The Right of Refugees to Durable Solutions: An Examination of the Situation of Iraqi Refugees

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Abstract

This research explores the legal nature of the right of refugees to durable solutions. This right has not been explicitly stated in any international instrument, nor has it been considered systematically in the literature. However, the existence of this right can be found in the combined effect of other legal obligations of States of a diverse legal nature, including the UN Charter, the Refugee Convention, UNGA resolutions, the UNHCR Statute, and ExCom conclusions.

The right of refugees to durable solutions will be explored in the context of Iraqi refugees in protracted situations. It will be argued that this is a right of refugees as a matter of international law rather than merely a policy tool at the discretion of the State. For Iraqi refugees, this right is to be materialised in resettlement in a third country, in agreement with the UNHCR that resettlement to third countries is the only possible solution for Iraqi refugees.

The thesis concludes by asserting that there is a right to durable solutions in international law in the making (*lege ferenda*) and that refugees are the subject of this right. This thesis suggests that the international community might consider taking steps towards a formal recognition of this right in an internationally binding instrument. This is a right that refugees should be entitled to access and, given the urgency of refugee situations, the international community, acting through the UNHCR, has the responsibility to develop, recognise it formally and effectively implement it. An explicit recognition of this right will significantly contribute to alleviating the plight of refugees.

The findings from this research will make several contributions to the current literature, given the emerging displacements in a number of countries, including Middle Eastern countries, as well as the terrible loss of life of thousands of migrants in the Mediterranean and Andaman seas. Hence, the ongoing refugee crisis has made this research even more timely and relevant.

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Dedication

I dedicate this doctoral thesis to my parents: Omar Yassen and Ronak Ibrahim. To my dad, you have been inspirational to me and you have profoundly influenced the directions I have taken in my life. Dad, your unwavering belief, wise words and encouragement have carried me throughout my life. To my mum, words do not describe how grateful I am to you. You are the kindest and most caring person I have ever known. What is best in me, I owe to you. To both of you, I love you unconditionally and we are the luckiest children to have you in our lives. I am grateful for the strong foundation on which much that I do today is built. I hope you are both proud for what I have achieved so far in life.

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List of Abbreviations

4Rs	Repatriation, Reintegration, Rehabilitation and Reconstruction
ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
ATCR	Annual Tripartite Consultations on Resettlement
CAT	Committee Against Torture
CEDAW	Convention for the Elimination of All Forms of Discrimination against Women
CERD	Convention for the Elimination of All Forms of Racial Discrimination
CHR	Commission on Human Rights
CIREFCA	International Conference on Refugees in Central America
CJEU	Court of Justice of the European Union
Convention Against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CPA	Comprehensive Plan of Action
CRC	Convention on the Rights of the Child
DAR	Development Assistance for Refugees
DLI	Development through Local Integration
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
ExCom	Executive Committee of the High Commissioner's Programme

FRA	Frontiers Ruwad Association
FRA	EU Agency for Fundamental Rights
GAOR	General Assembly Official Records
HRC	Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICARA I	First International Conference on Assistance to Refugees in Africa
ICARA II	Second International Conference on Assistance to Refugees in Africa
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICMC	International Catholic Migration Commission
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
ILA	International Lawyers Association
ILC	International Law Commission
IOM	International Organization for Migration
IRC	International Rescue Committee
IRIN	Integrated Regional Information Networks
IRO	International Refugee Organisation
ISIS	Islamic State of Iraq and Syria
JRS	Jesuit Refugee Service
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
MoU	Memorandum of Understanding
MPI	Migration Policy Institute
NGOs	Non-Governmental Organizations
OAU	Organisation of African Unity

PCIJ	Permanent Court of International Justice
PRSs	Protracted Refugee Situations
RAD	Refugee Aid and Development
Refugee Convention	Convention Relating to the Status of Refugees
RSD	Refugee Status Determination
SC	Security Council
SUR	Strategic Use of Resettlement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	United Nations Charter
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
Vienna Convention	Vienna Convention on the Law of Treaties
WGAD	Working Group on Arbitrary Detention
WGR	Working Group on Resettlement

For legal journal abbreviations, refer to Cardiff Index to Legal Abbreviations:
http://www.legalabbrevs.cardiff.ac.uk/

For non-legal journal abbreviations, refer to Journal of Economic Literature Abbreviation
List:
http://www.aeaweb.org/jel/abbrev.html

Chapter 1. Introduction, Purpose and Methodology

1.1 Introduction

Today, for the first time in history, there are 59.5 million people who have been forcibly displaced worldwide.[1] The United Nations High Commissioner for Refugees (UNHCR) notes that if the figures of displaced people were a country, they would be the 24th largest in the world.[2] The ongoing conflicts in places, including Iraq, means that the figures are expected to rise as a result of persecution, conflict, generalised violence, or human rights violations. Of this figure, more than 54.9 million are of concern to the UNHCR. Although this figure is unprecedented, the international community has so far failed to respond.[3]

The ongoing refugee crisis has made this research even more timely and relevant. This research examines the right of refugees to durable solutions in international law. This will be explored in the context of Iraqi refugees in protracted situations. It will be argued that this is a right of refugees as a matter of international law rather than merely a policy tool at the discretion of the State. The findings of the research will contribute greatly to the relevant literature.

A durable solution can be defined as 'any means by which the situation of a refugee can be satisfactorily and permanently resolved to enable them to live normal lives'.[4] According to Goodwin-Gill,

> [a] durable solution entails a process of integration into a society; it will be successful and lasting only if it allows the refugee to attain a degree of self sufficiency, to participate in the social and economic life of the community and

[1] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (World at War, 18 June 2015) 5.
[2] ibid.
[3] ibid 8.
[4] Kate Jastram and Marilyn Achiron, 'Refugee Protection: A Guide to International Refugee Law' (UNHCR, Inter-Parliamentary Union 2001) 126. Available at: <http://www.ipu.org/pdf/publications/refugee_en.pdf> accessed 17 October 2015.

> to retain what might be described, too summarily, as a degree of personal identity and integrity.[5]

According to the UNHCR, in principle, there are three durable solutions available for the permanent resolution of the refugee's plight: integration in the country of asylum, repatriation to the home country, and resettlement in a third country. All three are regarded as durable because they promise an end to the refugees' plight.[6]

The term 'durable solutions' is absent from the Convention Relating to the Status of Refugees (the Refugee Convention); however, Article 34 of the Convention has enshrined one of the three durable solutions: local integration. It provides that:

> [t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.[7]

The term 'assimilation' is no longer in use, as it has been replaced with local integration or integration in the country of asylum.[8] Aleinikoff and Poellot regard this provision as '[t]he closest the Convention gets to a right to a solution'.[9]

The Refugee Convention also mentions resettlement but only in relation to allowing the transfer of assets of refugees once they have been admitted to a third country.[10] However, the Conference of Plenipotentiaries that drafted the Refugee Convention included a plea in Recommendation D 'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of *resettlement*'.[11] Unlike local integration and resettlement, the term 'voluntary repatriation' is completely absent from the Refugee Convention.

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[5] Guy Goodwin-Gill, 'Refuge or Asylum: International Law and the Search for Solutions to the Refugee Problem' in Howard Adelman and Michael Lanphier (eds), *Refuge or Asylum?: A Choice for Canada* (York Lanes Press 1990) 38.
[6] UNHCR, *The State of the World's Refugees: Human Displacement in the New Millennium* (OUP 2006) 129.
[7] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. Art. 34. (Refugee Convention)
[8] Marjoleine Zieck, 'Article 35 of the Convention/Article II of the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1493.
[9] Thomas Alexander Aleinikoff and Stephen Poellot, 'The Responsibility to Solve: The International Community and Protracted Refugee Situations' (2014) 54(2) *Virginia Journal of International Law* 195, 203.
[10] Refugee Convention. Art. 30.
[11] Refugee Convention. Recommendation D. (Emphasis added).

To identify all the concepts, this chapter first introduces the background of the thesis, its aims and objectives. Then, it discusses a brief overview of the Iraqi refugees in protracted situations and analyses their continuous cycle of displacement, before stating the reasons why the plight of Iraqi refugees is a good case study to explore the legal nature of the right to durable solutions. Next, the research questions are discussed in order to narrow the specific domain that this research seeks to address. Then, the significance of the study highlights the importance of the research and identifies those expected to benefit from it. This is followed by a discussion of the methodology by which the data is compiled and analysed so as to guide the reader appropriately regarding the methods used in this thesis. Finally, the structure of the thesis is outlined.

1.2 The Background of the Study and Problem Statement

There is a growing concern about refugee crises around the world, and yet the international community seems to be unable either to resolve Protracted Refugee Situations (PRSs) or prevent the emergence of new ones. The Executive Committee of the High Commissioner's Programme (ExCom) has defined PRSs as

> one in which refugees find themselves in a long-standing and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years of exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.[12]

In its ExCom Conclusion, the UNHCR High Commissioner '*[n]otes* with deep concern the plight of millions of refugees worldwide who continue to be trapped in "protracted refugee situations" for 5 years or more after their initial displacement, without immediate prospects for implementation of durable solutions'.[13] The United Nations General Assembly (UNGA), the UNHCR and its ExCom have urged and supported policies to end PRSs.[14]

[12] ExCom Conclusion, 'Protracted Refugee Situations' (Standing Committee, 30th meeting, 10 June 2004) UN Doc. EC/54/SC/CRP.14, para. 3.
[13] ExCom Conclusion No. 109 (LXI) 'Conclusion on Protracted Refugee Situations' (8 December 2009) preamble (para. 3).
[14] See, for example, UNGA Res 64/127, 'Office of the United Nations High Commissioner for Refugees' (27 January 2010) UN Doc. A/Res/64/127, para. 22.

Based on this definition, there are 6.4 million refugees in PRSs, where they were living in 26 host countries. This constitutes a total of 33 protracted situations in the world.[15] In fact, by the end of 2014, the average length of refugees in protracted situations was about 25 years, in comparison with 2003 which was 17 years, and 1991 which was nine years.[16] These figures show that there are more refugees trapped in protracted situations than before and also that their plight takes longer to be resolved. Therefore, from the perspective of persons born in danger zones, one is more likely to be a refugee in 2015 than in 2014, yet less likely to find a durable solution. This shows that any expectation that the refugee problem will abate is, without question, unrealistic.

The increase in the number of recognised refugees constitutes evidence that States so far have been unable to promote and efficiently deliver the permanent solutions for refugee plights, and the problem is there are no signs that they will get lower anytime soon. For instance, the on-going conflict and civil war in the country of origin has restricted the prospect of voluntary repatriation for refugees. The lack of international co-operation and solidarity has contributed to the restriction of the resettlement opportunities and its efficient delivery. Equally, host States are generally reluctant to provide local integration for refugees because of, *inter alia*, the lack of additional support from donor States. Aleinikoff and Poellot also note that while most PRSs have their specific features, the main causes are generally similar. These include 'unresolved political instability at home, a host country set against local integration, and an international community unwilling to increase resettlement opportunities. And so refugees wait, and wait'.[17] The former UNHCR High Commissioner, Ruud Lubbers, notes that it is simply unacceptable that in the twenty-first century there are people neglected by the international community, as they are trapped in camps for years without immediate prospect of a durable solution.[18]

In 1950, the UNHCR was established to protect and resolve refugee problems. Since its creation, it has been the UNHCR's mandate to search for a durable solution. The UNHCR's Statute stipulates that the High Commissioner should 'seek permanent

[15] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 11.
[16] ibid 11; and ExCom Conclusion, 'Protracted Refugee Situations' (n 12) para. 6.
[17] Aleinikoff and Poellot (n 9) 200.
[18] UNHCR, 'Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, to the European Conference on Migration, Brussels (HC Statements, 16 October 2001). Available at: <http://www.unhcr.org/3bdd46c17.html> accessed 17 October 2015.

solutions for the problem of refugees by assisting Governments and, […] private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities'.[19] The term 'permanent solutions' has been replaced with 'durable solutions'. Such a term was coined in the late 1970s by the former UNHCR High Commissioner, Poul Hartling, for refugee problems.[20]

The overwhelming increase in refugee figures as mentioned above has stretched the capacity of the UNHCR. The agency has never in its history had to take responsibility for such a large number of people. In fact, it was originally meant to be a short-term agency, whose mandate was valid for a term of only three years.[21] This shows the expectations of solving refugee problems that States had at that time.[22] Yet today, more than 60 years later, the refugee plight has become a permanent factor in the international arena and the removal of the time limitation on UNHCR's mandate is further evidence of this permanence.[23] Such a move could be interpreted as a defeat by the international community for their inability to end refugee problems.

1.3 Aims and Objectives

This thesis aims to explore the legal nature of the right of refugees to durable solutions. This right is not explicitly stated in any international instrument. The research makes a contribution to the legal literature, which has not considered it systematically so far. As such, the international community, acting through the UNHCR, has the responsibility to develop and effectively implement this right, as well as an obligation to recognise it and fulfil. An explicit recognition of this right will significantly contribute to alleviating the plight of refugees.

The premise for this research is the assertion that States have an obligation to co-operate in international law, and that individuals are the subjects of rights in international law. The theoretical framework that this research develops is twofold: on the one hand, there

[19] Statute of the United Nations High Commissioner for Refugees, adopted 14 December 1950, UNGA Res 428(V), para. 1. (UNHCR Statute).
[20] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 99. See also, Zieck, 'Article 35 of the Convention/Article II of the 1967 Protocol' (n 8) 1493.
[21] UNHCR Statute, para. 1.
[22] ibid, para. (5); and UNHCR, 'History of UNHCR: A Global Humanitarian Organization of Humble Origins' available at: <http://www.unhcr.org/pages/49c3646cbc.html> accessed 20 October 2015.
[23] UNGA Res 58/153 (24 February 2004) UN Doc. A/RES/58/153, para. (9).

is the establishment of the obligations that States have in international law to co-operate with each other and with the UN, including the UNHCR, whose mandate is to find durable solutions on refugee matters and, on the other hand, that refugees are subjects of rights in international law, and hence they can be the subject of the specific right to durable solutions.

This thesis will also show that the optimal solution for Iraqi refugees is resettlement in third countries. This solution is the only one capable of addressing their ongoing displacement and of finding a home for this particular group of refugees from Iraq. It also provides the opportunity for them to rebuild their lives, in dignity and safety, in third countries. Therefore, it will be argued that it is the duty of the international community to show international solidarity to find a way to address the plight of Iraqi refugees and it is the responsibility of the UNHCR to find a way to facilitate that. The research moves beyond identifying resettlement as the preferred durable solution, to argue that Iraqi refugees have the right to be resettled in a third country. A right that the international community, acting through the UNHCR, has the responsibility to recognise, fulfil, and effectively implement.

1.4 Iraqi Refugees in Protracted Situations: Case Study

This research will examine the right to durable solutions, taking the plight of Iraqi refugees as a case study. As such, it will study the implementation of the key elements of this right to the situation of Iraqi refugees. The plight of Iraqi refugees is a good case study to explore the legal nature of the right to durable solutions. This is because there is a continuous pattern of large displacement from Iraq to neighbouring countries. This is, in part, due to the ongoing conflict, persecution, or post-conflict situations in the country. Indeed, as explored in Chapter Five, the review of their historical displacement shows that today 25 years after the 1991 Gulf War and 12 years after 2003 US-led invasion of Iraq, their predicament has not only continued but their plight has expanded over time.[24] The large-scale displacement has occurred throughout the past 30 years. The continued cycles of displacement are the result of the brutal dictatorship in the country, and waves of displacement occurred during Saddam Hussein's brutal regime and after its removal as well. The international community expected that the removal of

[24] For further analysis on the on-going displacement of Iraqi refugees see, Chapter Five.

Saddam from power would result in the repatriation of Iraqis to their regions of origin.[25] However, this expectation has been proven false and the waves of displaced Iraqi refugees have continued.[26] In fact, the latest UNHCR figures show that Iraqi refugees are one of the three groups of refugees to have consistently been among the top 20 source countries of refugees since 1980.[27] This has resulted in new generations being born into a situation of forced displacement. The table provided in appendix (A) shows the Iraqi refugee population from 1979 to 2014,[28] and also shows the never ending displacement cycle of refugees from Iraq.

An even more important issue is that this will remain the case in the future because, for example, Iraqi refugees as a population group will continue to seek protection in these countries regardless of the cause of their flight. Indeed, due to their geographical location, the systematic pattern of flight by Iraqi refugees will continue, as demonstrated by their recent large displacement.[29]

The recent displacement also proves the ongoing history of displacement from Iraq and shows that yet again Iraqi refugees are moving towards more protracted situations. It also shows that their displacement cycle is likely to continue in the foreseeable future. This is because the conditions in Iraq do not allow for voluntary repatriation. Indeed, the latest displacement crisis of Iraqi refugees shows that return to Iraq is neither feasible nor recommended by the UNHCR.[30] This is an indication that the international community must realise that an early resolution to the Iraqi refugee crisis is unrealistic. Initially, the displacement of Iraqi refugees was considered temporary; today, however, their plight has become permanent displacement in the international sphere. According to Alonso, this means that '[n]either Iraq's neighbours nor European countries can

[25] Philip Marfleet and Dawn Chatty, 'Iraq's Refugees – Beyond 'Tolerance'' (2009) Refugee Studies Centre, Forced Migration Policy Briefing 4, 1 <http://www.rsc.ox.ac.uk/publications/iraq2019s-refugees-2013-beyond-tolerance> accessed 12 October 2015.
[26] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (23 September 2014). Available at: <http://www.unhcr.org/542148839.html> accessed 14 October 2015.
[27] The other two are Afghanistan, and Viet Nam. UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.
[28] UNHCR, 'Total Refugee Population by Country of Asylum, 1960-2012 & Total Refugee Population by Origin, 1960-2012' (UNHCR Statistical Online Population Database, 2014). Available at: <www.unhcr.org/statistics/populationdatabase> accessed 15 October 2015.
[29] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[30] UNHCR, 'UNHCR Position on Returns to Iraq' (October 2014). Available at: <http://www.refworld.org/pdfid/544e4b3c4.pdf> accessed 22 October 2015.

ignore the situation and implement a closed-door policy'.[31] As noted by the UNHCR High Commissioner, 'without the prospect of durable solutions, [the] duty to protect refugees cannot be fulfilled effectively'.[32]

As explored in Chapter Five, the law, policy and practice of asylum countries does not allow for the possibility of local integration. This research echoes the UNHCR's own position that resettlement to third countries is the only possible solution for Iraqi refugees.[33] Hence, it develops a theoretical framework that applies to the law on resettlement.

Apart from the reasons outlined, the plight of Iraqi refugees is also a good case study to explore because, so far, the international community has not only failed to address their plight but also the emergence of refugee problems elsewhere in the region, such as Syria, has shifted international attention away from the tenuous situation of Iraqi refugees. According to Stevens, recently 'beyond the region, limited reference is made to the case of Iraqi refugees'.[34] Although there is a good body of literature on Iraqi refugee crisis,[35] the literature focuses on other disciplines, such as political science, and is more policy driven. This is different from the viewpoint taken by this research, which is an academic and scholarly approach conducted from a legal perspective. These are the reasons why Iraq is a good case study to explore the legal nature of the right to durable solutions. In the light of these issues, the questions this study seeks to address are stated below.

1.5 Research Questions

The main question that this thesis seeks to address is whether refugees have the right to durable solutions. In order to explore that refugees have this right and that the optimal

[31] Beatriz Tomé Alonso, 'Iraqi Conflict-induced Refugees and Their Regional Impact', in Antonio Marquina Barrio (ed), *Migration Flows, Economic Crisis, Environmentally-induced Migration and Human Security: Visions from Asia and Europe* (UCM 2010) 321.
[32] UNHCR, 'Lubbers Launches Forum on Convention Plus Initiative' (27 June 2003). Available at: <http://www.unhcr.org/3efc7e7b2.html> accessed 2 October 2015.
[33] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 13 October 2015. See also, UNHCR, 'UNHCR Position on Returns to Iraq' (n 30).
[34] Dallal Stevens, 'Legal Status, Labelling, and Protection: the Case of Iraqi 'Refugees' in Jordan' (2013) 25(1) IJRL 1, 1-2.
[35] See, for example, the literature cited in Chapter Six, Sections 6.1 and 6.2.5.

solution for Iraqi refugees is resettlement in a third country, the following questions will be asked:

A. Do States have an obligation to co-operate on refugee matters?

B. What is the role of the UNHCR in finding a durable solution for refugees?

C. What is the preferred durable solution for Iraqi refugees?

D. Is there a right of Iraqi refugees to resettlement in a third country?

1.6 The Significance of the Study

This study aims to address one of the current gaps in the legal literature on refugee protection, namely the legal nature of the right of refugees to durable solutions. This research will contribute to the understanding of what is meant by this right within the context of refugee plight. The findings from this research will make several contributions to the current literature, given the growing concern for refugee crises around the world, making this research timely. Moreover, the Iraqi refugee crisis is a current and urgent issue that must be studied as it continues to evolve, despite the continuous involvement of the international community.

Although other disciplines such as international relations and political science have paid more attention to durable solutions, no extensive research has been conducted from a legal perspective. As noted above, some of the research on durable solutions is more policy driven,[36] while this research's approach is academic and scholarly. Furthermore, the researcher explores the issue from the innovative perspective of the right of refugees to durable solutions; this is a right which is not recognised explicitly in any written instrument. However, the existence of this right can be found in the combined effect of other legal obligations of States of a diverse legal nature, including the UN Charter. The lack of codification of this right enriches the research argument. Therefore, the research brings a novel argument to the literature and presents a number of important new

[36] See, for example, Aleinikoff and Poellot (n 9) 195-222.

academic innovations that show improvements over existing related studies conducted by researchers in the field of international refugee law.

Despite the long standing recognition that States have obligations under international law to co-operate on a number of issues, including human rights, there is no explicit obligation of States under international law to co-operate on refugee matters. The analysis in Chapter Two aims to fill a gap in the literature on this obligation by identifying a legal framework where the obligations of States towards refugees can be found.

The international legal personality of individuals is another element that this thesis considers in order to answer the main research question. This element contributes to the existing knowledge on the international legal personality of refugees, and in particular, by exploring the emerging tendency that refugees can be the subjects of specific rights in international law. This contribution comes from the fact that although there is an abundant literature describing the position of individuals in international law,[37] there is little commentary directed towards the position of refugees as subjects of rights in international law.[38]

Additionally, the knowledge generated by this thesis seeks to inform recent academic and policy debates on the three durable solutions. This study will focus on the notion of PRSs in order to identify a solution that is capable of bringing the situation of Iraqi refugees to a close. The findings on this notion will thus have significant importance for scholars, policy makers, and others involved in refugee studies, in particular, complementing the existing research and policy literature on PRSs.

Contrary to the existing literature,[39] this research will show that resettlement is the optimal solution for Iraqi refugees in protracted situations. Accordingly, this thesis has special importance for refugees, in particular Iraqi refugees, because it will argue that they have the right to be resettled in a third country. It will also argue that the

[37] See, for example, the literature cited in Chapter Three, Section 3.1. (n 456).
[38] See, for example, Frank E. Krenz, 'The Refugee as A Subject of International Law' (1966) 15 *International and Comparative Law Quarterly* 90-116; and María-Teresa Gil-Bazo, *El derecho al asilo como derecho subjetivo del individuo en Derecho internacional. Especial referencia al Derecho europeo. [The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law]* (UMI 1999).
[39] See, for example, the literature cited in Chapter Six, Section 6.1. (n 1178).

international community is obliged to deliver this solution and show international solidarity to alleviate their protracted displacement. This research may also benefit Iraqi government and policy makers, such as the UNHCR, because, while critically analysing the displacement of Iraqi refugees, it identifies ways for the involved parties to improve the situation.

At a time when events, notably in the Mediterranean and Andaman seas, are bringing discussion on resettlement to political agendas at the highest level, a contribution to the debate theoretically and conceptually grounded in the law has the potential to make a significant contribution to the debate beyond academia.

1.7 Methodology of the Study

The methodology used for this research has been based primarily on documentary research since no fieldwork is required to answer the research questions. This approach among legal scholars is known as doctrinal research, or 'black-letter' law research. To evaluate legal rules, this method makes comprehensive reference to international instruments, judicial decisions, academic commentary, policy documents, and independent reports.[40] Örücü defines 'black-letter' law as 'normative, structural, institutional and positivistic, and would not use any approach other than the reading of statutes, cases, parliamentary debates and doctrinal works, and would regard description and identification to be the final stages of the inquiry'.[41] Therefore, black-letter law is law-oriented and rule-based research that plays an important role in the development of the legal system, and is a prominent method for legal research and continues to be a popular method among legal scholars. This section examines the methodological approach adopted and justifies both their usefulness and appropriateness for this research.

The approach was adopted in the thesis because the researcher uses legal reasoning to examine the right of refugees to durable solution, and contribute to the literature for further development of the law. The argument in this research is not confined to the Refugee Convention, but beyond focuses on other treaty obligations, including the UN

[40] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 3-4.
[41] Esin Örücü, 'Methodology of Comparative Law' in Jan M. Smits (ed), *The Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2006) 449.

Charter. International soft law instruments, such as UNGA resolutions, the UNHCR's Statute, ExCom conclusions are frequently referenced in this study because they provide a sufficient legal basis from which to argue the existence of States' obligations towards refugees. This exploration will assist in the identification of what is reflected in the soft law on this obligation, which might eventually become hard law. This is because soft law instruments could either codify existing rules of customary law or be used to interpret hard law, as discussed in Section 2.4.

In addition, refugees are entitled to benefit from the international regime for the protection of refugees which was born in the early twentieth century (the Refugee Convention and its Protocol), as well as from the range of other international and regional human rights instruments as they apply to all people, regardless of refugee status or nationality. These include the Universal Declaration of Human Rights (UDHR),[42] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),[43] the international human rights covenants (i.e. International Covenant on Civil and Political Rights (ICCPR),[44] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)),[45] and regional human rights instruments (i.e. the European Convention on Human Rights (ECHR),[46] the American Convention on Human Rights (ACHR),[47] and the African Charter on Human and People's Rights (ACHPR)).[48] The researcher refers to the provisions of these instruments because they complement the international refugee law regime and provide a wider scope of protection to refugees. These instruments are also evidence of the evolution of public international law in the twentieth century and they have influenced the developing position of refugees in the international legal order.

[42] Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A(III). (UDHR).
[43] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. (Convention against Torture).
[44] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. (ICCPR).
[45] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. (ICESCR).
[46] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5. (ECHR).
[47] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 36 OAS TS 1; 1144 UNTS 123. (ACHR).
[48] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. (ACHPR).

The primary sources, including the decisions of courts and tribunals, whether domestic, regional or international, are referred to throughout the thesis. For instance, the contentious and advisory cases of the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACrtHR), and the Court of Justice of the European Union (CJEU) are frequently referenced in this study.

Although in international law the judicial decisions are only 'subsidiary means for the determination of rules of law',[49] the decisions of these courts are declaratory of valid up to date international rules. In addition, the decisions of these courts are analysed to shed light on the controversial issues in international law. Apart from international and regional tribunals, this thesis makes specific reference to a number of domestic courts from both jurisdictions of common and civil law. In other words, the primary analysis of judicial reasoning is from a wide spectrum rather than being confined to a particular jurisdiction (i.e. common law).

