms of ill-treatment.[63]

Initially, the international supervisory bodies identified that the problem of DAs was the lack of effective monitoring mechanisms to ensure compliance with them. In *Alzery* v. *Sweden*, a case concerning the expulsion of an Egyptian citizen to Egypt and his subsequent ill-treatment by

[60] See, e.g., the assurances provided by Egypt to Sweden at issue in the *Alzery* and *Agiza* cases, and the diplomatic assurances provided by the Tunisian authorities, at issue in the *Saadi* case.

[61] See, e.g., the Memorandum of Understanding entered into by the United Kingdom with Libya signed on 18 Oct. 2005, at issue in *AS and DD (Libya)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 289.

[62] See, e.g., *Ahmad and Aswat* v. *United States of America* [2006] EWHC 2927 (Admin), and *R (on the application of Ahsan)* v. *DPP* [2008] EWHC 666 (Admin).

[63] See 2004 *Report of the Special Rapporteur on Torture*, para. 31.

Egyptian authorities, the Swedish Government was found by the HRC to have been at fault for accepting diplomatic assurances from Egypt which contained no effective mechanism to monitor enforcement. The HRC considered the visits by the state party's ambassador and staff to be insufficient because they commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm, and because the mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee or inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged.[64] In a report regarding the US practice of seeking DAs, the Committee against Torture noted that monitoring mechanisms should include private access of officials of the sending state to the returned person, the power to order medical examinations, the possibility of contact with relatives by telephone, and other international good practices.[65]

In spite of the clear standards regarding post-return monitoring, it has been noted that no working monitoring mechanism has yet been found in practice.[66] The difficulty to find a working model of assurances against ill-treatment is not surprising given that such assurances operate in a different way to assurances against the death penalty and fair trial violations. Unlike the latter, compliance with assurances against ill-treatment is notoriously difficult to monitor, because acts of torture and ill-treatment are habitually carried out in secret and are not easy to detect.[67] As a consequence, assurances aimed at prevention of torture or other ill-treatment are more easily breached. Already in 2005, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concluded that 'post-return monitoring mechanisms do little to mitigate the risk of torture and have proven

[64] Human Rights Committee, *Alzery* v. *Sweden,* Comm. 1416/2005, Views of 25 Oct. 2006, UN Doc. CCPR/C/88/D/1416/2005, at para. 11.5. In *Saadi*, visits by the International Committee of the Red Cross (ICRC) were deemed insufficient to mitigate an existing risk of ill-treatment due to the ICRC's duty of confidentiality about its fieldwork, and particularly so if similar visiting rights have been refused to independent human rights organisations (*Saadi,* para. 146).

[65] Committee Against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, 18 May 2006, UN Doc. CAT/C/USA/CO/2, at para. 21.

[66] See the European Committee for the Prevention of Torture (CPT), *15th General Report on the CPT's Activities; Covering the Period 1 August 2004 to 31 July 2005*, 22 Sept. 2005; Doc. CPT/Inf (2005) 17, para. 40.

[67] See, e.g., UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 Aug. 2006, para. 23.

ineffective in both safeguarding against torture and as a mechanism of accountability'.[68]

Due to the lack of working monitoring mechanisms and other reasons, the use of DAs has been increasingly challenged in recent years. Critics have noted that such assurances are unacceptable *per se* as they are inherently unreliable and unenforceable, and thus never capable of providing an effective safeguard against existing risk of torture and ill-treatment.[69] As categorically stated by the Special Rapporteur on Torture:

> [D]iplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.[70]

A different approach is adopted by international courts and treaty bodies, which have not categorically excluded DAs but consider the specific weight to be attached to them depending on the facts of each specific case.[71] For example, the European Court of Human Rights

[68] See, e.g., *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 30 Aug. 2005, A/60/316 (2005), para. 46.

[69] See, e.g., *Report of the UN High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 2 Jun. 2008 (A/HRC/8/13) para. 32; and Council of Europe, Commissioner for Human Rights Thomas Hammarberg, 'Torture can never, ever be accepted', 27 Jun. 2006, available at www.coe.int/t/ commissioner/Viewpoints/060626_en.asp (last accessed 25 Oct. 2008): '"Diplomatic assurances" are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of *non-refoulement* should not be undermined by convenient, non-binding promises of such kind.' See also Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom, 4–12 Nov. 2004 (Comm DH [2005]), Strasbourg, 8 Jun. 2005, para. 30.

[70] *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 30 Aug. 2005, para. 51.

[71] See, e.g., Human Rights Committee, *Alzery*; Committee against Torture, *Agiza*; European Court, *Saadi*, para. 148. See also the decision of the UK Court of Appeal in *AS and DD*.

allows the theoretical possibility that DAs may reduce the risk of ill-treatment and has left itself the power to decide the question on a case by case basis.[72] In practice, however, it has never found DAs against torture or ill-treatment to be sufficient when they are given by countries which systematically practice torture.[73] A similar approach has been adopted by the Human Rights Committee[74] and the Committee against Torture.[75]

It can be concluded that there is no support for the use of DAs in cases where torture and ill-treatment of terrorist suspects are systemic in the receiving state, or where the individual's profile renders him or her vulnerable to abuse. If a risk of torture or ill-treatment exists in the country of destination, DAs are unable to reduce that risk, and therefore removal must be prevented. In addition, where assurances are breached and the individual has been subjected to abuse in the receiving state, the question arises if he or she has an avenue to compel the sending state to enforce the DAs and to seek redress from that state for the ill-treatment.[76] No such cases have to date been brought successfully for the reason that once the sending state removes the individual from its

[72] *Saadi*, para. 148.

[73] E.g., in the recent case of *Ismoilov,* the European Court summarised its position: 'In its judgment in the *Chahal* case the Court cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent … In *Saadi,* the Court also found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention … Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic, the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.' (para. 127).

[74] See Concluding Observations of the Human Rights Committee: United States of America (2006), para. 16: 'in countries where torture or cruel, inhuman or degrading treatment are common practice, it is likely to be used regardless of assurances to the contrary, however stringent any agreed follow-up procedures may be.' See also Concluding Observations of the Human Rights Committee: United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 Jul. 2008, para. 12.

[75] According to the Committee against Torture, as a general rule states can only rely on DAs provided that two conditions have been met: first, DAs can only be relied upon in regard of states which do not systematically practice torture or ill-treatment; and second, there should be additional guarantees, notably fair judicial review prior to removal and effective post-return monitoring by the removing country. See Conclusions and Recommendations of the Committee against Torture: United States of America, 18 May 2006, UN Doc. CAT/C/USA/CO/2, para. 21.

[76] See *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 30 Aug. 2005, para. 51.

territory, it is impossible for the individual to seek judicial review in the sending state on the basis of a breach of assurances committed by another state. This gap in enforcement and accountability is a further serious deficiency inherent in DAs themselves, which raises a further question about their effectiveness.

Another recent development is the practice of some states to seek so-called 'reverse DAs' by which the sending state seeks assurances that the person handed over will be deprived of liberty as a precondition to transfer, despite the fact that there are no criminal charges against him or her and there is no other legal basis for detention. This phenomenon has been firmly rejected by international courts and treaty bodies. In its 2007 Report in respect of the United States' efforts to move detainees from secret detention sites and from Guantanamo Bay to their country of origin or third countries by seeking such 'reverse DAs', the Working Group on Arbitrary Detention noted that: 'Governments cannot accept detainees under such conditions without incurring serious violations of their obligations under international human rights law.'[77]

3. Ensuring the effective application of the prohibition: assessment of the risk of ill-treatment

Wary of challenging the absolute nature of the prohibition of removal to a risk of torture and ill-treatment, some states instead have sought to undermine its practical application. One tactic used by states to circumvent the prohibition of removal is to argue for additional evidentiary criteria or raised thresholds to prove the risk of torture or ill-treatment upon return by reference to the special context of the fight against international terrorism. Both lines of argument are inconsistent with settled international jurisprudence on the subject, and have been firmly rejected by monitoring bodies.

3.1 Criteria for assessing the existence of a risk of ill-treatment upon return *Ramzy* v. *The Netherlands,* currently pending before the European Court, concerns the deportation of an Algerian citizen

[77] Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 9 Jan. 2007, UN Doc. A/HRC/4/40, para. 57. However, *ibid*., para. 58, the Working Group stated that 'it might be acceptable for a receiving State to undertake to keep a person returned to its territory under surveillance, as long as such surveillance does not amount to a deprivation of liberty without charges, is not as intrusive as to violate other fundamental rights (e.g., the right to respect for privacy and family life), and is subject to periodic review.'

suspected of involvement in terrorist activities.[78] The applicant, who had been acquitted by the Dutch courts of a number of terrorism-related charges following a high-profile public trial, claimed that, if returned, he would face a real and serious risk of ill-treatment at the hands of the Algerian authorities.[79] The Dutch Government denied this, as Ramzy had not previously been ill-treated there, and was not currently sought by the Algerian authorities. In this way, the Dutch Government has sought to add, on top of the usual requirements of real, serious and personal risk, a further requirement of evidence of prior experience of torture or of current persecution.

Such attempts ignore the clear rules on the criteria for assessing the risk of a violation which have emerged from the international jurisprudence. The starting point in this regard is the principle, repeatedly emphasised by human rights bodies, that the level of scrutiny to be given to a claim that a risk of violation exists must be 'rigorous' in view of the absolute nature of the rights at stake.[80] The individual claiming the risk is generally required to show the existence of 'substantial grounds' for believing that a 'real', 'foreseeable' and 'personal' risk exists.[81] With respect to the evidentiary criteria to be applied when assessing the existence of a qualifying risk, the practice of international human rights bodies indicates that the competent authorities must take into account 'all relevant considerations' and that these considerations include both the general human rights situation in the country of return as well as the personal background and the circumstances of the individual.[82]

The examination of the personal circumstances of the individual is particularly important, as the existence of a general pattern of torture and ill-treatment in the receiving country is in principle not sufficient

[78] *Ramzy* v. *The Netherlands*, App. No. 25424/05, admissibility decision of 27 May 2008.

[79] The applicant made reference to numerous reports on the situation in Algeria which confirmed routine mistreatment of persons suspected of involvement with Islamic extremism, and claimed that the Algerian authorities would certainly have been aware of the 'Rotterdam terrorism trial' which received intense media coverage.

[80] *Chahal*, para. 79; European Court, *Jabari* v. *Turkey*, App. No. 40035/98, judgment of 11 Jul. 2000, para. 39.

[81] See Art. 3(1), UNCAT; see also Committee against Torture, *General Comment No. 1;* Human Rights Committee, *General Comment No. 31*, para. 12, referring to Arts. 6 and 7 ICCPR; European Court, *Soering*, para. 86; *Report on Terrorism and Human Rights* (2002); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* 28 Feb. 2000, OAS Doc. OEA/Ser.L/V/II.106 Doc. 40 rev, para. 154.

[82] See, e.g., Art. 3(2) UNCAT; see, also, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 16 (2).

per se to prove a qualifying risk as the risk must be 'personal' to the individual.[83] However, where the situation is particularly grave and ill-treatment and human rights abuses widespread or generalised, the general risk of torture or ill-treatment or of violation of other fundamental rights may be so high that consideration of the personal circumstances of the applicant becomes somewhat redundant, as little is required to demonstrate the existence of a 'personal' risk for an individual returned to that state.[84]

At the same time, the absence of a practice of systematic violations does not mean that a person cannot be considered to be in danger of being subjected to torture and ill-treatment in his or her specific circumstances.[85] In this regard, organisational affiliation is an especially important factor. The fact that the individual belongs, or is perceived by the authorities to belong,[86] to an organisation which the state of return has designated as a 'terrorist' group is a relevant consideration when assessing whether that individual faces a risk of persecution and abuse following removal.[87] In general, the assessment will turn on: (1) how the state in question treats members of these groups; and (2) whether sufficient evidence has been provided that the state is likely to believe the particular individual to be associated with the targeted group. In relation to the second question, the Committee against Torture has found that the nature and profile of the individual's activities in

[83] See Committee against Torture, *General Comment No. 1*, para. 7; *Saadi*, para. 131: '[T]he mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 … and where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence.'

[84] See, e.g., the UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2005/12 on Transfer of Persons*, 10 Aug. 2005 para. 4.

[85] See, e.g., *Aemei* v. *Switzerland*, para. 9.4.

[86] It is not necessary that the individual *actually* is a member of the targeted group, if the individual is believed so to be and targeted for that reason. See, Committee against Torture, *A.* v. *The Netherlands,* Comm. 91/1997, Views of 13 Nov. 1998, UN Doc. CAT/C/21/D/91/1997, para. 6.7.

[87] E.g., the Committee against Torture has found violations of the prohibition of removal to a risk of torture or ill treatment on account of a pattern of human rights violations against suspected members of organisations such as Euskadi Ta Askatasuna (ETA), Partiya Karkerên Kurdistan (PKK), the People's Mujahadeen Organisation, the Zapatista Movement and others, where it was sufficiently established that the states concerned were likely to identify the individuals with the relevant organisations, see the decisions of the Committee in *Tala* v. *Sweden,* Comm. 43/1996, Views of 15 Nov. 1996, UN Doc. CAT/C/17/D/43/1996; *Núñez Chipana* v. *Venezuela,* Comm. 110/1998, Views of 16 Dec. 1998, UN Doc. CAT/C/21/D/110/1998; *Aemei* v. *Switzerland*; *Agiza* v. *Sweden,* Comm. 233/2003, Views of 20 May 2005, UN Doc. CAT/C/34/D/233/2003.

his or her country of origin or abroad is relevant.[88] An influential factor is the profile of the individual or the extent of publicity surrounding his or her case. If an individual is well known, this may have the effect of drawing the negative attention of the authorities to him or her and may lead the state to identify the individual with the targeted group.[89]

3.2 Standard and burden of proof of the risk of ill-treatment Human rights bodies have recognised the difficulties facing individuals who seek to substantiate an alleged risk of ill-treatment in a foreign country. They have considered the fact that, due to the clandestine nature of torture and other ill-treatment, the individual and the state do not always have equal access to relevant evidence.[90] Human rights bodies have also taken into account the fact that in removal cases, the authorities are called upon to assess the existence of a potential violation in another state. In light of the irreparable damage that the individual would suffer in case of an incorrect evaluation of the risk, the human rights bodies have adopted a wider approach to the question of the applicable standard of proof. In this regard, the Committee against Torture has held that the risk 'must be assessed on grounds that go beyond mere theory or suspicion', but has emphasised that this does not require that the risk in question must be 'highly probable'.[91] Similarly, the European Court,

[88] See Committee against Torture, *General Comment No. 1*, para. 8(e); see also *Aemei* v. *Switzerland*, para. 9.5; cf. *M.K.O.* v. *Netherlands*, Comm No. 134/1999, Views of 25 May 1999, UN Doc. CAT/C/26/D/134/1999, para. 7.4.

[89] See the decision of the Committee against Torture in *Elmi* v. *Australia*, para. 6.8, and the European Court in *N.* v. *Finland*, para. 165; *Said* v. *The Netherlands*, para. 54; *Thampibillai* v. *The Netherlands*, App. No. 61350/00, judgment of 17 Feb. 2004, para. 63. See also *Shamayev*, at para. 351, where the European Court noted that: 'there is nothing in the evidence before it which enables the Court to consider the applicants as warlords, political figures or individuals who were well-known for other reasons in their country … all factors which could have served to render tangible or increase the personal risk hanging over the applicants after they had been handed over to the Russian authorities.' Cf. *Chahal*, at para. 98: 'the first applicant is a well-known supporter of Sikh separatism. It follows … that evidence relating to the fate of Sikh militants at the hands of the security forces outside the State of Punjab is of particular relevance'; see also *ibid.*, para. 106: 'the applicant's high profile would be more likely to increase the risk to him of harm than otherwise.'

[90] See, e.g., Human Rights Committee, *Womah Mukong* v. *Cameroon,* Comm. 458/1991, Views of 10 Aug. 1994, UN Doc. CCPR/C/51/D/458/1991; Inter-American Court of Human Rights, *Velasquez Rodriguez* v. *Honduras*, *Series C, No. 4* (1988), para. 134 *et seq.*

[91] See Committee against Torture, *General Comment No. 1*, para. 6. See, e.g., the decisions of the Committee in *X.Y.Z.* v. *Sweden,* Comm. 61/1996, Views of 6 May 1998, UN Doc.

whilst noting that a 'mere possibility of ill-treatment is not enough',[92] has stressed that a certainty that a violation will occur is not required.[93] Further, the Committee against Torture has consistently emphasised that doubts as to credibility or proof should be resolved in favour of the individual.[94]

Despite this international practice, some states apply a higher threshold of proof and require that the risk of ill-treatment be 'more likely than not'; this approach, which results in an inconsistent application of the protections against removal and does not ensure effective protection against torture or ill-treatment has been strongly criticised by human rights bodies.[95] Within the context of the Council of Europe, there have recently been attempts by governments to establish that, where there exists a present danger to the national security of the removing state, stronger evidence is required from the individuals to prove their claim of risk of ill-treatment. For instance, in the *Saadi* case, the UK Government argued that:

> National-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent state adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual

CAT/C/20/D/61/1996; and *A.R.* v. *The Netherlands,* Comm. 203/2002, Views of 21 Nov. 2003, UN Doc. CAT/C/31/D/203/2002.

[92] See *Vilvarajah,* para. 111.

[93] *Soering*, para. 94. For domestic interpretations of these requirements under the European Convention see, e.g., *A.S. and D.D.* v. *Secretary for the Home Department* [2008] EWCA Civ 289, a case concerning deportation to Libya. The Court of Appeal held that the ECHR requirement that there would be a real risk of ill-treatment on return meant no more than that there had to be proper evidentiary basis for concluding that there was such a risk. A real risk was more than a mere possibility, but something less than a balance of probabilities.

[94] See *Aemei* v. *Switzerland*, para. 9.6: 'even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, [the Committee] must ensure that his security is not endangered. In order to do this, it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.'

[95] See, e.g., the Human Rights Committee's criticisms of the US for using the 'more likely than not' standard of proof (Concluding Observations of the Human Rights Committee: United States of America (2006), para. 16). Compare with the standard applied by the High Court of South Africa in *Tantoush* v. *Refugee Appeal Board and others* 2008 (1) SA 232 (T), 14 Aug. 2007 para. 98: '[the Asylum] Board's finding that the applicant was required to prove a real risk on the balance of probabilities was not correct. The appropriate standard was one of "a reasonable possibility of persecution".'

concerned must prove that it was 'more likely than not' that he would be subjected to treatment prohibited by Article 3.[96]

The European Court firmly rejected that argument.[97] The Court reaffirmed the standard that it had previously laid down in *Chahal*, stating that it is 'necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3'.[98]

International courts and treaty bodies have sought to alleviate the burden of proof on the individual; for example, the Committee against Torture has suggested that it is sufficient for the individual to present an 'arguable case' or to make a 'plausible allegation', and that it is then for the sending state to establish the lack of danger in case of return.[99] Similarly, the Human Rights Committee has held that the burden is on the individual to establish a '*prima facie*' case of real risk, and the state must then challenge the claim with 'substantive grounds'.[100] The UN High Commissioner for Human Rights takes the view that for practical and legal reasons, the burden of proof should remain with the sending state to produce relevant information about the risk of torture and ill-treatment in the receiving country.[101] The UN Sub-Commission for the

[96] See the intervention by the UK Government, summarised in *Saadi*, para. 122.
[97] *Saadi*, para. 140.
[98] *Ibid.*
[99] Committee against Torture, *General Comment No. 1*, para. 5: '[t]he burden of proving a danger of torture is upon the person alleging such danger to present an "arguable case". This means that there must be a factual basis for the author's position sufficient to require a response from the State party.' In *Agiza* v. *Sweden*, the burden was found to be on the state to conduct an 'effective, independent and impartial review' once a 'plausible allegation' is made (para. 13.7). Similarly, in *A.S.* v. *Sweden*, it was held that if sufficient facts are adduced by the author, the burden shifts to the state 'to make sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture' (*A.S.* v. *Sweden*, Comm. 149/1999, Views of 15 Feb. 2001, UN Doc. CAT/C/25/D/149/1999, para. 8.6).
[100] See Human Rights Committee, *Byahuranga* v. *Denmark*, Comm. 1222/2003, Views of 9 Dec. 2004; UN Doc. CCPR/C/82/D/1222/2003, paras. 11.2–3. Similarly, the European Court stated in *Saadi* that: '[i]t is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it' (para. 129).
[101] See *Report of the UN High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, para. 14.

Promotion of Human Rights considered that once a general situation of risk of ill-treatment was established, there arises a rebuttable 'presumption' that the person would face a real risk.[102]

B. Affirming the applicability of due process guarantees to removal proceedings[103]

Removal to a risk of violation of fundamental rights is often facilitated by the fact that state authorities fail to comply with legal removal procedures in the domestic legal system or that these procedures do not provide sufficient safeguards against the possibility of exposing the individual to real dangers upon return.

At the international level, it is undisputed that removal procedures must be of sufficient quality to be capable of preventing arbitrary removals.[104] However, the exact content of the procedural guarantees to be afforded varies. Some regional human rights mechanisms such as the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights have seen no difficulty in recognising that the full catalogue of due process guarantees applicable in criminal and civil cases should apply also to deportation, extradition, and other instances of removal.[105]

However, other regional and international instruments are less categorical as to extending the full set of due process obligations to the specific areas of deportation and expulsion. Article 13 of the ICCPR obliges states to ensure the following procedural measures in removal cases:

(i) to allow the person to submit evidence to clear him or herself;
(ii) to have a review of the removal before a competent authority; and
(iii) to be represented for that purpose.

[102] UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2005/12 on Transfer of Persons*, para. 4.

[103] On due process guarantees more generally, see ch. 12 by C. Forcese in this book.

[104] See, e.g., Human Rights Committee, *General Comment 15*, UN Doc.HRI/GEN/1/Rev.6 at 140 (2003), para. 10.

[105] Inter-American Commission of Human Rights, *Tajudeen* v. *Costa Rica*, Case 10.289, Report No. 2/92, 4 Feb. 1992, OAS Doc. OEA/Ser.L/V/II.81 rev.1 Doc. 6 at 73; African Commission on Human and Peoples' Rights, *Organisation Mondiale Contre la Torture and others* v. *Rwanda* (Comm. 27/89, 49/91, 99/93), para. 34; see, also, *Amnesty International* v. *Zambia* (Comm. 212/1998), paras. 41, 44, 46, 61 holding that the fair trial provision contained in Art. 7(1)(a) of the African Charter applies to expulsion of non-nationals.

Article 1 of Protocol No. 7 of the ECHR also provides explicitly for certain procedural guarantees in expulsion cases, similar to those contained in Article 13 of the ICCPR.[106] However, the procedural protections under Article 13 of the ICCPR and Article 1 of Protocol No. 7 of the ECHR are limited to removals of non-citizens who are lawfully residing in the country, and therefore excludes a large group of people who are considered irregular migrants and who on that basis do not receive due process protection. As a further limitation, both ICCPR and Protocol No. 7 allow for exceptions to those obligations 'where compelling reasons of national security otherwise require', or where the expulsion is 'necessary in the interests of public order or is grounded on reasons of national security'.[107] On the other hand, as will be discussed below, the absolute nature of some of the rights at issue in removal proceedings implies that where there is a risk of torture or ill-treatment in the receiving country review is always necessary.

By contrast, the European Court explicitly rejects the notion that the full set of fair trial guarantees set out in Article 6 of the ECHR extend to removal proceedings.[108] Nevertheless, the Court has recognised that a number of important procedural guarantees apply to non-citizens removed from the territory of the state, regardless of whether they are lawfully resident there or are irregular migrants. In the first place, the Court recognises that a certain degree of procedural protection is required where removal directly affects other rights under the ECHR, for example where the right to family life or the liberty of the person are concerned. If there is a danger that the removal would unjustifiably restrict family rights guaranteed by Article 8 of the ECHR, certain procedural obligations are triggered by virtue of that provision, for example, the access of the individual concerned and the independent authority to the evidence underlying the removal decision.[109] Further, the right to a remedy under Article 13 of the ECHR, applied in conjunction with any other right under the Convention, requires that where there is an arguable claim that, if removed, a person will risk violations of fundamental rights in the receiving country, the person is provided

[106] Protocol No. 7 to the ECHR, Strasbourg, 22 Nov. 1984, ETS 117.
[107] Art. 13 ICCPR (first quote); Art. 1(2), Protocol No. 7 (second quote).
[108] See e.g., *Maaouia* v. *France,* App. No. 39652/98, Reports 2000-X [GC], at paras. 35–41.
[109] See *Liu and Liu* v. *Russia,* App. No. 42086/05, judgment of 6 Dec. 2007, para. 59; *Al-Nashif* v. *Bulgaria,* App. No. 50963/99, judgment of 20 Jun. 2002, para. 124.

with an opportunity to have his or her case reviewed and that the review should have a suspensive effect.[110]

In relation to the right to liberty in particular, where, as happens in most cases, the individual is detained pending removal, he or she has the right to challenge the lawfulness of the detention before the courts by virtue of Article 5(4) of the ECHR, and this in practice includes arguing that the removal *per se* is unlawful, for example, because of the danger of ill-treatment in the receiving county.[111] Further, the obligation to inform the affected person of the pending removal and the grounds thereof is well established by virtue of Article 5(2) (the right to be informed of the grounds for detention).[112]

In recent years, the European Court has been inclined to recognise some of these procedural obligations as safeguards not only against unlawful deprivation of liberty in the removing state, but also as necessary guarantees against removal to risk of ill-treatment in the receiving country. For instance, in *Garabayev* v. *Russia*, a case concerning extradition of a Russian national to Turkmenistan, the Court, noting that the applicant had not been informed of the decision to extradite him until the very day of extradition, and was not allowed to challenge that decision, nor allowed to contact his lawyer, found a violation of Article 3 on the basis that 'no proper assessment was given by the competent authorities to the real risk of ill-treatment'.[113] The practice of the Court in this regard is in line with the established practice of the Human Rights Committee, which has consistently held that, quite apart from the specific guarantees contained in Article 13 of the ICCPR and the exception thereto, the requirement of review of removal decisions is in any case inherent in the prohibition of torture and other ill-treatment under Article 7 taken in conjunction with the right to a remedy under Article 2 of the ICCPR.[114]

[110] See, e.g., *Garabayev* v. *Russia,* App. No. 38411/02, judgment of 7 Jun. 2007, para. 105.

[111] See *Shamayev*, para. 431.

[112] See *Shamayev*, paras. 413–14 and 427.

[113] *Garabayev,* para. 80. In *Garabayev*, given that the applicant had subsequently been returned, the European Court was also able to consider the treatment of the applicant following extradition, and found that, following removal, the applicant had been beaten whilst in detention, held in inhuman conditions, and denied access to consular visits (*ibid.*, paras. 81–82).