As well as primary sources, this research also critically analyses and evaluates a number of secondary legal sources, either as hardcopies or electronic materials. The former includes textbooks, paper journals, and legal encyclopaedias, while the latter includes electronic journals, policy documents, independent reports, academic commentaries, catalogues, databases, online research guides, and many other relevant websites. In addition, this research will involve a qualitative critique of both academic literature and judicial decisions, and will analyse a number of policy papers. State practice is also evaluated to reflect on the international community's approach to addressing the ever growing refugee problem.

As noted above, this thesis explores a right which is not codified in international law, and hence the research does not merely describe or interpret the law just to report the legal rules, but also systematises the law by way of reinterpreting differing concepts, rules, and principles. The Vienna Convention on the Law of Treaties 1969 (Vienna Convention)[50] has been referenced as a main source of treaty interpretation.

[49] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1179; 59 Stat. 1031. Art. 38(1)(d). (ICJ Statute).
[50] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Arts.26 and 31(1).

As indicated above, although doctrinal methodology predominantly relies on self-informed analysis of international instruments and judicial decisions, the researcher also analyses the UNHCR's data and statistics to verify the findings of the research and evaluate a number of specific issues related to refugees in asylum countries, countries of origin, resettlement countries, and the location and legal status of refugees in these countries.[51] The statistics, reports, surveys, and interviews conducted by international organisations provided a broad scope of reference to identify issues in particular countries, and evaluate and compare it to other countries in the region or other regions to look at the issues from different perspectives. The UNHCR's data and statistics are an important part of this research because they provide information, *inter alia*, on the people of concern to the UNHCR, such as refugees, asylum-seekers, internally displaced persons (IDPs), and returned refugees.

These data and statistics are particularly helpful when the researcher examines the State practice of Turkey, Jordan, and Lebanon and their response to the protection of Iraqi refugees. These data and statistics enable the researcher to identify the emerging issues and evaluate and compare them to other countries discussed in the study, and then highlight converging and diverging trends in their protection of Iraqi refugees.

To review the historical displacement of Iraqi refugees in the said countries, this research primarily relies on secondary sources such as books, journal articles, and NGO reports. Reports from Amnesty International, Refugee International, International Crisis Group, the Refugee Studies Centre Working Papers, and HRW are frequently referenced. These documents are considered and evaluated as they represent first-hand the plight of Iraqi refugees and their ongoing crisis. Their involvement alongside the UNHCR in the day-to-day fieldwork with refugees makes them reliable sources of reference. However, the researcher had to be selective in order to maintain the context of the research and has weighed materials based on the authoritative interpretation of legal rules.

Due to the non-applicability of the Refugee Convention to Iraqi refugees because neither Jordan nor Lebanon is party to the Refugee Convention, although Turkey

[51] See, for example, UNHCR, 'Statistics & Operational Data' available at: <http://www.unhcr.org/pages/49c3646c4d6.html> accessed 24 October 2015.

maintains the geographical limitation of the Convention,[52] the researcher instead took into account other international or regional instruments (i.e. ECHR, Convention Against Torture, and ICCPR) to examine the practice and policy of these States. In order to investigate their conduct towards Iraqi refugees, the decisions of a number of international human rights monitoring bodies, including the Committee Against Torture (CAT),[53] the General Comments of the Human Rights Committee (HRC),[54] the Working Group on Arbitrary Detention (WGAD),[55] and the Universal Periodic Review (UPR) are examined.[56] These monitoring bodies, in Gil-Bazo's view, have been instrumental in refugee protection by developing a sound body of case-law on the rights of non-nationals.[57] The reviews of reports from these enforcement mechanisms highlight the practice of these States, and help to identify whether they have violated the provisions of the international or regional instruments.

Lastly, the research reviews the provisions of the Memorandum of Understanding (MoU) as an applicable legal framework to Iraqi refugees Jordan and Lebanon. The MoU signed between Jordan and Lebanon and the UNHCR as an alternative legal instrument for regulating the status of refugees in the country.[58] Its provisions are reviewed to identify whether the treatment of Iraqi refugees in these countries reflects the applicable international law and standards.

1.8 Structure of the Thesis and the Chapter Outlines

This thesis is divided into seven chapters, sequenced to provide an overall legal perspective on the right of Iraqi refugees to durable solutions. In this section, the purpose of each chapter is mentioned, followed by the analysis of the key arguments

[52] For further detail on the non-applicability of Refugee Convention to Iraqi refugees in these countries see Chapter Five.
[53] UNHCR, 'UN Committee against Torture (CAT)' available at: <http://www.refworld.org/publisher/CAT.html> accessed 17 October 2015.
[54] HRC, 'Monitoring Civil and Political Rights' available at: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed 17 October 2015.
[55] The Commission on Human Rights, 'Question of Arbitrary Detention' (5 March 1991) UN Doc. E/CN.4/RES/1991/42.
[56] UNGA Res 60/251, adopted 15 March 2006, UN Doc. A/RES/60/251, para. (e).
[57] María-Teresa Gil-Bazo, 'Introduction: The Role of International Organizations and Human Rights Monitoring Bodies in Refugee Protection' (2015) 34(1) RSQ 1, 1.
[58] Michael Kagan, '"We live in a country of UNHCR" The UN Surrogate State and Refugee Policy in the Middle East' (2011) New Issues in Refugee Research, Research Paper No. 201, <http://www.unhcr.org/4d5a8cde9.html> accessed 17 October 2015.

and the legal findings. The first one (the present chapter) introduces, explains, and analyses the fundamental considerations which will be applied throughout this research.

Chapter Two along with Chapter Three provide the theoretical framework that guides the development of this thesis. Chapter Two identifies the legal framework where States' obligations towards refugees can be found, which is one of the elements considered to address the main research question as to whether refugees have the right to durable solutions. Despite the lack of explicit obligation of States to co-operate on refugee matters, States have obligations in international law to co-operate on a number of issues, including human rights and with the UN, including the UNHCR, whose mandate is to find durable solutions. The analysis will show that these obligations can be found in the combined effect of the UN Charter, Refugee Convention, UNGA resolutions, UNHCR Statute, and ExCom conclusions.

Chapter Three considers whether refugees are the subjects of rights in international law, and hence whether they can possess the right to durable solutions. To consider this element, the chapter first explores the position of individuals as subjects of international law and then specifically addresses the position of refugees as the subjects of rights. The exploration of their position shows that there is an emerging trend that refugees can be the subjects of specific rights in international law. This argument is strengthened by the fact that refugees are arguably already the subjects of certain rights in international law, including the right to asylum and the right of *non-refoulement*. Refugees, being the subjects of these two rights in contemporary international human rights law, show the evolution of international law on this subject matter. Such emergence opens the way for refugees to become the subject of other international rights, including the right to durable solutions.

Chapter Four examines the role of the UNHCR, which was established by the UN General Assembly with a mandate from international community to find durable solutions for refugee problems.[59] To examine this role, the chapter first analyses a series of initiatives, conferences, and expert meetings of the UNHCR. The chapter highlights the progress and challenges faced by the agency to improve the refugee situation. The second part of the chapter examines State practice and the UNHCR's policy towards

[59] UNHCR Statute, para. 1.

one of the durable solutions, voluntary repatriation. Chapters Five and Six, discussed below, consider local integration and resettlement in a third country respectively to identify a suitable solution for Iraqi refugees in protracted situations. The examination was performed to identify whether the practice of States, often facilitated by the UNHCR, is in compliance with the obligations the States have according to international law. The historical analysis into the position of the UNHCR shows that its role and responsibility towards refugees, including with regard to durable solutions, has changed dramatically.

In order to identify a suitable solution to address Iraqi refugees, **Chapter Five** examines the State Practice of Turkey, Jordan, and Lebanon and their responses to the protection of Iraqi refugees as the hosts of the greatest majority. The chapter then examines the status of Iraqi refugees and the legal framework applicable to them in these countries to identify whether their treatment is in compliance with the obligations the States have under international law. The analysis will show that all three countries have incorporated specific provisions in the MoU, in the case of Jordan and Lebanon, or in their domestic legislations, in the case of Turkey, objecting to the idea of local integration for Iraqi refugees. The law, policy, and practice of these countries also show that there is no evidence that such a pattern is going to change.

Although the options open to Iraqi refugees in terms of the three durable solutions are explored, the analysis in **Chapter Six** demonstrates that third country resettlement is the best solution for Iraqi refugees in protracted situations. This solution is the only way for Iraqi refugees to find any meaningful possibility of solution: a solution that is capable of finding them a home and addressing their ever growing crisis. The review of a number of UNHCR and the European Commission's reports likewise recognises that resettlement is the only possible solution for Iraqi refugees. Although it is considered that the other two durable solutions might provide a solution for some refugees, they are incapable of constituting a solution of general applicability. Despite identifying resettlement as the optimal solution, it is recognised in the chapter that there are challenges and obstacles that hinder the actual implementation and efficient delivery of this solution.

Chapter Six not only identifies resettlement as the best solution for Iraqi refugees but also argues that Iraqi refugees have the right to resettlement in international law. This is

not a matter of choice, but because there is nothing else available for them. However, it is not claimed that every refugee has a right to resettlement and that this right exists as a matter of choice for every refugee under any circumstance; it is only for those for whom no other alternatives are available, as is the case with Iraqi refugees.

Finally, **Chapter Seven** draws conclusions by presenting the research findings. The themes addressed throughout the research are drawn together. Lastly, it will identify specific areas that might deserve further research and/or policy development. In particular, it will make some recommendations for the international community, the UNHCR, and the Iraqi government. The chapter concludes the research by reminding the international community that across the globe the nation of displaced is growing. The latest growing figures are further evidence of this. Therefore, it is the duty of the international community to show international solidarity to address the ongoing plight of Iraqi refugees and it is the responsibility of the UNHCR to facilitate it.

Chapter 2. The Obligation of States to Co-operate on Refugee Matters

2.1 Introduction

In 1981, the former UNHCR High Commissioner, Poul Hartling, claimed that 'in refugee matters, the objective of the international community, of governments, of my office and of other organisations concerned is, from the very first moment, to identify and implement durable solutions'.[60] However, 34 years later there are still far too many refugees in protracted situations without a solution in sight. The emerging displacements in a number of countries, including Middle Eastern countries, have brought the plight of forced migrants once again to the forefront.[61] Despite this, the international community has so far failed to respond. This is mainly because States do not feel that they have obligations to respond to these crises.

The primary question that this chapter will examine is whether States have an obligation in international law to co-operate on refugee matters. The analysis of the obligations of States to co-operate on refugee matters and obligation of States to co-operate with the UNHCR, whose duty is to find durable solutions, is essential for the overall theme of the research because this analysis is key to showing that refugees have the right to durable solutions in international law. This chapter considers this question by first examining the obligations of States under the UN Charter,[62] Refugee Convention,[63] including its preamble, and by exploring several international instruments, including UNGA resolutions, the UNHCR Statute and ExCom conclusions. The obligation of States towards refugees can be read in a holistic interpretation of the said instruments. The analysis in this chapter aims to fill a gap in the literature on this obligation.

[60] Statement by Mr. Poul Hartling, United Nations High Commissioner for Refugees (1981). Cited in Jessica Schaffer, 'Repatriation and Re-integration: Durable Solutions?' (1994) Refugee Studies Centre, RSC/A-46 SCH, 1 <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:2097> accessed 18 October 2015.
[61] UNHCR, 'Time running out to Resolve Refugee Emergency in Europe' (News Stories, 18 September 2015). Available at: <http://www.unhcr.org/55fc0e386.html> accessed 13 October 2015.
[62] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. (UN Charter).
[63] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

The obligation to cooperate on refugee matters is one of the elements considered to test the hypothesis that refugees have the right to durable solutions. To consider this element, this chapter is divided into two parts. In the first part, it explores the principles of co-operation from the international and refugee law perspectives. In the second part, the focus will be on documents considered to be soft law and their legal relevance in international law. In this research, soft law refers to non-legally binding international instruments including UNGA resolutions, UNHCR Statute, and ExCom conclusions; this is in contrast to legally binding hard law instruments such as the Refugee Convention.

Although it is recognised that these instruments are non-binding as such, they have a strong influence while interpreting the Refugee Convention pursuant to Article 31 of the Vienna Convention,[64] as will be shown below.[65] This is also noted by the UNGA that 'international legal instruments, as well as internationally accepted principles and norms expressed, *inter alia*, in General Assembly resolutions, the Conclusions of the UNHCR Executive Committee, […] are vital tools for the protection of refugees'.[66] Aleinikoff and Poellot echoes the UNGA resolution that 'an international refugee regime exists, constituted by overlapping and interrelated instruments, norms, processes, and practices – including the Statute of UNHCR, the Refugee Convention and Protocol […], General Assembly resolutions, [and] Conclusions of the Executive Committee on UNHCR's Programme'.[67] These instruments are explored to consider the existence of obligations of States towards refugees. This exploration will assist in identifying what is reflected in soft law on this obligation that might eventually become hard law. This is because soft law instruments could either codify existing rules of customary law or be used to interpret hard law, as discussed in Section 2.4.

The analysis will show that there is a systematic reference in the UN Charter, Refugee Convention, UNGA resolutions, the UNHCR Statute, and ExCom conclusions to the significance of international co-operation to refugee protection, as illustrated in Table 1. This illustrates States' sense of legal obligation towards refugees. It also shows the long standing recognition among States that international co-operation is a necessary prerequisite for the satisfactory solution to the plight of refugees.

[64] Vienna Convention. Art. 31.
[65] See Sections 2.4.1, 2.4.2, and 2.4.3.
[66] UNGA, 'Note on International Protection' (7 September 1994) UN Doc. A/AC.96/830, para. 15.
[67] Aleinikoff and Poellot (n 9) 210.

The analysis also shows that States have obligations in international law to co-operate with UNHCR, whose mandate is to find durable solutions. The UNHCR Statute adopted by the General Assembly resolution on behalf of the international community seeks to protect and provide durable solutions for refugees. This resolution might provide evidence of customary international law because it was widely approved by States. In fact, UNHCR Statute is the closest reflection of the will of the international community and an important source of obligations of States towards refugees.

2.2 Obligations of States to Co-operate on Refugee Matters under the UN Charter

It is the purpose of this chapter to analyse the legal framework where States' obligations towards refugees can be found. In order to do this, this section examines the obligations of States under the UN Charter. Although there are provisions in the UN Charter which explicitly oblige States to promote human rights and fundamental freedoms and to co-operate with each other to solve international problems, they are not explicitly obliged to co-operate on refugee matters. To show the existence of this obligation, this section examines in particular three provisions of the UN Charter, namely articles 1(3), 55(c), and 56. While examining these provisions, other provisions that authorise the UN organs to take measures for the same purpose are also mentioned.

This examination yields a clear view of the obligations that UN Member States have in the field of international law. The analysis will show that the UN sees international co-operation as a necessary requirement for the adequate fulfilment of obligations of States towards refugees. The analysis will further show that that there are compelling arguments according to which the principle of international co-operation in the matters of refugee protection is of a binding nature. Hence, States have a duty to cooperate on refugee matters. Such a conclusion can be derived by a holistic interpretation of a number of instruments, including the UN Charter. In fact, the duty to co-operate in a specific legal context is already grounded in many international treaties, particularly treaties relating to environmental protection and shared resources.[68] These treaties show

[68] See, for example, International Convention on Oil Pollution Preparedness, Response and Co-operation (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 51. Art. 7; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 05 May 1992) 1673 UNTS 126. Art. 10; Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December

that there is an established legal duty upon States to co-operate in a particular field of international law.[69] Therefore, if this obligation is readily available in international environmental law, it is even more important that such an obligation is available for the protection of refugees.

2.2.1. Obligations to Co-operate to Solve International Problems

Co-operation in the UN Charter has not been mentioned in general terms but instead the drafters have defined the term in relation to specific fields namely, cultural, economic, social, political, and human rights.[70] The main organ for the performance of this function is the UNGA (Art. 13(1)) assisted by the ECOSOC (Art. 62). There are numerous provisions in the UN Charter obliging States to co-operate to achieve the goals set by the Charter. The Preamble and Chapter 1 (Articles 1 and 2) express the purposes and principles of the Organisation. The first aspect of international co-operation is envisaged in Article 1(3),

> [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all.[71]

This paragraph is the most important phrased obligation enshrined in the Charter to outline its object and purpose. According to Wolfrum, this provision is designed not only to achieve the purpose of Article 1(1), but also to serve its own objectives.[72] Verdross contended that the general nature of Article 1(3) should not lead to the opinion that this provision is a political statement. On the one hand, being part of the UN Charter, which is a binding treaty, Article 1(3) is a legally binding provision that creates

1975) 1037 UNTS 151. Arts. 4 and 6; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 06 October 1996) 1936 UNTS 269. Art. 9; and Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700. Arts. 5(2) and 8.

[69] For further analysis see, for example, Vaughan Lowe, *International law* (OUP 2007) 110-113.

[70] Christoph Schreuer, 'State Sovereignty and the Duty of States to Cooperate – Two Incompatible Notions? (Summary and Comments)' in Jost Delbrück and Ursula E. Heinz (eds), *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther-Schucking-Institute of International Law, May 23 - 26, 2001* (Duncker & Humblot 2002) 170.

[71] UN Charter. Art. 1(3). For an overview examination of principle of international co-operation see, Ann Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff 2002) 29-87.

[72] Rüdiger Wolfrum, 'Chapter I: Purpose and Principles: Article 1' in Article 10' in Bruno Simma and Others (eds), *The Charter of the United Nations: a Commentary* (Vol I, 3rd edn, OUP 2012) 109.

obligations upon States.[73] On the other hand, in accordance with the text of the Charter, its purposes are binding upon the UN itself.

Apart from Article 1(3), there are several other provisions in the UN Charter that require States to co-operate pursuant to the Charter. For instance, Article 2(5) of the UN Charter can be considered to have set the most general terms of obligations that Member States have.[74] It stipulates that,

> [a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter.[75]

The duty of States to co-operate under international law has become the foremost concern of the UN during 1960s and 1970s resulting from the independence of the former European colonies and their accession to the UN.[76] Likewise, the need for international co-operation has frequently been enshrined in many international conferences, including the Bandung Conference 1955,[77] Belgrade Conference 1961,[78] and Cairo Conference 1964,[79] and international instruments.[80] The need for international co-operation in various fields of international law has been stressed in several occasions by the UNGA resolutions.[81] In 1970, the key resolution of the UNGA, the Declaration

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[73] Alfred Verdross, 'The Charter of the United Nations and General International Law' in George Lipsky (ed), *Law and Politics in the World Community* (University of California Press I954) 153.
[74] Zieck, 'Article 35 of the Convention/Article II of the 1967 Protocol' (n 8) 1479.
[75] UN Charter. Art. 2(5).
[76] Pierre d'Argent and Nadine Susani, 'United Nations, Purposes and Principles' (2009) 10 MPEPIL 418, 420.
[77] Bandung Conference (Asian-African Conference), Final Communiqué of the Asian-African conference of Bandung (adopted 24 April 1955). Available at: <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 18 October 2015.
[78] Belgrade Declaration of Non-Aligned Countries (adopted 6 September 1961). Available at: <http://pustakahpi.kemlu.go.id/dir_dok/01st%20Summit%20of%20the%20Non-Aligned%20Movement%20-%20Final%20Document%20(Belgrade_Declaration).pdf> accessed 18 October 2015.
[79] Conference of Heads of State or Government of the Non-Aligned Movement Countries (adopted 10 October 1964) UN Doc. NAC-II/HEADS/5. Available at: <http://cns.miis.edu/nam/documents/Official_Document/2nd_Summit_FD_Cairo_Declaration_1964.pdf> accessed 18 October 2015.
[80] See, for example, UDHR Preamble (para. 6); ICESCR. Art. 2(1); Refugees Convention. Preamble (para. 4) and Art. 35; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. (CRC) Preamble; Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki (adopted 1 August 1975) 14 ILM 1292; ILC, 'Second Report on the Protection of Persons in the Event of Disasters' (4 May-5 June and 6 July-7 August 2009) UN Doc. A/CN.4/615, para. 52; Charter of Economic Rights and Duties of States, adopted 12 December 1974, UNGA Res 3281(xxix). Art. 17. UNGA Res 2152(XXI) (17 November 1966) UN Doc. A/RES/2152 (XXI), Art. 1; and UNGA Res 3201 (S-VI) (1 May 1974) UN Doc. A/RES/S-6/3201, para. 3.
[81] See, for example, UNGA Res. 1236 (XII) (14 December 1957) UN Doc. A/RES/1236 (XII); UNGA Res. 1301 (XIII) (10 December 1958) UN Doc. A/RES/1301 (XIII); UNGA Res. 1710 (XVI) (19 December 1961) UN Doc. A/RES/1710 (XVI); UNGA Res. 1815 (XVII) (18 December 1962) UN Doc. A/RES/1815 (XVII); UNGA Res 125/SR.34 (26 July 1966) UN Doc. A/AC/125/SR. 34 ;UNGA Res. 2625(XXV) (24

of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, confirmed that,

> [t]he States have the duty to co-operate with one another, irrespective of the differences, […] in the various spheres of international relations, in order to maintain […] the general welfare of nations and international co-operation.[82]

According to Babović, this obligation declares solidarity among the nations.[83] To some extent, the declaration has paraphrased the provision of the Charter. Most of the provisions enshrined in the declaration replicate the UN Charter; one might argue that the exact replication has been done deliberately to reaffirm the purpose of the Charter to Member States. In addition, the commentators widely held that the declaration provides an authoritative interpretation of the Charter.[84]

Despite the fact that the resolution of UNGA has deemed incapable of creating direct legal obligations and lack binding force, authors such as Klein and Schmahl argue that resolutions adopted by consensus or unanimously by Member States should possess a legal force that States bound by them.[85] The legal relevance of the UNGA resolutions is analysed in detail in Section 2.4.1. Such an argument is precisely applicable for the said Declaration because it attempts to codify existing rules of customary international law and specify the provisions of international treaty (i.e. UN Charter). This was confirmed by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, the Court acknowledged that,

> [t]he effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves […] It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately

October 1970) UN Doc. A/RES/2625 (XXV); UNGA Res. 3201 (S-VI) (1 May 1974) UN Doc. A/RES/S-6/3201; UNGA Res. 3202 (S-VI) (1 May 1974) UN Doc. A/RES/S-6/3202; UNGA Res. 3281(XXIX) (12 December 1974) UN Doc. A/RES/29/3281.

[82] UNGA Res 2625 (XXV) (24 October 1970) UN Doc. A/RES/2625 (XXV), Annex.

[83] Bogdan Babović, 'The Duty of States to Cooperate With One Another in Accordance With The Charter' in Milan Šahović (eds), *Principles of International Law Concerning Friendly Relations and Cooperation* (Institute of International Politics and Economics 1972) 289.

[84] See, for example, Schreuer (n 70) 170.

[85] Eckart Klein and Stefanie Schmahl, 'Functions and Powers [of the UN General Assembly]: Article 10' in Bruno Simma and Others (eds), *The Charter of the United Nations: a Commentary* (Vol I, 3rd edn, OUP 2012) 479.

> from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.[86]

This shows that the ICJ saw the declaration as the representation of the existing customary international law. According to Tomuschat, it would be hard to deny that a declaration adopted by the consensus or unanimously by most of the Member States acquires much more common legal substance.[87] Sohn even went further by placing the declaration in the same category of resolutions of the UNGA that 'constitute binding interpretations of the Charter'.[88] The declaration, in Klein and Schmahl's view, has attained a 'quasi-legislative function', which is an important example in terms of international law to represent general rules of public international law.[89] In another important Resolution, the UNGA affirmed,

> the solemn commitment of all States to enhance international cooperation in the field of human rights and in the solution to international problems of a humanitarian character in full compliance with the Charter of the United Nations, inter alia, by the strict observance of all the purposes and principles set forth in Articles 1 and 2 thereof.[90]

Similarly, the United Nations High Commissioner for Human Rights has emphasised the significance of international co-operation, stating that:

> [i]nternational solidarity and international cooperation are based on the foundation of shared responsibility. In the broadest sense, solidarity is a communion of responsibilities and interest between individuals, groups and States, connected by the ideal of fraternity and the notion of cooperation. The relationship between international solidarity and international cooperation is an integral one, with international cooperation as a core vehicle by which collective goals and the union of interests are achieved.[91]

Despite of the broad consensus on the significance of co-operation in international sphere, Delbrück argues that there is not an established general legal duty upon States to co-operate. Instead, there is an obligation to co-operate in a particular field of international law, including human rights.[92] Although Lowe notes that it might be

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[86] *(Nicaragua v. United States of America)* [1986] ICJ Rep 14, paras. 188-191. See also, ICJ in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para. 102.
[87] Christian Tomuschat, 'United Nation, General Assembly' (2011) 10 MPEPIL 371, 376-377.
[88] Louis B. Sohn, 'The Development of the Charter of the United Nations: the Present State' in Maarten Bos (ed), *The Present State of intentional Law and Other Essays* (Kluwer 1973) 50.
[89] Klein and Schmahl (n 85) 478-479.
[90] UNGA Res 56/152 (13 February 2002) UN Doc. A/RES/56/152.
[91] UNCHR, 'Note by the UN High Commissioner for Human Rights on the Human Rights and International Solidarity' (Ninth Session, 15 August 2008) UN Doc. A/HRC/9/10, para. 6.
[92] Jost Delbrück, 'The International Obligation to Cooperate–An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law' in

difficult to enforce the general the duty to co-operate, 'it is certainly possible to establish a legal duty to co-operate in specific legal context and to measure a State's compliance with it'.[93] In fact, as Lowe notes, this is already the case in a number of international instruments relating to environmental protection and shared resources.[94] These treaties have enshrined the duty of States to cooperate in a specific field. For example, Article 123 of the United Nations Convention on the Law of the Sea stipulates that:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.[95]

While drafting the principle of co-operation, the delegates of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States questioned the legal nature of this principle rather than its absolute necessity.[96] The view on the legality and binding nature of co-operation differed from one State to another. For instance, the Yugoslavian delegate expressed the view that since WWII, the obligation to co-operate has become a significant component of international law. It has been transformed from a voluntary act to a legal obligation due to the adoption of the UN Charter. The principle was thus developed to a necessary requirement in international sphere and evolved into a principle of customary international law. Other principles of friendly relation among nations, in the Yugoslavian delegate's view, would be devoid of any effect without this obligation.[97]

Similarly, the United Arab Republic delegate referred to the principle of co-operation as 'the only principle born of man's creative genius and his victories in his science and technology'.[98] Also, the Indian delegate stated that 'in the political sphere, the concept of co-operation was the corollary of peaceful coexistence'.[99] The Romanian delegate went even further by stating that co-operation between States, like any other principle of

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Holger P. Hestermeyer and Others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff 2012) 3-4.
[93] Lowe (n 69) 112.
[94] See, for example, the instruments cited in (n 68).
[95] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. Art. 123.
[96] Eggli (n71) 53.
[97] UNGA Res 125/SR.35 (26 July 1966) UN Doc. A/AC.125/SR. 35, paras. 5-6. (Mr. Šahović).
[98] UNGA Res 125/SR.36 (26 July 1966) UN Doc. A/AC.125/SR. 36, para. 4. (Mr. El-Reedy).
[99] UNGA Res 125/SR.34 (26 July 1966) UN Doc. A/AC.125/SR. 34, para. 19. (Mr. Therattil).

international law, constitutes a right that entails an obligation rather than a duty.[100] This right has become even more significant today since no State could live in isolation; hence, the co-operation between States is an absolute necessity.[101] While working on a joint proposal, the delegates of Burma and Lebanon saw the principle of co-operation as of universal character that all States are obliged to abide by this principle. [102]

Although States did not object to the idea that there is an obligation to co-operate in a particular field of international law, the delegates from Western countries disagreed on the existence of a general legal duty to co-operate.[103] They opposed the views of developing States that the principle of co-operation has a general duty that binds States in the international sphere. In particular, the Canadian delegate did not share the view that the principle of co-operation was expressed in the form of a legal principle.[104] Eventually, the delegates concluded that, fundamentally, the principle of co-operation has a declarative nature, which characterises the general statement on the capabilities of the UN Charter.[105] The delegates widely recognised the importance of this principle and its unique characteristics.[106] This shows that from its early years States have recognised the absolute necessity of international cooperation and have established that there is a legal duty upon States to cooperate in a particular field of international law.

The commentators, for their part, have also examined the legal position of co-operation in the international system. For instance, Wolfrum argues that '[a] legal obligation to co-operate cannot be founded upon the various resolutions of the UNGA, because the UN lacks a law-making function. This, however, does not exclude a significant influence of each resolution on the development of international law'.[107]

The principle of co-operation, therefore, applies to all States, irrespective of whether they are members of the UN.[108] Delbrück adds that in the current international sphere

[100] UNGA Res 125/SR.35 (26 July 1966) UN Doc. A/AC.125/SR. 35, paras. 24. (Mr. Tilinca). See also, UNGA Res. 125/SR. 58 '1966 Special Committee on Principle of International Law Concerning Friendly Relations and Co-operation Among States (July 1966) UN Doc. A/AC. 125/SR. 58.
[101] UNGA Res 125/SR.37 (26 July 1966) UN Doc. A/AC. 125/SR. 37, para. 21. (Mr. Miller).
[102] ibid paras. 1, 28-29. (Major Thaung Lwin and Mr. Chammas).
[103] Rüdiger Wolfrum, 'International Law of Cooperation' (2010) 2 MPEPIL 783, 786.
[104] UNGA Res 125/SR.37 (26 July 1966) UN Doc. A/AC. 125/SR. 37, paras. 21-26. (Mr. Miller).
[105] Babović (n 83) 283.
[106] UNGA, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States' UN Doc. A/6230 (27 June 1966) Ch VI.
[107] Wolfrum (n 103) 786. See also, F. Menghistu 'The Satisfaction of Survival Requirements' in Bertrand G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985) 74.
[108] Babović (n 83) 298.

the duty to co-operate is acceptable in specific treaties and contexts. This is evident in State practice, which shows that obligations to co-operate are acceptable and not considered an undue burden on a State's sovereignty.[109] On the other hand, Eggli argues that because of its consensual aspect, international co-operation is not mandatory by nature due to the lack of consequences in case of non-obedience.[110]

Goodwin-Gill and McAdam argue that, today, State obligations in accordance with the institutions of international co-operation are more comprehensive, global, and are firmly established in comparison to the 1940s. This is because at that time there were not many international instruments and courts. Thus, the obligations of States, today, are clearer and, presumably, their non-fulfilment is now more likely to be the subject of sanctions or other appropriate measures.[111] More importantly, the UN Charter contains a supremacy clause that makes it the highest authority in international law. Therefore, it is an agreed principle of international law that provisions of the Charter bind all Members of the UN. This has been confirmed in Article 103, namely:

> [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[112]

This means that the UN Charter, almost universally ratified, is at the top of the hierarchy of international law obligations, and States are required to respect its laws. There are a vast number of instruments in international law demonstrating the importance of the imperative nature of international co-operation in solving international problems in various fields. However, the term co-operation has never been defined in any international instrument. While drafting the provisions of the declaration, neither the Special Committee nor UNGA could reach an agreement to define the principle of co-operation. The lack of agreement between States on the subject matter, according to Babović, shows the controversial nature of the debate 'to determine the character, scope and content of the principle of contemporary international law whose importance and necessity everyone paid service to'.[113]

[109] Delbrück (n 92) 3-4.
[110] Eggli (n 71) 29.
[111] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edn, OUP 2007) 6, 502.
[112] UN Charter. Art. 103.
[113] Babović (n 83) 318-319.

However, the main contents of the term have been widely discussed among commentators.[114] Authors such as Wolfrum, while analysing the said declaration, described the term as 'the voluntary co-ordinated action of two or more States which takes place under a legal regime and serves specific objective and [t]o this extent it marks the effort of States to accomplish an objective by joint action'.[115] However, although this definition is generally accepted, it does not represent the exact meaning of co-operation. Instead, it describes the technical process.[116] Schreuer has come closest to defining the term and arguing that co-operation as a legal concept is more of a set of actions that embodies the specific goals that need to be achieved at the maximum. International law is created and sustained by co-operation between States, without which international law would lack comprehension. [117]

It should be noted that Article 1(3) is not the only provision mentioning the obligations of Member States to co-operate. The word co-operation is mentioned eight times in the Charter, including Articles 11(1), 13(1) (a) and (b), 55(c) and 56, which respectively contain language to that effect. In fact, an entire chapter of the Charter (Chapter IX) is devoted to 'International Economic and Social Co-operation'. The UNGA as the principal organ – Chapter IV of the UN Charter – has the responsibility to oversee the achievements of international co-operation among Member States.[118] Article 56 along with Article 55 establishes international legal obligations in relation to international co-operation. Article 56 of the Charter reads:

> [a]ll Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.[119]

In sum, the analysis of the above mentioned provisions shows that the UN has two types of obligations that derive from the principles of international co-operation. On the one hand, States are obliged to co-operate with each other for the purposes of international co-operation. On the other hand, the States are obliged to co-operate with the UN to achieve these same purposes.[120] The provisions of the UN Charter have the force of

[114] See, for example, Delbrück (n 92) 3-17; Wolfrum (n 103) 783-792; Schreuer (n 70) 163-181; Eggli (n71) 29-87; and Babović (n 83) 277-321.
[115] Wolfrum (n 103) 783.
[116] Delbrück (n 92) 5.
[117] Schreuer (n 70) 164.
[118] UN Charter. Art. 13.
[119] ibid. Art. 56.
[120] Babović (n 83) 282.

positive international law because the Charter constitutes a treaty which has binding authority. For this reason, States are under a duty to co-operate in a specific legal context in accordance with the UN Charter.

2.2.2. Obligations to Promote Human Rights and Fundamental Freedoms

Primarily, human rights have progressed through international instruments and their obligations to safeguard and co-operate have gained universal recognition through these instruments as well. This progress can also be noted in customary international law. [121] A specific obligation for the purpose of this research is set in Article 55(c) of the Charter, which states that:

> universal respect for, and observance of, human rights and fundamental freedoms for all.[122]

This provision does not set a new purpose for the Charter, but rather it endorses and emphasises what had been stated in Article 1(3).[123] In fact, Articles 55(c) and 56 create basic obligations,[124] which in accordance with Article 2(2) state that:

> '[a]ll Members […] shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'.[125]

This provision, Article 2(2), has been drafted in mandatory terms. In addition, the concept of faithful fulfilment of international obligations is a general principle that is rooted in international law,[126] which still has an impact in line with customary international law. This concept (good faith) has also been cemented in the provisions of the Vienna Convention, namely:

> [a] treaty shall be interpreted in good faith 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.[127]

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[121] Schreuer (n 70) 164.
[122] UN Charter. Art. 55(c).
[123] Babović (n 83) 297.
[124] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 212-213. See also, Bernhard Schluter, 'The Domestic Status of the Human Rights Clauses of the United Nations Charter' (1973) 61 (1) *California Law Review* 120-126.
[125] UN Charter. Art. 2(2).
[126] Goodwin-Gill and McAdam (n 111) 387; and Eggli (n 71) 46-47.
[127] Vienna Convention. Arts. 26 and 31(1).

States are obliged to perform in good faith according to international legal instruments. In accordance with Articles 1(3) and 55(c) of the UN Charter, one of the means to achieve international co-operation is to promote human rights.[128] Furthermore, in accordance with Article 62(2), the ECOSOC has the competence to make recommendations for the purpose of promoting human rights.[129] In fact, non-compliance with the provisions of the UN Charter, including Articles 1(3), 55(c) and 56 with respect of human rights would result in the violation of provisions of the Charter. This was confirmed by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case towards the South African policy of apartheid. In its Advisory Opinion, the ICJ held that:

> [t]o establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[130]

As stated, Article 55 is the central theme of the Charter for promoting international co-operation and respect for human rights. However, this is not the only provision with such responsibility, as there are other provisions that have the range of responsibilities and functions in relation with the Charter.[131] These include the preamble and main text which contain no fewer than seven provisions, 1(3), 13(1), 55(c), 56, 62(2), 68, and 76(c). These explicit references to human rights promote this subject as one of the essential component of the Charter. These provisions also provide the UN with the ability to address human rights matters, examine State duties, and show respect for and observe human rights.[132] According to Humphrey, these principles pervade the Charter like a 'golden thread'.[133]

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[128] Hans Kelsen, *The Law of United Nations: a Critical Analysis of Its Fundamental Problems* (2nd edn, Stevens & Sons 1951) 21.
[129] UN Charter. Art. 62(2).
[130] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion [1971] ICJ Rep 16, para. 131.
[131] Leland Goodrich, Edvard Hambro and Anne Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia University Press 1969) 373.
[132] Eibe H. Riedel and Jan-Michael Arend, 'Article 55 (c): Chapter IX: International Economic and Social Co-operation' in Bruno Simma and Others (eds), *The Charter of the United Nations: a Commentary* (Vol II, 3rd Edn, OUP 2012) 1569 (para. 4).
[133] John Peters Humphrey, *No Distant Millenium—The International Law of Human Rights* (UNESCO 1989).

However, the Charter has been subjected to criticism by commentators; they have noted certain 'ambivalence' in the Charter.[134] In particular, in regards to the text contained in Article 2(7), the UN commits itself to the 'sovereign equality' among all Members of the Organisation. Article 2(7) of the Charter reads that:

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[135]

In practice, States have used the latter provision, Article 2(7), to override the obligations they have under the former provision, Article 55(c).[136] In addition, when the UN requests the members to observe their universal standards, 'it moves into a delicate and often inflammatory area of activity'.[137] Kelsen, one of the renowned commentators of the Charter, claimed that 'the function of the UN lacks consistency in regard to the determination of human rights'.[138] On this basis, he concluded that 'the language used by the Charter in this respect does not allow the interpretation that the members are under legal obligations regarding the rights and freedoms of their subjects'.[139] In their commentary of the Charter, Goodrich, Hambro and Simons argued that no Member State is legally obliged to respect a certain right until it enters into such agreement. This has been argued based on Article 2(3) of the Charter, according to which the organisation only promotes co-operation among Member States. Until Member States enter into such agreement to respect a particular right, the Charter lacks the competence to interfere in matters essential to sovereign equality of the State.[140] Schwarzenberger made similar remarks, stating that in the Charter, 'a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The one is entrusted to the United Nations. The other remains in the prerogative of each Member State'.[141]

Against this background, the drafters of the Charter had to include the two provisions, namely respect for human rights and refrain from interference in the internal affairs of

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[134] Kurt Waldheim, *In the Eye of the Storm: A Memoir* (Adler & Adler 1986) 134.
[135] UN Charter. Art. 2(7).
[136] For further analysis on the controversial nature of Article 2(7) see, for example, Malanczuk (n 124) 212, 368-369; Schluter (n 124) 120-126; and Kelsen (n 128) 29.
[137] Waldheim (n 134) 134.
[138] Kelsen (n 128) 29.
[139] ibid.
[140] Goodrich, Hambro and Simons (n 131) 35.
[141] Georg Schwarzenberger, *Power Politics: A Study of World Society* (3rd edn, Stevens & Sons 1964) 462.

any State, due to the gross violations which occurred during the Second World War. It was the drafters' aim to enshrine a provision in order to oblige States to co-operate with one another and to make respect for human rights a matter of international concern. By the same token, the drafters also were adamant to re-instate the principle of sovereign equality among Member States, which was overlooked during the war.[142]

Furthermore, the text of Article 2(7) in comparison with the Dumbarton Oaks proposals was more broadly applied because States wanted assurance that the strengthening of the economic and social provisions of the Charter would not have an impact on their exclusive domestic jurisdiction. In other words, it would not allow the UN to intervene in matters that fall within the internal affairs of the State.[143] Loewenstein argues that the terms sovereignty and international co-operation are complementary rather than mutually exclusive.[144]

Although it has been assumed that the relationship between the former and the latter is contradictory, in Schreuer's view, those making such a claim used it as a justification to avoid their international obligations and use sovereignty as a 'smokescreen excuse'.[145] He, therefore, concludes that 'State Sovereignty and the Duty of States to Co-operate [are] Two Inseparable Notions!' [146]

It is not the function of the UN to have the powers of a government to deal with the economic and social problems on the national level of each Member State. Instead, its aim has always been to serve as a means of promoting co-operation among States to solve international problems and achieve maximum support from Member States.[147] Despite the fact that Article 2(7) authorises the UN not to interfere in the internal matters of member states, Article 1(3), together with Articles 55(c) and 56, obliges Member States to respect human rights and fundamental freedoms. The Member States are also obliged to co-operate with the UNGA in carrying out its recommendations in accordance with Article 56 of the Charter.[148]

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[142] Zenon Stavrinides, 'Human Rights Obligations under the United Nations Charter' (1999) 3(2) *The International Journal of Human Rights* 38, 39.
[143] Goodrich, Hambro and Simons (n 131) 35.
[144] Karl Loewenstein, 'Sovereignty And International Co-Operation' (1954) 48 *American Journal of International Law* 222, 225.
[145] Schreuer (n 70) 163.
[146] ibid (n 70) 164.
[147] Goodrich, Hambro and Simons (n 131) 35.
[148] ibid 25.

In short, the issue arose as to whether the legal obligation to respect human rights is compatible with Article 2(7) of the Charter, which prohibits the intervention into essential matters within the domestic jurisdiction of States.[149] Today, however, it is widely accepted that human rights protection no longer belongs to the exclusive jurisdiction of States, as a number of developments, including the concept of the Responsibility to Protect (R2P), indicates.[150] In other words, it is the object and purpose of the UN Charter to promote and encourage States to co-operate in order to respect individuals' human rights and fundamental freedoms. The UN Charter, as the highest authority of international law, binds States to fulfil in good faith the obligations they have assumed under the Charter. In the words of Lauterpacht, the Charter imposes on the States the 'legal duty to respect and observe fundamental human rights and freedoms'.[151] The UN is a unique organisation with certain special characteristics; this has been confirmed by the ICJ in the *Certain Expenses* case.[152] Moreover, the fundamental nature of the purposes stated in the Preamble and Chapter 1 is not a matter of dispute.[153] The UN Charter is a step forward in comparison with the League of Nations. The latter lacked the depth that the provisions of the former have concerning the purposes and principles of the Charter.[154] Historically, the Charter has had its position in international law, as the pioneer organisation to safeguard the right of individuals. Furthermore, it is the principal organisation that focuses on the gravest violations of human rights.[155] This is evident in provisions of the Charter that explicitly refer to human rights,[156] which make the subject matter the central theme of the instrument, as noted in this section.[157]

[149] UN Charter. Art. 2(7).
[150] Delbrück (n 92) 212, 368-369. For further analysis on the concept of responsibility to protect see, for example Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011); Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 4(3) *Global Responsibility to Protect* 400–424; Mahmood Mamdani, 'Responsibility to Protect or Right to Punish?' 4(1) (2010) *Journal of Intervention and Statebuilding* 53-67; and Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *The American Journal of International Law* 99-120. See also, the report of UN Secretary-General, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc. A/63/677. Available at: <http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf> accessed 06 January 2016.
[151] Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 147.
[152] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (1962) ICJ Rep 151.
[153] Jean-Pierre Cot, 'United Nations Charter' (2011) 10 MPEPIL 239, 249.
[154] d'Argent and Susani (n 76) 418.
[155] Waldheim (n 134) 134.
[156] UN Charter. Arts. 1(3), 13(l)(b), 55(c) 62(2), 68, and 76(c).
[157] See, for example, Stavrinides (n 142) 38-48; and Cot (n 153) 242.

More significantly for the purpose of this research, the 1984 UN Conference on Population emphasised 'the need for continued international co-operation in finding durable solutions to the problem of refugees'.[158] Goodwin-Gill and McAdam argue that the general principle of co-operation among States parties with respect to individuals moving across borders is derived from the duties undertaken by Member States under the provisions of the Charter, including article 1, 13(l)(b), 55, and 56.[159] Therefore, the protection provided by the UN remains located within the framework of the said provisions of the Charter. Generally speaking, this leaves the protection of refugees under Member States' responsibilities. In essence, the provisions of the UN Charter oblige States to co-operate in achieving the aims set by the Charter. As discussed in Section 2.3, there are instruments of specific relevance to the protection of refugees,[160] which demonstrate the importance of the imperative of international co-operation tackling refugees' disasters currently existing in the international sphere. Such instruments reflect the principle of co-operation on refugees' governance.[161]

In sum, the mentioned legal provisions make it clear that States are required to respect the UN Charter's laws and its organs in order to fulfil the obligations they have under the international legal instruments. The thorough examination undertaken shows that there are compelling arguments, according to which the principle of international co-operation in solving international problems of various fields is of a binding nature. Such conclusion can be noted in the contextual language of the UN Charter in articles, *inter alia*, 1(3), 55(c) and 56 in which it provides a legal foundation for international co-operation in general. This could be applied to the refugees' protection, in which the researcher's standpoint is based on the provisions of the Charter. Although the Charter does not proclaim such protection explicitly, the said provisions of the Charter promote various aspects of international co-operation, including economic, cultural, social, and human rights. To this, one may add another field based on the promotion of the human

[158] The United Nations Conferences on Population, International Conference on Population, Mexico City, 6-14 August 1984, III. Recommendations for Action. Part III. Recommendation 53. Cited in, UN, 'Compendium of Recommendations on International Migration and Development: The United Nations Development Agenda and the Global Commission on International Migration Compared' (2006) UN Doc. ESA/P/WP.197. 22. Available at: <http://www.un.org/esa/population/publications/UN_GCIM/UN_GCIM_ITTMIG.pdf> accessed 18 October 2015.
[159] Goodwin-Gill and McAdam (n 111) 502.
[160] Refugees Convention. Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. (Protocol).
[161] The ILC, 'Report of the International Law Commission on the Work of its 62nd Session' (3 May to 4 June and 5 July to 6 August 2010) UN Doc. A/65/10, 329.

rights efforts and humanitarian nature of the subject matter, the principle of co-operation spreads to cover the protection of refugees. As noted, the obligation to cooperate on refugee matters suggested by this research is not a new phenomenon, since the obligation to co-operate in a specific legal context is readily available in international environmental law.

In addition, defining the scope and content of the duty of States to co-operate, is no less important than the question of its legal nature, fields, and its application. The Charter covers all aspects of the international life.[162] From a number of provisions mentioning co-operation, it could be interpreted that includes refugees' protection, and it could be seen that the obligation to co-operate is not merely restricted to a specific field but rather extends to other fields, embracing refugee protection as such. In fact, State practice shows that international co-operation on refugee matters has been carried out in abundance, particularly during mass influx of refugees.[163] This shows that the provisions of the Charter have the competence to address refugee matters. Therefore, it is the duties of States to fulfil this obligation in good faith. As discussed above, this argument has its roots in Article 31(1) of the Vienna Convention,[164] and Article 2(2) of the Charter itself.[165]

2.3 The Obligation of States to Co-operate with the UNHCR, whose Mandate is to Find Durable Solutions for Refugee Problems, in Accordance with the Refugee Convention

In the wake of the Second World War, the international community had to do something to address the mass influx of refugees mostly from Europe. The States agreed to draft the Refugee Convention to provide international protection to refugees.[166] The Convention contains a number of rights to which refugees are entitled, obligations of States towards refugees, and most importantly, it sets out international standards for the

[162] Babović (n 83) 306-307.
[163] Eggli (n71) 30.
[164] Vienna Convention. Arts. 26 and 31(1).
[165] UN Charter. Art. 2(2).
[166] UNHCR, *The State of The World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 13. See also, Guy S. Goodwin-Gil, 'Convention Relating to the Status of Refugees [and] Protocol Relating to the Status of Refugees' (United Nations Audiovisual Library of International Law, 2008). Available at: <http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf> accessed 18 October 2015.

treatment of refugees.[167] In 1967, more significantly for refugees outside of Europe, the Protocol was adopted and this removed the temporal and geographical limitations of the Convention initially incorporated within it.[168] This resulted in an expansion of the Refugee Convention's scope. Today, the Convention with its Protocol remains the cornerstone of the international protection regime for refugees.[169] The Refugee Convention has been widely ratified and some States have incorporated it within their national legislation.[170]

Furthermore, the Refugee Convention remains central also to the protection activities of the UNHCR and Türk has described the Convention as 'a human rights instrument of a general character – universal in its applicability and non-discriminatory in its application'.[171] In fact, the Refugee Convention and its Protocol 'are the only universal instruments, and the clearest expression of international solidarity, for the protection of refugees'.[172] The Convention is also 'the most authoritative statement of international refugee law to date'.[173]

Article 35 of the Refugee Convention contains an agreement for States parties to cooperate with the UNHCR in the exercise of its functions. The article reads that:

> [t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.[174]

Just like Article 35, Article 2 of the Protocol also contains an explicit obligation of States to co-operate with UNHCR.[175] Although the function of both provisions is

[167] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[168] Protocol. Art. 1(3).
[169] UNHCR, 'Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees' (HCR/MMSP/2001/09, 16 January 2002) Preamble (para. 2). Available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html> accessed 18 October 2015.
[170] UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' available at: <http://www.unhcr.org/3b73b0d63.html> accessed 18 October 2015.
[171] Volker Türk, 'Reflections on Asylum and Islam' (2008) 27(2) RSQ 7, 12.
[172] UNGA (n 66) para. 15.
[173] Matthew Albert, 'Prima Facie Determination of Refugee Status: An Overview and its Legal Foundation' (2010) Refugee Study Centre Working Paper Series No. 55, 19 <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp55-prima-facie-determination-refugee-status-2010.pdf> accessed 18 October 2015.
[174] Refugees Convention. Art. 35.
[175] ibid. Art. 34.

identical, unlike Article 2,[176] States can make reservations against Article 35.[177] However, in practice, no reservations have been made to this provision so far.[178] In the UNHCR's view, these provisions not only concretise the general obligations of UN Member States to cooperate with the UN in accordance with Articles 2(2), 22, 55 and 56 of the Charter, they also serve to establish an explicit contractual link between the Refugee Convention and the UNHCR Statute, and form the basis for the legal framework establishing the UNHCR's mandate and its competence as a subsidiary organ of the UN.[179] In fact, the language used in Article 35 bears some similarities to expressions used in Articles 55 and 56 of the UN Charter.[180] The drafters of the Convention had in mind the provisions of the UN Charter, while drafting the provisions related to the obligations of State parties. Hence, this convergence between both provisions shows the mutual interest in providing international protection for refugees.

The UNGA expressed satisfaction at the conclusion of the Refugee Convention and invited States which have demonstrated their interest in the solution of the refugee problem to become party to that Convention.[181] In his astute commentary of the Convention, Grahl-Madsen notes that:

> it seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter. This brings the observance of the material provisions of the present Convention within the orbit of the vested interests of the United Nation.[182]

Indeed, the drafters of the Refugee Convention, just like the UN Charter, saw international co-operation as a necessary requirement for the adequate fulfilment of States' obligations towards refugees. During the Conference of Plenipotentiaries, the drafter of the Convention incorporated a plea in Recommendation D 'that Governments

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[176] Protocol. Art. 2.
[177] Refugees Convention. Art. 42(1).
[178] ibid. Available at: <https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en> accessed 18 October 2015.
[179] UNHCR, 'UNHCR Statement on the Right to Asylum, UNHCR's Supervisory Responsibility and the Duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility: *Issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the Administrative Court of Sofia lodged on 18 October 2011 – Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees (C-528/11)'* (20 August 2012) 15. Available at: <http://www.refworld.org/docid/5017fc202.html> accessed 18 October 2015.
[180] Atle Grahl-Madsen, 'Commentary on the Refugee Convention 1951: Articles 2-11, 13-37' (1963) 149. This commentary has been re-published in October 1997 by the UNHCR. Available at: <http://www.unhcr.org/refworld/docid/4785ee9d2.html> accessed 18 October 2015.
[181] UNGA Res 538 (VI) (2 February 1962) UN Doc. A/RES/538, paras. 2 and 3.
[182] Grahl-Madsen, 'Commentary on the Refugee Convention 1951' (n 180) 149.

continue to receive refugees in their territories and that they act in concert in a true spirit of *international cooperation* in order that these refugees may find asylum and the possibility of resettlement'.[183]

Article 35(1) of the Refugee Convention obliges State parties to co-operate in all of the functions of the UNHCR, 'irrespective of their legal basis'.[184] Therefore, it does not limit itself to functions laid down in any international instrument; in that respect, it is a 'blanket norm' that may include anything the UNHCR sets to do.[185] In addition, Article 35 of the Refugee Convention is a more elaborated study of the sixth paragraph of the preamble, which notes that the UNHCR:

> is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.[186]

Article 31 of the Vienna Convention is the main source guidance for treaty interpretation. [187] This section shows that national, regional, and international courts have used this provision to interpret the provision of the Refugee Convention. In this research, this provision is used in regards with the Article 35 and the preamble of the Refugee Convention in order to explore whether these provisions can be used as a legal source for the obligations of States to co-operate in refugee matters. When it comes to treaty interpretation, national, regional, and international courts have adopted three different approaches in order to remain faithful with the drafters intend. The first approach is subjective and focuses on the intentions of the parties only. The second approach is objective and focuses mainly on the text or the ordinary meaning of words of the treaty. In practice, this approach is more popular among judicial decisions because judges usually opt to privilege the treaty text. The teleological approach is the last approach emphasises the treaty's object and purpose.[188] In fact, all three types of treaty interpretation are enshrined in Article 31 of the Vienna Convention. This provision imposes the legal obligations on States and provides valuable insight on the interpretation of the Convention. In addition, Article 31 'is generally accepted as being

[183] Refugees Convention. Recommendation D. (Emphasis added).
[184] Grahl-Madsen, 'Commentary on the Refugee Convention 1951' (n 180) 151.
[185] Zieck, 'Article 35 of the Convention/Article II of the 1967 Protocol' (n 8) 1492.
[186] Refugees Convention. Preamble (para. 6).
[187] Vienna Convention. Art. 31.
[188] Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: Commentary* (OUP 2011) 81-82.

declaratory of customary international law'.[189] In fact, the ECtHR has regularly endorsed the Vienna Convention's rules on interpretation.[190] Article 31(1) invites the international and national courts to interpret the Convention:

> [i]n good faith 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.[191]

This provision shows that the rules of treaty interpretation are not only based on the literal interpretation of treaties. In fact, the Refugee Convention possesses special features; on the one hand, as an international instrument, it must be interpreted pursuant to the general principles of international law as enshrined in the Vienna Convention. The UK House of Lords has confirmed that in case of any doubts to the meaning of the Refugee Convention, Articles 31-33 of the Vienna Convention may be invoked to aid the process of interpretation of the Convention.[192]

On the other hand, the Refugee Convention is a 'living instrument' that must be interpreted in the light of present-day conditions and developments in current international law, as confirmed by the ECtHR in *Saadi*, in order to ensure the 'rights were given a broad construction and that limitations were narrowly construed'.[193] In other words, 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation' as required by Article 31(3)(c) of the Vienna Convention, [194] which obliges a treaty interpreter to take into account, together with the context,

> any relevant rules of international law applicable in the relations between the parties.[195]

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[189] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (CUP 2003) 103.
[190] See, for example, *Golder* v. *United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para. 29; and *Saadi* v. *United Kingdom* App no 13229/03 (ECtHR, 29 January 2008) paras. 26–8, 61–62.
[191] Vienna Convention. Art. 31(1).
[192] *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2006] UKHL 46, para.10.
[193] *Saadi* v. *United Kingdom* App no 13229/03 (ECtHR, 29 January 2008) para. 55.
[194] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep 16, 31.
[195] Vienna Convention. Art. 31(3) (c).