[114] See *Ahani* v. *Canada,* Comm. 1051/2002, Views of 14 Jun. 2004, UN Doc. CCPR/C/80/D/1051/2002, para. 10.6, and *Alzery* v. *Sweden*, para. 11.8. Similarly, the Committee against Torture has emphasised the importance of effective national remedies against removal, noting that the absolute nature of the UNCAT's protection even in the context of national security concerns requires appropriate review mechanisms and that, '[w]hile

One of the key questions is whether the review of the removal decision should be a judicial one, or whether administrative review is sufficient. In this regard, the Human Rights Committee, the Committee against Torture and the European Court all require as a minimum that the review body should be independent and impartial, and in addition they have expressed a preference for judicial mechanisms.[115]

Another state practice which has been subject to international consideration is the refusal of states to disclose the evidence on which they base their claim that the individual poses a threat to national security and therefore should be removed. Relying on justifications of national security, governments have tended to keep secret even the basic information supporting the removal decision. However, by preventing an individual from knowing the factual and evidential basis on which he or she is considered to be a threat, governments put that person in the impossible position of having to rebut an unspecified and unsubstantiated claim. In the case of *Al Nashif* v. *Bulgaria,* the European Court, reiterating a principle already expressed in *Chahal*, stated:

> Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The

national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy Article 3's requirements of effective, independent and impartial review' (*Agiza* v. *Sweden*, para. 13.8).

[115] UNHCHR requires judicial oversight and review prior to transfer as a minimum guarantee against irregular transfer; see *Report of the UN High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, para. 22. The Human Rights Committee, in its 2006 observations on the US Report criticised the US for not providing judicial review, noting that '[t]he State party should … adopt clear and transparent procedures with adequate *judicial* mechanisms for review before individuals are deported …' (Concluding Observations of the Human Rights Committee: United States of America (2006), para. 16). The Committee against Torture has adopted a similar position; for instance, in its Concluding Observations on Italy's fourth periodic report, the Committee expressed concern 'at the immediate enforcement of … expulsion orders, without any judicial review, and … [at the fact that] that this expulsion procedure lacks effective protection against *refoulement*' (Concluding Observation of the Human Rights Committee: Italy, 16 Jul. 2007, UN Doc. CAT/C/ITA/CO/4, para. 12). See also the view expressed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in his 2007 Report, UN Doc. A/62/263, 15 Aug. 2007, para. 53.

> individual must be able to challenge the executive's assertion that national security is at stake.[116]

The European Court has consistently encouraged states to seek a model for removal procedures which sufficiently accommodates the state's national security concerns without compromising the right to equality of arms of the affected persons, and have maintained that all states have an obligation to find such a model.[117] Among other guarantees which such a model should contain, the European Court has noted that states must ensure that the judge or the independent authority deciding a removal case has full access to all material on the basis of which the removal is requested, including where it contains classified information and that the independent authority 'must be able to react in cases where invoking [the concept of "national security"] has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary'.[118] According to the court, 'failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention'.[119]

Balancing the right of equality of arms with the concern of restricting access to state secrets has lead some states to develop models utilising so-called 'special advocates' who, after obtaining a special security clearance, are permitted access to classified information. However, some of the models currently in place remain problematic. In the case of the United Kingdom's Special Immigration Appeals Commission, the ability of the 'special advocates' to restore the inequality of arms caused by the non-disclosure of evidence has been questioned on the basis that they are prohibited from communicating directly with appellants and their lawyers once they have had access to closed evidence and hence have no opportunity to form a coherent legal strategy against the adverse material.[120]

[116] *Al-Nashif*, paras. 123–124. See also *Chahal*, para. 131.
[117] See *Liu and Liu*, para. 62.
[118] *Ibid.*, para. 59.
[119] *Ibid.*
[120] See, Seventh Report of the Constitutional Affairs Committee, House of Commons (2005), available at www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/32309.htm (last accessed 25 Oct. 2008). On the Canadian model of 'designated judges' in immigration cases involving confidential material see the judgment of the Supreme Court of Canada in *Charkaoui* v. *Canada* 2007 SCC 9; [2007] 1 SCR 350, paras. 32–46.

A non-controversial procedural requirement in relation to the review of the decision to remove an individual is that, given the irreversible harm that may occur, the review should take place prior to the removal,[121] and that any appeal against the decision to remove should have an automatic suspensive effect.[122] The latter requirement that no removal can take place before the appeal is resolved is said to arise from the obligation of states to provide an effective remedy against the potential violation of rights.[123] In parallel to this requirement, international monitoring bodies have the power to order the state as a provisional measure not to remove the individual until the ruling on the merits of the international litigation.[124]

After the person is removed, he or she is often imprisoned upon return in the receiving country, and prevented or unable to contact a lawyer in the sending country in order to coordinate and carry out adequate representation. As a result, once an individual is removed, it is extremely difficult for this person to attain redress for his or her removal where it has resulted in violations of rights. Given the serious potential impact of removal on the individual's fundamental rights, it is necessary to exercise a thorough scrutiny prior to the removal. Such scrutiny must include guarantees equivalent to those applicable in civil and criminal cases, in particular access to an independent and impartial tribunal, equality of rights, and effective legal representation.

[121] See, e.g., *Shamayev,* para. 460; *Jabari,* para. 50.

[122] See e.g., *Garabayev,* para. 105.

[123] See *Agiza* v. *Sweden*, para. 13.7; *Čonka* v. *Belgium*, App. No. 51564/99, ECtHR, *Reports 2002*-I, paras. 82–83.

[124] The Human Rights Committee, the Committee against Torture and the regional courts all have a power to issue interim measures imposing a stay of removal until the body examines the case on the merits. These rulings are binding in relation to the European Court (see *Mamatkulov and Askarov*), with the result that a failure to comply will result in a breach of the obligation of cooperation under the relevant treaty. However, if the state removes the individual in breach of the court's order, the court may be limited to finding a violation of the obligation of cooperation, rather than a breach of the substantive rule to which the *non-refoulement* principle applies itself. It has been suggested that the consequences for the state of its failure to comply with interim measures should not be limited to finding a violation of only the obligation of cooperation, but should also be taken into account by the court when it considers the merits of the case, since otherwise, states may prevent the applicants from providing further corroborating evidence of violations upon return, and thus avoid responsibility for violating fundamental rights by settling on responsibility for violation of the court's procedure. See the joint partly dissenting opinion of judges Sir Nicolas Bratza, Bonello and Hedigan in *Mamatkulov and Askarov*, para. 8.

C. *Expanding the scope of protection against removal*

As noted above, at present the prohibition of removal has principally been recognised in relation to situations where the individual, if returned, would face a risk of torture or other forms of ill-treatment, enforced disappearance, or an arbitrary deprivation of life.[125] In addition, although there has not yet been any instance in which removal has been held to be illegal on this basis alone, there is a strong line of jurisprudence to the effect that in exceptional circumstances removal may be unlawful where there exists a risk of a flagrant denial of fair trial in the receiving country.[126]

However, given the reports of serious abuses of other fundamental rights in the 'war on terror', questions arise as to whether the power of the state to remove unwanted non-citizens from its territory should also be limited in circumstances in which the individual will face a real risk of violations of other rights, such as the right to liberty or freedom of expression, in the country of destination.

With respect to potential violations of the right to liberty, the Working Group on Arbitrary Detention of the Human Rights Council has emphasised that states should refrain from returning individuals where there exists a real risk that the individual will be arbitrarily detained in the country of destination and recommended that consideration of whether expulsion, extradition or deportation involved a risk of arbitrary deprivation of liberty in the receiving state should be assessed as a matter of course by governments.[127] In particular, the Working Group noted that, where, 'as is often the case when the ground for removal is a suspicion of involvement in terrorist activities', there is a real risk that the removed individual will be deprived of his or her liberty in the receiving state, the sending state must examine whether the detention would be 'arbitrary', i.e. without legal basis, or 'to repress the exercise of fundamental freedoms, such as freedom of religion, freedom of opinion, freedom of association', or 'in grave violation of international fair-trial norms'.[128]

The proposition that a real risk of serious violations of the right to liberty may constitute an obstacle to removal has also received some

[125] See above, section II.C.
[126] *Ibid.*
[127] Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40 (9 Jan. 2007), para. 49.
[128] *Ibid.*, paras. 47– 48.

support, albeit entirely *obiter*, in decisions of domestic courts. As observed by Lord Steyn of the UK House of Lords in *Ullah* in considering the scope of application of the principle of *non-refoulement* under the ECHR:

> Imagine a case of intended expulsion to a country in which the rule of law is flagrantly flouted, *habeas corpus* is unavailable and there is a real risk that the individual may face arbitrary detention for many years. I could, of course, make this example more realistic by citing the actualities of the world of today. It is not necessary to do so. The point is clear enough. Assuming that there is no evidence of the risk of torture or inhuman or degrading treatment, is the applicant for relief to be told that the ECHR offers in principle no possibility of protection in such extreme cases? I would doubt that such an impoverished view of the role of a human rights convention could be right.[129]

In relation to the more general question whether the prohibition of removal is at least potentially applicable to all rights, the practice of the Human Rights Committee and the European Court does not exclude the possibility that the risk of violation of other rights in the country of destination might preclude extradition, deportation, or other transfer. Although there appear to have been no cases in which it has been held that transfer of an individual would breach the obligations of the transferring state under the ICCPR due to a risk of breach of rights other than the rights to life and the right to be free from torture and other ill-treatment, the formula utilised by the Human Rights Committee in the past in relation to the prohibition of removal to a risk of violation is of much wider scope, suggesting that issues may at least be raised where there is a risk of breach of *any* of the rights contained in the Covenant:

> If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.[130]

More recently, in General Comment No. 31, the Human Rights Committee referred to the obligation of states, deriving from Article 2 of the ICCPR, not to remove a person from their territory, 'where there are substantial grounds for believing that there is a real risk of irreparable

[129] *R* v. *Special Adjudicator, ex parte Ullah* [2004] UKHL 26; [2004] 2 AC 323, para. 43.
[130] *A.R J.* v. *Australia*, para. 6.9.

harm, *such as* that contemplated by articles 6 and 7 of the Covenant'.[131] Although giving examples of the rights to life and to be free from torture, the formulation does not exclude other issues that may be raised under other provisions of the ICCPR. Similarly, both before and after the adoption of General Comment No. 31, the Human Rights Committee has consistently refused to dismiss applications on the basis of the arguments made by states that the protection against removal under the ICCPR is limited only to cases in which where the right to life and the right to be free of torture are at risk. In this regard, the HRC has tended to reject the allegation on other grounds, for example on the basis that the applicant had not sufficiently established the risk of a violation of the particular right in question,[132] or that the applicant had failed to exhaust domestic remedies.[133]

The European Court has so far adopted a very cautious approach in the few cases in which it has been alleged that extradition or other transfer would cause the applicant to be exposed to a real risk of a violation of the right to liberty. In one admissibility decision, having repeated its normal formulation in relation to the risk of a flagrant denial of justice, the Court observed that 'whether an issue could be raised by the prospect of arbitrary detention contrary to Article 5 is even less clear', before going on to hold that in any case, in the circumstances of the case, 'the risk of arbitrary or unfair procedures [did not reach] the flagrant level necessary for the threatened expulsion to raise issues under Articles 5 or 6'.[134]

The European Court has been cautious when considering the applicability of the prohibition of removal in cases concerning the risk of violations of other rights under the ECHR. Its position appears to be that the principle that states incur responsibility under the ECHR where they expel or otherwise transfer individuals who are at risk of treatment contrary to Articles 2 and 3 of the Convention in the receiving state 'is based on the fundamental importance of these provisions, whose

[131] Human Rights Committee, *General Comment No. 31*, para. 12 (emphasis added).

[132] *A.R.J.* v. *Australia*, para. 6.15 (fair trial); *Khan* v. *Canada*, para. 5.6 (freedom of religion); *G.T.* v. *Australia*, para. 8.7 (right to liberty).

[133] *Shafiq* v. *Australia*, Comm. 1324/2004, Views of 13 Nov. 2006, UN Doc. CCPR/C/88/D/1324/2004, para. 6.5 (arbitrary detention).

[134] *Tomic* v. *United Kingdom*, App. No. 17837/03, decision on admissibility of 14 Oct. 2003, para. 3; *F.* v. *United Kingdom*, App. No. 17341/03, ECtHR, decision on admissibility of 22 Jun. 2004, para. 2; cf., however, *M.A.R.* v. *United Kingdom*, where the claim in relying on the risk of violation of Art. 5 of the ECHR was held to be admissible. The case was settled before a judgment on the merits.

guarantees it is imperative to render effective in practice'[135] and that: 'such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'[136] However, this formulation does not exclude the possibility that comparably 'compelling considerations', such as those applicable under Articles 2 and 3, could apply in relation to other Convention rights as well, and it appears the Court has left this question to be decided on the particular facts of each case. In light of the jurisprudence, it appears that potential violations in the receiving country of rights other than the right to life and the right to be free from torture or ill-treatment may in certain circumstances imply an obligation not to remove an individual, although it appears that any such violation would have to be particularly serious, in that it would have to be either a 'flagrant denial' of the right in question,[137] and/or would result in 'irreparable harm' to the individual.

IV. Conclusion

States must not disregard or underrate the threats to the human rights and human security which may await persons upon return, and states must comply with safeguards under international human rights law. Thus, each removal must take place within a legal framework and in compliance with the full set of due process guarantees, including access to court, equality of arms, and the right to representation, and the individual concerned must be allowed to stay in the country pending the final removal decision. In particular with regard to the potential risks to physical security of the individual, the sending state has the obligation not to remove individuals to countries, in which terrorist suspects are systematically ill-treated, and this obligation cannot be avoided by reliance on diplomatic assurances by the receiving state.

[135] *F.* v. *United Kingdom,* App. No. 17341/03, ECtHR, decision on admissibility of 22 Jun. 2004, para. 3.

[136] *Ibid.* The court in any event found that, in the circumstances of the case, the applicant's complaint based on the right to private life was inadmissible on the basis that the level of interference with the applicant's moral integrity in the country of destination was not sufficiently 'substantial' to engage Art. 8 of the ECHR.

[137] Cf. the decision of the UK House of Lords in *Ullah.*

The main obstacle to the operation of these safeguards is that they are often viewed by states as weakening the effective counter-terrorism action. Claiming practical necessity, states sometimes choose to disregard real dangers to fundamental rights and human security of the individual, because of the perceived threat that the individual is believed to represent to the society of that state.

However, interfering with the prohibition of *refoulement* is not a practical solution to the terrorist threat. In a globalised world, exporting the terrorist threat is not an effective way of dealing and indeed eliminating the threat. Removal also unduly discriminates between non-citizens and citizens who, even if considered a threat to state security, as a matter of principle cannot be deported. Targeted as it is predominantly at non-citizens from Muslim backgrounds, this unequal treatment leads to more rather than less extremism and therefore more dangers for the state. Aside from being counter-productive, the policy of removals raises moral questions, particularly with regard to removals of non-citizens who have lived all their lives or for a considerable period in the sending country. It is unfair for the sending state to relieve itself from responsibility for a dangerous individual who is a product of that society; it is also unfair to send him or her to a community which had nothing to do with his or her education and formation but has to bear his or her destructive influence.[138]

Deportation, expulsion and extradition are not the only conceivable tools the state has at its disposal for handling non-citizens who are considered a terrorist threat. Some states have adopted alternative measures such as assigning individuals to compulsory residence, surveillance, periodic reporting to the police, and other non-criminal sanctions. States which practice removal as a preventive counter-terrorism measure should explore these and other possible alternative measures not involving removal from the territory. Even in the face of terrorism, all states have the legal and moral obligation to protect their national security without compromising the human security of all people within their jurisdiction.

[138] See, e.g., in a case concerning expulsion from France to Algeria, Concurring Opinion of Henry G. Schermers, Member of the former European Commission of Human Rights, *Beldjoudi/Teychene* v. *France,* App. No. 12083/86, Report of the European Commission of 6 Sept. 1990: '*S'il n'est pas illégal, il est en tout cas moralement rejetable de renvoyer en Algérie ceux des nombreux immigrés qui deviennent criminels, tandis que ceux qui contribuent à la prospérité du pays peuvent rester en France. Il me semble plus juste que la France garde tant les bons que les mauvais immigrés.*'

15

The human security framework and counter-terrorism: examining the rhetoric relating to 'extraordinary renditions'

CARLA FERSTMAN

I. Introduction

Many have written about 'extraordinary rendition',[1] a policy which involves the secret detention and subsequent extrajudicial transfer or removal of individuals suspected of links to terrorist activity to countries with poor prison conditions and where interrogation under torture is routine, for the purpose of arrest, detention, and/or interrogation by the receiving state.[2] The policy, which is mainly initiated by the United States, and carried out with the collaboration, complicity, or acquiescence of other governments, abrogates fundamental notions of human rights and due process. However, aspects of the policy have been justified in light of the need to do all that is necessary to address the terrorist threat. As Condoleezza Rice, then US Secretary of State, said in December 2005, '[r]endition is a vital tool in combating transnational terrorism', '[r]enditions take terrorists out of action, and save lives'.[3]

[1] See, e.g., D. Priest and J. Stephens, 'Secret world of U.S. interrogation', *Washington Post*, 11 May 2004; Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'* (New York, NY: ABCNY and NYU School of Law, 2004), available at www.nyuhr.org/docs/TortureByProxy.pdf (last accessed 25 Oct. 2008).

[2] There are several variations of the definition of extraordinary rendition, See, e.g., Association of the Bar of the City of New York and Center for Human Rights and Global Justice (CHRGJ), *Torture by Proxy*; Council of Europe, *Opinion No. 363/2005 of the Venice Commission on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transfer of Prisoners*, adopted by the Venice Commission at its 66th plenary session (Venice: 17–18 Mar. 2006), CDL-AD (2006)009, para. 31.

[3] Remarks of Condoleezza Rice upon her departure from Europe, Andrews Air Force Base, 5 Dec. 2005, available at www.state.gov/secretary/rm/2005/57602.htm (last accessed 25 Oct. 2008).

This chapter considers the framing of security debates post-9/11, in order to analyse how counter-terrorism policies such as extraordinary rendition were able to gain traction and support and to consider why it has been so difficult to apply legal rules to address the underlying rights violations resulting from such policies. It considers the particular mind-sets that have underpinned the securitisation of terrorism as well as the inherent vulnerabilities of non- and dual citizens to actions in furtherance of same.

It is argued that when implementing counter-terrorism strategies, states have firmly rejected the human security paradigm – this has on the one hand exacerbated individuals' vulnerabilities in the counter-terrorism context – it also points to the limited capacity of the human security framework to impact governmental responses in respect of areas which 'really matter', or the ability of such an amorphous framework to put a dent in American or indeed other countries' political realism. The partial manner in which the human security framework has been applied risks that it becomes yet another tool of hegemonic state interests.[4] Yet, at the same time, legal formalism, as a constraining system of law manifested in notions such as universal values and *jus cogens* has not adequately served to check exceptionalist governmental action either.[5] In this sense, the human security framework, as a milder regulator of individual interests is revealed as both naive and altruistic, though highly relevant just the same.

II. Human security and counter-terrorism

As has been noted in the introductory chapter to this book, human security principally concerns security for people, rather than security exclusively for states and/or governments. As a policy agenda, the concept recognises that security for people is a strategic concern for national as well as international security, and in this sense does not displace the national security referent; instead it adds content to it, and

[4] A. Franceschet, 'The politics of global legalism and human security', *Policy and Society*, 4 (2007) 1–23, 4.

[5] See J. Fitzpatrick, 'Speaking law to power: the war against terrorism and human rights', *European Journal of International Law,* 14 (2003) 241–64, 242, who comments that: '[t]he attacks of September 11 and the ensuing "war against terrorism" test the limits of the legalist approach, leaving human rights advocates baffled and marginalized … Bedrock principles have been displaced by legally meaningless terms, and energies are diverted to wrestling with legal phantoms.'

shifts its positioning to one of several referents. The importance of the human security concept lies in the fact that in addition to promoting security for states and thereby states' inhabitants,[6] it also promotes individuals' security which is distinct from and not reliant upon states' interests. Human security emphasises 'freedom from fear' and 'freedom from want',[7] and consequently recognises that security conditions for individuals' and peoples' development are comprised of a broader set of goals, including the well-being, safety and dignity of individuals, taking into account a range of political, economic and social factors, and not limited by the traditional national security emphasis on the defence of borders, nor the traditional actors mandated to achieve these goals: the military, the police and intelligence services.

Terrorism is as detrimental to human security as it is to national security. Terrorism has traditionally been considered a threat against the boundaries and territorial integrity of nation-states. However, in the post-9/11 context, terrorism has increasingly been recognised as a transnational phenomenon fuelled by open borders, nurtured by failed or weakened states, and aided by powerful mobile communications systems, sophisticated technology and weaponry. In this sense, the human security concerns of poverty and gross social, political and economic inequalities all fuel terrorism. In addition, this notion of international terrorism stems also from its use of the tools of globalisation as well as the shift in notions of identity in which individuals tend to associate with several often competing groupings, not necessarily linked to the state or nationalism. As has been indicated: 'in the post-9/11 world, threats are defined more by the fault lines within societies than by the territorial boundaries between them. From terrorism to global disease or environmental degradation, the challenges have become

[6] UN Under-Secretary-General for Legal Affairs, Hans Correll, concluded that human security and the sovereign state were not incompatible because 'human security is best guaranteed in the sovereign state which is governed under the rule of law with full respect for the human rights and the fundamental freedoms of those who reside in its territory'. Cited in G. Oberleitner, 'Human security: a challenge to international law?', *Global Governance*, 11 (2005) 185–203.

[7] See UNDP, *Human Development Report 1994* (Oxford University Press, 1994) 23. Some states, such as Canada, have focused on freedom from fear (e.g., DFAIT, *Freedom from Fear: Canada's Foreign Policy for Human Security* (Ottawa: DFAIT, 2000)), whereas others, such as Japan, have embraced the broader UNDP conception. See A. Acharya, 'Debating human security: East versus West', *International Journal,* 56 (2001) 442, 446–7.

transnational rather than international. That is the defining quality of world politics in the twenty-first century.'[8]

Yet, despite its impact on human security, governments have largely framed the threat of international terrorism as a threat to national security, and have used typical national security tools to combat it. Governments have sought to increase multilateral and bilateral cooperation to bolster their own national security. As was stated in the final 9/11 Commission Report:

> An organization like al Qaeda, headquartered in a country on the other side of the earth, in a region so poor that electricity or telephones were scarce, could nonetheless scheme to wield weapons of unprecedented destructive power in the largest cities of the United States. In this sense, 9/11 has taught us that terrorism against American interests 'over there' should be regarded just as we regard terrorism against America 'over here.' In this same sense, the American homeland is the planet.[9]

There is a tendency to view terrorism as the most severe challenge to humankind's existence in our time;[10] as an unprecedented and exceptional challenge. The fear of the unprecedented ill of terrorism tends to govern policy-makers' responses to it. Labelling the challenge as 'exceptional' or 'unprecedented' has dramatised the fight against terrorism as having absolute priority,[11] and has served to legitimate exceptional policies, practices, executive measures and laws. This has led to a series of justifications in the name of terrorism, justifications which have been applied mainly against non-citizens – minorities, immigrants, asylum-seekers and refugees, and which have been said to be more effective in undermining personal security than any terrorist attack.

It is suggested here that the undermining of human rights and personal freedoms has been allowed to occur because of the liberal notion of the need to 'balance' competing interests. When one of the interests to be balanced – protection against terrorism – is explained as the absolute priority, the other interests sought to be protected – human rights and the inherent dignity of the individual – pale by comparison,

[8] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, Jul. 2004, available at www.gpoaccess.gov/911/index.html (last accessed 25 Oct. 2008) 362.

[9] *Ibid.*, 362.

[10] See, generally, A. Acharya, *Age of Fear: Power Versus Principle in the War on Terror* (New Delhi: Rupa & Co, 2004).

[11] O. Waever, 'European security identities', *Journal of Common Market Studies,* 34 (1996) 102–32, 108; B. Buzan, O. Waever and J. de Wilde, *Security: A New Framework for Analysis* (Boulder, CO and London: Lynne Rienner, 1998) 21–26.

certainly in the eyes of the public, though perhaps somewhat less so in the eyes of the law. The language of *jus cogens*[12] and peremptory or *erga omnes* norms – that some rights are so fundamental that they cannot be sacrificed away, is ill-suited to such balancing. Indeed, fundamentally, peremptory norms reject balancing. Even for those other rights which may be limited in times of emergency, the ominous spectre of terrorism casts a doubt over whether any real balancing can take place that is not already overshadowed or in fact overpowered by the shadow of terrorism. In the sphere of politics and international relations, therefore, the securitisation of terrorism has contributed to the weakening of the rule of law and the dehumanisation in the public sphere of terror suspects. As Senator Dick Marty has said: '[b]y characterising the people held in secret detention as "different" from us – not as humans, but as ghosts, aliens or terrorists – the US Government tries to lead us into the trap of thinking they are not like us, they are not subjects of the law, therefore their human rights do not deserve protection.'[13] The politics of exceptionalism has served to legitimise, at least in certain political spheres, the resort to new tools. Though the tools that are being employed seem anything but a reaffirmation of the same approaches used previously,[14] in essence they simply affirm the strength of unchecked politics over the rule of law.

The securitisation of terrorism has been especially perilous for non-citizens and certain categories of dual citizens.[15] It has served to justify public conceptions of 'otherness' and special legal frameworks with lesser protections; at times it has served as the pretext or justification

[12] *Jus Cogens* refers to a peremptory norm of general international law. The Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; entered into force 27 Jan. 1980, recognises in Art. 53 that: '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[13] Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*: Second Report, Explanatory Memorandum, Rapporteur: Mr Dick Marty, Switzerland, 7 Jun. 2007 AS/Jur (2007) 36, para. 234.

[14] A. Neal, 'Foucault in Guantanamo: national, sovereign, disciplinary exceptionalism', in R.B.J. Walker and V. Jabri (eds.), *Counter-Terrorism: Implications for the Liberal State in Europe* (Brussels: ELISE working document of the Centre for European Policy Studies (CEPS), 2005).

[15] D. Stasiulis and D. Ross, 'Security, flexible sovereignty, and the perils of multiple citizenship', *Citizenship Studies*, 10 (2006) 329–48, 343.

for the choice of particular rendition destinations. Also, it has impeded consular and diplomatic protections, which, while traditionally the sole prerogative of the state, nonetheless can be key means by which citizens' rights may be protected.

III. Extraordinary renditions: a legitimate counter-terrorism strategy or a by-product of the securitisation of terrorism?

A. The 'legality' of extraordinary renditions

'Rendition' and 'extraordinary rendition' are not legal terms. Though without a legal definition, 'rendition' has been taken to refer to the practice of transferring individuals from one country to another by means that bypass all legal or administrative procedures.[16] 'Extraordinary rendition' refers to the 'transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.'[17]

The European Parliament concluded that there exists a 'widespread, methodical practice of extraordinary rendition [sic], following precise rules, and carried out by certain US secret services'.[18] According to Senator Dick Marty, who led the Council of Europe's inquiry on the subject: '[t]here have been scores of sites in which thousands of prisoners have been held for varying periods of time either by one or more

[16] Amnesty International, *USA: Below the Radar: Secret Flights to Torture and 'Disappearance'*, AI Index: AMR 51/051/2006, 5 Apr. 2006, 1.

[17] See Association of the Bar of the City of New York and CHRGJ, *Torture By Proxy*. The Council of Europe's Venice Commission has specified that the term is used 'when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time'. *Opinion No. 363/2005 of the Venice Commission*, para. 31.

[18] European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners* (2006/2200(INI)) Eur. Parl. Doc. A6–0020/2007, 30 Jan. 2007. The *Report on the Alleged Use of European Countries* stresses at 11, para. 42 that: 'at least 1245 flights operated by the CIA flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005, to which should be added an unspecified number of military flights for the same purpose; recalls that, on one hand, there may have been more CIA flights than those confirmed by the investigations carried out by the Temporary Committee, while, on the other hand, not all those flights have been used for extraordinary rendition.'

agencies of the US Government, or on its behalf by foreign allies.'[19] He noted that: 'rendition affecting Europe seems to have concerned more than a hundred persons in recent years. Hundreds of CIA-chartered flights have passed through numerous European countries.'[20] Still, the details which underpin this US Administration 'High-Value Detainee' programme and the worldwide impact of the policy are not fully known.

The practice of extraordinary rendition is said to stem from a pre-9/11 American policy affirmed by the US Supreme Court to facilitate the transfer of individuals to US custody to face justice in American courts,[21] and has since evolved to include renditions of suspects to face trial in third countries, with further permutations to the current practice of rendering suspects to foreign locations for the purposes of detention and interrogation, irrespective of any prospect of trial.

The practice of extraordinary rendition violates a series of fundamental human rights. As stated by the European Parliament in its final report on the alleged use of European countries by the CIA for the transfer and illegal detention of prisoners:

> extraordinary rendition and secret detention involve multiple violations of human rights, in particular violations of the right to liberty and security, the freedom from torture and cruel, inhuman or degrading treatment, the right to an effective remedy, and, in extreme cases, the right to life; whereas, in some cases, where rendition leads to secret detention, it constitutes enforced disappearance.[22]

Normally, under rules governing the international protection of human rights, an arrest of an individual is regulated by law.[23] There must be a legal justification for the arrest and if the individual is to remain in custody, there are a series of applicable judicial guarantees,

[19] Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees,* Second Report, Explanatory Memorandum, para. 53.

[20] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged Secret Detention in Council of Europe Member States*, Information Memorandum II, Rapporteur: Dick Marty, AS/Jur (2006) 03 rev, 22 Jan. 2006, para. 66.

[21] See *United States* v. *Alvarez-Machain*, 504 US 655 (1992); *Ker* v. *People* 110 Ill. 627 (1884) (aff'd 119 US 436 (1886)).

[22] European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries*, Jan. 2007, 4 (F).

[23] Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR), GA res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976, states that every person: 'has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

including requiring that individuals be given an opportunity to challenge the legality of their detention before an independent and impartial tribunal, and that tribunal must have the power to order their release.[24] In addition, before an individual can be transferred outside of the jurisdiction, there is an obligation to provide the individual with an opportunity to challenge that transfer. This is a fundamental principal of immigration and nationality law,[25] of extradition law and of human rights law.[26]

Unlike in extradition, deportation or other legal transfer cases, persons subject to extraordinary rendition typically have no access to the judicial system of the sending state. With no due process of law, it effectively amounts to a kidnapping, and has been likened to the outlawed practice of enforced disappearance,[27] in which the individual concerned simply ceases to exist.[28] Furthermore, the secret nature of the transfers and, in some instances, the collusion of the individual's country of nationality has meant that there has also been a routine denial of consular access.[29] To the extent that renditions take place without the knowledge and acquiescence of the states where the individuals are

[24] See, e.g., United Nations Human Rights Committee, *A* v. *Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 Apr. 1997.

[25] Article 13 of the ICCPR prevents the expulsion of a non-citizen lawfully present in the territory of a state party unless the expulsion is 'in pursuance of a decision reached in accordance with law.' Article 16 of the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954, affords refugees free access to the courts of law on the territory of all states parties and provides that refugees shall enjoy 'the same treatment as a national in matters pertaining to access to the courts'.

[26] Article 2 requires that persons claiming a violation of their rights under the ICCPR must have an effective remedy. The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987 (UNCAT), disallows the transfer of persons to countries where they would face torture. See generally, *Opinion No. 363/2005 of the Venice Commission,* in which it is stated that: '[u]nder international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country' (para. 10).

[27] See *Velásquez Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, 162 (29 Jul. 1988).

[28] See, generally, L.N. Sadat, 'Ghost prisoners and black sites: extraordinary rendition under international law', *Case Western Reserve Journal of International Law* 37 (2006) 309. Article 16 of the ICCPR guarantees the 'right to recognition everywhere as a person before the law'.

[29] The 1963 Vienna Convention on Consular Relations, 24 Apr. 1963, 596 UNTS 261; entered into force 19 Mar. 1967, provides special protections for diplomats, and also guarantees consular access to individuals not located in their country of nationality. Under the terms of Art. 36, states parties must allow consular officers to communicate with nationals of their home country. See, further, ch. 16 by L. McGregor in this book.

initially located, the practice also violates the territorial sovereignty of these states and laws regulating the legality of the activities of foreign agents on the host state's territory.[30] It further violates some civil aviation principles.[31]

The said purpose of such transfers is typically to enable the gathering of intelligence to combat terrorism. Some commentators have referred to the practice as 'outsourcing torture',[32] given that these transfers typically involve locations in which authorities are known to regularly inflict torture and other cruel, inhuman and degrading treatment on detainees. As was indicated by former Central Intelligence Agency director George Tenet: 'It might be better sometimes for … suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation techniques.'[33] Rendition, according to US officials, 'allows us to get information from terrorists in a way we can't do on U.S. soil'.[34] Put another way: 'We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.'[35]

Despite what might be described as a patently illegal practice, a number of arguments have been used to frame extraordinary rendition as falling within the confines of the law.[36] In general terms, the US Government has made clear that its actions are legal, as is described below. As Condoleezza Rice, then US Secretary of State, stated on 5 December 2005, in response to queries from the European Union President about revelations in a media article about the practice of extraordinary rendition:[37]

[30] See, generally, EU Network of Independent Experts on Fundamental Rights, Opinion No. 3–2006, *The Human Rights Responsibilities of the EU Member States in the Context of the C.I.A. Activities in Europe ('Extraordinary Renditions')*, Ref. CFR-CDF Opinion 3 2006, 25 May 2006.

[31] See section III.A(2) in this chapter.

[32] J. Mayer, 'Outsourcing torture: the secret history of America's "Extraordinary rendition" Program', *New Yorker*, 14 Feb. 2005, 106.

[33] J. Barry, M. Hirsch and M. Isikoff, 'The roots of torture', *Newsweek,* 24 May 2004, 16.

[34] D. Campbell, 'U.S. sends suspects to face torture', *The Guardian*, 12 Mar. 2002, reprinted in CHRGJ, *On the Record: U.S. Disclosures on Rendition, Secret Detention, and Coercive Interrogation* (undated), available at www.chrgj.org/projects/docs/ontherecord.pdf (last accessed 25 Oct. 2008), 6–7.

[35] D. Priest and B. Gellman, 'U.S. decries abuse but defends interrogations: "stress and duress" tactics used on terrorism suspects held in secret overseas facilities', *Washington Post*, 26 Dec. 2002, reprinted in *On the Record,* 7.

[36] See, generally, M.L. Satterthwaite, 'Rendered meaningless: extraordinary rendition and the rule of law', *George Washington Law Review,* 75 (2006–2007) 1333.

[37] UK Foreign and Commonwealth Office, 'Letter from the Foreign Secretary (on behalf of the EU) to the U.S. Secretary of State', 29 Nov. 2005, available at www.fco.gov.uk/Files/kfile/Straw_EU_CondiRice_Letter,0.pdf (last accessed 25 Oct. 2008).

> It is the policy of the United States … to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. In accordance with the policy of this Administration: The United States has respected – and will continue to respect – the sovereignty of other countries. The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured. The United States has not transported anyone, and will not transport anyone, to a country where we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.[38]

In response to their constituents, their parliaments and others, other governments involved directly or indirectly with the US rendition programme have invariably failed to look behind these and other US assurances.[39] This lack of rigorous scrutiny has been routinely criticised.[40]

1. The characterisation of 'extraordinary rendition' as permissible conduct – a series of legal leaps

The justification for the practice of extraordinary rendition has involved a series of factual characterisations and legal arguments that, when combined, expose quite serious holes in the armour designed to forestall torture and other cruel, inhuman and degrading treatment or punishment (CIDTP). In particular, the US administration's restrictive interpretation of the definition of torture has helped it to be able to confirm publicly that 'it does not transfer people for the purpose of torture'. This

[38] US Secretary of State Condoleezza Rice, 'Remarks Upon Her Departure for Europe.'

[39] E.g., in the Government of Ireland's reply to the Council of Europe's inquiry, it indicated that they: 'are satisfied that they are entitled under [the European Convention on Human Rights] to rely on clear and explicit factual assurances given by the Government of a friendly state, on a matter which is within the direct control of that Government.' Council of Europe, *Secretary General's Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably By or At the Instigation of Foreign Agencies*, 28 Feb. 2006 (Art. 52 ECHR Report), Appendix, Reply of the Government of Ireland. The UK Government has cited the remarks of Condoleezza Rice of 5 Dec. 2005 to evidence US compliance with international law. See UK Government, *Government Response to the Intelligence and Security Committee's Report on Rendition*, Jul. 2007, available at www.official-documents.gov.uk/document/cm71/7172/7172.pdf (last accessed 25 Oct. 2008), 6–7.

[40] See, e.g., REDRESS, *Smoke and Mirrors Remain: Intelligence & Security Committee Report Does Not End Concerns Over Torture, Renditions and the Rule of Law – Positive Obligation to Respond to 'Extraordinary Renditions' Remains*, 30 Jul. 2007, paras. 13–14.

justification is further advanced by the use of diplomatic assurances in those instances when the US administration is seeking to transfer an individual to a country which routinely practices torture, as well as the use of a stringent standard of proof test[41] when assessing the likelihood of torture in the receiving state. Other arguments that have been employed, which are discussed more fully below, include the contention that the *non-refoulement* obligation does not extend to CIDTP and that the government's *non-refoulement* obligation is not capable of being applied extraterritorially (e.g., it only applies to transfers starting from the US and not to the frequent practice of transfers from one state (outside the US) to another foreign state), even when US officials are engaged in and exercising effective control over the transfer process and the detainee. The failure of other governments to look behind American assurances has contributed to the vacuous protections against torture and CIDTP and provide further explanation as to how the phenomenon of extraordinary rendition was able to occur.

The debate on the boundaries of permissible conduct relates to whether the conduct amounts to torture or some other form of ill-treatment, and second, if it constitutes some lesser form of ill-treatment, then the extent to which such treatment is permissible or prohibited. This second line of argumentation is somewhat artificial when one considers that conduct that falls short of torture but amounts to CIDTP is also outlawed under international law. However, the issue is not free from debate considering that in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), torture on the one hand and CIDTP, on the other, are dealt with separately, and arguably the restrictions and protections relating to torture are consequently different from what is afforded in respect of other forms of ill-treatment. In particular, it has been argued that there is only an obligation to 'prevent' CIDTP, but not necessarily to punish or provide remedies to victims, or to prevent *refoulement*.[42] However, most other human rights treaties, including the International Covenant on Civil and Political Rights 1966 (ICCPR),[43] the American Convention on

[41] In *non-refoulement* cases in the United States, the 'balance of probabilities' standard of proof is used when considering whether there is sufficient evidence to determine if an individual will suffer torture in the transfer destination. This test is more onerous than what is found in the jurisprudence of the UN Committee Against Torture, for example, where the standard of proof is 'substantial grounds for believing'. See, further, ch. 14 by V. Vandova in this book.

[42] Memorandum from J.S. Bybee, Asst. Attorney-General, Office of Legal Counsel, to A.R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. $$ 2340–2340A (1 Aug. 2002).

[43] Art. 7, ICCPR.

Human Rights 1969[44] and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[45] detail a single prohibition against torture and other forms of ill-treatment.

The United States considers itself bound by the terms of the UNCAT in accordance with the reservations and understandings it made when ratifying it. For instance, it considers itself bound by Article 16 of the UNCAT relating to cruel, inhuman or degrading treatment or punishment (CIDTP) 'only insofar as the term "CIDTP" means the CIDTP prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States'.[46] Consequently, the United States did not accept the obligation to prohibit 'cruel, unusual or degrading treatment or punishment' but to prevent 'cruel and unusual treatment or punishment' as proscribed by the US Constitution.[47]

With respect to the definition of torture contained in Article 1 of the UNCAT, the United States registered its understanding as:

> (1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;

[44] Art. 5(2),1969 American Convention on Human Rights, 22 Nov. 1969, OAS Treaty Series No. 136, 1144 UNTS 123; entered into force 18 Jul. 1978.

[45] Art. 3, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended by Protocol Nos 3, 5, 8, and 11, entered into force 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990 and 1 Nov. 1998 respectively.

[46] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 Jun. 1987, Reservations Made by the United States of America Upon Ratification, 21 Oct. 1994, I(1).

[47] Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties due in 1999* United States of America, List of Issues to be Considered during the Examination of the Second Periodic Report of the United States of America, *Response of the United States of America*, UN Doc. CAT/C/48/Add.3 (undated), produced for session dated May 2006, Answer to Question 43, 85–6.

> (b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.[48]

In a memo issued on 1 August 2002,[49] the US Office of Legal Counsel interpreted 'severe physical or mental pain' to encompass only 'extreme acts':[50]

> [Where the pain is] physical, it must be of an intensity akin to that which accompanies serious physical injury, such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340 [of title 18 of the United States Code implementing the UNCAT]. Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment, fail to rise to the level of torture.[51]

The memorandum further provided that: 'even if an interrogation method might violate Section 2340A [of title 18 of the United States Code implementing the UNCAT], necessity or self-defence could provide justifications that would eliminate any criminal liability.'[52] The memorandum was eventually withdrawn and replaced by another in 30 December 2004[53] which recognised a broader definition of torture. The 30 December memorandum provides that '[t]his opinion … supersedes in its entirety the August 1, 2002 opinion of this Office', and explains that: 'severe pain under the statute is not limited to excruciating or agonizing pain or pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.'

Despite this, the US position continued to maintain a distinction between the lawfulness of torture and other forms of cruel, inhuman or degrading treatment or punishment, stemming from the reservation it made to Article 16 of the UNCAT which obligates states to prevent ill-treatment. The Detainee Treatment Act of 2005 (also known as the

[48] H.H. Koh, 'A world without torture', *Columbia Journal of International Law,* 43 (2005), 645.
[49] Memorandum from J.S. Bybee, 46.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*, 46.
[53] Memorandum Opinion for the Deputy Attorney-General, Legal Standards Applicable under 18 U.S.C. §§2340–2340A (30 Dec. 2004).

McCain Amendment as a result of it being introduced by Senator John McCain) has changed this, making clear that persons in the custody or control of the US Government, regardless of their nationality or physical location, are prohibited from being subjected to cruel, inhuman or degrading treatment or punishment.

The torture and CIDPT distinction has also impacted on US policy regarding *non-refoulement*. Whilst international law recognises that states are obligated to refrain from sending or transferring individuals to states in which there is a 'real risk' of torture,[54] the US applies the higher standard of whether it is 'more likely than not' that a person would be tortured.[55]

Further, the US has limited its understanding of the *non-refoulement* obligation to the likelihood of torture, as opposed to also the likelihood of cruel, inhuman or degrading treatment and punishment, despite the contrary views of international bodies.[56] Thus, despite the McCain Amendment which clarified that CIDPT was also prohibited in US law, US agencies are not prohibited under US law from transferring persons to other countries where those persons would face cruel, inhuman or degrading treatment or punishment. This position contradicts the well-established international jurisprudence that the act of sending, returning, extraditing or otherwise transferring an individual to a location where they incur a real risk of torture (or indeed other forms of prohibited ill-treatment) violates the obligations of the sending state to prohibit such treatment. The violation is of the substantive prohibition of torture and other CIDTP, and the principle of *non-refoulement* cannot be considered in the abstract from the substantive prohibition.[57]

The US Government understands the UNCAT as applying only to its own *de jure* territory. It has specified that the principle of *refoulement* refers only to those instances in which a state is seeking to expel, return

[54] See, ch. 14 by V. Vandova in this book.

[55] Comments by the Government of the United States of America to the Conclusions and Recommendations of the Committee against Torture, UN Docs. CAT/C/USA/CO/2 and CAT/C/USA/CO/2/Add. 1, 6 Nov. 2007, para. 4.

[56] See, e.g., Human Rights Committee, *General Comment No. 20 Concerning Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 7), 10 Mar. 1992, para. 9: 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.'

[57] See *Soering* v. *United Kingdom* (1989) 11 EHRR 439; *Cruz Varas* v. *Sweden* (1991) 14 EHRR 1 at [69–70]; *Vilvarajah* v. *United Kingdom* (1991) 14 EHRR 248, at [103]; *Chahal* v. *United Kingdom* (1997) 23 EHRR 413.

or extradite a person from its territory to another, holding that: '[n] either the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the [UN]CAT applies to persons outside the territory of the United States.'[58] As one commentator has written:

> Seizing a person in one country and transferring him to another would arguably not constitute 'expelling' the person, if a State is understood only to be able to 'expel' persons from territory over which it exercises sovereign authority. So long as these persons were rendered to countries where they had not previously resided, it also could not be said that the United States 'returned' these persons to countries where they faced torture (though persons rendered to countries where they had previously resided would presumably be protected under [UN]CAT Article 3). In addition, if such renditions were not executed via a formal process, it could be argued they did not constitute extraditions for the purposes of Article 3. Accordingly, it could be argued that the United States would not violate the *express language* of Article 3 if it rendered persons to countries where they faced torture, so long as no part of these renditions occurred within the territorial jurisdiction of the United States.[59]

This is a more restrictive reading of the extraterritorial application of the UNCAT than was provided by the treaty itself, as interpreted by the UN Committee Against Torture which has expressed the view that: 'this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised.'[60]

[58] See Committee Against Torture, Response of the United States of America, Response to question 13, at 33. The US Government cited *Sale* v. *Haitian Centers Council, Inc.*, 509 US 155, 179 (1993) for the proposition that Art. 33 of the 1951 Refugee Convention was not intended to have extraterritorial effect. This differs from the view taken by the Inter-American Commission on Human Rights which considered the *Sale* Supreme Court judgment and determined that: 'The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.' *The Haitian Centre for Human Rights et al.* v. *United States, Case 10.675,* Inter-American Commission on Human Rights (IACHR), 13 Mar. 1997.

[59] M.J. Garcia, *Renditions: Constraints Imposed by Laws on Torture*, Congressional Research Service Report for Congress, 12 Oct. 2007, 16–17.

[60] Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States Of America, CAT/C/USA/CO/2, 25 Jul. 2006, para. 15. See also, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – United States of America, UN Doc. CPR/C/USA/CO/3 (2006), para. 16.

The US State Department has indicated that despite its understanding of the territorial limitations of the UNCAT, 'as a matter of policy the United States does not transfer persons in its custody to countries where they would face torture'.[61] This policy position has not been extended to cruel, inhuman or degrading treatment or punishment. As has been stated: 'Article 3 does not *per se* prohibit the return or transfer of individual to countries with a poor human rights record nor does it apply with respect to returns that might involve "ill treat[ment]" that does not amount to torture.'[62] Furthermore, the policy has not stopped the US administration from sending individuals to countries that are known to regularly torture terror suspects. Prior to transferring persons to other states, the United States receives 'promises that they won't be tortured'.[63]

2. Obtaining crucial foreign support – exploiting gaps in legal and institutional frameworks

The transnational nature of the practice of extraordinary rendition means that for it to be carried out successfully it requires cooperation from actors outside of the United States. Whilst in most instances, cooperants are states; non-state actors can also be involved.[64] Individuals are apprehended in foreign locations, sometimes with the knowledge, acquiescence and, at times, collusion of officials of the territorial state. Planes carrying rendition victims fly over numerous states' airspace, and stop and refuel in a variety of locations. Prisoners are detained, sometimes very temporarily or for significant periods of time, in a variety of state territories, requiring various levels of agreement and collaboration.

Most states have said they knew nothing about the abduction of individuals by CIA agents acting on their territory or elsewhere in respect of their nationals,[65] though it is often alleged that they knew

[61] UN Doc. CAT/C/USA/CO/2, *ibid.*, para. 5.

[62] Committee against Torture, Response of the United States of America, Response to Question 19.

[63] White House, Office of the Press Secretary, President's Press Conference, 16 Mar. 2005, available at www.whitehouse.gov/news/releases/2005/03/20050316-3.html (last accessed 25 Oct. 2008). This position was reiterated by President Bush in another press conference the following month. White House, Office of the Press Secretary, President's Press Conference, 28 Apr. 2005, available at www.whitehouse.gov/news/releases/2005/04/20050428-9.html (last accessed 25 Oct. 2008) (remarking that the United States 'operate[s] within the law and we send people to countries where they say they're not going to torture the people'). See ch. 14 by V. Vandova in this book on the use of diplomatic assurances.

[64] E.g., the company Jeppesen Dataplan, Inc. has been accused of arranging and providing chartered flights for renditions.

[65] Some exceptions are Sweden and Bosnia and Herzegovina.

and idly stood by whilst the seizures and transfers took place.[66] Often, security, border or other officials may be privy to information not held by other government departments. States are under a positive duty to ensure that they have an effective legal and practical framework to protect individuals within their jurisdiction from the risk of torture or ill-treatment by state agents or third parties operating within their jurisdiction.[67] If states were cognisant of the detention and transfer of terrorist suspects by CIA operatives acting on their territories, they would be complicit and share responsibility under human rights law for the underlying rights violations.[68] The United States has consistently stated that in its practice of rendition, it has not violated the territorial sovereignty of states, implying that states were informed about the United States' actions on its territory.[69] Certain states have opened investigations, some reluctantly, into what was known and by whom, and at what time.[70] In contrast, if states had no knowledge whatsoever about the violative practices on their territories, they could seek to address the breach of territorial sovereignty through diplomatic or legal means, though the individuals rendered would have no recourse to such

[66] See D. Van Natta Jr., 'Germany weighs if it played role in seizure by U.S.', *New York Times*, 21 Feb. 2006, available at www.nytimes.com/2006/02/21/international/europe/21germany.html (last accessed 25 Oct. 2008).

[67] See, e.g., Eur. Ct. HR (GC), *Ilascu and others* v. *Moldova and Russia* (Appl. No. 48787/99), judgment of 8 Jul. 2004, para. 330–331.

[68] As stated by the Venice Commission: '[a]ny form of involvement of a Council of Europe member State or receipt of information prior to an arrest within its jurisdiction by foreign agents entails accountability under Articles 1 and 5 of the European Convention on Human Rights (and possibly Article 3 in respect of the modalities of the arrest). A State must thus prevent the arrest from taking place. If the arrest is effected by foreign authorities in the exercise of their jurisdiction under the terms of an applicable Status of Forces Agreement (SOFA), the Council of Europe Member State concerned may remain accountable under the European obligations, such as they ensue from Article 3.' Opinion No. 363/2005 of the Venice Commission, para. 118.

[69] This has been noted by the European Parliament in its *Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, 2006/2200(INI), 14 Feb. 2007, which refers to statements by the legal adviser to the US State Department at his meeting on 3 May 2006 with representatives of the Member States meeting within the Council, according to which, in carrying out the extraordinary rendition programme, whose existence he confirmed, the sovereignty of the countries concerned had always been fully respected; and notes that his remark was subsequently confirmed at his meeting with the Temporary Committee delegation which visited Washington.

[70] The most extensive investigation into state complicity in renditions was the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar led by the Honourable Dennis R. O'Connor. Other parliamentary or ombudsman inquiries have been opened, in particular in Germany, Italy, Spain and Sweden.

state to state processes. In practice, states invariably sought clarification and made relatively modest diplomatic approaches in such circumstances,[71] deplored by parliamentary watchdogs as overly passive.[72]

The Secretary-General of the Council of Europe has stated that 'virtually none of our Member States have proper legislative and administrative measures to effectively protect individuals against violations of human rights committed by agents of friendly foreign security services operating on their territory' and that he has received 'official acknowledgement of the "handing over" of individuals to foreign officials through procedures which do not comply with the standards and safeguards required by the ECHR and other legal instruments of the Council of Europe'.[73] Indeed, the ability to reign in the conduct of security and intelligence operatives overseas has been seen as a key failing, causing the Venice Commission to note that:

> States' responsibility is engaged where its agents co-operate with foreign authorities or do not prevent an arrest or unacknowledged detention *without government knowledge, acting ultra vires* … Regardless of how a state chooses to regulate political control over security and intelligence agencies, in any event effective oversight and control mechanisms must exist.[74]

In respect of rendition flights' use of states' airspace and stops for refuelling, states that allow or facilitate such usages of territory violate their obligations to prevent and prohibit torture and other cruel, inhuman or degrading treatment and punishment.

The principal international treaty which regulates aviation is the Chicago Convention on International Civil Aviation of 1944 (the Chicago Convention).[75] No prior authorisation is needed for unscheduled civil aircraft wishing to fly over or land in the territories of states parties to the Convention. Such aircraft can fly into or transit non-stop across its territory and make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the state flown

[71] Exceptions include the Italian and German criminal investigations of CIA agents.

[72] European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Draft Interim Report by Rapporteur Giovanni Claudio Fava, 24 Apr. 2006 (Fava Report).

[73] Notes for the press conference given by Terry Davis, Secretary-General of the Council of Europe, on Wednesday 12 Apr. 2006, available at www.coe.int/T/E/Com/Files/PA-Sessions/April-2006/20060412_Speaking-notes_sg.asp (last accessed 25 Oct. 2008).

[74] Opinion No. 363/2005 of the Venice Commission, para. 159(c).

[75] International Civil Aviation Organization (ICAO), 1944 Convention on Civil Aviation (Chicago Convention), 7 Dec. 1944, 15 UNTS 295; entered into force 5 Mar. 1947.

over to require landing.[76] Under Article 3*bis* (b), the territorial state can require the aircraft to land if there are 'reasonable grounds to conclude that [the aircraft] is being used for any purpose inconsistent with the aims of this Convention' and under Article 16, 'the appropriate authorities of each of the contracting States shall have the right, without reasonable delay, to search the aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention'.

Clear from its name, the Chicago Convention applies to civil as opposed to state aircraft, state aircraft requiring a different set of bilateral permissions, comprising of prior authorisations but immunity from search on arrival. Article 3(b) of the Convention provides that, 'Aircraft used in military, customs and police services shall be deemed to be state aircraft', which should not be taken as comprehensive or exclusive,[77] and may well depend on the 'the function it actually performs at a given time'.[78]

As has been seen in the operation of rendition flights, the US Government has presented state aircraft as civil aircraft in order to avoid the requirements of prior authorisation but to still benefit from the availability of immunity from search and seizure on arrival.[79] The Council of Europe's Parliamentary Assembly found that:

> The US Government's post-9/11 detainee transfer operations would frequently make use of practices that were previously considered 'anomalies,' such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian agents and contractors travelling on military travel orders.[80]

[76] Art. 5, the Chicago Convention.