In addition, 'Article 31(3) forms a mandatory part of the interpretation process'.[196] The ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case confirmed this:

> the Court must take into consideration the changes which have occurred in the supervening half a century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.[197]

Similarly, in *Mamatkulov and Askarov v. Turkey*, in regards to the ECHR, the court stated that 'it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument, which must be interpreted in the light of present-day conditions'.[198] Although the statement of the Court refers to the ECHR rather than the Refugee Convention, this principle is applicable not only to the European Convention, but, to treaty application, more generally. Lord Justice Laws in *Ex parte Adan* made it clear what approach should be taken while interpreting the Refugee Convention,

> [i]t is clear that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded.[199]

More significantly on the importance of the Refugee Convention, the House of Lords in *R* stated that:

> [b]earing in mind its humanitarian objectives (see the preamble) the Refugee Convention should not be construed literally, but should be given a generous purposive construction as a living instrument; the obligations it imposes are to be performed in good faith so as to further rather than to frustrate those

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[196] Campbell Mclachlan, 'The Principle Of Systemic Integration And Article 31(3)(C) Of The Vienna Convention' (2005) 54(2) *International Comparative Law Quarterly* 279, 290.
[197] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep 16, 31, para. 53.
[198] *Mamatkulov and Askarov v. Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) para.12. See also *Johnston and Others* v. *Ireland* App no 9697/82 (ECtHR, 18 December 1986) para. 53; and *Tyrer* v. *the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para. 31. For further analysis on the living instrument approach, see Guy Goodwin-Gill, 'The Search for the One, True Meaning …' in Guy Goodwin-Gill and Helene Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2009) 231-237.
[199] *R v. Secretary of State for the Home Department, Ex parte Adan and Others* [1999] 3 WLR 1274, 1296 (Lord Justice Laws).

> objectives.[200] […] The Refugee Convention resonates with the European Convention on Human Rights: both comprise more than reciprocal engagements between contracting states and contain objective obligations for the collective enforcement of human rights.[201]

These decisions confirm that when it comes to interpreting the Refugee Convention, only an extensive approach to the legal rights will accomplish its goals. For instance, Justice Kirby in *Chen Shi Hai* stated that 'only a broad approach to the text, and to the legal rights which the Convention affords, will fulfil its objectives'.[202] Hathaway echoes Justice Kirby in that the text of the Refugee Convention should be a starting point. A comprehensive understanding should be adopted to reflect the true meaning of the Convention 'in a way that takes real account of its context, [and] which advances its object and purpose' rather than its literal interpretation.[203] Aust warns that placing undue emphasis on the text alone 'is unlikely to produce a satisfactory result'.[204]

Article 38 of the Refugee Convention provides that if any dispute occurs in relation to the interpretation of the Convention, States can refer the disputes to the ICJ to settle their differences.[205] However, State parties have not used this mechanism so far and it has been suggested that it is unlikely that this mechanism will ever be used. In accordance with North and Chia, this is in part due to the long, complex, and costly proceedings to solve the interpretation issues. In particular, the issue of interpretation of the Refugee Convention does not have any substantial benefit to the States.[206] Although national courts are competent to provide authoritative interpretation in accordance with the Convention, in doing so, no court can determine the law for another State.[207]

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[200] See, for example, *Fothergill v Monarch Airlines Ltd* [1981] AC 251; and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 417.
[201] *R. and United Nations High Commissioner for Refugees (intervening) (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport, Appeal* [2004] UKHL 55, para. 14. See also, *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978 (1978) para. 239.
[202] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553. House of Lord in a number of other cases has made similar statement. See, for example, *Januzi (FC) (Appellant) v. Secretary of State for the Home Department and others* [2006] UKHL 5, [2006] 2 WLR 397, para. 4; *R v. Special Adjudicator, Ex parte Ullah; Do (FC) v. Secretary of State for the Home Department* [2004] UKHL 26, para. 36; *Abdulaziz v. United Kingdom* (1985) 7 EHRR 471, para 60; *Adan v. Secretary of State for the Home Department* [1999] 1 AC 293, 305; and *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 479.
[203] James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 74.
[204] Anthony Aust, *Handbook of International Law* (2nd, CUP 2010) 83.
[205] Refugees Convention. Preamble (para. 3). See also ICJ Statute. Arts. 36(2) and 65.
[206] Anthony North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International judicial Commission for Refugees' in Jane McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 240.
[207] Goodwin-Gill, 'The Search for the One' (n 198) 207.

Moreover, the Refugee Convention is an international treaty in accordance with the meaning of Article 38(1)(a) of the Statute of the ICJ.[208] Such recognition is vital because it constitutes the main legal background by which other treaties, including Vienna Convention come into existence. Such recognition became the starting point for the minimum standards of legal protection that provides the basic human rights to refugees. Indeed, the Refugee Convention was drafted as a global, multilateral, standard-setting agreement in order to provide international protection for those individuals who needed such treatment.[209] This could be noticed in the language of the preamble, which conceived the Convention as a measure to:

> consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments.[210]

The preamble of the Refugee Convention contains some explicit provisions on the significance of international cooperation on refugee matters and assures refugees of the widest possible rights. Feller notes that '[r]efugee protection is global concern and a common trust. This means that responsibility for it is shared, not individual. It also means that, unless this is shouldered widely, it may be borne by none'.[211] It is not surprising, therefore, to find that there is an explicit reference to the principle of international co-operation in the fourth preamble paragraph of the Refugee Convention acknowledging that:

> the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without *international co-operation*.[212]

During the proceedings of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the UK delegate sought to whittle down the above paragraph in order to make it more harmonious and self-consistent. In his amendment, he omitted the first sentence of the paragraph. In regards to the importance of the preamble, he labelled

[208] ICJ Statute. Art. 38(1)(a).
[209] Volker Türk, 'Reflections on Asylum and Islam' (2008) 27(2) RSQ 7, 12.
[210] Refugees Convention. Preamble (para. 3).
[211] Statement by Ms. Erika Feller, UNHCR Assistant High Commissioner, 'Sixty-first Session of the Executive Committee of the High Commissioner's Programme, Agenda item 5(a): -Protection: Rule of Law 60 Years On' (6 October 2010) 1. Available at: <http://www.unhcr.org/4cac7f2f9.pdf> accessed 18 October 2015
[212] Refugees Convention. Preamble (para. 4). (Emphasis added).

it 'of but slight legal significance and was merely introductory'.[213] Weis did not share this view, he although admitted that the Preamble of the Convention is not legally binding, but is nevertheless important because it may be used for the interpretation of the Convention.[214]

However, various delegates including the Egyptian, French, West German, Italian, and Swiss objected to the amendment made by the UK delegate. In particular, the French delegate criticised the drafters for placing some important provisions in the preamble. Instead, he preferred provisions such as those stating the need for international co-operation to be incorporated with the main text of the Convention itself.[215] Likewise, the Egyptian delegate felt that 'it was essential to retain in the Preamble the idea of international cooperation contained in the original text'.[216]

However, it should be noted that Article 32 of the Vienna Convention notes that the preparatory work of the treaty is a supplementary means of interpretation. Accordingly, given its supplementary nature, the reference to the preparatory work of the Refugee Convention is used in this section for contextual rather than interpretative purposes.

It is argued here that although the principle of international co-operation enshrined in the preamble rather than in the main text of the Convention, based on Article 31(2) of the Vienna Convention, the preamble is an important part of the Convention and it could be used for its interpretation. The researcher interprets the preamble based on the Article 31(2), which stipulates that:

> [t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble.[217]

In fact, this Article lists the sources that may provide the context for the purpose of the interpretation of a treaty; of those listed, the preamble is the most relevant source of interpretation of the Refugee Convention.[218] Judge Weeramantry in *Case Concerning*

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[213] UNHCR, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-first Meeting: *Travaux Préparatoires*' (29 November 1951). Available at: <http://www.unhcr.org/3ae68cebc.html> accessed 18 October 2015.
[214] Paul Weis, 'The Refugee Convention, 1951: The *Travaux Preparatoires*' (1990) 32. Available at: <http://www.unhcr.org/4ca34be29.pdf> accessed 18 October 2015.
[215] UNHCR, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (n 213).
[216] ibid.
[217] Vienna Convention. Art. 31(2).
[218] Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 49.

the Arbitral Award of 31 July 1989 confirmed the significance of the preamble generally to treaty interpretation. He notes that:

> [a]n obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31 (2) of the Vienna Convention sets this out specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court also indicates, […] that the Court has made substantial use of it for interpretational purposes.[219]

Likewise, the ICJ in *Rights of Nationals of the United States of America in Morocco*,[220] and *the Asylum case*,[221] also resorted to the preamble as a guide to treaty interpretation. International arbitral awards have equally relied upon the preamble for the purpose of treaty interpretation.[222] Domestic courts in their decision have regarded preambles as a significant guide to treaty interpretations. For instance, the UK House of Lords in *R v Asfaw* emphasised that:

> [t]he overall context is provided by the preamble to the Convention. It refers to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination […]. This is an indication that a generous interpretation should be given to the wording of the articles, in keeping with the humanitarian purpose that it seeks to achieve and the general principle that the Convention is to be regarded as a living instrument.[223]

Further, courts have invoked the preamble to determine the Refugee Convention's object and purpose. The House of Lords in *Shah*,[224] stated that the preamble of the Convention is significant since it clearly states that the object and principle of the Refugee Convention is for all human beings to enjoy fundamental rights and freedoms. In a nutshell, the preamble has three important features namely, it affirms that the UN Charter assures refugees the widest possible rights to enjoy, it confirms that the UNHCR is responsible for the protection of the refugees and finally the preamble states

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[219] *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* [1991] ICJ Rep 53, para. 47. (Dissenting Opinion of Judge Christopher Gregory Weeramantry).
[220] *France v. United States of America* [1952] ICJ Rep 176, 196.
[221] *Colombia v. Peru* [1950] ICJ Rep 266, 282.
[222] Reports of International Arbitral Awards: Dispute between Argentina and Chile concerning the Beagle Channel (Vol XXI, 18 February 1977) 53-264 (paras. 19-20). For further information on the importance of the preambles in the international arbitrations, see J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Vol 1, Oceana 1979) 276, 318–319.
[223] [2008] UKHL 31, para. 55.
[224] *R. v. immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 639 (Lord Steyn).

that although the UNHCR is tasked to protect the refugees, the main responsibility for safeguarding the rights of refugees' lies with the States.[225]

In sum, it is argued here based on the interpretation of treaties provided by the Article 31 of the Vienna Convention that Article 35, the preamble and Recommendation D of the Refugee Convention can be used as a legal source for the obligations of States towards refugee and obligation of States to co-operate with the UNHCR, whose duty is to find durable solutions. Therefore, such obligations do exist in the Refugee Convention if one implements Article 31 of the Vienna Convention, which calls for an interpretation that takes into account the developing rules of international law to obligation of State to cooperate in refugee matters and in the light of the object and purpose of the Refugee Convention itself rather than imposing a restrictive literal interpretation of the drafters' view in 1951.

2.4 The Legal Relevance of Soft Law in International Law: the UNGA Resolutions, UNHCR Statute and ExCom Conclusions

Today, international law increasingly resort to international instruments, which enjoy so-called soft law status, this is partly due to their non-binding nature. Judicial decisions increasingly rely on soft law instruments as a guide for treaty interpretations. Likewise, State practice pledge to these instruments as alternative to international treaties because achieving consensus on these instruments is easier to reach and its speed and flexibility make it more attractive for States because there is more room to manoeuvre. In fact, non-compliance with these instruments would normally not have the same legal consequence and commitment as it might have with treaties. Arguably, their effect in international law is immediate in contrast with the long process of drafting and implementing treaties because they rely heavily on ratification and entry into force also subjected to reservations.[226]

[225] Refugees Convention. Preamble (paras. 2, 5 and 6).
[226] For an in-depth analysis of relevance of soft law in international law see, for example, Andrew T Guzman and Timothy L. Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171-226; Jeremy Malcolm, 'Multi-Stakeholder Public Policy Governance and its Application to the Internet Governance Forum (PhD Thesis, Murdoch University 2008) 116-117; Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D. Evans (ed), *International Law* (2nd edn, OUP 2006) 144; and Dinah Shelton, 'Law, Non-Law and the Problem of "Soft Law"' in Dinah Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, 2000) 11-13.

Prior to the examination of the legal relevance of each of UNGA resolution, the UNHCR Statute and ExCom conclusions, the legal nature of soft law will be analysed critically to identify their legal status in international law. To be precise, the concept of soft law is evaluated as a means to show the legal significance of the three mentioned instruments from the perspective of international refugee law, to analyse the legal framework where States' obligations towards refugees can be found. As discussed in the following three sections, the said instruments not only mention the rights to which the refugee is entitled, but also the obligations of States towards refugees.

It has been suggested that the term soft law was coined by Lord McNair.[227] However, the term has been used and defined differently by authors.[228] Although the term soft law has been criticised and is not regarded as a source of international law as such,[229] that does not mean they lack any evidence to current law, form the *opinio juris*, or evidence of State practice that results in creating customary international law.[230] Hence, soft law instruments in addition may obtain a binding legal character as components of a treaty-based regulatory regime in order to constitute 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.[231]

While there is a lack of consensus among scholars on why States are using soft law instruments in contemporary international law,[232] they have a significant effect in international law and can provide law-making purposes. Soft law instruments, in Boyle's view, 'can thus become vehicles for focusing consensus on rules and principles,

[227] Robert Y. Jennings, 'An International Lawyer Takes Stock' (1990) 39(3) *International and Comparative Law Quarterly* 513, 516. See also, Jean d'Aspremont and Tanja Aalberts, 'Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks' (2012) 25(2) *Leiden Journal of International Law* 309.
[228] On the critical analysis of soft law in the literature see, for example, Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law (2012) 25 *Leiden Journal of International Law* 335–368; d'Aspremont and Aalberts (n 227) 309-312; Mauro Barelli, 'The Role Of Soft Law In The International Legal System: The Case Of The United Nations Declaration On The Rights Of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957–983; Boyle (n 226) 141-158; Christine Chinkin, 'Normative Development in the International Legal System', in Dinah Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP 2000) 21–42; Shelton (n 226) 1- 18; Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381–391; and Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850- 866.
[229] Klabbers (n 228) 381–391.
[230] Boyle (n 226) 142.
[231] Vienna Convention. Art. 31(3)(a). Boyle (n 226) 144.
[232] See, for example, Andrew T. Guzman and Timothy L. Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171-225.

and for mobilizing a consistent, general response on the part of States'.[233] Furthermore, there are a number of reasons outlined by observers as to why soft law instruments can be an attractive alternative to treaties. Namely, due to the non-binding nature, reaching agreement would be easier between the States in comparison to treaties. Non-compliance with the soft law instruments would not have the same legal consequence and commitment as it might have with treaties, and this has resulted in States agreeing more comprehensive and specific provisions. A further advantage of soft law is their speed and flexibility, which make it more attractive for States as there is more room to manoeuvre. For instance, the adoption of a new resolution from a particular organisation would result in amendment, supplement, or even replacement of the particular instrument. Moreover, the soft law instruments' impact in international law, once followed, are immediate in contrast with the long process of drafting and implementing treaties because they rely heavily on ratification, and entry into force, and most of the time are also subjected to reservations.[234]

In other words, despite their limited juridical effect, soft law instruments have a crucial and increasing role in the development of international law.[235] In fact, on a number of occasions a soft law instrument has been used as a stepping stone to the conclusion of multilateral treaties namely, the adoption of the UDHR in 1948 was the first step in the process which ultimately led to the adoption of the ICCPR and ICESCR in 1966.[236] Likewise, the American Declaration of the Rights and Duties of Man[237] was drafted as a soft law instrument because it was intended to achieve consensus on basic principles before adopting the more binding treaty, the American Convention on Human Rights in 1969.[238] State practice shows that there is hardly a soft law instrument which can be

[233] Boyle (n 226) 141.
[234] ibid: 144. Shelton (n 226) 11-13. Guzman and Meyer (n 226) 171-226. The authors advanced four complementary reasons (coordination, loss avoidance, delegation, and international common law) in order to show why in certain circumstances States prefer to use soft law over hard law.
[235] Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D. Evans (ed), *International Law* (2nd edn, OUP, 2006) 182. See also, Alan Boyle and Christine Chinkin, The Making of International Law (OUP 2007) 210-262.
[236] Boyle (n 226) 145-46.
[237] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992). Likewise, the Declaration on the Elimination of All Forms of Discrimination Against Women was a soft law instrument initially before it was reproduced in legally binding instrument namely, the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[238] American Convention on Human Rights, "Pact of San Jose", Costa Rica, (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Douglass Cassel, 'Inter-American Human Rights Law,

found standing in isolation. Instead, they are always connected closely to the treaties either as a precursor or a supplement.[239] The UN Standard Minimum Rules for the Treatment of Prisoners is one such example.[240] Therefore, the relationship between these two instruments is complementary, rather than mutually exclusive. In fact, distinguishing between hard law and soft law is not as explicit as the terms may suggest and soft law plays an important role in assisting treaty interpretations.[241]

In general, the concept of soft law has faced two major critics; on the one hand, the term has been seen as misleading and contradictory because there cannot be two types of law (i.e. hard and soft), either something is law or not. On the other hand, the concept is inefficient, even risky, because it creates an expectation for States to comply with, yet there is no obligation to do so. Additionally, the concept of soft law can expose the existing norms to the risk of abandonment because if the threshold is not stated clearly, it would be difficult to distinguish between what is binding and what is not.[242]

Sztucki does not share the said criticism of the concept, and to illustrate he compares the term soft law with international legislation and argues that there are many scholars who have used the term international legislation despite knowing that they do not have power in the usual sense. Additionally, the term was only intended to indicate multilateral conventions purporting to regulate the behaviour of States. The term soft law therefore cannot be more misleading than the term international legislation, even if the latter has not been subjected to any objections.[243]

In regards to the second criticism, the literature suggests that the term soft law is used in two different phenomena. On the one hand, soft law is regarded as a norm which exists

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Soft and Hard' in Dinah Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, 2000) 393-4.

[239] Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D. Evans (ed), *International Law* (2nd edn, OUP 2006) 181.

[240] United Nations, Standard Minimum Rules for the Treatment of Prisoners (adopted 30 August 1955, approved 31 July 1957. Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 *Studies in Transnational Legal Policy* 121-122. See also, Dinah Shelton, 'Soft Law' (2008) Public Law and Legal Theory Working Paper No. 322, 4-5 <http://ssrn.com/abstract=1003387> accessed 18 October 2015.

[241] See, for example, Foster (n 218) 70-75.

[242] Jerzy Sztucki, 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme' (1989) 1(3) IJRL 285, 304; Laszlo Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 *International and Comparative Law Quarterly* 605; Klabbers (n 228) 382-383.

[243] Sztucki (n 242) 304.

in the form of a formal binding legal instrument; however, they are not enforceable due to their flexible, vague normative content or subjective nature. For instance, the Refugee Convention contains provisions of this character namely, Article 11: 'sympathetic consideration', Article 13: 'as favourable as possible', Article 19(2): 'endeavour', Article 34: 'as far as possible' and others.[244] On the other hand, soft laws are regarded as norms; even though they do not exist in the form of a formal binding legal instrument, they have some legal relevance. For instance, Article 38(1) of the Statute of the ICJ identifies international sources which have this characteristic.[245]

As indicated above, the term soft law has been explored at length in the literature and is beyond the scope of this chapter to discuss it any further. Suffice it to note that one scholar, Chinkin, advocates for soft law as a tool in the development of international law, and also argues that the value of binding instruments is decreasing, while that of non-binding instruments is increasing over time. This is because soft law is an increasingly used tool in international law due to its flexibility, and the necessity of binding all States together. She further argues that:

> [t]he complexity of international legal affairs has outpaced traditional methods of law-making, necessitating management through international organizations, specialized agencies, programmes, and private bodies that do not fit the paradigm of Article 38 (1) of the Statute of the ICJ. Consequently the concept of soft law facilitates international co-operation by acting as a bridge between the formalities of law-making and the needs of international life by legitimating behavior and creating stability.[246]

One must agree with Chinkin that today the significance of non-binding legal instruments in a wide variety of contexts in international law are increasingly relied upon by the international community for the obvious reasons mentioned in this section.

2.4.1 The Legal Effects of UNGA Resolutions

The UNHCR's mandate is laid down in its Statute, which states that the High Commissioner should provide international protection and seek permanent solutions for

[244] This list is not exhaustive. There are other provisions of international treaties which contain the soft content in a binding legal instrument. A large part of customary international law has been argued to qualify as soft law. See, for example, Sztucki (n 242) 305.
[245] Blutman (n 242) 606.
[246] Chinkin (n 228) 41-42.

refugee problems.[247] The General Assembly has in several resolutions confirmed the centrality of international protection and durable solutions for refugee plights.[248] The UNHCR is a subsidiary organ of the UN and was established by the UNGA under Article 22 of the Charter. In accordance with this Article, the Charter has empowered:

> [t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.[249]

The binding nature of the UNGA resolutions is considered in this section to identify their status in international law, in particular the status of a resolution that resulted in the adoption of the UNHCR.[250] A large number of discussions have been held concerning the legal importance of UNGA resolutions. This section will show that there is a division in the literature as to whether the resolutions of the UNGA have a binding effect in international law. The main question addressed here is whether the resolutions of UNGA can constitute authoritative sources of international law. To see this, a critical analysis of the position and status of the UNGA will be undertaken to identify their legal effect in international law. This section will also show that the UNGA resolutions have played an increasing role in the development of international law.

Asamoah argues that the lack of express provision in the Statute of the ICJ for resolutions of the UNGA as a source of international law does not mean such resolutions lack legal effects.[251] As will be shown in this section, the UNGA has other functions, including initiating studies and making recommendations for the purpose of promoting international co-operation.[252] In practice, the UN resolutions as a formal text adopted either by the SC or the GA. The resolutions of the latter organ are the focus of

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[247] UNHCR Statute, para. 1.
[248] See, for example, UNGA Res 1388 (XVI) (20 November 1959) UN Doc A/RES/1388 (XIV), para. 1(b); UNGA Res 1499 (XV) (5 December 1960) UN Doc A/RES/1499 (XV), para. 1(b); UNGA Res 1673 (XVI) (18 December 1961) UN Doc A/RES/1673 (XVI), para. 2(b); UNGA Res 1959 (XVIII) (12 December 1963) UN Doc A/Res/1959 (XVIII), para. 2(a); UNGA Res 3454 (XXX) (9 December 1975) UN Doc A/Res/3454 (XXX), para. 4; UNGA Res 31/35 (30 November 1976) UN Doc A/Res/31/35, para. 5; UNGA Res 32/67 (8 December 1977) UN Doc A/Res/32/67, para. 4; UNGA Res 33/26 (29 November 1978) UN Doc A/Res/33/26, para 5; UNGA Res 43/117 (8 December 1988) UN Doc A/Res/43/117, para. 9 and 12; UNGA Res 54/146 (17 December 1999) UN Doc A/Res/54/146, para. 2 and 12; UNGA Res 55/74 (4 Dec 2000) UN Doc A/Res/55/74, para. 15; UNGA Res 59/170 (20 December 2004) UN Doc A/Res/59/170, para. 10; UNGA Res 59/172 (20 December 2004) UN Doc A/Res/59/172, para. 2; UNGA Res 60/129 (16 December 2005) UN Doc A/Res/60/129, para. 12; UNGA Res 61/137 (19 December 2006) UN Doc A/Res/61/137, para. 17; UNGA Res 63/148 (18 December 2008) UN Doc A/Res/ 63/148, para. 19; and UNGA Res 66/133 (19 March 2012) UN Doc A/RES/66/133, para. 23.
[249] UN Charter. Art. 22.
[250] UNGA Res 428(V) (14 December 1950) UN Doc. A/RES/428(V).
[251] Obed Asamoah, 'The Legal Effect of Resolutions of the General Assembly' (1963-1964) 3 *Columbia Journal of Transnational Law* 210, 210.
[252] UN Charter. Art. 13(1).

this research. The term resolution has not been mentioned anywhere in the Charter; instead, resolutions are expressed in the form of recommendation and decisions.[253] The term resolution is defined as 'an expression of opinion issued by an organization upon a previously debated topic. [They] are the formal culmination, in written form of the given organization's decision-making process'.[254] The ICJ in its judgments has distinguished between decisions and recommendations of the UNGA. The latter are mainly used for non-binding resolutions, while the former are binding.[255]

The UNGA is one of the five principal organs of the UN[256] and the only one in which all member nations – currently 193 – have equal representation.[257] As an organ of the UN, it provides a unique forum for multilateral discussion of the issues covered by the Charter.[258] To say this another way, the UNGA has been chosen as a world forum where any question within the scope of the Charter can be discussed. Article 10 of the UN Charter states the functions and powers of the UNGA namely,

> [t]he General Assembly may discuss any questions or any matters within the scope of the present Charter […] and […] may make recommendations […] on any such questions or matters.[259]

The very idea that this provision has been mentioned at the very beginning of the list of the power of the UNGA shows the significance to be attached to it.[260] This provision, in Tomuschat's view, is a crucial to the role of UNGA in the Charter, which shows that UNGA scope is wider than any other organ of UN.[261]

The evaluation of resolutions of the UNGA shows that the character of such instruments is not black and white. Whether they possess the full legal effect or lack a binding nature is dependent on various factors. Therefore, one cannot describe or dismiss such instruments in a few words. Their binding nature has become multiplied and their

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[253] Klein and Schmahl (n 85) 478.
[254] Mark Ewell Ellis, 'The New International Economic Order and General Assembly Resolutions: The Debate Over the Legal Effects of General Assembly Resolutions Revisited' (1985) 15(3) *California Western International Law Journal* 647, 662.
[255] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter*) [1962] ICJ Rep 151, 163.
[256] UN Charter. Art. 7(1).
[257] ibid. Art. 9(1).
[258] UN, 'About the General Assembly' (United Nations 2013). Available at: <http://www.un.org/en/ga/about/index.shtml> accessed 18 October 2015.
[259] UN Charter. Art. 10.
[260] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd Edn, Stevens 1949) 151.
[261] Tomuschat (n 87) 371.

functions also varied.[262] Thus, on considering the legal nature of resolutions, one cannot deem that all the resolutions have the same value; instead one has to examine each resolution and its significance separately to reach a convincing argument. As Skubiszewski rightly stated, '[t]he evidential value of resolutions varies from cases to case and cannot be assessed once and for all'.[263] In other words, while analysing the resolutions of UNGA, one has to consider each resolution on its merit. Their legal effects will vary depending on the circumstances peculiar to them.