[77] See M. Milde, '"Rendition flights" and international air law', paper prepared for the Redress Trust, Jun. 2008, available at www.redress.org/documents/Prof_Dr_Michael_Milde_for_REDRESS_June_2008_2_.pdf (last accessed 25 Oct. 2008), 8.

[78] *Ibid.*, 9.

[79] However, see, Opinion No. 363/2005 of the Venice Commission, which notes that: 'state aircraft can only claim immunity inasmuch as they make their state function known to the territorial State through the appropriate channels. If the public purpose was not declared in order to circumvent the requirement of obtaining the necessary permission(s), then the State will be estopped from claiming State aircraft status and the airplane will be deemed to be civil and thus falling within the scope of application of the Chicago Convention, including its Article 16 providing for the territorial State's right to search and inspection.' (footnotes omitted), para. 103.

[80] See, *Secret Detentions and Illegal Transfers,* Second Report, Explanatory Memorandum, para. 78.

If extraordinary rendition aircraft are identified as civil aircraft, as already indicated, they must be permitted to fly through the airspace and to stop for refuelling or other similar non-traffic purposes, without having to obtain prior permission. In such cases, the Chicago Convention expressly permits state authorities to search the aircraft on landing or departure, and to inspect relevant certificates and other documents relating to the aircraft (Article 16). The Secretary-General of the Council of Europe found that the majority of European states failed to require the foreign state to provide details of the identities and status of all persons on board, the purpose of the flight, and/or its final destination, as well as the final destination of each passenger.[81] The Parliamentary Assembly of the Council of Europe also highlighted the particular problem posed by multilateral agreements which provide for blanket overflight clearances which reduce the opportunity to effectively detect renditions. It highlighted the terms of unpublished NATO agreements of 4 October 2001, which provide for:

> (1) blanket overflight clearances for the United States' and other Allies' aircraft for military flights related to operations against terrorism;
> (2) blanket access to ports and airfields on NATO territory, including for refuelling, for United States and other Allies for operations against terrorism.[82]

However, these agreements would need to be interpreted in light of other international law requirements, including *jus cogens* obligations relating to the prohibition of torture and *refoulement*,[83] which would arguably obligate states to search the flights and take positive steps to prevent the rendition. Invariably, the matter generally turns on the amount of evidence required to activate such obligations[84] and the willingness of officials to act promptly whilst the plane is within the jurisdiction. As has been stated:

[81] See, *Follow-up to the Secretary General's Reports under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably By or At the Instigation of Foreign Agencies* (SG/Inf(2006)5 and SG/Inf(2006)13), Proposals made by the Secretary General, 30 Jun. 2006, SG(2006)01, para. 12(d).

[82] *Secret Detentions and Illegal Transfers*, Second Report, Explanatory Memorandum, para. 91.

[83] Arts. 53 and 64, Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331; entered into force 27 Jan. 1980. See, also, para. 159(n) of Opinion No. 363/2005 of the Venice Commission.

[84] See, UK Joint Committee on Human Rights, Nineteenth Report, *UK Compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT)*, 18 May 2006, paras. 164–5.

> the authorities responsible have so far not seen the need to search United States civil aircraft with a view to crimes possibly committed on board. It remains to be seen whether these general rules for searches of premises will be applied more vigorously in the future, now that more and more evidence of criminal acts possibly committed on US civil aircraft comes to light and the authorities cannot simply refer to a lack of suspicion any longer.[85]

B. Remedies for extraordinary rendition – key problem areas

1. Who has done what? Multiple actors

The first challenge of addressing extraordinary rendition has been to unveil the practice. Its covert nature coupled with the large number of actors and multiple jurisdictions has made it difficult for courts, investigative bodies and human rights organisations to obtain a full picture of the practice and those responsible for extraordinary renditions. Senator Dick Marty has likened the practice to 'a spider's web'.[86] The victims of rendition for the most part continue to live in precarious circumstances, many of whom are still detained or subject to other legal restrictions. This, combined with the psychological impact of what they have endured, has made many fearful of coming forward publicly.

Leads have come from a variety of sources, including family members, the victims themselves who have spoken to lawyers and human rights organisations, journalists, 'plane spotters' and aviation specialists, and occasionally from intelligence officers and government officials. What has proved difficult for those seeking to establish the truth of what has taken place is to translate these investigative leads into verifiable elements of proof, though a sizable amount of material has indeed been collected.

[85] Opinion No. 3–2006, 30.

[86] Swiss Senator Dick Marty, Rapporteur of the Council of Europe's inquiry into the alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States has written, in relation to his report that: 'I have chosen to adopt the metaphor of a global "spider's web" as the *leitmotif* for my report. It is a web that has been spun out incrementally over several years, using tactics and techniques that have had to be developed in response to new theatres of war, new terms of engagement and an unpredictable threat.' See, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, Draft report – Part II (Explanatory memorandum) Rapporteur: Mr Dick Marty, Switzerland, ALDE AS/Jur (2006) 16 Part II, 7 Jun. 2006, para. 25.

A major difficulty has been to encourage governments against whom there are allegations of complicity to conduct full, impartial and public investigations into the practice. One notable exception has been the Canadian Government. Although initially reticent, it established an independent Commission of Inquiry to investigate the possible role of Canadian officials in two rendition cases. One involved a dual Canadian Syrian national who was rendered from the US to Syria where he was detained for more than a year and subjected to torture,[87] and a second closed inquiry to consider allegations of extraordinary rendition in respect of three other Canadian citizens.[88] As a result of pressure from Council of Europe and European Parliaments, a number of European States opened investigations, though these have invariably been limited in both scope and follow-up.[89] This stands in contrast to other countries which have failed to initiate investigations even though there exist credible allegations of collusion in extraordinary renditions.[90]

Public security confidentiality legislation and state secrets doctrines have proved to be a significant impediment to truth. States have used such principles to avoid explanations to parliamentary bodies and to prevent judicial authorities from determining the facts, and where appropriate, prosecuting those responsible. Requests under freedom of information legislation and related litigation have been used in the United States and elsewhere to gain access to previously undisclosed data, though the process has proved lengthy and cumbersome, and often significantly skewed in the favour of the party claiming confidentiality.[91]

2. Legal actions for redress

Given the violations to individuals' rights that the practice of extraordinary rendition engenders, a number of victims have sought to seek some form

[87] The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar was mandated to investigate and report on the actions of Canadian officials in relation to Mr Arar, and to make recommendations concerning an independent, arm's-length review mechanism for the Royal Canadian Mounted Police's activities with respect to national security.

[88] See, the Inquiry that was opened in respect of Messrs El Maati, Almaaki and Nurredin. Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, The Honourable Frank Iacobucci, QC, Final Report, Oct. 2008, available at www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf (last accessed 25 Oct. 2008).

[89] E.g., Germany, Portugal, Italy, Spain, Sweden and United Kingdom.

[90] E.g., Kenya and Russia.

[91] For information on efforts to obtain access to information in the US, see www.aclu.org/safefree/torture/torturefoia.html (last accessed 25 Oct. 2008).

of remedy for the harm they suffered. In large measure, such actions have not been successful to date despite the international recognition of the central importance of the right to a remedy for breaches of international law.[92] Individuals who have an 'arguable claim' that they have been subject to extraordinary rendition have a right to an effective remedy and appropriate relief, also encompassing the procedural right of access to a court of law.[93]

2.1 Legal actions in the US The UN Human Rights Committee has underscored that the US should 'investigate allegations of rendition and provide a remedy to its victims'.[94] The United States is the natural forum for such cases given the central role of the United States in effectuating the renditions.

Key barriers that have impeded access to justice for victims of renditions before US courts are the application of foreign policy considerations by the courts and the state secrets doctrine. Maher Arar was prevented from suing the American Government in relation to his rendition to Syria because of national security and foreign policy issues.[95] The district court and the panel majority declined to recognise the right to a constitutional remedy for conspiracy to subject Arar to torture and arbitrary detention, and held that national security and state secrets were 'special factors' precluding a constitutional claim. First, the panel majority noted that Congress provided an 'alternative remedy' for such interests in a petition for review of a removal order,[96] even though it was argued that the defendants had done everything possible to

[92] See, e.g., Art. 2(1) of the ICCPR; Art. 14 of the UNCAT; Arts. 8(1) and 25 of the American Convention on Human Rights and Art. 6 of the ECHR. See, also, Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (24 May 2004), paras. 15–16.

[93] See Principle 12 of the *Basic Principles on a Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by United Nations General Assembly resolution 60/147 of 16 Dec. 2005.

[94] Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – United States of America', UN Doc. CCPR/C/USA/CO/3 (2006), para. 16. Committee against Torture, 'Concluding Observations: United States of America', UN Doc. CAT/C/USA/CO/2 (2006), para. 16.

[95] *Arar* v. *Ashcroft*, 532 F.3d 157, 204–05 (2d Cir. 2008) (Sack, J., dissenting), *reh'g in banc* granted (2d Cir. 12 Aug. 2008).

[96] *Arar*, 532 F.3d 177.

prevent the operation of that remedy. Second, it was held that adjudicating Arar's claims 'would interfere with the management of our country's relations with foreign powers and affect our government's ability to ensure national security'.[97]

In a second case brought by Khaled El-Masri, a German citizen of Lebanese descent, against a former CIA director and others for his rendition from Macedonia to Afghanistan, where he alleged ill-treatment, suffered a similar fate. The claim was dismissed on the basis that it could not be fairly litigated without disclosure of sensitive information protected by the state secrets privilege.[98] Senator Marty, when commenting on this case, noted that:

> [f]rom the point of view of the rule of law, the ruling … in Mr El-Masri's case is disappointing and regrettable: whilst the Court of Appeal acknowledges that it is for the courts to decide on the extent of state secrecy, it takes a very restrictive stance as to the scope of judicial review, insisting on the court being obliged to accord the 'utmost deference' to the responsibilities of the executive branch.[99]

In the case of *Binyam Mohamed et al.* v. *Jeppesen Dataplan, Inc and the United States of America*, the assertion of state secrets led the court to extinguish the claim, leaving the applicants with no remedy at all.[100] The court dismissed the claim without assessing which aspects of 'extraordinary rendition' constitute a 'state secret' and how such secrets could be dealt with in a manner that would protect the national security interests at stake while upholding the appellants' right to a remedy.

It has been argued that the invocation of the state secrets privilege is inappropriate in the *El Masri* and other rendition cases given the now public knowledge of much of the information concerning the practice.[101] Further, while national security interests may constitute a legitimate aim,[102] they will only be considered legitimate when they are genuinely tailored to protecting such interests and not in order to

[97] *Ibid.* at 182.

[98] *El-Masri* v. *Tenet*, 437 F.Supp.2d 530 (E.D.Va.2006). *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 09, 2007) (No. 06–1613).

[99] *Secret Detentions and Illegal Transfers*, Second Report, Explanatory Memorandum, para. 303.

[100] *Binyam Mohamed* v. *Jeppesen*, U.S. D.C.D.C. (13 Feb. 2008) 7.

[101] See *El-Masri* v. *United States*, No. 06–1613, On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, Brief for *Amicus Curiae* Senator Dick Marty, In Support of Petitioner.

[102] *Ždanoka* v. *Latvia*, App. No. 58278/00 Eur. Ct. H.R. (17 Jun. 2004) at para. 86.

protect states from embarrassment or in order to prevent the exposure of illegal activity as security agencies are subject to the same democratic principles of governance as all other state organs.[103] Accordingly, the assertion of national security or the 'state secrets' doctrine should not automatically constitute a legitimate aim but instead must be analysed in the context of each individual case. This requires more than simply asserting that the overseas activities of the CIA constitute a 'state secret'; each case must be determined on its facts and the precise aspects of the CIA's overseas activities which have national security implications must be identified. This is particularly the case in light of the persistent concerns about the over-classification of evidence protected by the 'state secrets' doctrine and the potential for the doctrine to be abused, therefore requiring greater judicial scrutiny of the executive's assertion that certain information or activity is privileged.[104]

The US Supreme Court had denied *certiorari* in the *El Masri* case, though at the time of writing, it had decided to review the *Arar* case *en banc*, providing a further opportunity for these issues to be aired in US courts. Plaintiffs in the *El Masri* case have filed an application with the Inter-American Commission on Human Rights, which, though not a judicial remedy,[105] will provide an opportunity for external scrutiny of the application of the state secrets doctrine in rendition cases.

2.2 Legal actions outside the United States As has been indicated, there have been a number of hurdles impeding legal actions outside

[103] See Principle 2(b) of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1 Oct. 1995) (setting out that 'a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.') See, also, the *Siracusa Principles on the Limitation and Derogation Provisions on the International Covenant on Civil and Political Rights*, Commission on Human Rights, 'Status of International Covenants on Human Rights', UN Doc. E/CN.4/1985/4 (28 Sept. 1984), which demonstrate the high threshold required for national security to constitute a legitimate aim.

[104] W.G. Weaver and R.M. Pallitto, 'State secrets and executive power,' *Political Science Quarterly*, 120 (2005) 85–112 (noting that: '[v]irtually all observers acknowledge that overclassification is a significant problem, and this has led to some embarrassing moments for the executive branch').

[105] The case does not have the possibility of being heard by the Inter-American Court of Human Rights given the failure of the US Government to ratify the relevant treaties conferring jurisdiction.

the United States. On the whole, states have been extremely reluctant to initiate investigations capable at arriving at the truth,[106] often stopping at raising questions through diplomatic means, and/or through parliamentary or ombudsmen investigations. These investigations have also been hindered by the failure of US officials to cooperate in the search for the truth. Aside from the Canadian Government in respect of Maher Arar, governments have routinely failed to award compensation or other measures of reparation.[107] In a number of cases, such as Italy, Spain and Germany, criminal investigations have been lodged with several suspects arrested,[108] though the impunity of US officials have generally continued. Whilst prosecutors in these countries have sought international arrest warrants against a number of CIA agents, the likelihood that the indicted agents will face trial in these countries is presently low, though it may impede their international travel. Prospects for civil claims lodged outside of the United States may be somewhat better, though not without significant challenges. If it can be successfully argued that the crime took place in the jurisdiction in which the suit were to be brought, and that this was the most appropriate forum, this might satisfy state immunity exceptions, which might otherwise act to prevent claims against foreign states and their officials.[109]

Clearly, a significant shift in US counter-terrorism policy is necessary to end the practice of extraordinary rendition, ensure accountability of those who instigated the policies and the many who carried it out and provide redress for its many victims. The shift in political climate brought about by the election of Barack Obama as President of the United States may provide some new opportunities in this regard, though it is too soon to judge whether any real dent can be made in

[106] See, e.g., the UN Human Rights Committee's consideration of Sweden's actions in response to the Alzery deportation, Views of the Human Rights Committee, *Mohammed Alzery* v. *Sweden*, Comm. No. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005 of 6 Nov. 2006, para. 11.7, in which it notes that: 'the State party is under an obligation to ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring appropriate charges in consequence.'

[107] *Ibid.*, para. 13.

[108] See C. Whitlock and D. Linzer, 'Italy seeks arrests of 13 in alleged rendition', *Washington Post*, 25 Jun. 2005, A1. See also, *Secret Detentions and Illegal Transfers*, Second Report, Explanatory Memorandum, paras. 316–24, describing Italian and German criminal proceedings.

[109] See *Jones et al.* v. *Saudi Arabia* [2006] UKHL 26.

the politics of exceptionalism that have so characterised the US approach to counter-terrorism. As of July 2009, President Obama has taken a strong public stance against torture and is working to close Guantanamo Bay; however, he has also exhibited strong reluctance to respond to the growing calls for criminal accountability for past abuses.

IV. Conclusions

Despite the advent of human security as an alternate or expanded framework within which to consider major political, societal, and security challenges, security debates post-9/11 remain deeply embedded in the paradigm of national security. The human security framework could be a useful tool to rethink fundamentally approaches to counter terrorism, including the strategies and the end goals. Instead, the language of terrorism and the typical justifications for counter-terrorism strategies and approaches have been heavily steeped in national security rhetoric, and the prerogative of the state to protect state interests. Whilst the dynamics of international terrorism are recognised as different from prior instances of terrorism which have been characterised more by internal struggles targeting state interests, the approach of most governments has merely been to expand extraterritorially the conception of where state interests are to be protected. As was stated in the final 9/11 Commission Report: '9/11 has taught us that terrorism against American interests "over there" should be regarded just as we regard terrorism against America "over here." In this same sense, the American homeland is the planet.'[110] The more diffuse human security framework which privileges the interests of individuals over that of the state *qua* entity have been a background consideration at best.

A human security response to counter-terrorism would have considered more fully from the outset the specific permutations of and embraced more fully the causes of international terrorism in conceptualising responses, including poverty, social exclusion, political disenfranchisement and marginalisation, and the operation of multiple identities across frontiers. Such an approach is naturally multidisciplinary, privileging neither law, nor diplomacy, development goals, nor strategies for greater social inclusion. A broad approach is important given the failure of the law on its own to provide a sufficient moral and political basis to enshrine an approach centred on human rights. In the counter-terrorism context,

[110] *The 9/11 Commission Report*, 362.

states have paid lip-service to human rights. However, as has been outlined above, it has been practically impossible to ensure the respect of fundamental principles of human rights in the case of extraordinary rendition. States have routinely refused to put in place effective measures to forestall the practice (e.g., in respect to strengthening aviation protocols and enforcing existing rights of search). Once allegations of extraordinary rendition have surfaced, the right to an effective investigation and to know the truth have been routinely stymied, as has access to courts and to an effective remedy for the harm suffered. This does not provide evidence of law's lack of utility; instead it underscores that law cannot operate in a vacuum. Law operates in a political context and as such, political principles are tools to aid with the enforcement of law. As has been said, the language of *jus cogens* has proved to be an insufficient sword against hegemonic state interests. This, in and of itself, is reason enough to keep the human security framework in the toolbox of strategies.

16

Legal routes to restoring individual rights at Guantanamo Bay: the effectiveness of *habeas corpus* applications and efforts to obtain diplomatic protection

LORNA MCGREGOR

I. Introduction

On entering office in January 2001, the George W. Bush administration adopted a form of exceptionalism which one commentator describes as 'the traditional view that security was fundamentally determined by the military means of sovereign states, [it] sought to promote "a distinctly American internationalism"'.[1] Nine months later, the attacks of 9/11 intensified this approach to national security under the rubric of what the United States later termed 'the war on terror'. The attacks not only impacted the US security landscape but also generated a new global security agenda at the international and multilateral levels with the United Nations' Security Council adopting a series of measures mandating states to take a range of counterterrorism measures;[2] and states joining a US-led global coalition against terrorism.[3] While these initiatives emphasised the urgency and priority of global security, none explicitly addressed states' pre-existing human rights obligations or considered the human security implications of the strategies involved.[4]

[1] R.G. Patman, 'Globalisation, the new US exceptionalism and the war on terror', *Third World Quarterly,* 17 (2006), 963, 971.

[2] See, in particular, SC Res. 1373 (2001) UN Doc. S/RES/1373 (2001) adopted (28 Sept. 2001).

[3] Patman, 'Globalisation', 973.

[4] However, the UN Counter Terrorism Committee now appears to be taking a stronger approach to human rights in the context of counterterrorism operations. For example, it has now appointed a human rights officer and adopted policy guidance on human rights. See Counter-Terrorism Committee, 'Conclusions for Policy Guidance Regarding Human Rights and the CTC', UN Doc. S/AC.40/2006/PG.2 (25 May 2006). See, also, Security Council, 'Letter dated 7 February from the Chairman of the Security Council pursuant to

The US administration specifically couched its response to the attacks of 9/11 in moralistic tones, dividing the world into those 'against' and those 'with' the United States and characterising the 'war on terror' as one of 'good' against 'evil'.[5] The rhetoric employed focused on the objective of protecting democracy and the 'free world', without confirmation that the means used to combat terrorism would adhere to the values embedded in democracy.[6] Legal counsel within the administration conducted detailed legal analyses designed to remove the protection of international and US law to those engaged in a 'war of terror' against the United States. These legal analyses included the creation of the label, 'enemy combatant' – a term with no previous legal usage or history – in an attempt to sidestep the protection of the 1949 Geneva Conventions;[7] the detention of 'enemy combatants' outside of US territory in the belief that the US Constitution did not extend beyond US borders; and the development of a series of legal memoranda aimed at redefining the definition of torture in an attempt to legalise techniques such as waterboarding.[8] In addition, the practice of 'extraordinary rendition' had emerged,[9] which has been defined as '[t]he extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of

Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council', UN Doc. S/2008/80 (8 Feb. 2008).

[5] 'Bush says it is time for action' *CNN.Com* (6 Nov. 2001); 'Bush tells group he sees a "third awakening"', *Washington Post,* 13 Sept. 2006.

[6] Patman, 'Globalisation', 980.

[7] Characterising the detainees as 'enemy combatants' reflects an attempt to exempt international humanitarian law and in particular the protection of the 1949 Geneva Conventions from Guantanamo Bay. See J. Fitzpatrick, 'Speaking law to power: the war against terrorism and human rights', *European Journal of International Law,* 14 (2003), 242, 250 (noting that: '[t]he policy of the US Government is that the captives are not prisoners of war (POWs) whose internment is regulated by the Third Geneva Convention, and they are denied the mandatory hearings before a "competent tribunal". Their standards of treatment are determined by discretionary executive policy, not by legal norms. None of them has been charged or tried for any violations of humanitarian law that would establish their status as unprivileged combatants. Neither are the captives treated as interned civilians whose treatment is governed by the Fourth Geneva Convention. None of them is an "enemy alien" subject to internment under traditional rules of international law and the Fourth Geneva Convention. The selection of internees is determined by a pure exercise of administrative discretion, without announced criteria or process, and without judicial oversight.')

[8] See 'A Guide to the Memos on Torture', *New York Times*, available at www.nytimes.com/ref/international/24MEMO-GUIDE.html (last accessed 25 Oct. 2008); American Civil Liberties Union, *Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit*, 1 Apr. 2008.

[9] See, further, ch. 15 by C. Ferstman in this book.

detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment'.[10] 'Extraordinary rendition' has also been referred to as 'torture by proxy' or 'outsourcing torture'.[11]

Mainly due to the media images and latterly the testimonies of former detainees, the US detention centre at Guantanamo Bay in Cuba has become emblematic of its exceptionalist approach to human rights in the context of the 'war on terror'. In early 2002, the United States began to transfer non-US nationals captured in the course of the 'war on terror' to Guantanamo Bay, a 45-square mile area which has been under the complete control of the United States since 1903 under a lease agreement with Cuba.[12] The selection of Guantanamo Bay as a key detention site in the US 'war on terror' was not incidental but by design: the US administration believed that by holding foreign nationals outside of US territory, these individuals would not enjoy rights under the US Constitution, international humanitarian law, or be able to access to the US courts to challenge the legality of their detention.[13] As a result, these individuals have been held without charge, without the ability to challenge the legality of their detention, until recently without contact with a lawyer or family, and at risk of torture and other cruel, inhuman or degrading treatment. This has led to the characterisation of Guantanamo Bay as a 'legal black hole';[14] a site 'beyond the rule of law'[15] or, as one US

[10] United Kingdom Intelligence and Security Committee, *Special Report into Rendition*, Jul. 2007, para. 7 (the Report continues at para. 8 to note that: '[f]or example, the transfer of battlefield detainees from Afghanistan to Guantánamo Bay would fall into the category of "Military Renditions". The transfer of a detainee unconnected to the conflict in Afghanistan to Guantánamo Bay would be a "Rendition to Detention". A transfer to a secret facility constitutes cruel and inhuman treatment because there is no access to legal or other representation and, on that basis, we would describe this as an "Extraordinary Rendition"'.) See, also, M.L. Satterthwaite, 'Rendered meaningless: extraordinary rendition and the rule of law', *George Washington Law Review,* 75 (2007), 1333, 1336.

[11] A. Brown (International Affairs & Defence), 'Extraordinary Rendition', House of Commons Library Standard Note: SN/IA/3816 (23 Mar. 2006), 3.

[12] See Naval Station Guantanamo Bay, 'History of Guantanamo Bay' available at www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral (last accessed 25 Oct. 2008).

[13] Justice Scalia dissenting in *Rasul* v. *Bush* 542 U.S. 466 (2004), 11. See, also, F. de Londras, 'Guantánamo Bay: towards legality?', *Modern Law Review,* 71 (2008), 36.

[14] *R (on the application of Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598, para. 64; J. Steyn, 'Guantanamo Bay: the legal black hole', *International and Comparative Law Review,* 53 (2003), 1.

[15] D. Hope, 'Torture', *International and Comparative Law Review,* 53 (2004), 807, 830.

official has labelled it, 'the legal equivalent of outer space',[16] as a result of which one commentator notes that 'there is no way out, except through the good grace of the military'.[17]

The purpose of this chapter is to examine the effectiveness of two legal strategies employed in US and foreign courts to restore the rights of the detainees held at Guantanamo Bay, and which undercut the prioritisation of national security at the expense of fundamental human rights.

The chapter first examines applications brought in US courts to challenge the legality of the detentions at Guantanamo Bay. In a series of decisions, the US Supreme Court has affirmed the right of the detainees to *habeas corpus* under federal and most recently, constitutional law. However, after the first two decisions, Congress responded by enacting legislation designed to overturn the Supreme Court's findings, and the Department of Defence, at least, has indicated that it will seek to mobilise Congress to take similar action in response to the most recent decision of *Boumediene* v. *Bush.*[18] Thus, while lawyers have been successful in securing a rights-based approach to Guantanamo Bay, the lack of change in the administration's exceptionalist security-based approach to the 'war on terror' continues to result in an intense separation-of-powers battle between the judiciary and the legislature, and most importantly, the continuation of a 'legal black hole' at Guantanamo Bay and other known and secret detention sites around the world.

The remainder of this chapter acknowledges that other states – albeit belatedly – have condemned the situation at Guantanamo Bay and some have called for its closure. However, it is argued that, beyond general political statements, states have been slow to adopt practical and legal strategies available to them that could result in the release or fair trial of specific individual detainees. In particular, this section focuses on the use of diplomatic protection as a way in which to assert the rights of these individuals, looking in particular at the UK Government's approach to its own nationals and individuals with refugee and long-term residency status in the United Kingdom who have been held at Guantanamo Bay. In this respect, this section considers how national and international law – at least in the context of the United Kingdom – have proved to be weak tools in restoring detainees' rights, leaving them to the discretion

[16] L. Porteus, 'Gitmo detainee allegations cause uproar', *Fox News,* 14 Jun. 2005.
[17] G.P. Fletcher, 'Black hole in Guantanamo Bay', *Journal of International Criminal Justice,* 2 (2004), 121, 123.
[18] *Boumediene et al.* v. *Bush* 553 US (12 Jun. 2008).

of governmental decision-making, a heavy emphasis of which has also been the importance of national security and inter-state relations.