There is a division of opinion as to whether the resolutions of UNGA are binding on Member States. This division can be noted in the ICJ Advisory Opinion in *the Certain Expenses Case*[264] and later in the *Voting Procedure on South-West Africa Case*.[265] Judge Lauterpacht in his separate judgement listed a number of points on which UNGA has clear legal effects.[266] He persuasively argued that there are certain resolutions clearly binding upon Member States due to obligations they assumed due to the UN Charter. These resolutions are binding not because they are UNGA resolutions but because their binding nature derives from the character of the Charter as an agreement between Member States.[267] Although Judge Lauterpacht conceded that strictly speaking UNGA resolutions are not legally binding upon Member States, they are endowed with a full legal effect in some spheres and limited legal effect in others.[268] He perfectly summarised the full values of these resolutions,

> [a] Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its

[262] Shinichi Ago, 'Follow-Up of United Nations Resolutions' (1995) 61(3/4) *Journal of Law and Politics [Hosei kenkyu]* 33, 34-35. This journal is available at: <http://catalog.lib.kyushu-u.ac.jp/recordID/2026> accessed 14 October 2015.
[263] Krzysztof Skubiszewski, 'Resolutions of the U. N. General Assembly and Evidence of Custom' Krzysztof Skubiszewski (ed), *In International Law at the Time of Its Codification: Essays in Honour of Roberto Ago* (Giuffre 1987) 503, 507.
[264] [1962] ICJ Rep 151.
[265] [1955] ICJ Rep 115, 120.
[266] The matters listed by Lauterpacht were: the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses. [1955] ICJ Rep 67. (Separate Opinion of Judge Lauterpacht) 115.
[267] Asamoah (n 251) 210, 221. For an overall analysis of Lauterpacht's view on the full legal effect of resolutions of the UNGA, see David Neville Johnson, 'The Effect Of Resolutions Of The General Assembly Of The United Nations' (1955-1956) 32 BYBIL 99-105.
[268] (1955) ICJ Rep 67. (Separate Opinion of Judge Lauterpacht) 115.

> decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation.[269]

Similarly, Judge Alvarez in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* viewed that UNGA resolutions have a binding nature in a legislative sense.[270] In many of his judgments he reiterated this stance.[271]

On the other hand, Judge Klaestad, in the *Voting Procedure on South-West Africa Case*,[272] while evaluating the legal nature of UNGA resolutions, viewed them not to have any kind of legal obligation upon States. Rather, they have a moral and political effect which is recommendatory by nature. He, however, conceded that their recommendatory nature is not to say that resolutions are without real significance. The Member States, therefore, should not disregard it; instead they are obliged to consider it in good faith in accordance with the provision of UN Charter.[273] Authors such as Schachter argue that through the application of a legal principle such as good faith or estoppel, UNGA resolutions can have a binding effect.[274] In fact, this argument has its roots in the Preamble of the Vienna Convention, namely:

> the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.[275]

The Vienna Convention, hence, obliges States that have voted for a resolution to abide by its own declaration by virtue of the principle of good faith which is universally recognised. In the words of Hambro, 'the least can be said is that it is not excluded that a delegation may become bound by a declaration put forward by itself and by its vote in the General Assembly. If many, or even a majority, of the delegations act in this way, the declarations adopted by Assembly may indeed become documents with binding force'.[276] Tomuschat convincingly argues that the resolutions adopted by consensus or

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[269] ibid.
[270] [1951] ICJ Rep 15. (Separate Opinion of Judge Alvarez) 52.
[271] *Fisheries case (United Kingdom v. Norway)* [1951] ICJ Rep 116. (Separate Opinion of Judge Alvarez) 152.
[272] [1955] ICJ Rep 67.
[273] ibid (Separate Opinion of Judge Klaestad) 88.
[274] Oscar Schachter, 'Alf Ross Memorial Lecture the Crisis of Legitimation in the United Nations' (1981) 50 (1-2) *Nordisk Tidsskrift for International Ret* 3, 16.
[275] Vienna Convention. Preamble (para. 3).
[276] This includes, the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. UNGA Res 2625 (XXV) (n 82) Annex. Edvard Hambro, 'Some Notes On the Development of the Sources of International Law' (1973) 17 *Scandinavian Studies in Law* 86.

unanimously by Member States should possess a legal force, to a certain extent.[277] States agreeing to adopt a resolution are entering into an agreement under international law, and this could be interpreted as States entering into treaty obligations in accordance with the Article 38(1) (a) of the Statute of the ICJ.[278] The resolution can make an important contribution to further the development of international treaty law. This is done by developing principles which are later incorporated into international agreement.[279] The obvious example of this is the two international human rights covenants, the ICCPR,[280] and the ICESCR,[281] which came about as the result of the UDHR 1948.[282]

Commentators, likewise, have held different views as to whether the UNGA resolutions have a binding nature in international law. On the one hand, Kelsen did not share the argument that recommendations of the UNGA can never be binding upon Member States. Although he admitted that by their very nature recommendations do not constitute a legal obligation,[283] in the Charter the word 'recommendation' has a different meaning. There are circumstances in which recommendations of the UNGA might have a binding force upon Member States. Kelsen compares the recommendations of the UNGA to that of UNSC. The legal effect of the recommendations of the former is not binding unless non-compliance with a recommendation has been considered by the latter as a threat to the peace in accordance with the provisions of the Charter. Thus, the contrast between the recommendations of the two organs is that UNSC has the power to enforce its own recommendations, while UNGA lacks such a mechanism.[284] Therefore, having a recommendatory nature is not to say that resolutions of the UNGA lack full legal force. Whether they are legally binding on the Member States depends on the circumstances and the addressees.

In his seminal work on *the Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, Sloan went further and explored possible

[277] Tomuschat (n 87) 376.
[278] ICJ Statute. Art. 38.
[279] Klein and Schmahl (n 85) 482.
[280] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[281] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[282] Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A(III).
[283] Kelsen (n 128) 63 and 195-196.
[284] ibid 458-459.

circumstances under which a recommendation of the UNGA may be legally binding upon Member States.[285] He did not share the view that resolutions of UNGA have recommendatory nature; hence, they are legally not binding. Sloan rejected such a presumption and argued that non-obligatory status of UNGA resolutions is not absolute. For instance, States that vote in favour of resolutions should be legally bound by it. There is no reason not to be obliged while it is their attention to be so. There are other circumstances when UNGA has adopted a resolution in which is clear that it is issuing orders or creating legal obligations upon Member States. In these circumstances 'there is no reason why it should not be given effect'.[286] According to Lauterpacht, the resolution is binding on States as soon as they consent to it. In fact, ratification to a treaty is not the only way for a State to undertake binding obligations in international law.[287]

Asamoah went even further by suggesting that even if States have not agreed to be bound by the resolutions of the UNGA, they are obliged to abide by it because of the obligations they have assumed under the UN Charter and matters within the competence of the UNGA. These resolutions are clearly binding on the Members States.[288] Equally, Ago sees the resolutions of UNGA to have a full legal effect. He rightly questions 'why should member states take so many hours and days in discussing and drafting a resolution if they do not consider it legally relevant? Why do some states make reservations on the adoption of a resolution if it lacks legal relevance?'[289] He, therefore, rejected the claim of Robinson that the resolutions of the UNGA 'are as numerous as they are ineffective' and that 'they remain on paper, since they lack any sanction'.[290] He labelled Robinson's claims as unsupportive.[291] However, in respect of internal matters of the UN such as budgetary decisions or instructions to lower-ranking organs, the commentators are in agreement that the resolutions of UNGA are clearly binding on their addressees.[292]

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[285] F. Blaine Sloane, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations' (1948) 25 BYBIL 1-33.
[286] ibid 1, 15-16 and 21-22.
[287] Hersch Lauterpacht (ed), *Oppenheim: International Law: a Treatise Vol.1, Peace* (8th edn, Longmans, Green & Co. 1955) 144.
[288] Asamoah (n 251) 220.
[289] Ago (n 262) 35.
[290] Jacob Robinson, 'Metamorhosis of the United Nations' (Vol 2, 1958) 94 *Recueil des Cours* 493, 520-521.
[291] Ago (n 262) 35.
[292] See, for example, [1955] ICJ Rep 67. (Separate Opinion of Judge Lauterpacht) 115. See also, Marko Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16(5) EJIL 879, 883-4; and Johnson (n 267) 121.

On the other hand, Brierly does not share the above analysis, he argued that apart from its control over the budget, the UNGA can only discuss and recommend, and initiate studies.[293] Likewise, the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and a number of other cases have repeatedly stressed on the recommendatory nature of resolution of the UNGA.[294] Wilcox and Marcy added that resolutions of the UNGA are not binding on the Members States. Although the UNGA can study, draft, approve, debate, and recommend, it does not possess international legislative authority to legislate.[295] In other words, resolutions of UNGA lack the legal power to make rules of law to have obligatory force upon Member States. Despite the fact that resolutions of the UNGA have certain powers which might create legal obligations upon Member States, the exercise of such powers does not confer on the UNGA the authority to legislate. If it had such an authority, it would have allowed the UNGA to lay down authoritative interpretations of the provisions of the Charter through the process of the law-making.[296]

So far in this section two sides of arguments have been analysed. There are those who believe that resolutions of UNGA have full legal effect in international law. There are others who reject such a claim and regard resolutions to have a power of mere recommendation upon Member States. Apart from these two contradicting claims, there are some commentators that discuss the moral and political character of the recommendations of the UNGA rather than its legal significance. Authors such as Goodrich and Hambro argue that despite the fact the resolution of the UNGA might have greatest political influence, they are not obligatory by nature. States are, therefore, free to accept or reject them.[297] However, Vallat argued that the non-binding nature of the resolutions of the UNGA could be noticed during San Francisco Conference and the drafting of the provisions of the Charter. For instance, the term recommendation in Article 10 to 14 is in sharp contrast to Article 25. The latter provision gives the decision of the UNSC a mandatory effect, while the former provisions give the resolutions of the

[293] James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (5th Edn, OUP 1955) 107.
[294] *(South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16.
[295] Francis Orlando Wilcox and Carl Milton Marcy, *Proposals for Changes in the United Nations* (Brookings Institution 1955) 348.
[296] Francis Aime Vallat, 'The Competence of the United Nations General Assembly' (Vol 2, 1959) 97 *Recueil Des Cours* 203, 208-209.
[297] Goodrich and Hambro (n 260) 150-156.

UNGA moral and political but not legal force. However, this is not to say that the lack of legally binding force means the resolutions of the UNGA lack any legal effect altogether. On the contrary, Vallat argued that the resolutions of the UNGA constitute a powerful evidence of interpretation of the Charter and they are generally accepted principles of international law.[298]

At a minimum, the UNGA resolutions are regarded as a form of soft law, used to govern State practice.[299] In fact, the ICJ in *Case Concerning Military and Paramilitary Activities in and against Nicaragua* acknowledged that resolutions of the UNGA can be used to establish State practice and *opinio juris* as a prerequisite of the new rule of customary international law.[300] In this case, the court placed a great deal of weight on UNGA resolution 2625 (XXV) while assessing the customary status of the non-intervention rule. This resolution, in the court's view, can create a sufficient *opinio juris* to establish a rule of customary law because it was widely approved by States and was adopted without a vote.[301] Likewise, the ICJ in *Legality of the Threat or Use of Nuclear Weapons* noted that 'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide important evidence for establishing the existence of a rule or the emergence of an *opinio juris*'. [302]

However, at the Final Report of the Committee on the Formation of Customary (General) International Law, the Committee added that on some occasions the resolutions of the UNGA may constitute evidence of the existence customary international law to help form emerging customary law, or contribute to the new rules of customary law. However, strictly speaking, these resolutions do not *ipso facto* create new rules of customary law.[303]

In sum, the views examined in this section in regards to the resolutions of the UNGA are contradictory. Some argued that resolutions are legally binding; others dismissed such a claim entirely. Others took the middle ground and claimed that resolutions of the UNGA are not legally binding upon Member States, but did not dismiss altogether the

[298] Vallat (n 296) 230-231. See also, Malcolm (n 226) 117.
[299] Malcolm (n 226) 117.
[300] *(Nicaragua v. United States of America)* [1986] ICJ Rep 14, paras. 188-191.
[301] ibid para. 188.
[302] [1996] ICJ Rep 226, para. 70.
[303] Maurice H. Mendelson, and Rein Mullerson, 'Final Report of the Committee on Formation of Customary (General) International Law' (International Law Association, London Conference 2000) 55.

binding nature of resolutions. They argued that despite the fact resolutions of UNGA lack a binding effect, they do, however, have moral and political effect in international law. Apart from the three different views mentioned, there are also some commentators and ICJ judgments that saw resolutions as evidence of customary international law.

One can conclude that through the development of international law after the Second World War, the resolutions of the UNGA have grown in stature and thus more weight has been attributed to its actions. Although, generally speaking, it might not have a full binding nature upon Member States, it has gained the full legal effect in international terms and is an important source of international treaty and customary law, contributing significantly to the development of public international law.[304] The statistics show that thousands of resolutions have been adopted by the UNGA, resulting in the endorsement and repetition of the resolutions which have the capacity to become customary. Accordingly, it is now generally agreed that some resolutions of the UNGA constitute strong evidence of the existence of customary international law, as acknowledged the ICJ in *Nicaragua case.*[305]

Of direct relevance to this study is the need for international co-operation in various fields of international law, including refugee law, which has been stressed on several occasions by UNGA resolutions.[306] In a key resolution, the UNGA endorsed the responsibility to cooperate with one another in the various spheres of international law relations in order to promote universal respect for, and observance of, human rights and fundamental freedoms for all.[307] More specifically, in another resolution, the General Assembly,

> [e]xpresses concern about the particular difficulties faced by the millions of refugees in protracted situations, and emphasizes the need to redouble international efforts and cooperation to find practical and comprehensive approaches to resolving their plight and to realize durable solutions for them, consistent with international law and relevant General Assembly resolutions.[308]

[304] Klein and Schmahl (n 85) 486.
[305] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep 14, paras. 188-191. See also, *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 (para. 70). For an in-depth analysis see, for example, Ago (n 262) 34.
[306] See, for example, the resolutions cited in section 2.2.1 (n 81).
[307] (n 82), para. (b).
[308] UNGA Res 64/127 (n 14) para. 22.

In addition, there is a systematic re-affirmation by the UNGA to address refugee problems and find a suitable solution for refugee plights. The UNGA urges member states 'to safeguard[…] the principle of refugee protection and to uphold[…] our responsibility in resolving the plight of refugees, including, […] finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among States'.[309] The General Assembly has also reiterated the urgency and importance to cooperate with the UNHCR, whose mandate is to provide durable solutions for refugee problems.[310]

The UNHCR considers that these references to international cooperation and durable solutions can constitute further evidence of its acceptance as a basic normative principle. In Ago's view, the re-citation and repetition of the resolutions of the UNGA can influence the speed of the formation of customary rules in international terms or attain the status of accepted principles of international law.[311] The UNHCR admitted that the systematic re-affirmation and subsequent endorsement by the General Assembly elaborates upon and gives substance to the Agency's general mandate while covering wide range issues. In addition, the '[r]epeated GA resolutions and the acquiescence of states, therefore, lay down provisions of a "constitutional" nature for the High Commissioner and his Office'.[312]

Bleicher summarised the influence of UNGA resolutions in international law, he astutely stated that,

> there are several ways in which a resolution, by being linked to one or more of the traditional sources of international law, can serve as a law-creating mechanism. A resolution can interpret the United Nations Charter or other treaty, accelerate the development and clarify the scope of a customary rule, or identify and authenticate a "general principle of law recognized by civilized

[309] UNGA Res 60/1 (16 September 2005) UN Doc. A/RES/60/1, para. 133.
[310] See, for example, UNGA Res 4, 'International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees' (21 October 1954) UN Doc. A/RES/832 (IX); UNGA Res 109, 'International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees' (26 November 1957) UN Doc. A/RES/1166 (XII); UNGA Res. 38/121 'Durable Solutions' (16 Dec 1983) UN Doc. A/RES/38/121, para. 8; UNGA Res 60/1, '2005 World Summit Outcome' (24 October 2005) UN Doc. A/RES/60/1, para. 133; and UNGA Res 65/194, 'Office of the United Nations High Commissioner for Refugees' (28 February 2011) UN Doc. A/RES/65/194, para. 20.
[311] Ago (n 262) 42. See also, Samuel Bleicher, 'The Legal Significance of Re-citation of General Assembly Resolutions' (1969) 63 AJlL 444, 477.
[312] UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office' (October 2013) 3. Available at: <http://www.refworld.org/docid/5268c9474.html> accessed 18 October 2015.

> nations." A resolution tied in this way to a traditional source of international law may reasonably be relied upon as a definitive statement of international law.[313]

Therefore, one cannot ignore the important place the resolutions of the UNGA occupy in the international legal system. In addition, as a principal organ of the UN the resolutions of the UNGA are the closest reflection of the will of the international community and an important source of obligation of States towards refugees.

2.4.2 The Legal Nature of the UNHCR Statute

In 1951, the UNHCR was established by the UNGA with a mandate from the international community to find durable solutions for refugee problems.[314] Its Statute, an UNGA document, outlines the mandate, mission, and purpose of the Refugee Agency. This section explores the legal relevance of the UNHCR Statute and its Handbook and Guidelines to show that these instruments are an authoritative source of international law and that they have a central place in the international refugee law system. In particular, it will show that these instruments contain explicit provisions to promote international co-operation to protect refugees, urge and encourage States to pursue durable solutions for refugee problems, and end refugee crises. Ultimately, these instruments are explored to consider the existence of obligations of States towards refugees. In this section, it is necessary to pay attention to the close relationship between the UNHCR and UNGA to show that its status is stronger and its influence is greater due to the its direct link to UNGA in accordance with Article 22 of the UN Charter.[315]

Unlike many international human rights instruments including ICCPR,[316] the Convention Against Torture,[317] and the Convention on the Rights of the Child (CRC),[318] the Refugee Convention does not have a treaty-monitoring body to determine individual complaints or review the national reports to ensure its proper application and

[313] Bleicher (n 311) 452.
[314] UNHCR Statute, para. 1.
[315] UN Charter. Art. 22.
[316] Human Rights Committee. ICCPR, Art. 28.
[317] Committee Against Torture. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Art. 17.
[318] Committee on the Rights of the Child. CRC. Art. 43.

implementation.[319] In addition, the absence of an international refugee court, to act as the final authority on issues of interpretation of the Refugee Convention, means that there is a lack of standardised and consistent international practice or single interpretation of the Convention.[320]

Instead, acting under the authority of the UNGA,[321] the UNHCR has been empowered to question and review States implementation of the application of the Refugee Convention.[322] This responsibility has been given to the UNHCR by virtue of Article 35 of the Convention. It has been assigned the special status of the 'guardian' of the Refugee Convention and its Protocol. In fact, there is a specific commitment of members of the UNGA and signatories to the Refugee Convention to cooperate with the UNHCR in the performance of its functions concerning refugees.[323] Likewise, in its Statute, the UNHCR states that Member States are obliged to co-operate with the agency.[324] During the proceedings of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the French delegate argued that General Assembly contemplated the UNHCR as the means of making the Refugee Convention a dynamic and living instrument.[325]

The UNHCR Statute, Handbook and Guidelines have also assisted courts in interpreting the Refugee Convention. Although there is a disagreement among national courts on whether these instruments are binding sources in international law, there is a general agreement among commentators and judicial decisions that the UNHCR enjoys a special status in international law because acting under the authority of the UNGA, it is a special organ of the UN and it has a special relationship with the Refugee Convention

[319] Deneisha E. Moss, 'Review of Asylum Policies and Procedures in the Bahamas: Are Current Policies and Procedures Consistent with International Instruments for the Protection of Refugees?' (Master Dissertation, University of Lund, 2005) 64-66.
[320] McAdam, 'Interpretation of the 1951 Convention' (n 189) 75.
[321] UN Charter. Art. 22. UNHCR Statute. For further analysis on the UNHCR's supervisory role see, for example Volker Türk, 'The UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate' in James C. Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013).
[322] UNHCR Statute, para. 8. For an in-depth analysis in the growing role of UNHCR in international refugee law, see for example, Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012).
[323] Refugees Convention. Art. 35.
[324] UNHCR Statute, para. 8.
[325] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summery Record of the Twenty- Seventh Meeting (27 November 1951) UN Doc. A/CONF.2/SR.27, 22 ((Mr. Rochefort).

due to its direct link. This special and evolving status has enabled the agency to meet the growing needs of refugee problems.

Commentating on the role of the UNHCR in relation to Article 35 of the Convention in *Al-Rawi* case, Goodwin-Gill astutely notes that,

> Article 35, however, remains an obligation entered into between States, and UNHCR is not a party to the Convention or the Protocol. This does not mean that UNHCR is without legal standing, for States members of the United Nations have also recognized their ' obligation ' to co-operate, in the resolutions setting up UNHCR and in successive resolutions adopted by the General Assembly on the work of the Office. UNHCR therefore has the legal authority to intervene with a State party which is perceived to be failing in its implementation of the Convention. UNHCR's legal position is consequently and correspondingly different from that of a Contracting State. Although UNHCR may not be able to claim the breach of Convention obligations owed to itself, or to invoke the dispute settlement provisions of the Convention and the Protocol, which are reserved to States parties, it nevertheless possesses the necessary legal standing to exercise a 'supervisory jurisdiction'.[326]

Despite the fact that the UNHCR has a supervisory role in overseeing the implementation and application of the Refugee Convention,[327] it does not have the authority to act as an arbiter on issues of interpretation of the Convention. Thus, the said instruments are not binding upon States but are guidelines, both instructive and interpreting tools of the Refugee Convention.[328] It is not surprising that the UNHCR's Handbook and Guidelines have high persuasive authority and are increasingly being referred to in judicial decisions and cited in RSD procedures.[329] Lord Woolf in *Ex parte Robinson* stated that in the absence of a supranational court, the interpretations are a matter for the UNHCR as a 'significant actor in refugee protection', and for national and international judicial decisions. He recognised that,

> [t]here is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook […] by the Office of the [UNHCR], is particularly helpful as a guide to what is the

[326] Guy S. Goodwin-Gill, 'The Queen (Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another (United Nations High Commissioner for Refugees intervening)' (2008) 20(4) IJRL 675, 697. This case was heard by the UK Court of Appeal in July 2006, [2006] EWCA Civ 1279.
[327] Refugees Convention. Arts. 35 and 36.
[328] McAdam, 'Interpretation of the 1951 Convention' (n 189) 79.
[329] Goodwin-Gil, 'Convention Relating To the Status of Refugees [and] Protocol Relating To the Status of Refugees' (n 167) 6-7. See also, Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000) 191. See also, *R. (on the application of Adan (Lul Omar)) v Secretary of State for the Home Department, R. v Secretary of State for the Home Department Ex p. Subaskaran, R. (on the application of Aitseguer) v Secretary of State for the Home Department (No.2)* [2000] UKHL 67 [2001] 2 AC 477, 520.

> international understanding of the Convention obligations, as worked out in practice.[330]

The ECtHR has in several of its judgments referred to the UNHCR Statute, Handbook and Guidelines.[331] Likewise, national courts have followed the ECtHR by frequently resorting to these instruments while interpreting and applying the Refugee Convention. This has been done because of the expertise of the UNHCR in the application of the Convention.[332] Hathaway notes that in the context of the Refugee Convention, the notion of "subsequent agreements between the parties" in Article 31(3)(a) of the Vienna Convention include the UNHCR Handbook on Procedures, and ExCom conclusions. These instruments, therefore, 'are to be taken into account as evidence of "subsequent agreement between the parties" on the meaning of the treaty'. [333] Accordingly, the State parties to the Refugee Convention and its Protocol issued a declaration re-affirming that,

> the fundamental importance of UNHCR as the multilateral institution with the mandate to provide international protection to refugees and to promote durable solutions, and recall our obligations as State Parties to cooperate with UNHCR in the exercise of its functions.[334]

The declaration also [u]rge[d] all States […] to ensure closer co-operation between States parties and the UNHCR to facilitate the UNHCR's duty of supervising the application of the provisions of these instruments.[335] The UNHCR through *amicus curiae* has intervened in many cases to provide broader and more far reaching interpretations of international refugee law. The '*amicus curiae'* is a Latin term meaning 'friend of the court'. This is one of the forms of intervention by the UNHCR before national and regional courts. The UNHCR's intervention to make submission

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[330] *R* v *Secretary of State for the Home Department ex parte Robinson* [1998] QB 929, para. 11.
[331] See, for example, *D.N.W. v. Sweden* App no 29946/10 (ECtHR, 27 May 2013); *Khodzhamberdiyev v. Russia* App no 64809/10 (ECtHR, 05 September 2012); *Hirsi Jamaa And Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012); *Antwi And Others v. Norway* App no 26940/10 (ECtHR, 9 July 2012); *Neulinger And Shuruk v. Switzerland* App no 41615/07 (ECtHR, 6 July 2010); *Milan Basnet v. the United Kingdom* App no 43136/02 (ECtHR, 24 June 2008); *Mohamed Reza Hemat Kar v. Sweden* App no 62045/00 (ECtHR, 5 March 2002); and *Jorge Antonio Paez v. Sweden* App no 29482/95 (ECtHR, European Commission Of Human Rights Report, 6 December 1996).
[332] See, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004*, [2006] HCA 53, Australia: High Court, (15 November 2006) para. 76; *Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 392; Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, 20 [61]; *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533, 545 [21]*; Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, 1008-1009 [80]-[82]; 207 ALR 12, 35-36; and *Re Woolley; Ex parte Applicant M276/2003 (by their next friend GS)* (2004) 79 ALJR 43, 67 [107]; 210 ALR 369, 399.
[333] Hathaway (n 203) 54.
[334] UNHCR, 'Declaration of States Parties' (n 169) para. 8.
[335] ibid para. 9.

before the courts is to ensure the appropriate interpretation and application of the Refugee Convention and its Protocol. [336] According to Gilbert, decisions of the national courts along with the UNHCR interventions, through *amicus curiae*, have advanced international refugee regime immeasurably.[337] Some of the cases have taken the law further than one might have predicted.[338] The ECtHR in *MSS v Belgium and Greece* treated the UNHCR's views as 'pre-eminent and possibly decisive' in the field of asylum and refugee law.[339]

The UK Supreme Court echoed the ECtHR's opinion in the recent decision of *EM (Eritrea)* that '[t]he UNHCR material should form part of the overall examination of the particular circumstances of each of the appellant's cases'.[340] One has to quote Sir Stephen Sedley's opinion on the position of UNHCR, who perceptively notes that,

> [i]t seems to us that there was a reason for according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff [...] able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.[341]

One has to agree with Sir Stephen Sedley' view that today, due to its growing role in the international refugee regime, the UNHCR Statute, Handbook and Guidelines are seen as

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[336] UNHCR, 'Court Interventions / Amicus Curiae' available at: <http://www.refworld.org/type,AMICUS,,,,,0.html> accessed 18 October 2015. See also, Volker Türk, 'The UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate' in James C. Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (CUP 2013) 51.
[337] Geoff Gilbert, 'Editorial' (2005) 17(1) IJRL 1, 5-6.
[338] See, for example, *Gashi and Njkshiqi v. Secretary of State for the Home Deparment,* (IAT, Appeal No. HX/75677/95, (13695), 22 July 1996), [1997] INLR 96.
[339] *MSS v Belgium and Greece*, App no. 30696/09 (ECtHR, 21 January 2011). See also, *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department (Respondent)* [2014] UKSC 12. (2014) 26(2) IJRL 286–306.
[340] *EM (Eritrea), R (on the application of) v Secretary of State for the Home Department* [2014] UKSC 12, para. 74.
[341] *EM (Eritrea) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 1336, para. 41 (Sir Stephen Sedley). Likewise, in a recent decision of *IA (Iran) v Secretary of State for the Home Department* [2014] 1 WLR 384, the UK Supreme Court acknowledged the unique and unrivalled expertise of UNHCR in the field of international refugee law. (para. 44).

important sources of guidance for the interpretation and application of binding refugee law obligations. The above view has also been echoed in a number of other cases. For instance, in *R v Asfaw*, the Court noted that based on Article 35 of the Refugee Convention, the opinion of the UNHCR is a matter of some significance in international law and its views should be taken into account duly.[342]

Furthermore, as well as having direct institutional link to the Refugee Convention through Article 35, the UNHCR has also indirect link to other international instruments, including Articles 22 and 45 of the CRC,[343] and Article 11 of the Convention on the Reduction of Statelessness.[344] Moreover, the UNHCR has encouraged the adoption of the UNGA resolutions,[345] the ExCom conclusions, and has contributed significantly to their content. It has also played an active role in guaranteeing that its responsibilities in relation to international refugee law remain relevant in order to meet the growing needs of the refugees.[346]

As mentioned above, the UNHCR is a subsidiary organ of the UN and it was established by the UNGA under Article 22 of the Charter. In accordance with this provision, the UN Charter has empowered the UNGA to establish subsidiary organs as it deems necessary.[347] Furthermore, the Charter has empowered the General Assembly to determine the composition and the mandate of these organs, regulates their rules of procedure, provide binding guidelines, and endorse or disapprove their work.[348] Accordingly, the relationship between the UNGA and UNHCR is based on the principle of subordination. In fact, Article 22 has the full legal effects of the resolutions of the UNGA.[349] As Sloane perceptively stated,

> [t]he second category of binding resolutions for which authority is easily discernible in the Charter are those addressed to organs of the United Nations which are placed under the control of the General Assembly. It is a logical inference, confirmed by practice, that resolutions containing terms of reference and other directives are binding upon the *subsidiary* organs of the General Assembly established by it under Article 22 of the Charter.[350]

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[342] *R v Asfaw (Case for the Intervener UNHCR)*, [2008] UKHL 31, para. 13.
[343] CRC. Arts. 22 and 45.
[344] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175. Art. 11.
[345] UNGA Res. 65/194 (28 February 2011) UN Doc. A/RES/65/194, paras. 23-24.
[346] Lewis (n 322) 54.
[347] UN Charter. Art. 22.
[348] Tomuschat (n 87) 377.
[349] Sloane (n 285) 1, 5. See also, Johnson (n 267) 102.
[350] ibid 5.