II. Attempts to restore individual rights through the US courts

One of the most striking features of the detention facility at Guantanamo Bay has been the denial of detainees' right to challenge the legality of their detention by way of a *habeas corpus* application. Rather, the administration has established review mechanisms in the form of the Combatant Status Review Tribunal and the Administrative Review Board. The Combatant Status Review Tribunal considers whether a detainee has properly been designated as an 'enemy combatant'; the Administrative Review Board considers, on an annual basis, whether the 'enemy combatant' should still be detained. However, as they lack 'truly adversarial processes, [provide] inadequate legal representation, [and are unable] to effectively order the release of the petitioning detainee',[19] they cannot act as adequate substitutes to the writ of *habeas corpus*. The retired British Law Lord, Johan Steyn, has commented that: '[a]s a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this [denial of the writ of *habeas corpus*] as a monstrous failure of justice.'[20] Moreover, as one commentator notes, the ability to challenge the legality of the detention acts as the 'gateway' to the assertion of other rights-based claims, including the alleged torture and cruel, inhuman or degrading treatment of detainees at Guantanamo Bay and the reliance on evidence procured by torture as the basis for detention and possible trial by military commission.[21]

Initially, both foreign and US nationals held within the context of the 'war on terror' were denied the right of *habeas corpus*. However, in 2004, the US Supreme Court in *Hamdi* v. *Rumsfeld* found that US nationals enjoy a constitutional right to *habeas corpus*, regardless of where they are held.[22] Neither the Executive nor Congress has sought to reverse or alter this finding through the enactment of legislation.

In contrast, whether or not non-US nationals are entitled to *habeas corpus* rights has been the subject of an intense power struggle between the judiciary and the legislature. In essence, the Supreme Court has

[19] de Londras, 'Guantánamo Bay: towards legality?', 40.
[20] Steyn, 'Guantanamo Bay: the legal black hole', 11.
[21] de Londras, 'Guantánamo Bay: towards legality?', 38.
[22] *Hamdi* v. *Rumsfeld*, 542 US 507 (2004).

repeatedly confirmed the rights of foreign nationals to bring a *habeas corpus* petition under US federal law and most recently, under the US Constitution. One commentator thus characterises the Supreme Court's approach to *habeas corpus* in Guantanamo Bay as '"rights-enforcing", meaning that it is concerned with the recognition, protection and enforcement of individual rights'.[23] For each positive judgment, however, the legislature has responded by enacting new legislation designed to remove the legal basis of the court's decision. The same commentator considers that: 'the political branches conceive these decisions as "democracy-enforcing", meaning that the government may introduce myriad measures in relation to (non-citizen) suspected terrorists provided they do so in a (structurally) democratic and constitutionally appropriate manner.'[24]

Starting with *Rasul* v. *Bush*,[25] the petitioners challenged the authorisation of indefinite detention without due process in the Presidential Order of 2001.[26] The Supreme Court held that the writ of federal *habeas corpus* applied to the detainees held at Guantanamo Bay on the basis that as a result of the US lease agreement with Cuba, the United States 'exercises plenary and exclusive jurisdiction but not "ultimate sovereignty"'[27] over Guantanamo Bay. However, following *Rasul* v. *Bush,* Congress enacted the Detainee Treatment Act of 2005. Section 1005 stripped US courts of jurisdiction to hear the *habeas corpus* applications of aliens detained at Guantanamo Bay. While the US Court of Appeals for the District of Columbia Circuit was provided with exclusive jurisdiction to hear petitions from detainees at Guantanamo Bay, this jurisdiction was limited to the power of the court to review whether the Combatant Status Review Tribunals had properly designated the detainee as an 'enemy combatant' and did not provide for full *habeas corpus* rights.

The case of *Hamdan* v. *Rumsfeld*[28] reached the Supreme Court after the enactment of the Detainee Treatment Act. However, the Supreme Court found that this Act did not remove its jurisdiction from hearing pending *habeas corpus* petitions. As with *Rasul,* the decision of the

[23] de Londras, 'Guantánamo bay: towards legality?', 37.
[24] *Ibid.*, 37.
[25] *Rasul* v. *Bush* 542 US 466 (2006).
[26] 'Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism', Military Order of 13 Nov. 2001, 66 Fed Reg. 57.833 (2001).
[27] *Rasul* at 6.
[28] *Hamdan* v. *Rumsfeld* 126 S Ct. 2749 (2006).

Supreme Court in *Hamdan* was limited to the consideration as to whether the courts had jurisdiction under federal as opposed to constitutional law to hear *habeas corpus* petitions. Again, however, Congress responded by enacting legislation to overcome the Supreme Court's decision. In this respect, the Military Commissions Act of 2006, among other things, stripped US courts of federal *habeas* jurisdiction for all pending and future cases involving non-US nationals.[29]

In the third Supreme Court decision on *habeas corpus,* the issue in *Boumediene* then became whether detainees held at Guantanamo Bay have a right to *habeas corpus* under the US Constitution. In this respect, the Supreme Court held that detainees enjoy rights under the US Constitution, including the right to *habeas corpus* review of their detention. It found that the Combatant Status Review Tribunal established under the Detainee Treatment Act does not present an adequate and effective substitution to *habeas corpus* proceedings and therefore found the denial of access to the writ of *habeas corpus* under the Military Commissions Act unconstitutional.[30]

The decision explicitly rejects a formalistic view of the situation at Guantanamo Bay in favour of pragmatism and a strong separation of powers between the judiciary and the legislature.[31] In particular, the court dismissed the government's argument that the Constitution does not apply to detainees held at Guantanamo Bay on the basis that it does not enjoy *de jure* sovereignty over the territory. It held that: '[t]he necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.'[32] In particular, the Supreme Court specifically condemned the administration and legislature's attempts to undercut the protection of the Constitution by employing formalistic notions of sovereignty, emphasising that: '[o]ur basic charter cannot be contracted away like that … To hold the political

[29] For commentary on the Military Commissions Act, see J. Vervaele, 'The anti terrorist legislation in the U.S.: criminal law for the enemies', *European Journal Law Reform,* 8 (2006), 137, 168 and R. Knowles, 'Detainee policy and the rule of law: a response', *Harvard International Law Journal,* 48 (2007), 69.

[30] *Boumediene,* 37–8; 54–64.

[31] *Ibid.*, 34.

[32] *Ibid.*, 35. See, also, 39 (finding that '[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States'.)

branches have the power to switch the Constitution on or off at will is quite another.'[33]

The confirmation of detainees' rights under the US Constitution not only affirms their right to *habeas corpus* but also potentially opens up a range of other litigation. As the Center for Constitutional Rights notes:

> [o]ther significant issues may [now] be litigated as well: most detainees are being held in solitary confinement, including dozens who are cleared for release; most are losing their minds as a result. In habeas proceedings, petitioners should be able to argue for more humane conditions of confinement. Many detainees are also cleared for release to countries where they may face torture; these men are basically in the position of refugees and countries that can offer them asylum will have to be found before they can be released. A significant issue for the habeas cases will also be challenges to the government's reliance upon information obtained through torture or unlawful coercion to justify the detentions.[34]

However, the decision still leaves a number of issues unresolved. As one commentator notes: 'The Supreme Court's decision does not immediately require that any of the detainees be released. It does not even set out the criteria that should be used by the courts when they begin the process of assessing whether detainees are being lawfully held.'[35] These issues will have to be determined at the district court level as it hears the applications for *habeas corpus* afresh.

Moreover, the response of the Department of Defense to the decision in *Boumediene* suggests that the administration's exceptionalist position is unchanged and that it will pursue a similar approach to its responses to previous Supreme Court decisions affirming the rights of Guantanamo detainees. The Department of Defense's response emphasises the continued priority accorded to national security to the exclusion of the rights of detainees in stating that:

> these habeas proceedings could require the diversion of significant operational, law enforcement and security resources in addition to administrative, legal, and intelligence resources. In addition to the significant resources the Department already is devoting to this litigation, if judges order the in-person appearance of detainees at hearings, numerous security assets would need to be devoted to the task. As alarming, if

[33] *Ibid.*, 35.

[34] Center for Constitutional Rights, '*Boumediene* v. *Bush/Al Odah* v. *United States*', available at www.ccrjustice.org (last accessed 25 Oct. 2008).

[35] A. Dworkin, 'The Supreme Court's Guantanamo ruling at the future of the war on terror', *Crimes of War Project*, 2 Jul. 2008.

> federal district court judges issue subpoenas requiring in-person testimony of those who gathered the relevant information pertaining to a habeas petitioner, combat troops, intelligence personnel, and other critical military and civilian personnel may need to be pulled from the theatre of combat operations and sent to Washington, D.C. to answer questions from detainees' lawyers.[36]
>
> [T]he rules for habeas proceedings could affect how our soldiers, sailors, airmen, and marines fight on battlefields around the world … Judges could require arrest reports, chain-of-custody authentication reports, or other evidentiary processes. Rulings that evidentiary processes, relevant to a civilian but not a wartime environment, were not followed, would, in effect, serve to regulate our troops on the battlefield, just as judges, in effect, regulate the local police in civilian life … habeas proceedings could be used as a vehicle for detainees charged with war crimes to attempt to halt or delay their military commission trials.[37]

As a result, the Department of Defense has called upon Congress to enact legislation which would:

1. 'make clear that federal courts may not order the Government to bring, admit, or release those detained at Guantanamo Bay into the United States';[38]
2. 'ensure national security interests are protected and that terrorists do not use these proceedings as a means to discover what we know about them and how we acquired that information';
3. 'Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes';
4. 'Congress should explicitly reaffirm that the United States remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations and that the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations';
5. 'Congress should establish sensible procedures adapted to the realities of national security … Military servicemembers should not be required by subpoenas to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefields activities have ceased, should suffice';

[36] Opening Statement of D.J. Dell'Orto, Acting General Counsel, Department of Defense, to the House Armed Services Committee on 31 Jul. 2008, 2.
[37] *Ibid.*, 3.
[38] *Ibid.*, 5.

6. 'Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention.'[39]

Beyond attempting to limit the reach of the decision to the detainees held at Guantanamo Bay, the Department of Defense also expressly called upon Congress to ensure that the decision is confined to the 'unique circumstances prevailing at Guantanamo Bay' on the basis that 'all of the difficulties that we face with respect to the Guantanamo habeas petitions would pale in comparison to the difficulties we would encounter were federal court jurisdiction extended to those detained near a zone of active hostilities, such as in Iraq and Afghanistan'.[40] Thus, within the already exceptionalised context of the 'war on terror', the Department of Defense attempts to distinguish and contain the situation at Guantanamo Bay from the broader problems it represents by preventing the restoration of the rights of other detainees held throughout the world under the auspices of the 'war on terror'. As such, while *Boumediene* undoubtedly reflects a landmark decision in restoring the rights of detainees held at Guantanamo Bay, the administration's continued prioritisation of national security 'at all costs' suggests that deeper inroads into the United States' exceptionalist approach to the 'war on terror' have not yet been achieved.

III. The responses of foreign states in the wake of a denial of individual rights to Guantanamo detainees

Despite the status of Guantanamo Bay as a 'legal black hole' and the challenges detainees have faced in trying to assert their rights through the US courts, in the six years since the first detainees were transferred to Guantanamo Bay, the interventions of foreign states have largely been confined to general protests[41] rather than individual-specific, practical action. As illustration of this point, this section focuses on the cases of British nationals and individuals with refugee or long-term residency status in the United Kingdom prior to being held at Guantanamo Bay. In particular, this section considers how the prioritisation of national security and the use of a traditional international law framework to advance rational and neutral justifications for the United Kingdom's

[39] *Ibid.*, 6.
[40] *Ibid.*, 7.
[41] E.g., see S. Knight, 'EU renews call to close Guantanamo after deaths', *Times Online*, 12 Jun. 2006.

initial inaction again exposed these individuals to the uncertainty of inter-state politics rather than provide a firm legal basis upon which to assert their rights.

A. The appropriateness of diplomatic protection as a means of restoring the rights of certain individuals held at Guantanamo Bay

Diplomatic protection is a formal remedy to which a specific international legal regime attaches and enables a state exercising the diplomatic protection to demand a response from the state at which the intervention is directed. It therefore differs from political or diplomatic protests which may carry weight as a result of the relationship and power balance[42] between the two states concerned, but as a matter of international law, leave the respondent state free to ignore the intervention made by the protesting state.[43] Article 1 of the International Law Commission's Articles on Diplomatic Protection describes diplomatic protection as:

> consist[ing] of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[44]

The nature of diplomatic protection 'is essentially remedial, and is designed to remedy an internationally wrongful act that has been committed'.[45] It is a remedy of last resort and therefore domestic remedies must first be exhausted before a state can make a formal claim against another state[46] unless '[t]he local remedies provide no reasonable possibility of effective redress' or '[t]here is undue delay in the remedial process which is attributable to the State alleged to be responsible'.[47] In

[42] C. Warbrick, 'Diplomatic representations and diplomatic protection', *International and Comparative Law Quarterly,* 51 (2002), 723, 724–5.

[43] *Ibid.,* 724.

[44] General Assembly, 'Resolution Adopted by the General Assembly, 62/67: Diplomatic Protection', UN Doc. A/RES/62/67 (8 Jan. 2008) (adopting the International Law Commission's *Draft Articles on Diplomatic Protection*, UN Doc. A/61/10).

[45] General Assembly, 'Report of the International Law Commission: Fifty-Eighth Session', UN Doc. A/61/10 (2006), 27.

[46] *Ibid.,* Art. 44.

[47] International Law Commission, *Diplomatic Protection: Titles and Texts of Draft Articles 8[10], 9[11] and 10[14] adopted by the Drafting Committee*, UN Doc. A/CN.4/L.631 (15 May 2003) at Art. 10[14].

the context of Guantanamo Bay, therefore, diplomatic protection ostensibly presented the optimal means through which detainees could assert their rights and challenge the legality of their detention in the absence of an ability to lodge a *habeas corpus* application.

Diplomatic protection also provides a clear method – and in the context of Guantanamo Bay, one of the only ways – for states to fulfil their obligations *erga omnes*. This is particularly relevant in situations such as Guantanamo Bay, where the individual detained alleges torture or cruel, inhuman or degrading treatment or punishment since the prohibition of torture is a *jus cogens* norm which gives rise to obligations *erga omnes*. In *Prosecutor* v. *Furundzija,* the International Criminal Tribunal for the Former Yugoslavia held that:

> [T]he prohibition of torture imposes upon States obligations *erga omnes,* that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.[48]

Moreover, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the International Court of Justice (ICJ) held that states were not only under an obligation 'not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory' and 'not to render aid or assistance in maintaining the situation created by such construction' but also under the positive obligation to 'see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end … and to ensure compliance by Israel with international humanitarian law as embodied by the [Geneva] Convention[s]'.[49]

Article 40 of the International Law Commission's Articles on State Responsibility deals with the 'international responsibility which is entailed by a serious breach by a State of an obligation arising out of a peremptory norm of general international law'.[50] Article 41(2) provides

[48] *Prosecutor* v. *Furundzija,* International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95–17/1-T (1998), para. 151.

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), para. 159.

[50] International Law Commission, *Responsibility of States for Wrongful Acts*, UN Doc. A/59/49 (Vol. 1) Corr. 4 (2001).

that: '[n]o state shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.' In order to meet their obligations *erga omnes,* Article 41(1) requires states to 'cooperate to bring to an end by lawful means any serious breach within the meaning of Article 40'.[51] In this respect, the United Nations' Human Rights Committee has recognised that as a means to comply with obligations *erga omnes* in General Comment No. 31, states should: 'draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.'[52]

In fulfilling their obligations *erga omnes* in the case of Guantanamo Bay, states must use all available and lawful means to bring to an end the arbitrary detention and ill-treatment to which the detainees are exposed. In this respect, two available lawful means are either to make general protests about the situation and/or to make specific requests for the fair trial or release and return of individual detainees by way of diplomatic protection. However, as the cases of the British nationals and individuals with refugee and long-term residency status discussed below illustrate, diplomatic protection has offered a far from ideal avenue to restore detainees' rights and resolve the 'legal black hole' of Guantanamo Bay.

B. The case of the British national: Feroz Abbasi

Nine British citizens were detained at Guantanamo Bay between, according to best estimates, January 2002/mid-2003 and January 2005.[53] While the UK Government had contacted the US Government with regard to their treatment and well-being on a number of occasions, no representations had been made on their behalf to challenge the basis for detention and their lack of access to *habeas corpus* review.[54]

One of the detainees, Mr Feroz Abbasi and his mother brought a claim in the English courts for judicial review of the Secretary of State's

[51] *Ibid.*

[52] Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

[53] Five of the British citizens were released on 9 March 2004 (Ruhal Ahmed, Tarek Dergoul, Jamal Udeen, Asif Iqbal and Shafiq Rasul); the remaining four were released on 25 Jan. 2005 (Martin Mubanga, Feroz Abbasi, Richard Belmar, and Moazzam Begg).

[54] *Abbasi*, 4.

decision not to make diplomatic representations on his behalf to the US Government. In so doing, they requested the court to declare that the Secretary of State was under a duty to make representations to the United States for his fair trial or release and return to the United Kingdom.

1. Appropriateness of seeking a judicial review of the decision not to exercise diplomatic protection

Under traditional international law, diplomatic protection reflected a right of the state and not the individual concerned. The exercise of diplomatic protection was seen as discretionary,[55] as it was for the state to decide whether it would be in its best interests to intervene. As the ICJ stated in *Barcelona Traction*, 'the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease' and 'should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law'.[56] This view afforded the state the opportunity to take into account a wide range of considerations beyond the situation of the individual such as inter-state relations and commercial interests in the state concerned.

However, a number of states now provide for a right to diplomatic protection within their constitutional law.[57] Moreover, the decision as to whether to exercise diplomatic protection is increasingly subject to judicial review. The International Law Association recently endorsed judicial review in its Resolution on Diplomatic Protection of Persons and Property: 'in the context of due process and the prevention of arbitrariness … and to ensure that the government of nationality considers the position of the particular individual and the extent to which such action might be taken.'[58]

Judicial review of decisions not to exercise diplomatic protection is available in a number of national jurisdictions and may result in an order to pay compensation to the individual where the state refuses to

[55] International Law Association, *Diplomatic Protection of Persons and Property: Final Report*, Toronto Conference, 2006, para. 11.

[56] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, ICJ Reports (1970) 3, paras. 78–79.

[57] E.g., International Law Commission, First Report on Diplomatic Protection by Mr. John R. Dugard, Special Rapporteur (7 Mar. 2000) UN Doc. A/CN.4/506, para. 2 (commentary on Art. 2).

[58] International Law Association, *Diplomatic Protection of Persons and Property*, para. 2.

exercise diplomatic protection on his or her behalf.[59] For example, David Hicks, an Australian who was detained at Guantanamo Bay, recently brought an action for *habeas corpus* and judicial review of the Australian Government's decision not to intervene on his behalf to secure his release or fair trial. The Federal Court of Australia granted Mr Hicks leave to bring a case against the executive for its failure to take action on his behalf since 'deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing before this Court'.[60] Thus, the request for judicial review of the United Kingdom's decision not to intervene in the case of Mr Abbasi was consistent with developments in other jurisdictions.

2. The English Court of Appeal's decision in Mr Abbasi's case

In a rare commentary on another state's judicial system, the English Court of Appeal premised its consideration of the application for judicial review: 'on the basis that, in apparent contravention of fundamental principles [particularly "the ancient writ of *habeas corpus*"[61]] recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a "legal black-hole".'[62]

However, in spite of such a rare and bold assertion, the Court of Appeal's decision assumed the traditional international law position that diplomatic protection reflects a discretionary remedy of the state and not the right of the individual.[63] Thus, while the court suggested that the judiciary could make a mandatory order to the Secretary of State to consider a request to make diplomatic representations,[64] the Secretary of State was under no duty to intervene, even in a case such as Mr Abbasi's where no other remedy was available to challenge his detention. The court explained that: '[i]t is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with

[59] *Ibid.*, para. 162 (discussing the availability of administrative or judicial review and in some instances compensation for the failure to provide diplomatic protection in the Spanish, German – particularly the case of *Rudolph Hess*, Case No. 2 BVR4 19/80, 90 ILR 386 – and Swiss courts).
[60] *Hicks* v. *Ruddock* (2007) FCA 299 (8 Mar. 2007), 90–2.
[61] *Abbasi*, para. 59.
[62] *Ibid.*, para. 64.
[63] International Law Association, *Diplomatic Protection of Persons and Property*, at para. 11.
[64] *Abbasi*, para. 104.

injury in a foreign State.'[65] In explaining the reach of diplomatic protection the court concluded that:

> it must be a 'normal expectation of every citizen,' that, if subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate[66] … [but] the policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will 'consider' making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.[67]

Thus, while appealing to a legal doctrine to restore his rights, the decision of the English Court of Appeal did not improve Mr Abbasi's position. Rather, it left him without any legal means through which to assert his rights, the restoration of which remained at the discretion of the British Executive.[68] Indeed, as the English Court of Appeal demonstrated in quoting the position of the Deputy Under-Secretary of State for Foreign and Commonwealth Affairs, whether diplomatic protection would be extended to Mr Abbasi was particularly uncertain due to the macro political climate resulting from the 'war on terror'. And thus, factors entirely unrelated to his detention in a 'legal black hole' would inform the United Kingdom's decision as to whether to make interventions on his behalf:

> Assessments of when and how to press another State require very fine judgements to be made, based on experience and detailed information gathered in the course of diplomatic business. In cases where a person is detained in connection with international terrorism, these judgements become particularly complex. As regards the issue of the detainees now at Guantanamo Bay, as well as satisfying the clear need to safeguard the welfare of British nationals, the conduct of United Kingdom international relations has had to take account of a range of factors, including the duty of the Government to gather information relevant to United Kingdom national security and which might be important in averting a possible attack against the United Kingdom or British nationals or our

[65] *Ibid.,* para. 69.
[66] *Ibid.,* para. 98.
[67] *Ibid.,* para. 99.
[68] See *Barcelona Traction,* paras. 78–79 (stating that: 'the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease' and 'should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.')

> allies; and the objectives of handling the detainees securely and bringing any terror suspects to justice.[69]

Following the *Abbasi* case, the Foreign and Commonwealth Office did visit the British detainees on a number of occasions[70] and began to make representations to the US Government that they either face a fair trial or be sent back to the United Kingdom. On 26 April 2004, the Foreign and Commonwealth Office announced that it had secured the release of five of the British detainees and that it remained in discussions with the United States regarding the remaining four which included Mr Abbasi.[71] The final four were released at the beginning of 2005.[72]

However, these interventions were not based on any recognition of the right of citizens to diplomatic protection and thus only served to underscore the inadequacy of both international law and British constitutional law in protecting nationals held arbitrarily abroad, as a result of the significant deference to the Executive in the area of foreign affairs.

C. The cases of the detainees with refugee and long-term residency status in the United Kingdom

Beyond the nine British nationals, six individuals with refugee or long-term residency status in the United Kingdom were also held at Guantanamo Bay. Shaker Aamer is a Saudi national and long-term British resident. Jamil El Banna is a Jordanian citizen who had been granted indefinite leave to remain in the United Kingdom and refugee status. Omar Deghayes is a Libyan national who had indefinite leave to remain and refugee status in the United Kingdom. Binyam Mohamed is an Ethiopian citizen and was given leave to remain in the United Kingdom while his application for political asylum was processed. Bisher Al-Rawi is an Iraqi citizen who fled Iraq with his family in 1983. While his family members became British citizens, Mr Al-Rawi retained his Iraqi nationality, as the family felt that this might assist them in recovering property

[69] *Abbasi,* para. 7.

[70] See, e.g., Foreign and Commonwealth Office, 'Statement on the British nationals detained in Guantanamo Bay' (10 Mar. 2003); Foreign and Commonwealth Office, 'Statement on British Guantanamo Bay detainees' (20 May 2003).

[71] Foreign and Commonwealth Office, 'Statement by the Foreign Secretary on return of British Guantanamo detainees' (26 Apr. 2004) (Rhuhel Ahmed, Tarek Dergoul, Jamal Al Harith, Asif Iqbal and Shafiq Rasul).

[72] Foreign and Commonwealth Office, 'Straw statement on return of last British detainees at Guantanamo Bay' (12 Jan. 2005).

appropriated in Iraq. Abdennour Sameur is an Algerian national with indefinite leave to remain in the United Kingdom as a refugee.

Attempts to judicially review the decision of the British Government not to intervene on their behalf proved even more unsatisfactory as a means of restoring their legal rights as the United Kingdom not only denied that they were under any obligation to intervene but also claimed that they enjoyed no legal right to do so. This position attempted to mask the political reality in which states can always choose to make political representations to other states even in relation to individuals with no connection to the state. Also, it sought to advance a legally rational and neutral basis for choosing not to intervene on behalf of individuals with whom it has a very real connection.

1. The position of the Foreign Office Minister

Only after the British detainees had been released, did the then Foreign Office Minister, Baroness Symons, start to make inquiries as to the health and treatment of the long-term British residents at Guantanamo Bay.[73] However, no representations were made for their fair trial or release and return in contrast to the Government's eventual approach to the British citizens. In response to requests for diplomatic representations to be made on their behalf, the Foreign and Commonwealth Office's initial position focused on its 'longstanding policy … not to offer consular assistance to non-British nationals, except in cases in which a specific agreement to do so exists with another state'.[74]

Baroness Symons went as far as to write to the family of Mr Deghayes to the effect that: '[h]is detention and welfare are matters for the United States and Libya. I can only advise that you contact the Embassies of the United States and Libya in London and seek information from them.'[75] Similarly, in relation to Mr Al Rawi, Baroness Symons wrote that: '[i]f he was travelling on Iraqi documentation, then clearly it is the role of the Iraqi authorities to provide assistance either directly or through a country which they have indicated they wish to represent their interest.'[76]

Given that in both cases the detainees were resident in the United Kingdom as a result of having fled from their countries of origin, the

[73] *R (on the Application of Al Rawi and others)* v. *Secretary of State for Foreign and Commonwealth Affairs and another* [2006] EWHC 458, paras. 21–22.
[74] (2006) UKMIL, 6/64, FCO Minister reply to adjournment debate on Guantanamo Bay.
[75] *Al Rawi,* para. 19.
[76] *Ibid.*

Court of Appeal later termed these statements as 'crass'.[77] In making these statements, Baroness Symons also adopted a highly formalistic and traditional approach to diplomatic protection. Under traditional international law, the ability of a state to exercise diplomatic protection was premised on the 'nationality of the claimant state attaching to the individual or corporation'.[78] In the *Panevezys-Saldutiskis* case, the Permanent Court of International Justice discussed the basis for diplomatic protection as, 'in the absence of special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection'.[79]

Under traditional international law, diplomatic protection belonged to the state of nationality because its exercise was seen as the right of the state alone – what is often referred to as the 'Vattelian fiction' of diplomatic protection.[80] However, the increasingly held view is that diplomatic protection is exercised by a state as the individual's agent rather than in its own exclusive interest. As the International Law Association notes:

> The essence of the evolution points toward the fact that in both the scenario of diplomatic protection and in that of direct standing of the individual, it is increasingly the right of the individual that is asserted in its own merits and no longer that of state of nationality. The state may still act as a conduit, an agent, or on behalf of the individual, but no longer substituting for his rights. This is not to say that the state may not consider that a wrong done to one of its nationals affects its own interest, but the latter will be the consequence of the rights of the individual and not of the state's own right.[81]

Thus when the focus of the exercise of diplomatic protection is the individual, strict rules of formal nationality give way to practical assessments of which state has most connection to the individual and can therefore best assert their rights.