The relationship between the two organisations is also laid down in the UNHCR Statute, which declares that the UNHCR,

> acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees.[351]

Moreover, paragraph three of the UNHCR Statute stipulates that '[t]he High Commissioner shall follow policy directives given him by the General Assembly'.[352] This paragraph in conjunction with paragraph nine of the UNHCR Statute provides the agency further evolution of its office and activities.[353] Paragraph nine of the Statute stipulates that '[t]he High Commissioner shall engage in such additional activities, […] as the General Assembly may determine'.[354] These provisions show that the Statute is not the only source of law of the mandate of the UNHCR.[355] The mandate of the UNHCR is embedded in public international law and particularly in international treaty law, which was explored in the Section 2.3.[356]

The UNHCR High Commissioner is responsible to the UN through the General Assembly and he enjoys a special status within the UN, and possesses 'the degree of independence and the prestige which would seem to be required for the effective performance of his functions'.[357] In addition, the UNHCR is an intergovernmental institution, and the UNHCR High Commissioner's Office forms a multilateral discussion that covers international refugee law issues. In fact, due to the authority given to it by the UNGA, the 'UNHCR therefore has a highly dynamic and fragmented legal basis'.[358]

In addition to being entrusted with specific functions, in Türk's view, the UNHCR has also been granted the part of UNGA's competence in regards to 'the progressive

[351] UNHCR Statute, para. 1.
[352] ibid, para. 3.
[353] Türk (n 336) 46.
[354] UNHCR Statute, para. 9.
[355] UNHCR, 'Note on the Mandate' (n 312).
[356] Refugees Convention. Art. 35; Protocol. Art. 2.
[357] UNGA, 'Refugees and Stateless Persons: Report of the Secretary-General' (26 October 1949) UN Doc. A/C.3/527, paras. 46, 48.
[358] Volker Türk, 'The Role of UNHCR in the Development of International Refugee Law' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 154. See also, Türk (n 336) 46.

development and codification of international law and standards for the protection of refugees'.[359] Due to its evolvement, the UNHCR activities which were originally outside its mandate, it is now been incorporated into the UNGA resolutions. The continuous endorsements by the UNGA and the compliance of States on the UNHCR activities have, thereby, laid down statutory provisions.[360] In fact, as noted above in Section 2.3, the competence of the UN to address refugee problems is implicitly contained in Articles 1(3), 13(1), 55(c), 56, and 60 of the Charter. These provisions, in conjunction with Articles 7(2) and 22, form the constitutional basis of the UNHCR Statute.[361]

There are explicit provisions in UNHCR instruments that promote international co-operation to protect refugees, urge and encourage States to pursue durable solutions for refugee problems, and end refugee crises. For instance, the UNHCR had the UNGA adopt a resolution that:

> *[e]xpress[ed] concern* about the particular difficulties faced by the millions of refugees in protracted situations, and emphasizes the need to redouble international efforts and cooperation to find practical and comprehensive approaches to resolving their plight and to realize durable solutions for them, consistent with international law and relevant General Assembly resolutions.[362]

Indeed, the need for international co-operation to address refugee plight has been stressed in several occasions by the UNHCR.[363] Its instruments, just like the UN Charter and the preamble of the Refugee Convention, recognise that a satisfactory solution to refugee plights cannot be achieved without international co-operation and it is the purpose of the UN Refugee Agency to fulfil that. In fact, it explicitly stipulates 'the importance of international cooperation to resolve the plight of refugees' and 'achieve a satisfactory durable solution to a problem which is international in scope and nature'.[364]

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[359] ibid. See, UNHCR Statute. (para. 8(a) and (b)). These paragraphs show the powers entrusted by the UNGA on the UNHCR

[360] Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 154.

[361] UNHCR, 'Note on the Mandate' (n 312) 1. For further analysis on the role of the UNHCR in the development of international Refugee regime, see Türk (n 336) 39-58; and Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 153-174.

[362] UNGA Res. 65/194 (28 February 2011) UN Doc. A/RES/65/194, paras. (23) - (24).

[363] ExCom Conclusions No. 85 (XLIX), 'Conclusion on International Protection' (9 October 1998) para. (e).

[364] ExCom Conclusions No. 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (8 October 2004) preamble.

This section has shown that the UNHCR Statute, Handbook and Guidelines are, although non-binding, highly persuasive and views expressed in them should duly be taken into account. In addition, these instruments are seen as important sources of guidance for the interpretation and application of binding refugee law obligations. The UNHCR, as a UN Refugee Agency created by States, acting on their behalf, with a specific mandate to provide protection and find suitable solutions for refugees and cooperate with States in doing so. Although providing international protection to refugees is the core mandate of the UNHCR,[365] this responsibility primarily lies with States. It is the task of the UNHCR to facilitate and provide assistance to States to accomplish such duties. States, through the GA, have given a mandate to the UNHCR to cooperate with it in the exercise of its functions. Therefore, States have an obligation to deliver the required international obligations towards refugees by cooperating with the UNHCR and its mandate, mission, and purpose outlined in its Statute.

2.4.3 The Status of ExCom Conclusions in International Law

This section shows that ExCom conclusions have contributed to the evolution of international refugee law regime and formed the basis of the UNHCR's guidance. ExCom through its conclusions has outlined the obligation of States towards refugees and their duty to cooperate on refugee matters. In 1958, ExCom was established to advise the UNHCR on international protection. The UNHCR required a legal body to provide guidance and advice with respect to its function.[366] Paragraph four of the UNHCR states that,

> [t]he Economic and Social Council [ECOSOC] may decide […], to establish an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.[367]

Consequently, the ECOSOC created the ExCom, [368] at the request of the UNGA, as illustrated in Table 1.[369] Although established by the ECOSOC, ExCom functions and

[365] UNHCR Statute, para. 1.
[366] UN Economic and Social Council (adopted 30 April 1958, came into existence 1 January 1959) ECOSOC Res 672 (XXV)), para. 2(a).
[367] UNHCR Statute, para. 4.
[368] UN Economic and Social Council (adopted 30 April 1958) UN Doc. E/RES/672 (XXV), para. 1 (a) and (b).
[369] UNGA Res. 109 'International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees' (26 November 1957) UN Doc. A/RES/1166 (XII).

its documentation is issued in a UNGA series and its report is submitted directly to the UNGA for consideration in the Third Committee.[370] According to the obligatory statutory reports, the appropriate organs of the UN are the UNGA and ECOSOC and its subsidiary organ, the ExCom.[371]

The ExCom is the only specialised forum which exists in international law for the development of international refugee law.[372] Therefore, it has played a significant role in broadening the international protection regime for refugees.[373] Each year, the UNHCR holds one ExCom plenary session, which result in the adoption of conclusions, notably on international protection, and then they are annexed to the High Commissioner's annual report and endorsed by the UNGA.[374] In fact, today UNGA frequently endorses ExCom's annual reports.[375] These conclusions have been a key instrument in addressing the gaps in legal interpretation for the development of international standards relating to refugees. According to Türk, 'the annual conclusions on international protection have an important standard-setting effect. They document consensus of the international community on a specific protection matter and are usually worked out in close co-operation with UNHCR'.[376]

The aims of ExCom conclusions are to determine existing shortcomings in relation to interpretative and broader protection standards. The UNHCR has also recognised the important role the ExCom conclusions play not only in addressing the gaps but also developing the international refugee regime. In the UNHCR's view, 'ExCom Conclusions are of great authoritative value for States, are binding on the UNHCR and are important tools of advocacy for the organization in exercising its supervisory role

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[370] UNHCR, 'The Executive Committee's Origins and Mandate' available at: <http://www.unhcr.org/pages/49c3646c86.html> accessed 20 October 2015.
[371] Zieck, (n 8) 1500.
[372] Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 165. See also, Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner (UNHCR)' (2007) 8 MPEPIL 720, 723-724.
[373] UNHCR, 'Non-Paper on Key ExCom Conclusions that have Contributed to the Evolution of International Refugee Law and Formed the Basis of UNHCR Guidance' (5 January 2006) para. 1. Available at: <http://www.unhcr.org/45a754072.html> accessed 18 October 2015.
[374] UNHCR, 'The Executive Committee's Structure and Meetings' available at: <http://www.unhcr.org/pages/49c3646c8f.html> accessed 18 October 2015.
[375] UNHCR, 'UNHCR's Annual Reports to the UN General Assembly from 1951 to Date' (2014). Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=3b4f07fd4&cid=49aea93a20&scid=49aea93a16&keywords=UNHCR%20Annual%20Reports> accessed 18 October 2015.
[376] Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 165.

under the Statute and Article 35 of the 1951 Convention'.[377] They are also an influential mechanism for developing new agreements among States related to refugees, and have considerable interpretive influence in relation with the application of the Refugee Convention.[378] Moreover, ExCom conclusions have addressed the major fields where there is a gap in legal interpretation and standard, including the importance of international co-operation and durable solutions for refugee problems.[379]

Although ExCom was initially established to advise the UNHCR only,[380] its role has grown and its influence has become more effective over the day-to-day management and policy work of the UNHCR. In addition, since 1972 the ExCom conclusions have directly addressed States as well. Feller and Klug argue that its evolution shows that 'ExCom does provide an important forum for interaction with States on their practices and policies'.[381] In fact, ExCom has grown from a gathering of a relatively small number of harmonious States – initially consisting of 25 Member States – to a grouping of some 98 Member States in 2015, from which 89 are State parties to the Refugee Convention and/or Protocol, and the numbers continue to rise.[382] All the five permanent members of the UNSC are also a member of the ExCom. Furthermore, all State parties to the Convention are invited to observe and comment upon draft proposals under consideration by the ExCom conclusions. Currently, ExCom has 12 States which are Standing Committee Observers and 37 international organisations and NGOs.[383] This shows that ExCom conclusion meetings are not exclusively held to its Member States but also observers from States, international organisations, and NGOs.[384] Therefore, it is flexible to incorporate the efforts of new actors, which are invited to participate in compliance mechanisms. As noted in the Section 2.4, this flexibility to allow more actors to become involved in the law making process is one of the reasons that soft law

[377] UNHCR, 'Non-Paper on Key ExCom Conclusions' (n 373) para. 2.
[378] Tom Clark and Frangois Crepeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law, Part A: Articles' (1999) 17(4) *Netherlands Quarterly of Human Rights* 389, 407.
[379] See, for example, ExCom Conclusions No. 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (8 October 2004) preamble; and ExCom Conclusions No. 85 (XLIX), 'Conclusion on International Protection' (9 October 1998) para. (e).
[380] UNGA Res 109, 'International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees' (26 November 1957) UN Doc. A/RES/1166 (XII), para. 5(b).
[381] Feller and Klug (n 372) 723.
[382] ExCom, 'ExCom Members and How to Apply' available at: <http://www.unhcr.org/pages/49c3646c89.html> accessed 18 October 2015.
[383] UNHCR, 'UNHCR Executive Committee of the High Commissioner's Programme Composition for the period October 2014 – October 2015' available at: <http://www.unhcr.org/pages/49f85c356.html> accessed 18 October 2015.
[384] ibid.

instruments are favoured over treaties, which only permits the participation of the State parties.[385] Hathaway notes that it would be difficult to envisage in practical terms how subsequent agreement among 147 State parties to the Refugee Convention and/or Protocol could be generated more adequately.[386]

As a result of this rapid expansion, ExCom has become a large and weighty legal body,[387] and has placed the conclusions in a broader context.[388] In addition, since 1981, the UNGA has regularly endorsed ExCom conclusions,[389] and according to scholars this procedure will improve the position of conclusions and contribute further to their authority when it comes to States.[390] For instance, the Court of Appeal of New Zealand in *Attorney-General v E* confirmed that the explicit endorsement by the UNGA clearly invests ExCom conclusions with 'considerable weight'.[391]

Although ExCom conclusions have non-legal characteristics, in Sztucki's view, they are neither doubtful nor controversial. Accordingly, their non-legal characteristic does not affect their compliance as they are quite compelling.[392] As Vedsted-Hansen astutely states, 'the non-mandatory legal nature of EXCOM Conclusions […] does not […] make them totally irrelevant as sources of international refugee law, given the regulatory intent and the normative content embodied in a number of the provisions'.[393] Indeed, the lack of binding nature of ExCom conclusions does not mean that they must

[385] Dinah Shelton, 'Soft Law' (2008) Public Law and Legal Theory Working Paper No. 322, 16 <file://tower6/home33/b1027711/Downloads/SSRN-id1003387.pdf> accessed 18 October 2015.
[386] Hathaway (n 203) 54-55.
[387] James Milner and Gil Loescher, 'Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion' (2011) Refugee Studies Centre, Forced Migration Policy Briefing 6, 14 <http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb6-responding-protracted-refugee-situations-2011.pdf> accessed 18 October 2015.
[388] Bryan Deschamp and Rebecca Dowd, 'Review of the use of UNHCR Executive Committee Conclusions on International Protection' (UNHCR Policy Development And Evaluation Service, PDES/2008/03, April 2008) 4 (para. 15). Available at: <http://www.unhcr.org/research/RESEARCH/487b672d2.pdf> accessed 18 October 2015.
[389] See resolutions cited in Section 2.4.1.
[390] Sztucki (n 242) 314.
[391] *Attorney-General v E*, Court of Appeal, Wellington CA282/99; [2000] 3 NZLR 257 [96]. Despite the fact that UNGA resolution's legal relevance might vary in international law, however in comparison to ExCom conclusions, they carry more weight as a principal organ of the UN. Sztucki (n 242) 312-316. See also Michael Barutciski, 'Observations on EXCOM's 60th Session (2009): Does UNHCR Need (More) EXCOM Conclusions?' (2009) 27(2) *Refuge* 133, 136.
[392] Sztucki (n 242) 306.
[393] Jens Vedsted-Hansen, 'Non-Admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 282.

be dismissed as irrelevant. Instead, Kälin notes that ExCom conclusions should be regarded as authoritative statements whose disregard requires justification.[394]

Sztucki notes that ExCom conclusions also have a significant influence on the international protection of refugees despite the lack of a legally binding nature. In contrast with perhaps some human rights and humanitarian law treaties which possess legal characteristics and are binding upon States, they still command a relatively low degree of compliance. In his view, this shows that the relationship between the legal and non-legal character of international instruments and their effectiveness is complementary rather than functional.[395]

In addition, Hathaway notes that the ExCom conclusions represent the views of the UNHCR on the substance of the refugee law, which are 'formally codified through the authoritative process of Executive Committee decision making'.[396] Article 35 of the Refugee Convention is referred to as the basis on which the UNHCR may require State parties to the Convention to explain treatment of refugees falling short of those ExCom conclusions.[397] Sztucki echoes Hathaway's view is that ExCom conclusions represent collective international expertise in refugee plights. He confirms that:

> conclusions adopted by the Executive Committee have been described as sound in substance and consonant with the letter and the humanitarian spirit of both the 1951 Convention and other binding instruments relating to refugees in particular, and to human rights in general. Moreover, the Conclusions represent collective international expertise in refugee matters, including legal expertise.[398]

HRW has also added that ExCom conclusions 'do constitute a body of soft international refugee law. They are adopted by consensus by the ExCom member states, are broadly representative of the views of the international community, and carry persuasive authority'.[399]

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[394] Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees Article 35 and Beyond' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 626-627.
[395] Sztucki (n 242) 285, 307.
[396] Hathaway (n 203) 116.
[397] ibid 114.
[398] Sztucki (n 242) 308.
[399] HRW, 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy' (April 2003) Vol. 15(3) (D), 7 <http://www.hrw.org/sites/default/files/reports/nether0403.pdf> accessed 18 October 2015.

ExCom conclusions also add to the shaping of the *opinio juris* or lead to law creation, hence they provide evidence of the rule of customary international law.[400] This is achieved by setting standards of treatment or approaches to interpretation, which illustrate States' sense of legal obligation towards refugees.[401] Goodwin-Gill and McAdam note that '[s]ome Conclusions seek to lay down standards of treatment, or to resolve differences of interpretation between States and UNHCR, while others are more hortatory, repeating and reaffirming basic principles without seeking to expand their field of application'.[402]

Furthermore, ExCom conclusions represent standards that have strong political authority as consensus resolutions of a formal body of government representatives expressly responsible for providing protection and seeking durable solutions for the refugees' problems.[403] They further 'contribute to judicial pronouncements as sources of authority on matters of policy, legal practice or interpretation'.[404] This is the reason that ExCom conclusions are regularly cited by the national, regional, and international courts,[405] and are also frequently invoked in *amicus curiae* briefs by the UNHCR.

The national, regional, and international courts have considered the ExCom conclusion for the interpretation of various international and regional instruments and national legislation. As the judgment of the courts show, the significant weight of ExCom conclusions in international law should not be discounted. The case laws also demonstrate that ExCom conclusions have been used by the courts for various purposes which show its dynamic nature in international law. Hathaway argues that these conclusions should be considered to constitute 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions',[406] pursuant to Article 31(3)(a) of the Vienna Convention.[407] This is because ExCom

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[400] See, for example, *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*. [2006] UKHL 46. Deschamp and Dowd (n 388) 26. See also, Feller and Klug (n 372) 724.
[401] Goodwin-Gill and McAdam (n 111) 217.
[402] ibid.
[403] Hathaway (n 203) 113.
[404] Deschamp and Dowd (n 388) 7, para. 21.
[405] *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener*) [2006] UKHL 46, para. 84. *MIMA v QAAH of 2004 & Anor* [2006] HCA 53, para. 118. *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, 24.
[406] Hathaway (n 203) 54.
[407] Vienna Convention. Art. 31 (3)(a).

consists of State parties which are 'demonstrating interest in, and devotion to the solution of the refugee problem'.[408] Adopting the language of the ICJ in its *North Sea Continental Shelf* judgment, the ExCom consists of State parties 'whose interests are specially affected' by issues concerning refugees.[409] Lauterpacht and Bethlehem echoed the ICJ judgment in that ExCom conclusions are accepted by a significant majority of the State parties. They argue that:

> [c]onclusions of the Executive Committee can, in our view, be taken as expressions of opinion which are broadly representative of the views of the international community. This is particularly the case as participation in meetings of the Executive Committee is not limited to, and typically exceeds, its membership. The specialist knowledge of the Committee and the fact that its decisions are taken by consensus add further weight to its Conclusions. [410]

However, it should be noted that it is not a permissible method of treaty interpretation to use the statement from the ICJ. It is essentially intended in this section to illuminate the fundamental role of ExCom in treaty interpretation in relation to the Refugee Convention and the weight of its conclusions in international law. Therefore, this method of interpretation is not directly applicable but rather it is used as an analogy that ExCom conclusions are important sources of treaty interpretation for international instruments, including the Refugee Convention.

The regional tribunals have also made specific reference to ExCom conclusions to assist them in the interpretation of the Convention's application. For instance, while discussing the need for an individual's detainment, The IACrtHR in *Advisory Opinion on Juridical Condition and Human Rights of the Child* referred to ExCom Conclusion No. 44.[411] The reference to this conclusion assisted the Court in its interpretation of the American Convention on Human Rights.[412] Likewise, the ECtHR in *Saadi v. United Kingdom* made reference to the same conclusion,[413] while interpreting the ECHR.[414]

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[408] UNGA Res 109, 'International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees' (26 November 1957) UN Doc. A/RES/1166 (XII), para. 5.
[409] *Federal Republic of Germany v. Netherlands* [1969] ICJ Rep 43, para. 74.
[410] Lauterpacht and Bethlehem (n 189) 148.
[411] ExCom Conclusion No. 44 '(XXXVII), Detention of Refugees and Asylum-Seekers' (13 October 1986).
[412] *Advisory Opinion on Juridical Condition and Human Rights of the Child,* IACrtHR OC-17/02, (28 August 2002) 36-37.
[413] *Saadi v. United Kingdom* App no. 13229/03 (ECtHR, 29 January 2008) paras. 34, 57, and 65. The ECtHR in *In the case of Hirsi Jamaa and Others v. Italy* App no. 27765/09 (ECtHR, 23 February 2012) 72.
[414] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5.

National courts in a range of jurisdictions have for their part also used ExCom conclusions and regarded them as 'persuasive and even authoritative sources on matters of policy, legal practice, or interpretation'.[415] For instance, the Canadian Federal Court of Appeal in *Rahaman v. Minister of Citizenship and Immigration* stated that ExCom Conclusions deserve high regards. In the words of Justice Evans:

> [i]n Article 35 of the [Refugee] Convention the signatory states undertake to cooperate with the Office of the UNHCR in the performance of its function and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to the recommendations of the ExCom of the High Commissioner's Program on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself.[416]

The State practice shows that soft law instruments are used as a supplement, not an alternative, to treaties. For instance, ExCom conclusions are used primarily to supplement Refugee Convention with new norms or to fill in the gaps that exist in the Convention. As noted above, Article 31 (1) of the Vienna Convention stipulates that a treaty shall be interpreted in good faith.[417]

This could be interpreted as being that a good faith application of the Refugee Convention means taking into account the ExCom conclusions on matters of law. HRW insists that '[s]ince the members of ExCom have negotiated and agreed to their provisions, they are under a good faith obligation to abide by the Conclusions'.[418] Those States that have recognised and became a member of ExCom, in Stevens's view, explicitly acknowledged the importance of ExCom conclusions and the law and policy enshrined in them, and they have implicitly acknowledged the importance of the UNHCR and of refugee law and policy more generally.[419] As an ExCom member, States thus have responsibilities, including setting international standards with respect to the treatment and protection of refugees.

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[415] Deschamp and Dowd (n 388) para. 83.
[416] *Rahaman v. Canada (Minister of Citizenship and Immigration) (C.A.)* [2002] FCA 89; [2002] 3 F.C. 537, (C.A.), Canada: Federal Court of Appeal (1 March 2002) para. 39. (Justice John Evans).
[417] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.
[418] HRW, 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy' (April 2003) Vol. 15(3) (D), 7 <http://www.hrw.org/sites/default/files/reports/nether0403.pdf> accessed 18 October 2015.
[419] Dallal Stevens, 'Legal Status, Labelling, and Protection: the Case of Iraqi 'Refugees' in Jordan' (2013) 25(1) IJRL 1, 7.

The Court of Appeal in *Refugee Council of New Zealand* shares the above standpoint, stating that the importance of the ExCom conclusions is partially derived from the fact that the ExCom is itself an assembly of States, which has demonstrated interest in, and devotion to, the solution of the refugee problem.[420] The court used the ExCom conclusion as a guide to assess its country's obligations under the Refugee Convention. More importantly, the court recognised the opinion expressed in the ExCom conclusion. Justice Glazebrook on the value of the ExCom conclusion stated that 'on questions of interpretation I have focused on this judgment on the Executive Committee's views which in any event I regard as the most valuable guide for the Court'.[421]

The domestic courts have not only used ExCom conclusions to interpret the Refugee Convention but also to interpret their own legislations. For instance, the Austrian High Court in *Complaint Filed by B of W* used ExCom conclusion No 64[422] to interpret Article 27 of its Asylum Act.[423] The Supreme Court of Ireland in *Z v. The Minister for Justice, Equality and Law Reform*, considered ExCom Conclusion No 44[424] to determine RSD because at the time of their determination the provisions of the Refugee Convention had still not been brought into effect in Irish domestic law.[425] Likewise, the Slovenian Constitutional Court in *Decision Number: U-I-200/00-6*. U-I-200/00-6 offered the citizens of Bosnia and Herzegovina a *de facto* protection in accordance with the ExCom conclusion's recommendation.[426] The Court also admitted that '[w]hen considering a large-scale refugee situation, the republic of Slovenia acted in accordance

[420] *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (NZ CA, Apr 16, 2003), para. 100 (Justice John McGrath).
[421] ibid para. 111 (Justice Susan Glazebrook).
[422] ExCom Conclusion No. 64 (XLI), 'Refugee Women and International Protection' (5 October 1990).
[423] *Complaint Filed by B of W v. Administrative Decision No. 221.553/0-V/13/01 Issued on 22 May 2001 by the Independent Federal Asylum Review Board concerning Articles 7 and 8 of the 1997 Asylum Act (Additional Party: Federal Minister of Interior)*, 2001/01/0402-10, Austria: Higher Administrative Court (Verwaltungsgerichtshof), (3 December 2003) 6. Available at: <http://www.refworld.org/docid/411736f54.html> accessed 18 October 2015.
[424] ExCom Conclusion No. 44 (XXXVII), 'Detention of Refugees and Asylum-Seekers' (13 October 1986).
[425] *Z. v. The Minister for Justice, Equality and Law Reform, James Nicholson Sitting as the Appeals Authority, Ireland and the Attorney General*, [2002] IESC 14, Ireland: Supreme Court, (1 March 2002) 13-14 and 22. Available at: < <http://www.refworld.org/docid/42cb98b74.html> accessed 18 October 2015. See also, *Hassan Ch v. Office for Repatriation and Aliens*, BMU-III-211/93, Poland: Department of Refugee and Asylum Proceedings (10 September 2002). Available at: <http://www.refworld.org/docid/3debaed14.html> accessed 18 October 2015.
[426] *Decision Number: U-I-200/00-6*, U-I-200/00-6, Slovenia: Constitutional Court (28 September 2000) paras. 3. Available at: <http://www.refworld.org/docid/3ae6b74a8.html> accessed 18 October 2015.

with the recommendations of the UNHCR Executive Committee concerning the actions of states when a large-scale influx of aliens occurs'.[427]

However, the Japanese District Court in *Myanmarese v. Japan* did not share the above standpoint and claimed that ExCom Conclusion No 15[428] 'is no more than guidelines to the effect that states should use their best endeavours to grant asylum to refugees without an asylum country'.[429] It also added that '[t]he Executive Committee of the UNHCR is nothing more than an independent body, not established under the Convention, whose views cannot have binding forces on the Contracting Parties outside their agreement'.[430] However, the purpose of the ExCom conclusions is to regulate, guide, or influence the conduct of States in practice. Their legal significance in fulfilling these functions should not be neglected, in Sztucki's view, 'denying their normative character from the juridical point of view is not to deny their normative function at all. […] the term "soft law" is a handy formula, denoting a body of non-legal and non-binding provisions, still having normative purport and, possibly, also some legal relevance'.[431]

Candler suggests that 'the main problem with EXCOM Conclusions is when they go against the current, and represent a reaction to what are seen as negative developments in state practice'.[432] The Sub-Committee of the Whole on International Protection regarded ExCom conclusions 'as mere orientations, guidelines, the purpose of which is to serve as the basis for the efforts of governments towards solving the problems relating to refugee law'.[433] However, the Sub-Committee did state that their non-binding nature should not discount the fact that ExCom conclusions provide very practical recommendations to States in relation to particular refugee situations and, therefore, the conclusions deserve to be widely acknowledged and relied upon.[434]

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[427] ibid paras. 4.
[428] ExCom Conclusion No. 15 (XXX), 'Refugees without an Asylum Country' (16 October 1979).
[429] *Myanmarese v. Japan (Minister of Justice)*. Heisei 14 (2002) Gyo-U (Administrative Case) No. 19. Japan: District Courts. (15 September 2003) 6-7. Available at: <http://www.refworld.org/docid/4284b7544.html> accessed 18 October 2015.
[430] ibid 6-7.
[431] Sztucki (n 242) 306-307.
[432] Philippa Candler, 'The Legal Significance of ExCom-Conclusions: Summary of Article by Jerzy Sztucki (1989) 1(3) IJRL 285'. Cited in Mary Crock (ed), *Protection Or Punishment?: The Detention of Asylum-seekers in Australia* (the Federation Press 1993) 77-78.
[433] UNGA, 'Report of The Sub-Committee of The Whole On International Protection' (UNHCR Thirty-ninth session, Thirteenth Meeting, 3 October 1988) UN Doc. A/AC.96/717, para. 4.
[434] ibid para. 8.

The national, regional, and international court cases, mentioned above, are significant as they acknowledge that as a part of the duty to cooperate with the UNHCR and accept its supervisory role under the Convention and its Protocol, the States should take into account ExCom conclusions.[435] Although the case law was specifically referred to, the weight given to it differs from one judgment to other. This is because some jurisdictions are more willing to use ExCom conclusions than others.[436]

As mentioned with the UNGA resolutions and UNHCR Statute, ExCom conclusions systematically reaffirm the importance of international co-operation and finding a sustainable solution to address refugee plights. For instance, in Conclusion No. 46(XXXVIII), the Executive Committee recognised that 'international protection is best achieved through an integrated and global approach to protection, assistance and durable solutions'.[437] In another Conclusion, the Executive Committee '[r]eiterates that refugee protection is primarily the responsibility of States and that it is best achieved through effective cooperation between all States and UNHCR'.[438] He, therefore, urges 'Governments, UNHCR and the international community to continue to respond to the asylum and assistance needs of refugees until durable solutions are found'.[439]

In sum, the systematic reference to the significance of international co-operation to address refugee plights in ExCom conclusions illustrate member states' sense of legal obligation towards refugees. It also shows the long standing recognition among ExCom Members that international co-operation is a necessary prerequisite for the satisfactory solution to the plight of refugees. These commitments and processes, endorsed by the ExCom, are the most recent concrete manifestations of the more general, hortatory provisions of the UN Charter, noted in Section 2.2. Hence, the analysis in this section has shown that there are explicit provisions enshrined in ExCom conclusions that promote international co-operation on refugee matters. Therefore, ExCom member states have responsibilities to set international standards with respect to the treatment

[435] See, for example, Kälin (n 395) 626-627.
[436] Deschamp and Dowd (n 388) para. 86.
[437] ExCom Conclusions No. 46 (XXXVIII), 'General Conclusion on International Protection' (12 October 1987) para. (n).
[438] ExCom Conclusions No. 85 (XLIX), 'Conclusion on International Protection' (9 October 1998) para. (e).
[439] ExCom Conclusion No. 89 (LI) 'Conclusion on International Protection' (13 October 2000) preamble (para. 8).

and protection of refugees and are obliged to deliver the obligations enshrined in its conclusions.

2.5 Conclusion

The purpose of the chapter was to analyse the legal framework where States' obligations towards refugees can be found. This chapter has used a line of argumentation that focused on the obligations of protection of States vis-à-vis refugees under international law. The analysis of the applicable international legal framework showed that States have obligations in international law to co-operate with each other and with the UN, including the UNHCR, whose mandate is to find durable solutions on refugee matters. The examination of the obligations was essential for the overall theme of the research to explore the right of refugees to durable solutions in international law.

This chapter has argued that there is a duty to co-operate on refugee matters. This is based on the combined provisions of the UN Charter, the Refugee Convention including its preamble, and several international instruments including UNGA resolutions, the UNHCR Statute and ExCom conclusions, as illustrated in Table 1. International co-operation is an obligation under international law instruments. This co-operation on refugee matters is a global concern and well established legal commitment. This chapter has explored the emerging tendency to refer to the UN Charter as a tool that protects the right of refugees and obliges States to co-operate on a number of issues, including human rights. In fact, in accordance with its purposes and principles, the promotion and protection of all human rights and fundamental freedoms is a priority objective of the UN.

The provisions of the UN Charter and Refugee Convention as a living instrument are used to identify the legal framework where States' obligations towards refugees can be found. It was shown that the UN Charter has the competence to address refugee matters, and that this obligation is enshrined in Articles 1, 13, 55, 56 and 60. In fact, these provisions together with Articles 7 and 22 form the constitutional basis of the UNHCR Statute. It is now generally agreed that in accordance with its own provisions, among States, the UN Charter is expected to be respected as a binding universal instrument.

In this chapter, the provisions of the Refugee Convention, including its preamble, were interpreted in the context of the framework of the entire legal system that is prevailing at the present time adding to the interpretation of the initial draft in 1951. It is generally agreed that the original drafters were not able to predict the rise of refugees in numbers from thousands to literally millions of refugees. While interpreting the treaty, its concepts in nature were treated as evolutionary in the sense that while its meaning has not changed over time, its application has.[440] International, regional, and national courts have confirmed such a stance.[441]

The analysis has shown that there is an obligation on States to cooperate on refugee matters and the UNHCR is a tool created by States, acting on their behalf collectively with a specific mandate to find suitable solutions for refugees and cooperate with States in doing so. Although providing international protection to refugees is the core mandate of the UNHCR, this responsibility primarily lies with the States. It is the task of the UNHCR to facilitate and provide assistance to States to accomplish such duties. Therefore, States, through the General Assembly, have given a mandate to the UNHCR to provide protection to refugees and find durable solutions for their plight. Therefore, States have an obligation to deliver the required international obligations towards refugees by cooperating with the UNHCR.

[440] See, for example, *Sepet and Bulbul v. Secretary of State for the Home Department* [2003] UKHL 15, para. 6 (Lord Bingham).
[441] See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* [1971] ICJ Rep 16, 31. See also, *Aegean Sea Continental Shelf Case* (*Greece* v. *Turkey*) [1978] ICJ Rep 3, 32; *Tyrer v. United Kingdom,* App no 5856/72 (ECtHR, 25 April 1978) para. 31; and *Sepet and Bulbul v. Secretary of State for the Home Department* [2003] UKHL 15, para. 6.

Chapter 3. Refugees as Subjects of Rights in International Law

3.1 Introduction

The legal status of individuals in international law has attracted huge debate for centuries. This has brought with it controversies as to whether individuals are subjects of international law: an entity, which is capable of possessing international rights and duties. This entity in the literature has been referred to as an international legal person or as having legal personality.[442] In fact, the debate was started as early as the sixteenth century by the Spanish theologians de Vitoria and Suárez, and later Grotius, who believed that the rules of the law of nations were applicable to both States and individuals. This view, however, was disputed by Vattel.[443] Although the writings of these scholars were produced four centuries ago, their teachings on the position of individuals in international law should not pass unnoticed, given the necessity of articulation and systematization of these.[444] Their doctrinal views remains to this day as a significant contribution to the position of individuals in the international legal order.

In order to answer the main research question as to whether refugees have the right to durable solutions, it is necessary to consider whether refugees are subjects of rights in the international legal system hence enabling them to be subjects of the right to durable solutions. The legal personality of refugees in international law is one of the elements, which this chapter considers in order to test the hypothesis that refugees have this right in international law. To consider whether refugees are subjects of rights, this chapter

[442] See, for example, P. K. Menon, 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1 *Journal of Transnational Law & Policy* 151 -182; Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff 2010) 243-273; Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (2nd edn, OUP 2006) 315-322; Julie Cassidy, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9(2) *Deakin Law Review* 533-572; Curtis Francis Doebbler, 'The Individual in the Process of International Human Rights Law: A Value-Oriented Policy Approach' (PhD Thesis, the University of London, London School of Economics and Political Science, 1997) 189-236; and Lauterpacht (n 151) 27-47.

[443] The contribution of these authors on the subject matter are examined in detail in Section 3.2.1 and 3.2.2.

[444] For the contribution of the classic writers on the subject matter see, for example, Antônio Augusto Cançado Trindade, 'The Emancipation of The Individual From His Own State: The Historical Recovery of The Human Person As Subject of the Law of Nations' (2006/2007) 7(7) *Revista do Instituto Brasileiro de Direitos Humanos* 11-36.

first explores the position of individuals as subjects of international law and second addresses specifically the position of refugees as subjects of rights.

This analysis contributes to the existing knowledge on the international legal personality of refugees, and focuses specifically on exploring the emerging tendency that refugees can be the subjects of specific rights in international law. This contribution comes from the fact that although there is an abundant literature describing the position of individuals in international law, there is little commentary directed towards the position of refugees as subjects of rights in international law. Krenz and Gil-Bazo have considered the international legal personality of refugees. In 1966, Krenz analysed this issue extensively. He astutely concluded that 'there remains at present little doubt that […] individual persons become proper subjects of the law of nations, with clearly circumscribed rights and duties. This has been recognised as an important development in the nature and technique of international law'.[445] In fact, since then, international law has evolved even further, which has made the position of refugees in international law even stronger. Gil-Bazo added to the limited literature on the subject matter by examining the impact of international human rights law on the status of refugees as subjects of international law. She argues that, due to the development in international law, refugees are subjects of rights, including the right to be granted asylum in international law.[446]

In order to establish whether refugees are subjects of rights to durable solutions in international law, this chapter is divided into two main sections. The first section is devoted to the analysis of scholars' theoretical views on the nature and extent of the position that individuals hold in international law. In order to show the historical background of the position of individuals in international law, the discussion will be carried out in three different phases. The first phase is dedicated to the examination of the doctrinal contribution by the classic writers such as de Vitoria, Suárez, and Grotius. The second phase will then explore the theoretical view of the legal positivism to show the controversial nature of the debate. The views of the prevalent writers of this School such as Hegel, Anzilotti, Strupp, Triepel, and Oppenheim will be acknowledged in order to identify their State-centric view on the subject matter. The last phase of the

[445] Krenz (n 38) 96.
[446] This view is discussed further in Section 3.3.3.1.

section will critically examine the position of individuals according to contemporary international law. In particular, the opinion of certain theorists, including Grahl-Madsen, Lauterpacht and Cançado Trindade will be emphasised in order to evaluate the theoretical standing of contemporary international law in regards to the position of individuals.

The second section then develops the argument that not only individuals are subjects of international law but refugees are also emerging as subjects of international rights. To examine this argument, this section firstly reviews the emergence of an international refugee law regime by tracing the history from the early *laissez-faire* attitude of displacement to the birth of the refugee problem in the early twentieth century. Secondly, the section explores the special features of refugees in international treaties as a special category of individuals to further determine their legal personality. Then, the Section 3.3.3 will examine the debate as to whether refugees are subjects or beneficiaries of rights in the Refugee Convention. This argument will be based on the development in international treaties and judicial decisions, which confirms that international treaties such as the Refugee Convention are able to recognise rights of individuals directly, as derived from the case law of the ICJ.

To consolidate this argument, Section 3.3.3.1 will highlight that today, refugees are arguably already subjects of certain rights in international law, including the right to be granted asylum and the right of *non-refoulement*, recognised in international human rights treaties of regional scope. These are rights which are enforceable before the relevant international human rights court. Therefore, it will be argued that refugees being subjects of these two rights in the contemporary international human rights law shows the evolution of international law on this subject matter. Such evolution suggests that refugees can possess other international rights, among them the right to durable solutions.

The last section will consider whether refugees have the right to durable solutions, which is the main question that this thesis aims to explore. This section considers this question by first considering the obligations of States under the UN Charter, the Refugee Convention including its preamble, and by exploring several international instruments, including UNGA resolutions, the UNHCR Statute and ExCom

conclusions, discussed in Chapter Two. Then, the section will consider the status of refugees as subjects of international rights.

Authors, such as Kelsen, argue that individuals are subjects of international rights only in an imperfect sense due to the lack of procedural capacity to enforce their rights, or that they only possess this ability through the State.[447] Accordingly, the subjects of international law have been defined with reference to their ability to possess the international procedural capacity required to bring claims.[448] They argue that an individual needs enforcement in order to qualify for the legal personality in international law. However, the legal personality of individuals is different from their procedural capacity in international law; this study rejects the claim that the enforcement of rights is a prerequisite for the legal personality of individuals. Although procedural rights may play a stronger role in common law jurisdictions, both in civil law jurisdiction and in international law itself, a right exists as soon as it has been recognised as a matter of law.

This means the capacity to possess rights is not conditional on the capacity to exercise those rights. This view is in line with the PCIJ in the *Peter Pázmány University* case, which insisted that 'it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself'.[449] Commentators in their part have also dismissed an additional requirement as a threshold for rights of individuals under international law.[450]

In simpler terms, for instance, the UK is party to the Convention Against Torture. This means that refugees are protected under Article 3 of the Convention not to be *refouled*

[447] Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1967) 233. See also, Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31(2) *California Western International Law Journal* 241-276.
[448] Kelsen 233. See also, Hermann Mosler 'The International Society as a Legal Community' (1974) 140(4) *Recueil des Cours* 1–320.
[449] *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pazmany University)* PCIJ Series A/B No 61 (1933) 231.
[450] See, for example, Simone Gorski, 'Individuals in International Law' (2011) 5 MPEPIL 147, 149; Cançado Trindade, 'The Emancipation of The Individual From His Own State' (n 444) 11-36; Albrecht Randelzhofer, 'The Legal Position of the Individual under Present International Law' in Albrecht Randelzhofer and Christian Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grace Violations of Human Rights* (Martinus Nijhoff 1999) 231–242; Krenz (n 38) 90-116; and Lauterpacht (n 151) 27-47.

to a place where they might face torture.[451] The UK has not made the declaration under Article 22 to recognise the jurisdiction of the CAT to hear individual communications[452] which means refugees cannot bring action before the CAT. However, from the perspective of public international law, the right exists from the moment it has been recognised and the UK has done so by becoming a party to the said Convention. This includes the duty to report to the committee on the UK's performance in relation to *non-refoulement*.[453] The lack of procedural capacity of individuals in this matter does not affect the right that individuals are entitled to in accordance with international law. Admittedly, the enforcement makes the right stronger, but it is not a qualification for legal personality of individuals in international law. Lauterpacht analysed the matter extensively in 1950. In his opinion

> [t]he position of the individuals as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument of rights ensuring to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.[454]

In other words, a distinction must be drawn between the ability to possess rights and to have procedural capacity to enforce these rights. Therefore, whether individuals are subjects of international law and whether they have, in addition, the procedural capacity to enforce these rights are two distinct questions that must be answered pragmatically according to the legal instruments that are administrated for each particular situation. Thus, 'the governing international norms may only confer legal rights on the individuals or may also give them procedural capacity'.[455] In fact, since Lauterpacht's work, international procedural capacity of individuals has seen even further improvement due to developments in international law (notably in international human rights law and international criminal law). The argument on the procedural capacity of individuals is more in the past because of these developments in public international law and it is now

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[451] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Art. 3.
[452] ibid. Art. 22. Available at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GBR&Lang=EN> accessed 19 October 2015.
[453] ibid. UK has ratified the Convention on 8 December 1988. Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> accessed 19 October 2015.
[454] Lauterpacht (n 151) 27.
[455] Cassidy (n 442) 546.

generally accepted that individuals do have procedural capacity to seek the enforcement of their rights in international law, which is supported by an overwhelming amount of literature.[456]

3.2 Individuals as Subjects of Rights in International Law

The premise for this research is necessarily the assertion that individuals are subjects of International Law, as right holders vis-a-vis States. When discussing the position of the individual in International Law, one has to bear in mind that their position is neither straightforward nor free from criticism. There is a division of opinion among theorists as to whether individuals are subjects of international law. In order to determine this, this section is divided into three sub-sections, namely the views of classic writers, the theoretical instances of legal positivism and the examination of the modern development of international law. The analysis will show that by virtue of developments in international law, in particular the recognition of rights in international human rights law, as well as the right of legal standing, both active and passive, in international proceedings before international human rights and international criminal law courts, it is

[456] See, for example, Jan Klabbers, *International Law* (CUP 2013) 107-123; Titus Coratean, 'The Individual - Subject of the International Human Rights Law' (2012) 60(2) *Revista Română de Statistică* 19-22; Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011); Cançado Trindade, *International Law for Humankind* (n 442) 243-273; Conrado M. Assenza, 'Individual as Subject of International Law in the International Court of Justice Jurisprudence' (LLM Dissertation, University of Heidelberg 2010); Michal Davala, 'Position of Individuals in the Inter-American Human Rights System' (Dny práva – 2010 – Days of Law, Brno, 2010) 2476 – 2494. Available at: <http://www.law.muni.cz/sborniky/dny_prava_2010/files/sbornik.html> accessed 19 October 2015; Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law* (n 38); McCorquodale (n 442) 307-332; Cassidy (n 442) 533-572; Trindade, 'The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights' (2004) 25(5-8) *Human Rights Law Journal* 157-160; Ole Spiermann, 'The "LaGrand" Case and the Individual as a Subject of International Law' (2003) 58(2) *Zeitschrift für öffentliches Recht (ZOR)* 197-221; Francisco Orrego Vicuña, 'Individuals and Non-State Entities before International Courts and Tribunals' (2001) 5 *Max Planck Yearbook of United Nations Law* 53-66; Trindade, 'The Consolidation Of The Procedural Capacity Of Individuals In The Evolution Of The International Protection Of Human Rights: Present State And Perspectives At The Turn Of The Century' (1998-1999) 30 *Columbia Human Rights Law Review* 1-28; Doebbler (n 442); Menon (n 442) 151 -182; Mark Weston Janis, 'Individuals as Subjects of International Law' (1984) 17(61) *Cornell International Law Journal* 61-78; Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States'(1982 -1983) 32(1) *American University Law Review* 1-64; Rosalyn Higgins, 'Conceptual Thinking about the Individual in International law' (1978) 4(1) *British Journal of International Studies* 1-19; Krenz (n 38) 90-116; Carl Aage Norgaard, *Position of the Individual in International Law* (Munksgaard 1962); Wilard B. Cowles, The Impact of International Law on the Individual (1952) 46 *American Society of International Law Proceedings* 71-85; George Manner, 'The Object Theory of the Individual in International Law' (1952) 46(3) *The American Journal of International Law* 428-449; and Lauterpacht (n 151). However, there are minority views who argue that individuals are not yet subjects of international law. See, for example, Orakhelashvili (n 447) 241-276; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 65, 553-589; Liam Burgess and Leah Friedman, 'A Mistake Built On Mistakes: The Exclusion of Individuals under International Law' (2005) 5(11) *Macquarie Law Journal* 221-239; Korowicz (n 432) 533-562.

now generally accepted that individuals do enjoy the status of subjects of international law.

3.2.1 The Position of Individuals In Accordance With the Founding Fathers of International Law

In his well-known Salamanca lectures, *De Indis* (First Section), the Spanish theologian Francisco de Vitoria (1483 – 1546) was of the opinion that the law of nations – *jus gentium*– applies to both States and individuals as 'every fraction of humanity'.[457] He opposed the idea that the Emperor could capture the towns of the Indian aborigines. Speaking of the legal status of the Indians, de Vitoria stated that the Emperor is not and never has been the Lord of the world.[458] In his writings, he effectively acknowledged that Indians have internationally recognised legal rights.[459] Therefore, they should not be denied the right to possess land just because they do not have the same religion (i.e. Christianity) as the Spanish. In his view, 'the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view'.[460]

In other words, de Vitoria recognised that the American Indians were entitled to the same rights as any other nations (here: Spanish and French) and the violation of their rights had the same consequences in fact and in law.[461] He emphasised that the entitlement of American Indians to human rights and dignity was lacking under the laws of the American States. Despite writing before the creation of modern States, De Vitoria gave examples of the *jus gentium*, namely the right of individuals to travel and reside temporarily in foreign countries (sojourn), the right of free intercourse and commerce,

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[457] James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Humphrey Milford, Clarendon Press 1934) 140 and 170. See also, Cançado Trindade, *International Law for Humankind* (n 442) 214.
[458] Ernest Nys (ed) and John Pawley Bate (tr), *Franciscus de Vitoria: De Indis et de lure Belli Relectiones; Being Parts of Relectiones Theologicae XII* (the Carnegie Institution of Washington 1917) 130-132. For a critical analysis on the de Vitoria's doctrines on the law of nations and the status of indigenous people, see Yuri G. Mantilla, 'Francisco de Vitoria, the Spanish Scholastic Perspective on Law and the Conquest of the Inca Empire: Universal Justice or Ethnocentric Colonialism' (PhD Thesis, University of Aberdeen 2012).
[459] Nys and Bate (n 458) 125.
[460] ibid.
[461] James Brown Scott, *The Catholic Conception Of International Law Francisco De Vitoria, Founder Of The Modern Law Of Nations Francisco Suarez, Founder Of The Modern Philosophy Of Law In General And In Particular Of The Law Of Nations: A Critical Examination And A Justified Appreciation* (Georgetown University Press 1934) 18.

and the common ownership of the seas.[462] Therefore, to him these rights belonged to individuals, and were the central subject of society rather than the State.[463]

In short, de Vitoria saw the law of nations on equal footing with the law of nature,[464] which applied to all individuals in whatever capacity they were engaged in international relations. They were bound by this law as individuals, not as agents of the State. Therefore, de Vitoria considered the law of nations as a law of persons, not as a law of States.[465] The writing of jurists such as de Vitoria show that from early years the individual has enjoyed the status of public international law.

Francisco Suárez (1548 – 1617) continued the trajectory of the legal theory devised by de Vitoria, which was based on theological concepts of human nature. However, he did not only follow de Vitoria but also 'interpreted and developed his views on the natural law of nations and considered them just and universally valid for all civilisations'.[466] Suárez has been called the founder of the modern law of nations, because his writings are so effective, they apply not only to the time of the seventeenth century when they were originally written but also to more modern times.[467] The writings of Suárez and de Vitoria, in Lauterpacht's view, 'laid the foundations of the jurisprudential treatment of the problem of the international community as a whole'.[468]

Suárez examined, and distinguished between, in his outstanding book, *Tractatus de Legibus ac Deo Legislatore* (1612), the doctrine of natural law and the law of nations.[469] In his view, the latter referred to the law that ought to be observed in the relations between States, while the former referred to the law that all States commonly accept and respect within their own borders. Therefore, Suárez believed in limiting the freedom of States according to the law of nations and natural law. Although States may constitute a

[462] Nys and Bate (n 458) 151-153.
[463] Higgins (n 456) 2.
[464] Nys and Bate (n 458) 151.
[465] Cassidy (n 442) 542.
[466] Mantilla (n 458) 228.
[467] Scott, *The Spanish Origin of International Law* (n 457) 127 -130. See also, Sergio Moratiel Villa, 'The Philosophy of International Law: Suárez, Grotius and Epigones' (1997) 37 (320) *International Review of the Red Cross* 539-552.
[468] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1, 17.
[469] Gwladys L. Williams, Ammi Brown And John Waldron (trs), *Selections From Three Works Of Francisco Suarez: De Legibus, Ac Deo Legislatore, 1612, Defensio Fidei Catholicae, Et Apostolicae Adversus Anglicanae Sectae Errores, I613, De Triplici.Virtute Theologica, Fide, Spe, Et Charitate, 1621* (Vol Two, The Clarendon Press 1944). For critical analysis of Suárez's work, see Scott, *The Catholic Conception of International Law* (n 461).

perfect community in themselves, they are also viewed in relation to the human race, as members of the universal society. Hence, the law of nations – *jus gentium* – discloses the unity and universality of the human race.[470]

In another words, States, as members of the universal society must guarantee absolute respect for fundamental human rights and freedoms, and recognise the undisputed rights of the individual. The UN Charter in its provisions has echoed Suárez's view that Member States have the duty to promote and encourage respect for human rights and fundamental freedom for all without distinction.[471] Suárez's views contribute to the very argument that Chapter Two made which is that since the plight of refugees is a concern of the universal society gathered in the UN, States as members of that society have the duty to co-operate on refugee matters. Hathaway translated Suárez's idea of universal society into 'the humanitarian duty of international protection of refugees, and the individual right of the refugee to seek international protection'.[472] Therefore, one has to agree with Villa that Suárez's treatise shows a manifest and modern view in respect of safeguarding and promoting the human rights.[473]

Indeed, the modernity of his view can be noticed in recognising the right of asylum as the natural right of an individual and the duty of the State, acting on behalf of the international community, to grant such a right.[474] Hathaway notes that these classic writers, for reasons of humanity, favoured the international protection to be granted to refugees because they believed States are not only acting on behalf of the international community -*civitas maxima*- but also they are the trustee of the individual.[475]

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[470] Williams, Brown And Waldron (n 469) book 2, ch 19, paras. 8-9. For further analysis on Suárez treatise see, for example, Villa (n 467) 539-552; and Sergio Moratiel Villa, 'The Spanish School of the New Law of Nations' (1992) 32(290) *International Review of the Red Cross* 416-433.
[471] UN Charter. Art. 1(3)
[472] James C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) *Harvard International Law Journal* 129, 130. See also, Rainer Hofmann, 'Refugee-Generating Policies and the Law of State Responsibility' (1985) 45 *Zeitschrift for Auslandisches Offentliches Rech und Voelkerrecht (ZaöRV)* 694.
[473] Villa (n 467) 543. See also, Scott, *The Spanish Origin of International Law* (n 457) 483-484.
[474] Manuel R. Garcia-Mora, *International Law and Asylum as a Human Right* (Public Affairs Press 1956) 23-41. See also, Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook International Law* 92, 119; and Paul Weis, 'Human Rights and Refugees' (1972) 10 (1-2) *International Migration* 20, 24.
[475] Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (n 472) 130. See also, Hofmann (n 472) 694; Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook International Law* 92, 119; and Weis, 'Human Rights and Refugees' (n 474) 24.