Baroness Symons' portrayal of the international law position failed to take into account a number of long-standing exceptions to the nationality rule which arose out of a connection or relationship between the state

[77] *Ibid.*, para. 20.
[78] I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003), 389.
[79] PCIJ Series C, No. 5–1, 61.
[80] PCIJ, Series A/B, No. 61, *Appeal from a Judgment of the Hungaro-Czechoslovakia Mixed Arbitral Tribunal*, 231 (1933).
[81] International Law Association, *Diplomatic Protection of Persons and Property*, para. 18.

seeking to provide protection and the non-national, particularly in cases where no other state could *de jure* or *de facto* exercise protection on their behalf.[82] These exceptions transgress the formal requirement of nationality to respond to factual situations in which the individual has a close bond with another state beyond the one of origin. The first category of non-nationals on whose behalf a state may exercise diplomatic protection arises out of contractual, treaty or *ad hoc* arrangements which establish 'agency'.[83] A second category of non-nationals also entitled to the diplomatic protection of a state other than their state of origin relates to individual who would otherwise be placed outside of the realms of diplomatic protection as no state legally or practically exists to take up his or her claim.[84] Drawing on these long-standing exceptions, the second category in particular, the International Law Association recently passed a resolution providing for diplomatic protection in the state of residence.[85] It set out that diplomatic protection could be brought on behalf of non-nationals in exceptional circumstances, particularly in relation to 'humanitarian concerns or where the individual would have no other alternative to claim for his rights'.[86]

Article 8 of the Articles on Diplomatic Protection confirms this approach in international law by providing that:

> 1. A State may exercise diplomatic protection in respect of a stateless person who at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
> 2. A State may exercise diplomatic protection in respect of a person who is recognized by that State, in accordance with internationally

[82] *Reparation for Injuries Suffered in the Service of the United Nations,* ICJ Reports (1949) 181 (finding that: 'in inter-state relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality').

[83] Brownlie, *Principles of Public International Law,* 460. See, e.g., Art. 5(1)(a) of the *Provisional Rules for Claims Procedure of the United Nations' Compensation Commission*, UN Doc. S/AC.26/1992/10 (26 Jun. 1992) (providing that, '[g]overnments and international organizations are entitled to submit claims to the Commission. A Government may submit claims on behalf of its nationals and at its discretion, of other persons resident in its territory.') See, also, P. Weis, *Nationality and Statelessness in International Law*, 2nd edn (Germantown, MD: Sijthoff and Noordhoff, 1979), 40 (setting out a number of categories of non-nationals to whom protection may be afforded on a functional basis while continuing to enjoy the protection of the state of nationality).

[84] Weis, *Nationality and Statelessness*, 40.

[85] International Law Association, *Diplomatic Protection of Persons and Property*, para. 6.

[86] *Ibid.,* para. 7.

> accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

Article 8 focuses on the underlying rationale for diplomatic protection by requiring a close link to the state seeking to exercise protection. Yet, the requirement of lawful and habitual residence demonstrates the high threshold required to come within the terms of Article 8. The narrow nature of the principle is therefore designed to respond to the situation in which no state exists to exercise diplomatic protection on behalf of the individual but still requires the close bond as set out in the *Panevezys-Saldutiskis* case.[87]

Thus, in advancing this traditional international law position, Baroness Symons failed to recognise the applicability of these long-standing exceptions in international law as for individuals with refugee status, the state of original nationality, as one commentator notes, is precluded from exercising diplomatic protection on behalf of the individual because of the 'disruption or non-existence of the normal bond of trust and allegiance between citizen and government, leaving a relationship of fear and alienation … The denial of state protection is actually a symbol or a manner of speech to describe the broken bond.'[88] Indeed, he points out that if the state of original nationality did try to exercise diplomatic protection on behalf of the refugee, as a result of the broken bond: 'that government would most likely exercise "protection" not for the benefit of the refugee, but for its own purposes[89] … intervention by the state of nationality "on behalf of" refugees may cause considerable hardship for the individuals involved, and recognition of the legitimacy of such intervention could create the impression that the asylum is imperfect.'[90]

Moreover, for long-term residents, the ICJ's decision in *Nottebohm* suggests that in certain cases the state of original nationality may be unable to exercise diplomatic protection due to a lack of the close bond which the individual now has with the state of residence. In this case, Mr Nottebohm was formally a national of Liechtenstein. However, the

[87] See, also, Brownlie, *Principles of Public International Law,* 406 (confirming the suitability of the effective nationality principle in cases involving refugees who would otherwise be left 'stateless or link[ed] to a community which he has tried to quit permanently in many cases').

[88] A. Grahl-Madsen, 'Protection of refugees by their country of origin,' *Yale Journal of International Law,* 11 (1985–1986), 362, 375.

[89] *Ibid.,* 389.

[90] *Ibid.,* 390.

ICJ denied Liechtenstein the right to exercise diplomatic protection on his behalf due to the lack of an effective link or connection to Liechtenstein. The court characterised nationality as:

> A legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties … the judicial expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the State conferring nationality than that of any other State.[91]

Thus, essentially, what Baroness Symons was asking the residents to do was to re-establish a bond and seek the protection of countries from which they had fled, despite the fact that the United Kingdom had purported to offer them protection through the provision of indefinite leave to remain and refugee status.

2. The attempt to have the decision not to intervene judicially reviewed

As a result of these statements, three of the detainees at Guantanamo Bay (Mr El Banna, Mr Deghayes and Mr Al-Rawi) and their families brought an action for the judicial review of the Secretary of State's decision not to intervene on their behalf. They sought a declaration that 'the Foreign Secretary is under a duty to make a formal and unequivocal request of the United States for the release and return of the detainee claimants to this country' and/or a 'declaration that the Foreign Secretary is under a duty to make the same representations to the United States of America in respect of the detainee claimants *as have been made in respect of British citizens* detained at the Guantanamo Naval Base in Cuba'.[92]

In contrast to the *Abbasi* case, in which the treatment of Mr Abbasi was not pleaded, all three detainees alleged that they had been tortured and ill-treated. Indeed, the Court of Appeal proceeded 'on the premise that the detainee claimants have been subjected at least to inhuman and degrading treatment'.[93]

Again, the Secretary of State justified the decision not to intervene on national security grounds, despite the fact that the detainees' position as 'terror suspects' had precisely led to their vulnerability, subjection to ill-treatment and possible torture, and lack of access to *habeas corpus*

[91] *Nottebohm Case (Second Phase) (Liechtenstein* v. *Guatemala)* ICJ Reports (1955) 23.
[92] *Al Rawi,* para. 30.
[93] *Ibid.,* para. 3.

review. The Secretary of State added that: 'It is assessed that Mr El Banna and Mr Deghayes would pose a significant threat to national security and the public if they were permitted to return to the UK. The assessment in relation to Mr Al Rawi is that he might in some circumstances pose a threat, but the risk of this is at a lower level than for the others.'[94]

As in *Abbasi*, the Secretary of State also underscored the weight it accorded to the United Kingdom's relationship with the United States, emphasising the risk of expending its 'diplomatic credit' with the United States in cases in which it deemed interventions to be counterproductive and ineffective, particularly as 'Guantanamo Bay and what the US calls the "Global War on Terror" are currently topics of particular significance and sensitivity for the US Government'.[95]

However, in attempting to provide a legally rational basis for its refusal to intervene on behalf of the long-term residents despite the fact that no other state could provide them with diplomatic protection, the Secretary of State again advanced its Vattelian view of diplomatic protection by asserting that it lacked legal standing to act:

> [A] sovereign State only possesses standing to seek redress or remedial action from another sovereign State on behalf of an individual where that individual is a national of the first State … There is of course nothing to prevent a State from making representations to another on behalf of a person who is not one of its nationals; indeed, there is nothing to prevent such representations being made on behalf of anyone at all. But the principle of international law asserted by the first respondent, and summarised in the assertion of standing to which we have referred, articulates a legal position which is quite distinct from this ordinary factual reality. The reference is to a *right* which is recognised and enjoyed by every State to afford diplomatic protection for its own nationals by means of a State to State claim.[96]
>
> The process is by its nature wholly different from the making of intercessionary or humanitarian representations on behalf of a non-national, and the response which they might elicit.[97]
>
> The US Government is fully alive to the UK Government's lack of any recognised right to intervene on their behalf in the way that the Claimants seek. In our assessment and that of the FCO, the US Government would be very likely to resist any intervention along the lines which the Claimants seek. In our view … lobbying along these lines would not be effective in itself.[98]

[94] *Ibid.*, para. 37.
[95] *Ibid.*, para. 33.
[96] *Ibid.*, para. 28.
[97] *Ibid.*, para. 29.
[98] *Ibid.*, para. 34.

However, as the litigation proceeded, the government's focus shifted to concerns over the practicality and efficacy of interventions rather than any absence of standing. As the Court of Appeal noted, 'this point's importance has receded'.[99]

By the time the case reached the Court of Appeal, the Secretary of State had made a formal request for the release of Mr Al Rawi, who was later released on 30 March 2007. However, the request was explained by the government as:

> The Foreign Secretary has investigated these matters and has concluded that there is a basis on which it would be possible to approach the US Government on Mr Al Rawi's behalf with some reasonable prospect of success, and without causing the significant counterproductive effects more generally … the matters referred to do not give rise to a legal obligation on him to make any request at all.[100]

In addition to the claims that the refusal to make representations to the United States constituted a violation of the rights of the family members under Articles 3 and 8,[101] the Court of Appeal focused on whether the refusal of the Secretary of State to make the same representations to the United States in respect of the detainee claimants as had been made in respect of British citizens constituted unlawful discrimination under the Race Relations Act 1976; whether it constituted a breach of legitimate expectations; whether the position on state to state claims in international law and the primacy of nationality was mistaken; and whether its judgment as to practicality and efficacy was flawed.

The court did not undertake a detailed analysis of the question of standing, particularly as it had determined that the importance of the issue had receded. Rather, it interpreted Article 8 of the Draft Articles on Diplomatic Protection as *de lex ferenda* and not *de lege lata*[102] and therefore found that the United Kingdom did not have standing to make formal representations on behalf of the three nationals.

The court then considered whether the executive had acted discriminately in failing to intervene on behalf of the non-nationals when it had intervened on behalf of the nationals and whether it had breached a legitimate expectation of the non-nationals in so doing. The court dismissed this argument, however, as it had already adopted a traditional

[99] *Ibid.*, paras. 28 and 48.
[100] *Ibid.*, para. 38
[101] This part of the case is not dealt with in this chapter.
[102] *Ibid.*, paras. 118–19.

international law position on standing, finding that diplomatic protection was only exercisable in relation to nationals. As discussed above, this interpretation is inconsistent with the international law on diplomatic protection which has always recognised exceptions to the general rule of nationality, precisely in circumstances in which an individual would be otherwise unprotected. Interestingly, however, in contrast to its decision in *Abbasi,* the court then shifted from its Vattelian approach to a modern view of diplomatic protection by recognising diplomatic protection as the right of the national rather than the right of the state concerned. It explained that:

> A person who is not a British national is not entitled to the protection of a State to State claim made by the first respondent. That is not an *attribute* of the non-British national. It is not a function of how he is likely to behave. It is … simply a legal fact … The national and the non-national are in truth in materially different cases one from the other for the purpose of the exercise of the right of diplomatic protection by means of State to State claims … The non-nationals have been treated differently from the nationals not because of their race (nationality) but because one group is entitled to diplomatic protection and the other is not.[103]

The thrust of the court's reasoning appeared to be most concerned with the efficacy and practicality of the interventions rather than their legal basis. In relation to both the Articles on Diplomatic Protection and Article 16 of the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention),[104] therefore, the court held that they 'do not in truth engage the core of the case: the first respondent's judgment that any formal representations to the US authorities on behalf of the detainee claimants would be ineffective and counterproductive'.[105] In this respect, the court appears to have suggested that if the appellants could have shown that an intervention would be effective and productive in securing the fair trial or release and return of the individuals, the court would be prepared to consider whether the Secretary of State's decision not to intervene was sound.

The House of Lords granted leave to appeal the Court of Appeal's decision. However, shortly before the Lords were due to hear the case, the Secretary of State decided to request the release and return of the

[103] *Ibid.,* para. 78.

[104] 1951 Convention relating to the Status of Refugees, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

[105] *Al Rawi*, para. 122; see also, para. 120.

appellants as well as Binyam Mohamed and Abdennour Sameur. The appellants accordingly withdrew their case.[106] In contrast to the nature of its intervention on behalf of the British nationals, however, the Foreign and Commonwealth Office did not place emphasis on the deprivation of their rights or the possibility that they might be tried by military commission, a system the British Government had already expressed its concerns about. Rather, the focus of the intervention was on the provision of assistance to the United States in closing Guantanamo Bay. As the Foreign Secretary stated:

> My Right Honourable Friend the Home Secretary and I decided to seek the release of the five in light of work by the US government to reduce the number of those detained at Guantanamo and our wish to offer practical and concrete support to those efforts. In reaching this decision we gave full consideration to the need to maintain national security and the Government's overriding responsibilities in this regard.[107]

Jamil El Banna, Omar Deghayes and Abdennour Sameur were released and returned to the United Kingdom in December 2007. The British Government remains in discussions regarding Binyam Mohamed, who is still detained at Guantanamo Bay but is no longer discussing the situation of Shaker Aamer with the United States.

Thus, in contrast to the *habeas corpus* litigation in the United States, the litigation efforts in the United Kingdom did little to shift the political underpinnings of the 'war on terror' to a rights-based approach. Rather, they demonstrated the continuing influence of traditional international law and deference to the Executive where the rights of nationals and individuals with refugee and long-term residency status are severely impacted through detention abroad.

IV. Conclusion

This chapter has considered how the use of two legal doctrines, *habeas corpus* and diplomatic protection, have been used in attempts to restore the rights of detainees held at Guantanamo Bay in a context in which national and global security has been prioritised to the exclusion of human rights and human security. The *habeas corpus* applications have

[106] Foreign and Commonwealth Office, 'Guantanamo Bay: former UK residents', 7 Aug. 2007.

[107] Foreign and Commonwealth Office, 'David Miliband: written ministerial statement on Guantanamo Bay: return of UK residents' (13 Dec. 2007).

ultimately been successful in confirming the reach of the US Constitution to detainees at Guantanamo Bay. These decisions have also potentially opened the space for litigation on other issues relating to Guantanamo Bay. For example, at least sixty individuals currently remain detained at Guantanamo Bay despite the fact that they have been cleared for release but cannot be returned to their country of origin due to the risk of torture, cruel, inhuman or degrading treatment, or persecution.[108] Although at least forty men are thought to have been returned to states in which they would be at a risk of torture or cruel, inhuman or degrading treatment or punishment in contravention of international law, the terms of the Military Commissions Act 2006 prohibit the establishment of a legal mechanism through which these individuals could challenge their return.[109] The Supreme Court decision may enable these detainees to challenge a proposed return to their country of origin.

Equally, however, the affirmation of detainees' rights under the Constitution has taken six years, during which time detainees have languished in a 'legal black hole'. Moreover, the Supreme Court's decision in *Boumediene* leaves a number of procedural issues unanswered and the Department of Defense's response indicates that it has not resulted in any overall policy shift by the administration. Rather, the Department of Defense's response suggests that the Administration will seek to contain the reach of *Boumediene* in so far as it applies to Guantanamo detainees and to prevent its extension to detainees held in other known and secret detention sites outside of US territory. Therefore, while the decision is significant, from a macro perspective, it has only made limited inroads into a much larger political prioritisation of national security over individual rights.

While the cases of *Abbasi* and *Al-Rawi* did not reach the House of Lords or the European Court of Human Rights and cannot therefore be viewed as determinative, they do suggest serious shortcomings in the law on diplomatic protection as a means to restore the rights of nationals and individuals with a strong connection to the state through refugee or permanent residency status. Moreover, these two cases address only two issues relating to detainees held at Guantanamo Bay. They do not, as set out above, address the situation of individuals who cannot be returned to their state of origin or those who may face trial by military

[108] See Centre for Constitutional Rights and FIDH, 'European Countries Responding to the Refugee Crisis at Guantánamo: Frequently Asked Questions' (n/d); See, also, ch. 14 by V. Vandova in this book, discussing the absolute obligation of *non-refoulement*.

[109] Centre for Constitutional Rights and FIDH, 'European Countries', 2.

commission at Guantanamo Bay, which, as the former British Law Lord, Johan Steyn, has commented:

> are not independent courts or tribunals. The term 'kangaroo court' springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice … Trials of the type contemplated by the United States government would be a stain on United States justice. The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely.[110]

Although legal strategies may bring about further relief, political commitment to restoring the individuals' rights by the US and foreign states is also necessary. For example, even if the right to challenge the return to the state of origin is achieved, the question still remains as to where these individuals would be sent. Although the European Parliament has passed a resolution calling on EU member states to receive individuals held at Guantanamo Bay who cannot be returned to their own countries,[111] so far no state has accepted a cleared detainee. Indeed, only Albania has accepted six former Guantanamo detainees who could not be sent to China as a result of their Uighur ethnicity. However, due to the lack of integration facilities in Albania, these individuals have faced extremely challenging circumstances and have had little opportunity to integrate into society.[112]

As a result, even where legal interventions have been successful, they have only impacted a small part of a larger political framework with national and global security at the centre. There are indications that the tide is turning, at least in relation to Guantanamo Bay. The then US President, George W. Bush, the then Secretary of State, Condoleezza Rice and then Defense Secretary, Robert Gates each publicly acknowledged their interest in closing Guantanamo Bay. Similarly, President Barack Obama has expressed his commitment to closing the facility. The exceptionalist approach to human rights pursued by the former administration is wider than Guantanamo Bay alone, which, due to its visibility, is representative of a much larger problem and therefore efforts to ensure the prioritisation of human rights and human security within national

[110] Steyn, 'Guantanamo Bay: the legal black hole', 13.

[111] European Parliament, 'Resolution of 12 Dec. 2007 on the Fight against Terrorism', B6 – 0514/2007 (12 Dec. 2007).

[112] See Human Rights Watch, Amnesty International, Center for Constitutional Rights, ICJ, FIDH, REDRESS, Reprieve, Swedish Helsinki Committee, Swedish Network of Refugees and Asylum Support Groups and OMCT, 'NGO Support Letter to the Swedish Migration Board on the Adel Hakim Case' (25 Jan. 2008).

and global counterterrorism strategies must permeate national, international and global coalition efforts. As noted at the outset, at the United Nations level, this shift has begun to happen; and it must also occur at the national and coalition levels to prevent unilateralist and exceptionalist approaches to human rights within the counter-terrorism context.

INDEX

Aamer, Shaker, 576, 585
Abbasi, Feroz, 572–576
Afghanistan
  Canadian transfers of detainees to, 442–444
  development, 114
  Independent Human Rights Commission, 443
  refugees
    empowerment, 100–101
    peace and security, 111–112
    protection, 97
    returning women, 104
  US invasion, 12, 14, 87
  US standards of treatment, 429
  war on terror, 433–434
African Charter on Human and Peoples' Rights, 135, 286, 383
African Court on Human and People's Rights, 398, 521
age, gender and diversity mainstreaming (AGDM), 100
Al Qaeda, 433, 437, 459, 475, 476, 485, 488, 489, 568
Al-Rawi, Bisher, 576, 577, 581, 582, 583
Albania, 212, 587
Algeria, 467, 476, 515–516
aliens. *See* non-citizens
American Convention on Human Rights (1969)
  environmental rights, 383
  jus soli nationality, 61
  non-discrimination, 286
  non-refoulement, 502
  torture prohibition, 542
American Declaration on the Rights and Duties of Man (1948), 286
Amnesty International, 138
anarchy, realism and, 10
ANC, 170
Angola, 137, 170
Annan, Kofi
  human security, 23, 30, 90
  illegality of Iraq invasion, 14
  images of migrants, 228
  international cooperation, 93
  migrants' contribution, 272
  responsibility to protect, 120
  three pillars of UN, 103
  voluntary migrants, 231
  widening security agenda, 389–390
Anwar, Dewi Fortuna, 394
Arar, Maher, 446, 447–448, 548, 553, 554–555
Arbour, Louise, 87, 90–91, 122
Argentina, 278
armed conflicts
  See also international humanitarian law
  children, 106–107
  climate change and, 384
  definition, 434
  gender and, 109–110
  globalisation and, 87
  human rights law and, 435
  mass influxes of refugees, 88–89
  post-Cold War proliferation, 85–86
  sexual violence, 107–108
ASEAN, 287–288
Ashcroft, John, 475, 484
asylum
  See also asylum-seekers; refugees
  national security exceptions, 471
  non-binding right, 334

asylum (cont.)
official use of, 183
protracted refugees and, 125
refusal, justifications, 177
right to seek asylum, 7, 84
UDHR exceptions, 37
asylum-seekers
See also refugees
alternative forms of protection, 318
Cold War framework, 15, 16
detention, 489
non-refoulement, 202–203
return, torture risks, 444–445, 447, 495, 503–504
security discourse, 15–21, 37, 40, 471
Australia, 153, 198, 212, 328–329, 573–574
Austria, Human Security Network, 28
Awori, Minister, 132

Bali Process, 247
Balkans. *See* Yugoslavia
Ban Ki-Moon, 86, 105, 121, 255
Bangladesh, 253, 366
Banjul Charter, 135, 286, 383
Banyarwanda people, 52
Barber, Ben, 185
Barbour, Brian, 121
Batliwala, S., 99
Belgium, 245
Berne Initiative, 236, 240–241, 293–295
Bidoons, 51, 70
biometrics, 234
Black, Richard, 133
boat people, 210–213
Bosnia
extraordinary renditions and, 547
failure to protect Srebrenica, 119
genocide, 86
humanitarian intervention, 38
protection of refugees, 97
Brandt Commission, 22
Brazil, 241
Budapest Group, 247, 303–304
Burkina Fasso, 280
Burundi, refugees from, 144
Bush, George H., 433
Bush, George W.
Darfur policy, 121
Detainee Protection Act, 442
exceptionalism, 560
Guantanamo Bay, 587
invasion of Iraq and Afghanistan, 14
on irregular migrants, 228
trial of non-citizens, 437
unilateralism, 13
business, migrants and, 252–255

CAFTA-DR, 288
Calvo Doctrine, 427
camps. *See* protracted refugees
Canada
Charter of Rights, 444, 454
Chinese migrants, 328
counter-terrorism
Arar inquiry, 447, 548, 553
detainee transfers to Afghanistan, 442–444
detention of aliens, 449–450
extraordinary renditions, 446, 553
racialised security discourse, 335
security certificates, 449, 454–455
special advocacy, 454–455
Guinea, police deployment, 192
human security
concept, 31, 90
foreign policy and, 27–28
Human Security Network, 28, 265
website, 267
Japanese in WWII, 421
MWC and, 280
UN migration report, 280
Canary Islands, 195, 196
CARICOM, 288
Carteret Islands (Papua New Guinea), 369–370
Cels, J., 29, 45, 94, 117
Center for Constitutional Rights, 567
Central African Republic, 105, 106
Chad
asylum as surrogate support for rebels, 183
militarisation of refugee camps, 173
refugees and IDPs, 105, 106, 108

security of refugee camps, 138, 139
UNSC intervention, 86
Chenoy, Anuradha, 41
Chicago Convention (1944), 549–551
children
armed conflicts, 106–107
rights, 135, 423
Chili, Human Security Network, 28
China, 400, 587
citizenship. *See* nationality, non-citizens
civil society, 86, 245, 251–255, 416
civilians, protected persons, 436
civilisation discourse, 470, 491
Clarke, Charles, 483
climate-induced displacement
assumptions, 363–364
climate change refugees, 318
complex patterns, 234
conceptualising issue, 363
human security approach, 360–361, 387–400
advantages, 391–393
critiques, 394–396
human rights v human security, 396–399
international law, 357–360
environmental treaties, 380–384
gaps, 370–387, 399–400
human rights, 373–380, 399–400
humanitarian law, 384–386
institutions, 386–387
refugee Conventions, 370–373
standards of treatment, 374–377
responses, 89
responsibility to protect, 400–402
risks, 357, 361–370
Carteret Islands, 369–370
Inuit, 361, 368–369
numbers, 364–366
socio-economic conditions, 367–368
statelessness, 374–375
wars, 87
clinging nationalities, 425, 447
coercive interrogation, discrimination, 438–444
Cold War, 9–10, 12, 15, 16, 85, 181
Colombia, 112, 115
Colombo Process, 301–303
combatants
as refugees, 170
enemy combatants, 561, 564
privilege, 436
Commission on Human Security
approaches, 190
concept of human security, 29, 388, 407
development and security, 113
empowerment strategy, 33, 83, 95, 98, 268
final report, 24–26, 33, 248
HIV/AIDS, 343
human security and human rights, 268, 397
human v state security, 408–409, 415–417
importance of citizenship, 70
international law and migration, 18
launch, 23–24, 90, 248
migration, 248–249
approaches, 298–299
global governance, 249
motivation, 24
narrow focus, 76
priorities, 118, 266–267
protection strategy, 83, 95
protracted refugees, 125
on regional processes, 247
state-centricity, 266
Committee on Migrant Workers, 310
communications, migration and, 235–236
Congo (DRC)
Banyarwanda minority, 52
destabilisation by Rwandan refugees, 327
Great Lakes crisis, 163
militarised refugees, 171, 182
Mount Nyiragongo eruption, 372
refugee camps
demilitarisation, 189, 192–193
military use of humanitarian aid, 185
political violence, 184
strategic buffers, 185–186

Congo (DRC) (cont.)
refugees and IDPs, 105, 108
return of refugees to, 157, 158
statelessness, 50
UNSC intervention, 86
constructivism, 3, 10–11
consular protection, 259
Convention on the Rights of the Child (1989)
right to nationality, 423
right to security, 135
Coomaraswamy, Radhika, 107
cooperation. *See* international cooperation
Correll, Hans, 534
Costa Rica, 28, 287
Côte d'Ivoire
ethnic tensions, 74
militarised refugees from, 171
refugee camps, 182, 184
statelessness, 50, 75
threat to international peace, 143
Council of Europe
See also specific Conventions
diplomatic assurances and, 467
extraordinary renditions and, 550, 551, 553
Venice Commission, 537, 548, 549, 550
counter-terrorism
See also removal of aliens
asylum and, 177
civilisational discourse, 470, 491
coercive interrogation
Canada, 442–444
United States, 439–442
dehumanisation, 536
exceptionalism, 20, 533, 535, 536, 560
Guantanamo Bay, 562, 563, 567–569, 570
extraordinary renditions. *See* extraordinary renditions
extraterritoriality, 429
human security and terrorism, 533–537
human trafficking and, 234
immigration control. *See* immigration control
legal expediency, 422
'lesser evils' rhetoric, 421–422
migration discourse, 15–21, 87–88, 335
misuse of security discourse, 332
non-citizens and war on terror, 433–444
See also removal of aliens
coercive interrogation, 438–444
immigration paradigm, 445–456
legal discrimination, 427
militarisation, 433–435
military commissions, 437–438
nationality-limited due process, 435–438
non-discrimination appeal, 260
refugee resettlement and, 161–162
resources, 393
rule of law, 457, 458
UN resolutions, 19
war on terror rhetoric, 433
moralism, 560
crimes against humanity, 411–412
Crisp, Jeff, 129, 166
Critical Security Studies, 4, 12
Cuba, 212
Currie, J., 426
customary international law
displaced persons in armed conflicts, 385
environmental obligations, 381
human security and, 408
nationality, 424
non-discrimination, 479
non-refoulement principle, 201, 503
responsibility to migrants, 294
treatment of foreign nationals, 425, 426, 427
denial of justice, 429
Cyprus, 206

Darfur
climate change war, 87
crisis, 163
genocide, 86, 121
refugee camps
disarmament campaigns, 186
military use of humanitarian aid, 185

refugees and IDPs, 105
responsibility to protect, 120
UNSC intervention, 86
death penalty, extradition and, 498, 501, 505
Deghayes, Omar, 576, 577, 581, 585
Deng, Francis, 113–114
denial of justice
Guantanamo Bay, 564, 586–587
non-citizens, 428–429
removal of aliens and, 506–507
deportation. *See* removal of aliens
development
co-development, 256
human security and, 44–46, 112–116
migration and, 235, 263–264
securitisation, 395–396
sustainable development, 381
UN Declaration, 263
dignity, 321, 343–354
diplomatic assurances, 467–468, 511–515, 530
diplomatic protection
asylum alternative, 84
Calvo doctrine and, 427
constitutional rights, 573
dual nationality and, 537
gaps, 586
Guantanamo Bay, 570–572
UK residents, 577–585
justiciability, 573–574, 574–576, 581–585
nationality and, 537, 578–581
state centricity, 34
disarmament, demobilisation and reintegration programmes, 188
discrimination
core human rights Conventions, 479–480
counter-terrorism. *See* counter-terrorism
ECtHR, 283
EU prohibition, 285
gender, 64, 337–338, 339
immigration. *See* immigration control
nationality decisions, 64–66
nationality discrimination
coercive interrogation, 438–444
due process, 435–438
international prohibitions, 426–427
Western democracies, 445–446
race, 64–66, 471–478
survival migrants, 337–339
displaced persons
climate change. *See* climate-induced displacement
Guiding Principles on Internal Displacement, 25, 113, 399
natural disasters, 371
increase, 20–21
international law and, 91
militarisation. *See* militarised refugees/IDPs
post-Cold War, 85–88
post-WWII, 161, 400
Dominican Republic, 50
Doyle Report, 241, 249
due process, war on terror
nationality discrimination, 435–438
removal of aliens, 506–507, 521–526
truncated due process, 452–455, 469–470
Durieux, Jean-François, 191
Dyzenhaus, David, 457

East Timor, 86, 184
economic rights
See also ICESCR
survival migrants, 341–342
ECOWAS, 288
Ecuador, 280
education
protracted refugees, 145–149
right to, 145–147
Edwards, Alice, 372–373
Egypt
diplomatic assurances, 511
extraordinary renditions to, 446
migrants to UK, 476
migrants to US, 475
nationality law, 447
El Banna, Jamil, 576, 581, 585
El-Masri, Khaled, 555–556

Electronic Industries Code of Conduct, 254
emergencies, 37, 450–451
empowerment
  age, gender and diversity mainstreaming, 100
  CHS, 33, 83, 98, 268
  human rights and, 265
  human security and, 417
  migrants, 268, 270–272, 298
  process or outcome, 100
  refugees, 83, 95, 98–101, 114
  stateless persons, 73–74
  strategies, 44
enemy combatants, 561, 564
enforced disappearance, 500, 539
environmental degradation
  See also climate-induced displacement
  displacement, 362–363
  environmental refugees, 363
  migration and, 234, 252
environmental security, 388–391
environmental treaties, 380–384
erga omnes obligations, 536, 571, 572
Eritrea, 183
Estonia, 50
Ethical Trading Initiative, 254
Ethiopia, 136, 183, 184
European Commission against Racism and Intolerance (ECRI), 480
European Committee of Social Rights, 283
European Convention on Human Rights
  discrimination
    immigration control, 338, 484
    UK counter-terrorism, 453
  emergency derogations, 450–451
  extraterritorial reach, 432
  fair trial, removal of aliens, 522–525
  migrant workers' rights, 282
  non-refoulement, 200
    climate change refugees, 379
    extraterritoriality, 206
    fair trial, 507
    legal gaps, 528, 529–530
    migrants with HIV/AIDS, 344–346, 349–352
    right to life, 504–505
    risk of torture, 466–467, 508–510
    scope, 204
    standard of proof, 208
    UK deportation case, 501–502
  ratifications, 479
  right to liberty, 450, 453
  state obligations, 414
  statelessness cases, 69
  torture prohibition, 508, 542
    diplomatic assurances, 513
    evidence, 515–516, 518–520
  underlying values, 501
European Convention on Nationality, 65
European Convention on the Legal Status of Migrant Workers (1977), 283, 291–292
European Court of Human Rights. *See* European Convention on Human Rights
European Parliament, 537, 538, 548, 553, 587
European Social Charter, 283, 291–292
European Union
  Charter of Fundamental Rights, 285–286
  common visa scheme, 472
  diplomatic assurances and, 468
  equal treatment, 285
  free movement of workers, 284
  gender equality, 284
  human trafficking, 417
  integration, 275
  international aid policies, 113
  migrants' rights, 284–286
  Returns Directive, 247–248
expulsion. *See* removal of aliens
extradition
  See also removal of aliens
  agreements, 498
  fair trial and, 506–507
extraordinary renditions
  Chicago Convention (1944) and, 549–551
  Council of Europe inquiry, 537

discrimination against non-citizens, 446–448
foreign support, 547–552
illegality, 15, 537–552
kidnapping, 15, 539
legal actions for redress, 553
meaning, 537, 561
numbers, 446, 537–538
origins, 538
remedies, 552–557
US justification, 532, 541–547
US policy, 532
Venice Commission, 537, 548, 549, 550
extraterritoriality
Canadian Charter of Rights, 444
counter-terrorism and, 492
human rights law, 377
international terrorism, 535
non-refoulement and, 204–208
Refugee Convention, 219
Torture Convention, 546
treatment of aliens, 429–432

fair trial. *See* due process
family life, deportation and, 282
Feinstein, Dianne, 440
Feller, Erika, 88, 115, 122
feminism, 3, 11
financial crisis, 14
Fitzpatrick, J., 533
5+5 Dialogue, 247, 305–306, 311
food security, 114
Ford Institute, 182
foreign policy, 27–28, 73
France, 151, 257, 489
freedom from fear, 398–399, 533
Friends of Human Security, 28, 299

Garcia, M.J., 546
Gates, Robert, 587
GATS, 281–282
gender
See also sexual violence
age, gender and diversity mainstreaming (AGDM), 100
armed conflicts and, 109–110
discrimination, 64, 337–338, 339
EU equal treatment, 284
migrant workers, 280
refugee strategies, 101–102, 107–108
survival migrants, 323
Geneva Conventions. *See* international humanitarian law
Geneva Migration Group, 243, 250
Georgia, 121
Germany
1986 Berlin discotheque bombing, 433
Al Qaeda operations, 489
Arbeitsgruppe BIRGiT, 468
constitutional right to non-discrimination, 479
ECHR ratification, 479
extraordinary renditions and, 549, 553, 557
French 17th century refugees, 151
guest workers, 257
ICCPR ratification, 479
immigrant communities, 460
immigration control as anti-terrorism
coordinated activities, 469
ethnic selectivity, 472, 477
judicial review, 482
post-9/11, 464–465, 477
pre-9/11, 462, 472
rigorous enforcement, 468
truncated due process, 469
Ghana, 160
Global Commission on International Migration (GCIM), 241–242, 249, 256, 293, 318
Global Compact, 254
Global Forum on Migration and Development (GFMD), 245–246, 254, 274, 297–298, 312
Global Migration Group, 243
globalisation
interdependence, 34
international terrorism and, 534
migration and, 86–87, 328
structural poverty and, 322
Goetz, Nathaniel, 129
Gonzales, Alberto, 439–440, 442

Goodwin-Gill, Guy, 19, 37, 95, 257
Gorlick, Brian, 121
Greece, 28, 394
Greenland, 361
Guantanamo Bay
  Administrative Review Board, 564
  Combatant Status Review Tribunal, 437, 564, 566
  habeas corpus, 438, 563, 564–569
  international law and, 15
  international response, 563, 569–585
    Abbasi case, 572–576, 581
    diplomatic protection, 570–572
    UK residents, 576–585
    weakness, 569–570
  legal actions in US, 564–569
  legal black hole, 562, 563, 569, 574, 586
  military commissions, 437–438, 566, 568, 586–587
  return of detainees, 468, 515
  standards of treatment, 430
  territorial jurisdiction, 562–563
  US exceptionalism, 562, 563, 567–569, 588
  US sovereignty over, 566
Guatemala, 157, 287
guest workers, 256
Guinea
  militarised refugees from, 171
  refugee camps
    militarisation, 173, 182
    political violence, 184
    security, 139, 191–192
    threat to peace, 143
Gulf of Aden, 195
Gulf War (1991), 462
Guterres, António, 43–44, 233, 387

habeas corpus
  Guantanamo Bay, 438, 563, 564–569
  military commissions and, 437
Haiti, 212
Hammarberg, Thomas, 513
Hamza al-Masri, Abu, 456
Hasegawa, Yuka, 100–101, 111–112
Heuvern-Goedhart, G.J. van, 127, 149, 160
Hicks, David, 456, 573–574
Higgins, Roslyn, 357
Hillyard, P., 474
HIV/AIDS
  CHS priority, 266, 343
  economic effect, 87, 125
  ECtHR deportation cases, 344–346, 349–352
  floodgates arguments, 347, 350, 353
  human rights, 344
  international cooperation, 343
  migrant protection gap, 351–352
  migrants' rights, 343–354
  Millennium Development Goal 6, 343
  UK deportation cases, 347–349
home states
  right to leave, 266
  right to return to, 154
housing, migrants, 264
human rights
  See also specific rights and freedoms
  balance of interests, 535–536
  biometrics and, 234
  children, 135, 423
  climate change refugees, 373–380
    gaps, 399–400
    human security and, 396–399
  derogability, 35, 36
  development, security and, 44–46
  emergency suspensions, 37
  enforceability, 38
  environmental rights, 382–384
  fundamental freedoms, 36
  HIV/AIDS migrants. *See* HIV/AIDS
  human security and
    climate change refugees, 396–399
    competing rights and securities, 334–343
    Japan, 361
    non-derogable rights, 339–341
    refugees, 116–119
    survival migrants, 317, 330–334
  human trafficking, 406
  international law
    See also specific Conventions
    armed conflicts, 435
    climate change refugees, 373–380

core Conventions, 258, 479–480
extraterritoriality, 430–431
migrants' rights, 258–265
removal of aliens, 499–507
scope, 358
justiciability, 35
migrants
binding law or cooperation, 309–311
business responses, 252–255
competing rights and securities, 334–343
consular protection, 259
debate, 246
empowerment, 265
European Union, 247–248
gaps, 279–281
GATS, 281–282
GFMD (2007), 246
global initiatives, 292–309
human security v human rights, 268–270
ILO Conventions, 276–277
MWC, 277–279
norms, 258–265, 275–276
regional initiatives, 300–309
regional treaties, 282–289
survival migrants, 342–343
non-citizens, 33–39, 426
people-centred approach, 321
refugees, 132, 373–380
security exceptions, 37–38
sovereignty and, 7–8
statelessness and HR law, 59–69, 79
territorial jurisdiction, 377
transnational corporations, 269
Vienna Declaration (1993), 118
Western values, 118
Human Rights Council
creation, 280
state succession, 59
Working Group on Arbitrary Detention, 515, 527
Human Rights Watch, 140
human security
climate change refugees, 360–361, 387–400
common human security, 343
concept, 21–22, 265–266, 320–322
definitions of insecurity, 30–32
emergence, 22–28, 89, 315
vagueness, 75–76, 123, 267, 340, 394
converging rights, 44–46
development and, 44–46, 112–116
empowerment. *See* empowerment
environmental security, 388–391
framework, 21–33
freedom from fear, 398–399, 533
hegemonic tool, 394–395
human rights and
climate change refugees, 396–399
competing rights and securities, 334–343
Japan, 361
non-derogable rights, 339–341
refugees, 116–119
survival migrants, 317, 330–334
human trafficking and, 407–417
interdepedence, 42
international cooperation, 42
international peace and, 70–71
migration context, 255–267
survival migrants, 317–329
multilateralism, 42
non-citizens and, 4–5
meaning, 39–46
non-state actors, 416
objects of security, 32, 92
people-centred, 39–40, 92, 315, 320, 415–416
refugees, 89
responsibility to protect, 43–44
refugees, 119–122
scope, 28–33, 495
security language, 40–42, 331–333
security providers, 32–33
state obligations, 407–417
state security and human security, 408–409, 415–417
statelessness. *See* statelessness
terrorism and, 533–537
theoretical debate, 3, 8–12
transition discourse, 12–15
Trust Fund, 23
UN debate (2008), 26

Human Security Network, 28, 265, 299, 391, 394
Human Security Unit, 23
human trafficking
  CHS on, 299
  counter-terrorist strategies and, 234
  definition, 404
  evidence from victims, 417
  GFMD and, 297
  human security and, 407–417
  international crime, 411–412
  international law, 406–407
  municipal law, 405–406
  organised crime, 406
  Palermo Protocol, 335, 411–412
  security threat, 406
  slavery, 404–405
  state-centred approach, 412–415
  types of work, 405
humanitarian aid, refugees, 138, 185
humanitarian interventions, 38, 119, 120
Huysmans, J., 41

Ibrahim, M., 329
ICCPR
  binding instrument, 408
  change of nationality, 424
  citizenship rights, 67
  death penalty, 506
  expulsion of refugees, 134
  freedom from fear, 398
  migrants' rights, 336
  non-citizens, 426
  non-discrimination, 337–338
  non-refoulement
    fair trial, 506
    implied principle, 200, 501, 502
    scope, 203, 204
    standard of proof, 208
  ratifications, 479
  removal of aliens, 445–446
    due process, 521–522, 523
    gaps, 528
  right of entry in home state, 154
  right to nationality, 423
  right to security, 135
  scope, 34–35, 66–67
  state obligations, 415
  territoriality, 207, 430–431
  torture prohibition, 542
  UK derogation, 450
  US reservations, 440–441
ICERD
  immigration control, 480
  meaning of discrimination, 35
  non-citizen exceptions, 337–338, 339
  ratifications, 479
ICESCR
  aspirational obligations, 408
  development, 263
  freedom from fear, 398
  Limburg Principles, 341
  limitations, 341–342
  non-derogable rights, 340–341
ICRC
  access to Afghan detainees, 443
  customary law of displaced persons, 385
  internally displaced persons, 359
imagined communities, 316
immigration control
  See also removal of aliens
  counter-terrorist tool, 445–456, 459–471
    civilisational discourse, 470, 491
    criminal law enforcement, 469
    detention pending removal, 448–451
    discrimination, 478–492
    executive discretion, 470, 482, 484
    exporting terrorism, 488
    identification of terrorists, 487–488
    institutional changes, 469
    legal removals, 448
    political convenience, 470, 478
    post-9/11, 463–471, 474–478
    pre-9/11, 461–463, 471–474
    rigorous enforcement, 465–469
    selective enforcement, 471–478
    territoriality bias, 492
    truncated due process, 452–455, 469–470
  discrimination, 478–492
    comparability, 485–486
    ECtHR, 338

effectiveness, 487–490
judicial deference, 470, 482, 484
nationality, 480
negative effects, 490
objective justification, 486–492
proportionality, 487–491
result, 492
standard of review, 482–485
stereotyping, 486, 489–490
United Kingdom, 338
ethnic selectivity, 471–478
non-discrimination right, 478–492
post-9/11, 474–478
pre-9/11, 471–474
sovereignty, 236–237, 330–334, 334–336
India, 246
indigenous communities, 376
Indonesia, 280
intellectual property rights, 343
Inter-American Court/Commission on Human Rights
discrimination and counter-terrorism, 481
due process and removal of aliens, 521
indigenous communities, 376
migrants' rights, 261, 286
non-refoulement, 502
right to life, 375
right to nationality, 66
Inter-Governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants, 247
Inter-Governmental Consultations on Asylum, Refugees and Migration Policies, 247, 305
Inter-Governmental Panel on Climate Change (IPCC), 361, 363, 366, 375
interception at sea
cloaked as rescue, 219–223
international law, 215–223
practice, 215–216
states responsible for protection, 217–219
interdepedence, 34, 42, 72–74
International Agenda for Migration Management (IAMM), 241, 293–295
International Centre for Migration Policy and Development (ICMPD), 304
International Commission on Intervention and State Sovereignty (ICISS), 43, 119
International Conference on Population and Development (1994), 239
international cooperation
HIV/AIDS, 343
human security and, 42
migrant workers' rights, 289–309
binding law or, 309–311
global initiatives, 293–299
ILO Conventions, 291
international treaties, 289–292
MWC (1990), 289–291
non-binding processes, 292–309
regional initiatives, 300–309
International Court of Justice
diplomatic protection, 573, 580–581
extraterritoriality of ICCPR, 431
nationality, 423
response to illegality, 571
International Criminal Court, 13, 28, 107, 109
International Criminal Tribunal for Rwanda, 109
International Criminal Tribunal for the Former Yugoslavia, 109, 571
International Dialogue on Migration, 293, 295–296
international humanitarian law
application, 434
civilian–combatant distinction, 434–435
climate change refugees and, 384–386
combatants and refugees, 170
combatant's privilege, 436
human trafficking and, 411–412
indiscriminate attacks, 434–435
protected persons, 434–435
civilians, 436

international humanitarian law (cont.)
prisoners of war, 436, 499
removal, 499
removal of aliens, 498–499
International Labour Organization
irregular migration, 232
migrant workers, 261–262, 276–277
Multilateral Framework on Labour Migration, 274, 293, 296–297
international law
See also specific subjects
protection of non-citizens, 33–39
reservations to treaties, 440
role, 45
International Law Association, 573, 578, 579
International Law Commission
diplomatic protection, 570, 579–580
state responsibility, 219, 571–572
state succession, 58
International Maritime Organization, 213
International Organization for Migration (IOM)
Colombo Process, 301–303
IAMM, 241
interception at sea, 216
International Dialogue on Migration, 293, 295–296
objectives, 295
projects, 249
return of survival migrants, 324
role, 249, 251
interpretation of treaties, 205
Inuit, 361, 368–369
Iran, 280, 281
Iraq
protection of refugees, 97
refugees from, 19
statelessness, 50, 52
unilateralist invasion, 12, 27, 42
justification, 121
realist security agenda, 14
violent backlash, 87
US standards of treatment, 429
war on terror, 433–434
Ireland, 28, 541
Islamic Jihadism, 433
Israel, 433
Italy
counter-terrorism, removal of aliens, 509
extraordinary renditions and, 549, 553, 557
Libyan agreement on migration patrol, 218–219
maritime refugees, 195
MWC and, 281
UN migration report, 280
Ivory Coast. *See* Côte d'Ivoire

Jacobsen, Karen, 133, 166, 355
Japan
CHS and, 24
Friends of Human Security, 28, 299
human security
concept, 31, 32, 90
development, 112
empowerment, 114
foreign policy, 27
human rights v security, 361
statelessness and foreign policy, 73
Trust Fund contributions, 104
Jordan
diplomatic assurances to UK, 467
extraordinary renditions to, 446
Human Security Network, 28
Iraqi refugees, 88, 92
migrants to US, 475
nationality law, 447
jus cogens
counter-terrorism and, 533, 536
insufficiency, 559
non-refoulement principle, 201, 503, 551
prohibition of torture, 508, 551
jus sanguini, 64

Kabila, Joseph, 183
Kabila, Laurent, 183
Kagwanja, Peter, 153
Kaiser, T., 139
Kang, Kyung-Wha, 234
Kaplan, Metin, 477
Karlsson, Jan, 241

Kenya
2008 violence, 164
extraordinary renditions and, 553
local integration of refugees, 160
refugee camps, 130
despondency, 163
earnings, 150–151
education, 147–148
encampment policy, 132, 133
free movement and, 134
location, 137
militarisation, 173, 184, 185
security, 138, 139, 192
sexual violence, 141, 186
threat to international peace, 143
voluntary repatriation, 155–156
Somali refugees, 92, 137
Sudanese refugees, 137
wealth inequalities, 112
Kerim, Srgjan, 123
Kiribati, 366
Kony, Joseph, 109
Koskenniemi, M., 392–393
Kosovo, 38, 97, 119, 184
Kurds, 52, 64, 92
Kurnaz, Murat, 468
Kuwait, 50
Kyoto Protocol, 13, 382, 393

Landmine Convention, 28
Lane, Melissa, 355
Latvia, 50
law of the sea
interception, 215–223
rescue, 208–215
territoriality, 204–208
League of Nations, 49
Lebanon, 467
legal theory, human security and, 4
legitimate expectations, 583
Legomsky, Stephen, 488
Lester, Eve, 41–42
liberalism, 3, 10, 12, 535–536
Liberia, 108, 114, 171, 184
Libya, 183, 218–219, 278, 467, 511
life. *See* right to life
Lillich, R.B., 33–34
Lima Process, 306
Limburg Principles, 341
Lischer, Sarah Kenyon, 172–173, 182
Loescher, Gil, 131, 153, 181, 185
Lord's Resistance Army, 109, 179

McCain, John, 544, 587
MacFarlane, Neil, 101–102, 103
McKinley, B., 252
McSweeney, W., 12
Makiedo, Mr, 161
malaria, 87
Malawi, 143
Malaysia, 253
Mali, 28, 113
maritime refugees
boat people, 210–213
casualties, 196–198
distress phase, 222
incidence, 195–196
interception at sea, 215–223
non-refoulement principle, territoriality, 204–208
rescue obligation, 197–198, 208–215
smugglers, 196
Marty, Dick, 536, 538, 552, 555
Mauritania, 52
media, image of migrants, 227–228, 272
mercenaries, 436
MERCOSUR, 288
Mexico
migrant workers, 287
MWC ratification, 278
MWC report, 310
Plan of Action (2004), 115
UN migration report, 280
US-Mexico Claims Tribunal, 429
migrant workers
circular migration, 256–257
consultation and cooperation, 289–309
binding law or, 309–311
global initiatives, 293–299
ILO Conventions, 291
international treaties, 289–292
MWC, 289–291
non-binding processes, 292–309
regional initiatives, 300–309, 311

migrant workers (cont.)
definition, 6
discrimination, 261
feminisation, 280, 323
guest workers, 256
ILO Conventions, 261–262
ILO Multilateral Framework on Labour Migration, 274, 293
international Conventions, ratifications, 274, 276
irregular migrants, 280
labour conditions, 252–255
legally binding standards, 275–289
cooperation or, 309–311
gaps, 279–281
GATS, 281–282
ILO Conventions, 276–277
Migrant Workers' Convention, 277–279
regional treaties, 282–289
universal human rights, 275–276
marketplace, 246
political agendas, 312
recruitment agencies, 253, 260, 279
remittances, 228, 326, 327
resettlement, cooperation, 290
return, cooperation, 290
temporary work, 280
trade unions, 261
Migrant Workers' Convention
Committee, 310
consultation and cooperation, 289–291
definition of migrant, 230
entry into force, 277
ratification, 242, 269, 278, 336
reports, 310
rights, 258–260, 277–279
scope, 278–279
state sovereignty and, 279
migration
See also migrant workers; survival migrants
bilateral treaties, 237
climate change. *See* climate-induced displacement
communications, 235–236
control, sovereignty, 236–237
customary international law, 294
definitions, 6, 229–230
development and, 235, 263–264
durable solutions, 354–356
empowerment, 268, 270–272, 298
environmental degradation and, 234, 252
globalisation and, 86–87
good v bad migrants, 319
hearing migrant voices, 255–267
HIV/AIDS. *See* HIV/AIDS
host state conditions, 330–331
human rights. *See* human rights
human security
framework, 265–267
human security v human rights, 268–270
trajectory, 322–325
internal migration, 230
international law and, 18
irregular migrants, 228
arbitrary detention, 266
growth, 280
housing strategies, 264
human trafficking, 405–406
labour rights, 261
MWC and, 278–279
rhetoric, 271–272
security discourse, 335
terrorism and, 488
life-cycle, 231
management discourse, 228–229, 266
media image, 227–228, 272
Millennium Development Goals and, 263
motivations, 24, 233–236
numbers, 227
policy responses, 236–251
business, 252–255
CHS. *See* Commission on Human Security
global governance, 249–251
international initiatives, 238–246
non-state actors, 251–255
regional processes, 247–248
political agendas, 228–229, 312
poverty and, 17, 235, 315–316

security discourse, 17–20, 40, 87–88, 461, 470–471
survival migrants. *See* survival migrants
symbiotic relations between communities, 354–356
twenty-first century profile, 229–232
UN debate, 237
UN Special Rapporteur, 280–281, 287
voluntary migrants, 231
vulnerability, 231–232
double insecurity, 319
health, 266
workers. *See* migrant workers
Migration Dialogue for Southern Africa (MIDSA), 247, 309
Migration Dialogue for Western Africa (MIDWA), 247, 309
militarised refugees/IDPs
Africa, 168, 170–171
arms traffic, 185
conceptualisations, 193
agents and victims, 183
manipulation, 180–183
UNHCR responses, 187–193
debate, 173–176
early responses, 170
emerging research, 169–176
harnessing humanitarian aid, 185
host government accusations, 177
host government responses, 186–187
increase, 169
indicators, 179
international humanitarian law, 170
inward militarisation, 168, 178, 179–180
meaning, 176–180
outward militarisation, 168, 178
problem from hell, 167
refugee warriors, 181, 184
military commissions, 437–438, 566, 568, 586–587
Millennium Development Goals, 240, 263, 343, 397
Millennium Summit, 240, 248
Milner, James, 131, 153
Mobutu Sese Seko, 52, 183, 186
Moeckli, D., 19–20
Mohamed, Binyam, 555, 576, 584, 585
Montclos, Marc-Antoine, 153
Morocco
Centre for Migrants' Rights, 311
extraordinary renditions to, 446
global panel on migration, 241
migrants to UK, 476
MWC ratification, 278
nationality law, 447
UN migration report, 280
Mozambique, 170
Mtango, E., 186
Mujahadeen, 181
Munich Olympics, 462
MV Tampa incident, 198, 212
Myanmar, 50

NAFTA, 288
national security
See also counter-terrorism
alternative discourse, 316
derogation from human rights, 36
expulsion of refugees, 134
human rights exceptions, 37–38
human security, 40–42, 331–333, 395–396
human trafficking, 406
immigration control and, 470–471
majoritarian project, 421
migration discourse, 17–20, 40, 87–88, 461, 470–471
model, 461
non-citizens and, 15–21, 40
state v human security, 408–409, 415–417
statelessness and, 70
survival migrants, 327–329, 335
threats to peace. *See* peace
United States, 14–15
nationality
See also non-citizens; statelessness
clinging nationalities, 425, 447
deprivation, 456
arbitrary deprivation, 63–66
international law, 424–425
diplomatic protection and, 537, 578–581
dual nationality, 424–425, 536

nationality (cont.)
effective nationality, 21
equal treatment, 64–66
European Convention, 65
foreign nationals. *See* non-citizens
immigration control and, 480
international law, 422–425
change of nationality, 424–425
loss, 424–425
right to, 6, 53, 57, 60–61, 422–423
right to birth registration, 62–63
state succession, 58
jus sanguini, 64
jus soli nationality, 61
nationality discrimination, 67–68
coercive interrogation, 438–444
due process and war on terror, 435–438
gender, 337–338, 339
international prohibitions, 426–427
western democracies, 445–446
rights, 5, 67–68
sovereignty and, 5–8
natural disasters, 371, 372, 387
Nepal, 49, 50, 75, 97
Netherlands, 28, 515–516
Newman, D., 30
Newman, Edward, 153
Newton Review, 488
Nike, 254
9/11 attacks
See also counter-terrorism
9/11 Commission, 487, 535, 558
climate of fear, 17, 87–88
human security discourse and, 26
immigration control and, 463–471, 474–478
intelligence failures, 487
preventability, 493
refugee resettlement and, 161–162
US responses, 12, 14–15
war on terror rhetoric, 433
Noll, G., 332, 356
non-citizens
control. *See* immigration control
counter-terrorism. *See* counter-terrorism
diplomatic protection, 34, 427
discrimination, 37
gender discrimination, 337–338
human security and, 4–5, 39–46
humanising, 39–40
marginalisation, 39
meaning, 5–6
migrants. *See* migration
nationality deprivation, 456
refugees. *See* refugees
removal. *See* removal of aliens
rights, 33–39
security discourse and, 14–15
standards of treatment
Calvo Doctrine, 427
customary law, 425, 426, 427
denial of justice, 428–429
extraterritoriality, 429–432
international law, 425–429
non-discrimination, 426–427
statelessness. *See* statelessness
terminology, 5
non-refoulement
cornerstone principle, 496–498
ECHR, 501–502
exceptions, 37, 142
ICCPR (1966), 501, 502
jus cogens, 201, 503, 551
migrants with HIV/AIDS, 343–354
principle, 7, 84, 199–201
right to life and, 504–506
scope of principle, 202–208
climate change refugees, 378–379
extraterritoriality, 204–208
ratione materiae, 203–204
ratione personae, 202–203
standard of proof, 208
security and, 396
status of principle, 201
torture risks, 444–445, 447, 495, 503–504, 508–521
US policy, 545–546
non-state actors, 86, 245, 251–255, 416
North American Agreement on Labor Cooperation, 288–289
North Korea, 475
Norway, 28, 73, 90, 265

OAU Refugee Convention
1951 UN Convention and, 145
definition of refugee, 126
international aid, 138
location of refugees, 190
political exceptions, 37, 142
resettlement of refugees, 161
right to education, 145–146, 148
right to security, 136
security exceptions, 142
voluntary repatriation, 156
Obama, Barack, 15, 557, 587
Oberleitner, G., 31, 331
Ogata, Sadako
approaches, 190
CHS co-chair, 23, 90
compartmentalisation of strategies, 94
concept of human security, 29, 45, 265
double insecurity of refugees, 319
human security and human rights, 117
militarisation of refugee camps, 172
OHCHR, 250
organised crime
Convention, 335, 404
diasporas, 327
human trafficking. *See* human trafficking
Organization of American States, 286–287
Ouattara, Alassane, 75

Pakistan, 181, 433, 475
Palestinian refugees, 129
Pan-African Congress, 170
paternalism, 332
peace
refugee strategies and, 103–112
threats to peace
broadening definition, 388–390, 393
Great Lakes Region, 158
mass refugee movements, 194
narrow focus, 320
population movements, 409
poverty, 390
refugee camps, 142–144
statelessness, 70–71
Peacebuilding Commission, 26, 44
Permanent Court of International Justice
diplomatic protection, 578
nationality, 422
persecution, climate change refugees and, 371–372
Peru, 280, 281
Petrasek, D., 356
Philippines, 241, 246, 280
piracy, 217
Poland, 89
Portugal, 311, 553
Posen, B., 186
poverty
dignity and, 321
migration and, 17, 235, 315–316
structural poverty, 315–316, 322
threat to security, 390
prevention, responsibility to prevent, 43–44
preventive charging, 448–449
prisoners of war
Guantanamo Bay and, 561
international humanitarian law, 434, 499
status, 436
proportionality, 487–491
protection, definition, 95
protracted refugees
Africa
causes, 130–131
encampment policies, 132–135
lack of resources, 137–138
numbers, 126
asylum and, 125
causes, 130–131, 163
definitions, 127–131, 166
encampment
effects, 132–154
free movement, 133–135
location, 137, 190
lost opportunities, 144–154
policies, 132–135
security concerns, 135–144
size, 190

protracted refugees (cont.)
human rights, 132
increase, 166
integration, 158–160
lost opportunities, 144–154
education and training, 145–149
income, 149–154
non-UNHCR assisted, 131
numbers, 125
resettlement, 160–162
security concerns, 135–144
international peace, 142–144
lack of resources, 137–138
location of camps, 137
personal security, 137–141
sexual violence, 139–141
solutions, 154–162
taxation, 152
travel documents, 134
urban refugees, 130
voluntary repatriation, 154–158
proxy wars, 85, 181
Puebla Process, 247

race discrimination
See also ICERD
GFMD and racism, 297
immigration control, 471–478
nationality decisions, 64–66
securitisation of discourse, 329
Ramcharan, B.G., 41, 117, 383
Ramphele, Mamphele, 241
rationalism, 174–175
realism
anarchism, 10
human security and, 3, 8–10
non-citizen debate, 21
post-Cold War paradigm, 12
US security agenda, 14
recruitment agencies, 253, 260, 279
Red Cross. *See* ICRC
Red Scare, 461
refoulement. See non-refoulement
refugee camps. *See* protracted refugees
Refugee Consortium of Kenya, 161
Refugee Convention
climate change refugees, 371–372
definition of refugee, 126, 130
environmental displacement, 362
free movement, 133
integration of refugees, 158
international aid, 138
non-discrimination, 479
non-refoulement
exceptions, 37, 204
extraterritoriality, 207, 219
principle, 199
scope of principle, 202, 203, 497–498
standard of proof, 208
parties, 118
penalties for illegality, prohibition, 134
persecution, 371–372
Protocol (1967), 84
resettlement of refugees, 161
right to earnings, 149–150, 151
right to education, 145, 146–147
scope, 53, 83–84
security exceptions, 142, 464
state-centred, 39
taxation of refugees, 152
voluntary repatriation, 154, 156
refugee warriors, 181, 184
refugees
See also asylum-seekers
age, gender and diversity mainstreaming (AGDM), 100
climate change. *See* climate-induced displacement
Cold War framework, 15, 16
Convention. *See* Refugee Convention
definition
gender-related persecution, 96
strict interpretation, 89
treaty definitions, 126, 130
diplomatic protection, 34, 84
distinction from migrants, 319–320
double insecurity, 319
environmental refugees, 363
food security, 114
gaps in protection regime, 25, 88–89
climate change refugees, 370–373
gender and, 101–102, 107–108
human rights, 116–119
climate change refugees, 373–380, 399–400

human security
discourse, 77
emergence of concept, 89
human security strategies, 95
children, 106–107
development, 112–116
empowerment, 83, 95, 98–101, 114
focus on specific groups, 101–103
human rights, 116–119
peace and security, 103–112
protection, 83, 95–98
responsibility to protect, 119–122
rule of law, 109
illegality, penalties, 134
Indo-China, 161
international law
See also Refugee Convention
climate change refugees, 370–373
definition, 6
framework, 83–85
state centricity, 85
litmus test, 42
maritime. *See* maritime refugees
mass influxes, 88–89
militarisation. *See* militarised refugees/IDPs
non-refoulement. *See* *non-refoulement*
numbers, 83
Palestinians, 129
post-Cold War forced displacements, 85–88
post-WWII, 161, 400
protracted refugees. *See* protracted refugees
right to return home, 154
sea journeys. *See* maritime refugees
security discourse, 15–21, 40
registration of births, right to, 62–63
remittances, 228, 326, 327
removal of aliens
See also immigration control
ICCPR, 445–446
due process, 521–522, 523
gaps, 528
international law, 427
legal protection against, 497–507
ECHR, 453, 466–467, 501–502, 508–510
fair trial guarantees, 506–507
human rights law, 499–507
non-refoulement principle, 496–498
potential violation of rights, 503–507
regional treaties, 500
right to life, 504–506
risk of torture, 444–445, 447, 495, 503–504, 508–521
war on terror, 508–530
legal removals, 448
detention pending removal, 448–451
preventive charging, 448–449
truncated due process, 452–455
terminology, 496
terrorism grounds, 496
war on terror, 445–446
diplomatic assurances, 467–468, 511–515
due process, 521–526
evidence of torture, 515–521
legal removals, 448
protection issues, 508–530
renditions. *See* extraordinary renditions
torture risks, 508–521
widening protection, 527–530
rescue at sea
disembarkation
problem, 210–213
treaty amendments, 213–215
interception cloaked as, 219–223
international law
ancient principle, 209
challenges, 197–198, 208–215
traditional context, 209–210
reservations to treaties, 440
resettlement, refugees, 160–162
responsibility to protect
abuse of concept, 120
climate change refugees, 400–402
human security and, 43–44, 119–122
refugees, 119–122
United Nations, 26
Responsible Business Summit (2007), 254

Rice, Condoleezza, 532, 540–541, 587
right to birth registration, 62–63
right to education, 145–147
right to leave home states, 266
right to liberty, 398, 450
right to life
  climate change refugees, 375
  removal of aliens and, 504–506
right to nationality, 6, 53, 57, 60–61, 422–423
right to return to home states, 154
right to security, 135–136
Rio Declaration, 381
Rivero, Julie, 157
Roosevelt, Franklin, 398
Rowlands, J., 99
Ruddock, Philip, 328–329
rule of law
  counter-terrorism and, 457, 458, 536
  Guantanamo Bay and, 562
  peace, security and, 109
Russia, 121, 553
Rwanda
  arms caches, 174
  exported conflict, 327
  genocide, 86, 121, 163, 190
  militarised refugees from, 181
  non-intervention, 38, 119
  refugee camps, disarmament, 193
  return of refugees to, 157
  socio-economic roots of conflict, 323
  UNAMIR, 193
  UNSC intervention, 86

Sadat, Said Khobaib, 477
SADC, 288
Saddam Hussein, 52
Sameur, Abdennour, 576, 584, 585
SAR Convention
  amendments, 213, 221
  distress phase, 222
  rescue at sea, 209, 210
seasonal workers, 252, 278
security. *See* human security, national security
security, right to
  African constitutions, 136
  human rights Conventions, 135–136
  protracted African refugees, 135–144
security providers, 32–33
self-determination, 374
Sen, Amartya, 23, 39, 90, 103
Senegal, 136
sex industry, 405
sexual violence
  African refugee camps, 139–141
  war tactic, 107–108, 110
Shawcross, William, 172
Sierra Leone, 114, 171, 184
slavery, 259, 404–405
Slovenia, 28
smuggling
  CHS on, 299
  counter-terrorist strategies and, 234
  methods, 196
  Palermo Protocol, 200–201, 262, 335
  survival migrants, 318, 323–324
social security, migrants, 260
Söderköping Process, 303
SOLAS, 209, 210, 213, 221
Somalia
  displacements, 92, 248
  interventions, 38, 86, 119, 163
  piracy, 217
  refugees to Kenya, 137
  return of refugees to, 157
  threat to international peace, 143
  use of asylum, 183
South Africa, 28
South Korea, 261, 280, 281
South Ossetia, 121
sovereignty
  alternative discourse, 316
  citizenship and, 5–8
  extraordinary renditions and, 539, 541, 548–549
  human rights and, 7–8
  limitations, 7
  migration control, 236–237, 330, 334–336
  MWC and, 279
  responsibility to protect, 119
  statelessness and, 72–74
  territoriality, 342
  traditional concept, 7, 342, 582

US sovereignty over Guantanamo Bay, 566
welfare obligations, 117
Westphalian concept, 8, 33, 236
Spain, 280, 281, 553, 557
spies, 436
Sri Lanka, 49, 75, 183, 185–186
state responsibility, 217–219, 571–572
state secret doctrine, 554–556
state security. *See* national security
state succession, 57
statelessness
See also nationality
arbitrary deprivation of nationality, 63–66
climate change refugees, 374–375
Conventions, 7, 53–59, 78–79, 424
de facto statelessness, 54
definition, 54, 374
empowerment, 73–74
fluctuating concern, 77–78
foreign policy and, 27–28, 73
human dimension, 50–53, 78
human rights framework, 59–69, 79
human security framework, 69–77, 79–80
incidence, 20–21, 49
interdepedence and, 72–74
international law definition, 6
international peace and, 70–71
legal ghosts, 52
national security and, 70
normative gaps, 75
post-WWII crisis, 77
protection, 74
state succession and, 57, 58
statistics, 20, 50
UK nationality law and, 456
Statelessness Convention (1954)
Convention travel documents, 55, 72
definition of statelessness, 54
issues, 56–57
parties, 59
rights, 55–56
scope, 53–57, 78–79
Statelessness Convention (1961)
deprivation of nationality, 424
parties, 59
scope, 57–59, 78–79
states
diplomatic protection and, 34
human security obligations, 407–417
human trafficking and, 412–415
migrants' rights and, 334–336
people focus v international law, 39–40
refugee obligations, 85
relevance, 13
security providers, 32–33
sovereignty. *See* sovereignty
states of emergency, 37, 450–451
Stedman, John, 172, 181, 191
stereotypes, 486, 489–490
Steyn, Johan, 564, 586–587
Stilwell, Frank, 153
Stockholm Declaration (1972), 382
Sudan
See also Darfur
militarised refugees from, 184
refugee camps
attacks on, 182
militarisation, 173
protection, 97
refugees to Kenya, 137
return of refugees to, 157
use of asylum, 183
Sudanese Peoples' Liberation Army, 143, 181
Suhrke, Astri, 98, 328, 332–333, 356
survival migrants
agents of human insecurity, 327–329
agents of human security, 326–327
competing rights and securities, 334–343
non-derogable rights, 339–341
non-discrimination norm, 337–339
sovereignty v human rights, 336
states v migrants, 334–336
double insecurity, 319
economic rights, 341–342
feminisation, 323
HIV/AIDS. *See* HIV/AIDS
host state conditions, 330–331

survival migrants (cont.)
human rights, 342–343
human rights v human security
competing rights and securities, 334–343
discourses, 317, 330
HIV/AIDS, 343–354
meaning, 314
remittances, 228, 326, 327
return, 324–325
smuggling, 318, 323–324
survival rights, 330
symbiotic relations between communities, 354–356
taxonomies, 317–320
trajectory, 322–325
sustainable development, 381
Sutherland, Peter, 243
SWAPO, 170
Sweden, 241, 511, 547, 553
Switzerland
Al Qaeda operations, 489
Berne Initiative, 236, 240–241, 293–295
global panel on migration, 241
Human Security Network, 28
Symons, Baroness, 577–581
Syria
Al Qaeda operations, 489
extraordinary renditions to, 446, 447–448
Iraqi refugees, 88, 92
nationality law, 447
statelessness, 50, 64

Tadjbakhsh, Shahrbanou, 29, 41
Taliban, 433, 442, 568
Tancredo, Tom, 228
Tanner, Fred, 172, 181, 191
Tanzania, refugees in
Burundians, 183, 184, 185, 191
camps
encampment policy, 132
location, 137
militarisation, 171, 173, 182, 184
military use of humanitarian aid, 185
political violence, 184
security, 138
security package, 191
sexual violence, 140
threat to international peace, 143, 144
destabilisation by Rwandans, 327
local integration, 160
South Africans, 170
taxation, 152
taxation of refugees, 152
Taylor, Charles, 143
Tenet, George, 540
territoriality. *See* extraterritoriality
terrorism. *See* counter-terrorism
Terrorist Financing Convention, 393
Thailand, 28, 50, 70, 97, 249
torture
absolute prohibition, 36, 500, 508–510
Canadian transfers of detainees to Afghanistan, 442–444
definition
climate change refugees, 379
United States, 541, 543–544
erga omnes obligations, 571
extraordinary renditions and, 541–547
jus cogens prohibition, 508, 551
removal of aliens
diplomatic assurances, 511–515
evidence, 515–521
risk of torture, 444–445, 447, 495, 503–504
war on terror, 508–521
US death penalty, 501
US war on terror, 439–442
Torture Convention
absolute prohibition, 36, 500
Article 3, 444–445, 447
cruel, inhuman or degrading treatment, 439–440, 542–545
extraterritoriality, 546
non-refoulement
extraterritoriality, 207
principle, 199
scope, 203, 204
standard of proof, 208
trafficking. *See* human trafficking
transit countries, 278, 324, 336

transnational corporations, 269
Troeller, Gary, 153
Trust Fund for Human Security, 23, 103–104, 246, 248
Trutzchler, M. von, 146, 150, 151
tsunami (2004), 386
Tunis Declaration (2002), 305–306
Turkey, Kurds and, 92
Turkmenistan, 248
Tuvalu, 366

Uganda
  Lord's Resistance Army, 109, 179
  refugee camps
    disarmament campaigns, 186
    militarisation, 179–180, 184, 185
    political violence, 184
Ukraine, 49
Ullman, R.H., 30–31
UNCAT. *See* Torture Convention
UNCLOS, rescue at sea, 209, 221
UNDP
  freedom from fear, 398
  human security, 21, 22, 29, 31–32, 268, 388
  migration as threat to peace, 228
  sources of insecurity, 393
UNEP, 386
UNHCR
  2007 Dialogue on Protection, 17–18
  age, gender and diversity mainstreaming (AGDM), 100
  Agenda for Protection, 147, 189
  child-friendly spaces, 107
  climate change refugees and, 371, 386–387
  concept of human security, 116
  DDR programmes, 188
  on detention of asylum-seekers, 489
  Emergency Security Service, 191, 192
  extraterritoriality of *non-refoulement* principle, 207
  field security officers, 191
  funding, 147
  gender strategies, 102
  Global Consultations on International Protection, 16, 89, 94, 147
  High Commissioner's Dialogue, 89
  on interception at sea, 215, 216, 217–220, 221, 223–224
  limits of humanitarian agenda, 16–17
  mandate, 84, 250
  migration increase, 17
  non-refoulement, asylum-seekers, 202
  people-centred approach, 39
  protection, 96
  protracted refugees, 128
    Congo, 158
    definition, 128–129, 130
    dependency on, 151
    firewood project, 140–141
    integration, 152, 159–160
    militarisation, 174
    resources, 138
    return, integration and resettlement, 385
    voluntary repatriation, 154–155, 156
  refugee security liaison officers, 192
  rescue at sea, 210, 213
  responses to militarised camps, 187–193
  responsibility to protect, 43–44
  return of survival migrants, 324
  sea casualties, 195
  statelessness
    human security, 70
    mandate, 58–59
    rights, 55
    statistics, 20, 50
  Turkmenistan project, 248
  Zambia Initiative, 115
UNICEF, 107
United Arab Emirates, 51, 70, 246
United Kingdom
  Al Qaeda operations, 489
  discriminatory immigration laws, 472, 473
  ECHR ratification, 479
  equality before the law, 479
  extraordinary renditions and, 541, 553
  extraterritorial reach of ECHR, 432
  Guantanamo Bay and, 572–585

United Kingdom (cont.)
ICCPR ratification, 479
immigrant communities, 257, 460
immigration control as anti-terrorism
control orders, 451
diplomatic assurances, 467–468, 511
due process, 452–454
ethnic selectivity, 474, 476
executive discretion, 483
Immigration, Asylum and Nationality Act (2006), 464, 469
indefinite detention of aliens, 450–451
institutional fusion, 469
internment of enemy aliens, 462
judicial deference, 482, 585
legal gaps, 528
post-9/11, 464, 476
pre-9/11, 461–462, 472, 473
Prevention of Terrorism Act 2005, 451
ricin case, 466
rigorous enforcement, 466–468
risk of torture, 508–510
SIAC, 453–454, 525
stereotyping, 486
truncated due process, 469
London bombings, 466
nationality deprivation, 456
Newton Review, 488
non-discrimination right, 479
prerogative powers, 482
United Nations
See also specific agencies
charter, 46
CHS. *See* Commission on Human Security
Declaration on the Rights of Indigenous People, 376
Doyle Report, 241, 249
funding UNHCR, 153
human rights and, 35, 40, 275
human security and
debate (2008), 26, 123
emergence of concept, 90–91
endorsement, 391
Human Security Unit, 248–249
IASC, 94, 95
migration and
debate, 237
High Level Dialogue, 243–245, 255–256, 270, 297
lack of agency, 241–242, 249–250
Special Rapporteur, 280–281, 287
OCHA, 387
pillars, 82, 103
Protocol against Smuggling, 200–201
reform, 94
refugee protection, 85
responsibility to protect, 120–121
right to development, 263
right to nationality, 63
Security Council. *See* United Nations Security Council
state equality, 9, 92
statelessness, 52
Trust Fund for Human Security, 23, 103–104, 246, 248
Westphalian sovereignty and, 9
World Summit (2005), 26, 82, 120, 391, 397
United Nations Security Council
abuse of refugee status, 18
Chad and Central African Republic, 105–106
children in armed conflicts, 107
Cold War and, 10
Counter-Terrorism Committee, 463
gender and armed conflicts, 109–110
instrumentalisation, 393
legitimacy, 393
militarised refugees/IDPs, 181–182
non-military threats, 13
Resolution 1325 (2000), 104, 109–110
Resolution 1373 (2001), 393, 463
Resolution 1612 (2005), 107
Resolution 1624 (2005), 463
Resolution 1820 (2008), 104, 110
response to 9/11, 560
responsibility to protect, 401
sexual violence as war tactic, 107
terrorism resolutions, 19
terrorist financing, 393

threats to peace
broadening definition, 388–390, 393
Great Lakes Region, 158
Ivory Coast, 143
mass displacements, 86, 194
refugee camps, 144
Somalia, 143
United States
1998 embassy bombings, 433
Al Qaeda operations, 489
constitutional right to non-discrimination, 479
death penalty, 501
definition of torture, 541, 543–544
Detainee Protection Act (2005), 442, 544, 545
Detainee Treatment Act (2005), 565
discriminatory immigration control
anti-Chinese, 472
counter-productive effect, 490–491
judicial deference, 482
plenary power doctrine, 482
race and religion, 481
standards of review, 483
extraordinary renditions. *See* extraordinary renditions
ICCPR and, 440–441, 479
immigrant communities, 460
Immigration and Naturalization Service, 469
immigration control as anti-terrorism
Absconder Apprehension Initiative, 459–460, 483, 487
Alien Control Act 1918, 461
Antiterrorism and Effective Death Penalty Act 1996, 463, 474
Department of Homeland Security, 469
Iranians, 492
post-9/11, 463–464, 465–466, 474–476
Red Scare, 461
rigorous enforcement, 465–466
selectivity, 471–472, 473, 474–476
special registration, 475, 484, 490
Voluntary Interview Program, 474, 483, 485, 490
Inuit, 368–369
invasion of Iraq, 12, 14, 27, 42
Japanese in WWII, 421, 473
Kyoto Protocol and, 382
lending practices, 14
McCarthy era, 461
migrant workers, 287
MWC and, 281
national security approach, 395, 560
nationality rights, 66
9/11. *See* 9/11 attacks
Oklahoma City bombing, 463
Operation Liberty Shield, 476, 489
Refugee Convention and, 479
removal of aliens
diplomatic assurances, 512
non-refoulement policy, 545–546
Rwandan policy, 121
Somalia and, 163, 217
territoriality of Refugee Convention, 207
UN migration report, 280
unilateralism, 12, 13, 14–15, 42
US-Mexico Claims Tribunal, 429
war on terror and non-citizens
See also Guantanamo Bay
Administrative Review Board, 564
coercive interrogation, 439–442
Combatant Status Review Tribunal, 437, 564, 566
detention pending removal, 448–449
due process, 435–438
enemy combatants, 561, 564
exceptionalism, 560, 562, 563, 567–569, 570
militarisation, 433–435
military commissions, 437–438, 566, 568, 586–587
moralism, 560
Patriot Act, 448–449, 463–464
preventive charging, 448–449
renditions. *See* extraordinary renditions
rhetoric, 433, 560

Universal Declaration of Human Rights (1948)
asylum exceptions, 37
change of nationality, 424
freedom from fear, 398
inalienable rights, 7
non-binding instrument, 408
non-citizens, 426
right to leave home country, 266
right to liberty and security, 398
right to nationality, 53, 60–61, 422
right to return home, 154
right to security, 135
right to seek asylum, 84
University of South Africa (UNISA), 147
Uvin, P., 30

Vattell, Emmerich de, 582
Venice Commission, 537, 548, 549, 550
Verwey, W., 341
Vienna Convention on the Law of Treaties, 440
Vienna Declaration (1993), 118
Vienna World Conference on Human Rights (1993), 238–239
Vietnam, boat people, 211
von Tigerstrom, B., 317, 322, 397
vulnerability
concept, 98, 333
migrants, 231–232

war crimes, 142, 411–412
war on terror. *See* counter-terrorism
Weiner, M., 236
Weissbrodt, D., 67
Westphalia, Treaty of (1648), 8, 33, 236
Whitaker, B., 144
Working Group on Arbitrary Detention, 515, 527
World Conference against Racism (Durban, 2001), 239–240
World Health Organization, 249
WTO, 281–282

xenophobia, 297, 327

Yemen, 196, 475
Yu, L., 192–193
Yuen Foong Khong, 101–102, 103
Yugoslavia
1992 humanitarian crisis, 130
displaced persons, 386
ethnic conflicts, 327
state succession, 57
UNSC intervention, 86

Zaire. *See* Congo (DRC)
Zambia, 115, 132, 136, 142, 170
Zimbabwe, 113
Zolberg, Aristide, 184