In his most famous book, *De Jure Belli ac Pacis,* which is regarded as a foundational text in international law,[476] Hugo Grotius (1583 – 1645) recognised that individuals, like States, are a participant in the international sphere. He was opposed to the rights of individuals being taken away as a result of war. He gave the example of an ambassador, according to whom, the law of nations safeguards his right to be admitted into any States and, more importantly, to be protected from all personal violence. Therefore, States not only have duties towards the ambassador's State but to the ambassador himself.[477] Grotius's work was significantly influenced by the Spanish philosophers de Vitoria and Suárez.[478] He considered international law as a body of rules governing the activities of individuals as opposed to a body of treaties binding States.[479]

He also argued that the law of nations does not only regulate the relationships between States but also between States and individuals, and individuals of different States.[480] Therefore, unlike the legal positivism mentioned in the next section, international law is not concerned with the States exclusively but also with individuals as well. This means that, according to Grotius, States and individuals exist on equal footing – rather than States being superior – under one mutual law of nations setting.[481]

Lauterpacht notes that although other writers, including de Vitoria and Suárez addressed the issues of the law of nations, unlike Grotius, they did not address the subject matter in its entirety.[482] In fact, Grotius's book, *De Jure Belli ac Pacis,* was 'the first comprehensive and systematic treatise on international law'.[483] Oppenheim was impressed by Grotius's contribution to the law of nations stating that Grotius bears by right the title of 'Father of the Law of Nations'.[484] According to Grotius, the law of nature regulates the relationship between human beings while providing them with a common share of these rules, not because they belong to a specific community but

[476] A. C. Campbell (tr), *Hugo Grotius, On The Law of War and Peace* (Kitchener: Batoche Books 2001). *De Jure Belli ac Pacis* [On the Law of War and Peace] this book written in Latin in 1625 published in Paris. Due to importance on the legal status of war, it has been translated into several languages, including English.
[477] ibid ch 19, 165, 164-174, and 349.
[478] Cançado Trindade, *International Law for Humankind* (n 442) 214.
[479] Peter Pavel Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (Martinus Nijhoff 1960) 57.
[480] Doebbler (n 442) 164. See also, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 97-98.
[481] ibid. See also, Parlett (n 456) 10-11.
[482] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1, 17.
[483] ibid.
[484] Lassa Oppenheim, *International Law: A Treatise* (Vol I, Longmans, Green and Co.1905) 77.

rather because they are human beings. In his own words, 'still the very circumstance of their being as MEN, entitles them to those privileges which are sanctioned by the law of nature'. [485]

In his other treatise, he remained firm on the position of individuals, stating that an individual is born 'free and *sui iuris*'; his actions are not subject to another but to his own will, which he referred to as the 'natural liberty' concept. This is exemplified when he refers to a saying that 'every man is the governor and arbiter of affairs relative to his own property'.[486] On the other hand, he saw States as a tool to achieve the overall outcomes of the social legal contract to secure the legal order consistent with 'human intelligence', in order to enhance 'common society which embraces all mankind'.[487]

Like Suárez, Grotius saw the right of asylum as a natural right of the individual and a duty of States to grant asylum. He referred to it as 'the right of suppliants', arguing that '[n]or ought a permanent residence to be refused to foreigners, who, driven from their own country, seek a place or refuge'.[488] Jurists, such as Suárez and Grotius, noted that States acting on behalf of the international community had an international humanitarian duty to grant asylum because they considered asylum 'as a guarantee of liberty'.[489]

For four centuries from 1360 to 1758, the generally agreed view among theologians was that individuals are subjects of international law.[490] In fact, this view is also shared among contemporary international commentators, as discussed in the Section 3.2.3. Kosters argues that the jurists 'in no way perceived the law of nations as a law between abstract entities. In fact, they considered the law of nations together with the law of nature to be binding upon individuals when involved in actions of international

[485] Campbell (n 476) book 3, ch 19, para. 2.
[486] Gwlady L. Williams and Walter H. Zeydel (trs), *Hugo Grotius: De Iure Praedae Commentarius* (Carnegie Endowment for International Peace, OUP 1950) 1:18.
[487] Campbell (n 476) book 2, ch 11, para. 4.
[488] Ibid, book 2, ch 2, para. 16.
[489] See generally, Garcia-Mora (n 474) 23-41. See also, Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook International Law* 92, 119. See also, Weis, 'Human Rights and Refugees' (n 474) 24; and Roman Boed, 'The State of The Right of Asylum in International Law' (1994) 5(1) *Duke Journal of Comparative & International Law* 1, 8.
[490] Cowles (n 456) 73-74.

character. [Therefore,] to these writers the law of nations recognised States as well as private individuals, as both can have rights and duties'.[491]

3.2.2 The Emergence of Legal Positivism and the Exclusion of Individuals

The doctrinal trend of legal positivism is based on a rigid definition that recognises States as the only subjects of public international law and denies the individuals the condition of subjectivity. The founding father of this doctrine is Emer De Vattel (1714 – 1767), who believed that the law of nations applies to States exclusively and it does not bind individuals directly. He, unlike the three philosophers – de Vitoria, Suárez and Grotius – confined his work to the rights and obligations of States.[492] Indeed, the literature shows that Vattel's work in the mid-eighteenth century was the beginning of the personification of the State, which in accordance with Cançado Trindade, had much 'repercussion in the international legal practice of his times'.[493] This is because Vattel envisaged the law of nations as a law between States only unlike the law of nature which is applicable to individuals.[494] This meant that, according to him, the safeguarding of human rights is not a matter of international law but national sovereignty and domestic jurisdiction that should not be interfered with. This view partly echoes Article 2(7) of the UN Charter, which authorises the UN not to interfere with matters, which essentially are regarded within the domestic jurisdiction of the State. However, as discussed in Chapter Two, Section 2.2.2, this provision is no longer absolute due to the development of international human rights law in the twentieth century.

In his treatise, the law of nations (*Droit des Gens*), Vattel claims that 'the law of nations is the science of the rights which exist between Nations or States, and the obligations corresponding to these rights'.[495] He distinguished the law of nature from the law of nations

[491] Jan Kosters, *Les Fondements Du Droit Des Gens: Contribution À La Théorie Générale Du Droit Des Gens* (Lugduni Batavorum , Brill 1925) 32 ff. Cited in Remec (n 479) 27-28.
[492] Bela Kapossy and Richard Whatmore (eds), *Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund 2008) ch 3, paras. 26 – 37.
[493] Cançado Trindade, 'The Emancipation of The Individual From His Own State' (n 444)13-14.
[494] Parlett (n 456) 10. For a detailed analysis on the Vattel's doctrinal point of view, see Remec (n 479).
[495] Kapossy and Whatmore (n 492) preliminaries §3.

> [a] state […] is a subject very different from an individual of the human race: from which circumstance, pursuant to the law of nature itself, there result, in many cases, very different obligations and rights; since the same general rule, applied to two subjects, cannot produce exactly the same decisions, when the subjects are different; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of a quite different nature. [496]

Vattel also disagreed with the natural law theorists such as Grotius and Suárez that the right of asylum is a natural right of an individual.[497] Instead, he claimed that the right to be granted asylum is imperfect and it is a sovereign right of States whether to admit an individuals to its territory.[498] Vattel separated States from the will of individuals. According to him, it is the duty of the State to preserve and to perfect itself, and assist each other in achieving those duties each State owed to itself.[499] Therefore, according to Remec, Vattel saw 'the obligations and rights that bind men in the state of nature are in essence imperfect, not enforceable, depending only on the free judgment and conscience of those that are obliged'. [500]

In short, the main concept of Vattel's treatise is that sovereignty of the State is based on the applicability of the law of nations among States that is an inter-State legal order. This led to a limited view of the subjects of the law of nations. Thus, he restricted the law of nations only to States because he regarded them as the only sovereign entity.[501]

Subsequently, this position became more prevalent in the eighteenth and nineteenth century, which saw many scholars of the positivist school of thought in international law such as Hegel, Anzilotti, Strupp, Triepel, and Oppenheim being of the view that States are the only subjects of international law.[502] In accordance with this school of thought, individuals only enjoy their rights through States, in which they are nationals.[503] In fact, individuals are viewed as beneficiaries of States rather than subjects

[496] Ibid, preliminaries para. 6.
[497] Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 *Canadian Yearbook International Law* 92, 119. See also, Weis, 'Human Rights and Refugees' (n 474) 24.
[498] Kapossy and Whatmore (n 492) ch 19 (paras. 230-231). For further analysis see, for example, Peter MacAlister-Smith and Guomundur S. Alfreosson (eds), *Atle Grahl-Madsen: The Land Beyond: Collected Essays on Refugee Law and Policy* (Martinus Nijhoff 2001) 36, 206.
[499] Ibid, ch 1 (para. 12), ch 2 (para. 14).
[500] Remec (n 479) 138.
[501] Cançado Trindade, *International Law for Humankind* (n 442) 217. See also, Parlett (n 456) 11-13; Remec (n 479) 228, 229 and 234.
[502] Oppenheim (n 484) 18. There are other legal theorists who made similar remarks namely, Georg Schwarzenberger, Torsten Gihl, M. Siotto-pintor and Guiseppe Sperduti. For a detailed analysis on the doctrinal point of view of these writers see, Norgaard (n 456) 35-41.
[503] Janis (n 456) 63-4; Manner (n 456) 428; and Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) *The Yale Law Journal* 385-458.

of international law. Anzilotti stated 'it is unthinkable' that besides States, there might exist other subjects in the international sphere.[504]

Likewise, Oppenheim confirmed the position of States in international law. He stated that international law governs the conduct of States and not of individuals. He also added that the origin of international law is based on the common consent of States and not of their nationals. Therefore, he concluded that 'subjects of the rights and duties arising from the Law of Nations are States solely and exclusively'.[505] He opposed Grotius's idea that individuals such as kings or ambassadors are directly subjects of international law.[506] Oppenheim believed that kings or ambassadors are never directly subjects of international law because the rights and duties that have been conferred upon them have a domestic character since they are not enacted explicitly on subjects of the States but on the respective States.[507]

That is to say, the legal positivism endowed States with a will of their own and restricted international law exclusively to sovereign States. This doctrinal trend also reduced the rights of individuals to only those which the State conceded to them.[508] However, the trend, which was based on such a rigid definition, was short lived. According to Cançado Trindade, the atrocities committed against human beings at the beginning of the twentieth century was the result of the international legal order moving away from the views of the founding fathers of the law of nations.[509] The view that human rights of individuals are the concern of the State and its national sovereignty, and not the international community is no longer a sustainable argument, and this will be discussed next.

3.2.3 The Contemporary International Law and the Re-emergence of Individuals

The view that States are solely and exclusively subjects of international rights started to decline, particularly during the UN era. Prominent scholars, such as Grahl-Madsen,

[504] Criton Goerge Tornaritis, *The Individual as a Subject of International law* (Public Information Office 1972) 17.
[505] Oppenheim (n 484) 18.
[506] ibid.
[507] Atle Grahl-Madsen, *The Status of Refugees in International Law, Volume I—Refugee Character* (A. W. Sijthoff 1966) 63.
[508] Remec (n 479) 36-37.
[509] Cançado Trindade, 'The Emancipation of the Individual from His Own State' (n 444)13-14.

argued that there is nothing in international law preventing individuals from holding international rights and duties and possessing procedural capacity to bring international claims.[510] The change in position of individuals reflects the major developments in international law, most notably in international human rights law.[511] These include the adoption of several universal and regional human rights instruments.

The change in the position of individuals in international law led many commentators to claim a change in the structure of international relations disfavouring the uniform State-centred approach.[512] There is generally an agreed view among prominent scholars, such as Jennings and Watts that 'it is now generally accepted that there are subjects other than states, and practice amply proves this'.[513] This view echoes the doctrinal opinion expressed by the founding fathers of the law of nations, discussed in the Section 3.2.1. Therefore, it could be argued that it is no longer possible to treat States as the only subjects of international law, it is also necessary to include individuals. This is simply down to the progress of international human rights laws that appeared after the Second World War. In fact, the nineteenth century saw a great majority of international law instruments concerning rights of individuals.[514] For instance, virtually all members of the UN have entered into at least one universal and regional treaty to provide protection for the rights of individuals. These treaties contain provisions for the benefit of individuals, their rights, and procedures.[515]

Lauterpacht is one of the renowned jurists who supported the contemporary view that States are no longer the sole and exclusive subjects of international law. In a substantial work entitled *International Law and Human Rights,*[516] he notes that not only is there

[510] Grahl-Madsen, *Volume I—Refugee Character* (n 507) 56-57.
[511] As Jennings notes 'Just half a century separates the eighth and the first editions of Oppenheim's volume on the law of peace. Those fifty years has probably seen greater changes in the substance, and techniques, as indeed in the status, of international law, than any comparable period in the entire history of the subject'. Robert Y. Jennings (rev), *Hersch Lauterpacht (ed), Oppenheim: International Law: a Treatise Vol.1, Peace (8th edn, Longmans, Green & Co. 1955)* (1956) 14(1) *The Cambridge Law Journal* 112-113.
[512] James Wilets, 'The Demise of the Nation-State: Towards a New Theory of the State Under International Law' (1999) 17(2) *Berkeley Journal of International Law* 193.
[513] Robert Jennings and Arthur Watts (eds), *Lassa Oppenheim: Oppenheim's International Law: Foundation of International Law (The Nature of International Law)* (Vol. 1, 9th edn, Longmans, Green & Co. 1992) 16.
[514] Menon (n 442) 157. See also, Frederick S. Dunn, 'The International Rights of Individuals' (1941) 35 *Proceedings of the American Society of International Law* 14, 15.
[515] See, for example, ECHR. ICCPR; ICESCR; and ACHR. It should be noted that there are many more universal and regional treaties that mention the right of individual in their provisions. See generally, McCorquodale (n 442) 312.
[516] Lauterpacht (n 151).

nothing in international law that prevents or excludes individuals from being subjects of international law, but also the 'the individual is the final subject of all law'.[517] Therefore, Lauterpacht astutely argues that the positivist theory that excludes individuals is 'absolutely unworkable' and an inaccurate representation of the present legal position.[518] This is a shared view among an overwhelming amount of literature.[519] In fact, on the importance of individuals, Lauterpacht viewed international law as not only concerning States, but also applying to individuals due to its several rules and regulations that explicitly or implicitly influence the position of individuals.[520] Lauterpacht lucidly argues that the position of individuals in international law cannot remain unaffected by the evolution that allows individuals to protect their rights before international tribunals and directly imposes on them duties derived from international law.[521] Indeed, the analysis of State practice in this section shows that the rules of international law are directly applicable to individuals.

There is no doubt that since Lauterpacht's seminal work in 1950, the position of individuals has seen even further evolution in their process of recognition under international law. Kelsen agrees with Lauterpacht by acknowledging the progressive changes in the structure of international law in favour of individuals and their rights. Although he admits that in accordance with the positivist view only States have international legal personality, he puts forward rules where individuals directly appear as subjects of international law. For instance, individuals can be held for violating rules of conduct imposed by international law.[522] In fact, a large number of scholars, including the French scholars; Georges Scelle, Léon Duguit, Marc Réglade and the Dutch professor Hugo Krabbe, hold the view that ultimately only individuals are the real subjects of international law.[523]

[517] Ibid 51, 61, 69, and 70.
[518] ibid 6, 8 and 9.
[519] See Section 3.2.
[520] Lauterpacht (ed), *Oppenheim* (n 277) 846-847.
[521] ibid 636-637.
[522] Max Knight (tr), *Hans Kelsen: Pure Theory of Law* (University of California Press 1967) 328. Cited in Norgaard (n 456) 42. For an overview on the position of individuals in international law according to Hans Kelsen, see Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9(2) *European Journal of International Law* 287-305; Anthony Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law' (1998) 9(2) *European Journal of International Law* 344-354; and Danilo Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9(2) *European Journal of International law* 306-324.
[523] For a detailed analysis on the views of these writers, see Norgaard (n 456) 72-77; and Cançado Trindade, 'The Emancipation of The Individual From His Own State' (n 444) 11-36.

In considering the position of individuals in international law, the views of Cançado Trindade should not pass unnoticed. He, in a number of his works, has clearly demonstrated the growing position of individuals in international law, which was foreseen by the founding fathers of the law of nations.[524] He argues, quite rightly, that 'the individuals […] are true subjects of international law, bearers of rights and duties which emanate from international law'.[525] The examination of the selected cases of international tribunals in this section shows that the applicable criteria of the international legal personality have become flexible in favour of individuals. These cases further consolidate the significance of the evolution of international legal personality of the individual after the Second World War. For instance, in the recent judgment of ICJ in *Ahmadou Sadio Diallo*, the court allowed Mr. Diallo's claim 'in so far as it concerns protection of [his] rights as an individual'.[526] In this case, the ICJ highlighted the evolution of legal personality of the individual in international law. The court stated that '[i]ndividuals, – like States and international organizations, – are likewise subjects of international law. A breach of their rights entails the obligation to provide reparations to them'.[527] Judge Cançado Trindade notes that

> [i]n effect, […] the Court's Judgments […] clearly show that its findings and reasoning have rightly gone well beyond the straight-jacket of the strict inter-State dimension. There are circumstances wherein the Court is bound to do so, in the faithful exercise of its judicial function, in cases concerning distinct aspects of the condition of individuals. After all, breaches of international law are perpetrated not only to the detriment of States, but also to the detriment of human beings, subjects of rights? and bearers of obligations? emanating directly from international law itself. States have lost the monopoly of international legal personality a long time ago.[528]

In this case, the view of Judge Cançado Trindade, who reaches largely the same conclusions with those of the majority opinion, shows that in international law not only are States regarded as subjects, but individuals as well.[529] In fact, this case has been

[524] See, for example, Cançado Trindade, *International Law for Humankind* (n 442); Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2010); Cançado Trindade, 'The Emancipation of The Individual From His Own State' (n 444) 11-36; and Cançado Trindade, 'The Consolidation Of The Procedural Capacity Of Individuals In The Evolution Of The International Protection Of Human Rights' (n 456) 1-28.
[525] Cançado Trindade, 'The Emancipation of the Individual from His Own State' (n 444) 25.
[526] *Ahmadou Sadio Diallo (Republic Of Guinea V. Democratic Republic of the Congo)* 2012 ICJ Rep 324, para. 2.
[527] ibid (Separate Opinion of Judge Cançado Trindade) para. 13.
[528] Ibid, para. 12.
[529] Ibid, para. 101.

described as unprecedented in international law because for the first time the ICJ awarded reparations to an individual for the breach of their rights.[530]

The rights of individuals in international law have a long history; it has been suggested that this goes back as far as the genesis of international law.[531] In fact, 'the view of international law as directly binding on individuals without the intermediary of their state' is 'at least as old as […] the sixteenth century'.[532] In 1928, the PCIJ considered whether individuals could be bearers of international rights and duties. The court in the *Danzig Railway Officials case* held that duties and rights of individuals could not be created by a treaty between countries but by international agreements. Thus, the court opened the door for States to confer international rights on individuals if they wished to do so. The court stated that '[i]t cannot be disputed that the very object of international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[533]

In fact, the status of individuals is recognised in many international treaties and customs in which they have conferred rights on individuals. Sometimes, individuals have acquired these rights without the interference of domestic legislation.[534] The *Danzig* case is exceptionally important in this context due to the fact that it confirmed in principle the validity of such agreements. Moreover, the case was a breakthrough in international law because for the first time, international law was declared by the PCIJ to apply not only to States but also to individuals.

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[530] William A. Schabas, 'Individual Obtains Reparation at the International Court of Justice for Breach of the International Covenant on Civil and Political Rights' (PhD Studies in Human Rights, 2 July 2012). Available at: <http://humanrightsdoctorate.blogspot.co.uk/2012/07/individual-obtains-reparation-at.html> accessed 19 October 2015. This case is also important because the ICJ relinquished its predecessor's decision in the *Mavrommatis Palestine Concessions (Greece v. Britain)* PCIJ Series A No2 (30 August 1924) 12; *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)* PCIJ Series A/B No 76 (28 Feberuary 1938) para. 65; and *East Timor (Portugal v. Australia)* 1995 ICJ Rep 90. In these cases, the PCIJ claimed that individuals could only bring claims in international law through States. See generally, Bruno Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?' in Holger P. Hestermeyer and Others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum* (Martinus Nijhoff 2012) 592-594.

[531] Burgess and Friedman (n 456) 225.

[532] Marek St Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50(3) *American Journal of International Law* 533, 534.

[533] *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)* (Advisory Opinion), 1928 PCIJ Rep Series B No 15, 17, para. 37.

[534] Alina Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 208.

However, there are differing views among scholars as to whether the decision of the court could be considered as evidence of individual personality in international law. On the one hand, Lauterpacht regarded the decision of the court as an important step towards recognising individuals in international law. He considered that the decision 'dealt a resounding blow to the dogma of the impenetrable barrier separating individuals from international law'.[535] On the other hand, from a minority position, Friedmann and Lord McNair disagreed with Lauterpacht.[536] Friedmann, in particular, considered Lauterpacht's view to be 'somewhat over-enthusiastic'.[537] However, there is a general agreement that the court's decision can be interpreted as evidence of legal personality of individuals under international law.[538]

The PCIJ successor, the ICJ, went further, in the landmark case of *Reparation for Injuries Suffered in the Service of the United Nations*,[539] explicitly rejected the view that only States can be subjects of international law. The court noted that

> [t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[540]

Although this case concerned an international organisation (i.e. the UN) as a subject of international law, it may be thought to challenge the view that only States can be subjects of international law. However, from a minority position, Orakhelashvili claims that 'despite its importance as a foundation for international legal order, this decision cannot be understood as confirming the existence of a rule or principle that the court did not imply or was not called to pronounce upon'.[541] Accordingly, in Orakhelashvili's view, 'neither the letter nor the spirit of the opinion corresponds to the attitude that the court has in any extent touched the legal position of any other category of entities acting in the international plane other than the international organization'.[542] However,

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[535] Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1948) 64(2) LQR 97, 98.
[536] Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961) 337-338.
[537] Wolfgang Friedman, 'The General Course in Public International Law' (VII, 1969) 127 *Recueil Des Cours* 38, 126, and 124-130.
[538] See, for example, Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1948) 64(2) LQR 97, 98; McCorquodale (n 442) 312; and Cassidy (n 442) 552-553.
[539] ICJ Rep (1949) 174.
[540] *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174.
[541] Orakhelashvili (n 447) 249.
[542] ibid 249-250.

McCorquodale does not share this view, and argues that the principles set by the court are broad enough to apply to any non-State actors on the international sphere. Although States are the main subjects of international law, the court made it clear that the subjects of international law can change and develop depending on the needs of the community, and the requirements of international life. Therefore, the decision of the court could be understood as deciding that other entities apart from States can be the subjects of the international law.[543]

In addition, the ICJ in its recent decision in *LaGrand* concluded that 'Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this court by the national State of the detained person'.[544] The court's decision in this case is belatedly aligning with various human rights monitoring bodies and institutions on this point.[545] According to Kaczorowska, this case further confirms that rights of individuals do not have to derive only from international human rights treaties or from 'self-executing' treaties but they may also come from any treaty concluded between States.[546] This judgment has been widely interpreted to confirm the position of individuals as subjects of international law.[547] As Judge Simma notes 'it is difficult to see […], why something which looks like an individual right, feels like an individual right and smells like an individual right should be anything else but an individual right'.[548] The ICJ further strengthened this position in *Avena and Other Mexican Nationals Case* and re-confirmed the *LaGrand* interpretation.[549] At present, and by virtue of developments in international law, the international treaties, including the international human rights treaties are capable of creating individual rights and obligations.[550]

Indeed, recent evidence suggests that the rules of international law can directly govern the rights of individuals. In particular, international treaties provide rights for individuals and oblige States not to deny these rights. The applicability of international

[543] McCorquodale (n 442) 309-310.
[544] *LaGrand (Germany v. United States)* [2001] ICJ Rep 466, para. 77.
[545] ibid para. 89.
[546] Kaczorowska (n 534) 208.
[547] See, for example, Spiermann (n 456) 197-221.
[548] *LaGrand, (Germany v. United States)* Oral Proceedings, CR 2000/26, 13 November 2000, 57, para. 3. (Judge Bruno Simma).
[549] *(Mexico v United States of America)* [2004] ICJ Rep 12. For further analysis on these two cases, see generally, Enrico Milano, 'Diplomatic Protection before the International Court of Justice: Refashioning Tradition?' (2004) 35 *Netherland Yearbook of International Law* 85-142.
[550] *Ahmadou Sadio Diallo* case (n 526).

treaties for the protection of individuals undoubtedly strengthens their position in the international legal system.[551] It is the main object of human rights treaties to safeguard the rights of individuals and oblige States to protect these rights within their territories subject to their jurisdiction. This principle was affirmed by the European Commission on Human Rights in *Austria v Italy*, where it was stated that

> the obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.[552]

Likewise, in its advisory opinion, the IACrtHR in *Juridical Condition and Human Rights of the Child* summarised perfectly the status of individuals when it stated that individuals are endowed with legal personality, which could restrict the power of the State. Despite the fact that legal capacity differs in virtue of the legal status of each individual in undertaking certain acts, all individuals are awarded legal personality. Human rights instruments strengthen the universal characteristics of the individuals independently of their existential or legal status.[553] In short, in accordance with the IACrtHR the very object of

> modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[554]

The aforementioned cases show that provisions of the international human rights instruments are concluded to ensure human beings, regardless of their status in

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[551] Lauterpacht (ed), *Oppenheim* (n 277) 637.
[552] *Austria v Italy*, App no. 788/60, (the European Commission of Human Rights, 11 January 1961) 19. <file://tower6/home33/b1027711/Downloads/AUSTRIA%20v.%20ITALY.pdf> accessed 16 October 2015. See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, IACrtHR Series A No 2 (24 September 1982) reprinted in 22 ILM 37, 47 (1983) paras. 27, 29, 33, and 34.
[553] *Advisory Opinion on Juridical Condition and Human Rights of the Child*, IACrtHR OC-17/02, (28 August 2002) para. 34.
[554] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, IACrtHR Series A No 2 (24 September 1982) reprinted in 22 ILM 37, 47 (1983).

international law, enjoy fundamental rights and freedoms and it is the duty of the States to facilitate and safeguard such rights.[555]

A number of international treaties and judicial decisions, and State practice recognise explicitly that individuals possess rights, which emanate from international law. This recognition is an indication that today it would be difficult to argue against the subjectivity of individuals in public international law. There is also an overwhelming amount of literature indicating development in this direction.[556] The IACrtHR in its advisory opinion in *Castillo Petruzzi Case* confirmed that there is an irreversible reality that individuals are subjects of international rights, and the violation of their rights would result in judicial consequences.[557]

3.3 The Position of Refugees in International Law

As it has been noted,[558] there is an abundant literature describing the position of individuals in international law. This section shows, however, that this is not the case in terms of the position of refugees as subjects of international law. Therefore, the ultimate objective of this paper is to explore the status of refugees as subjects of international law and the implication of this status. Moreover, this paper makes a significant contribution to the literature, and in particular to the emerging debates on the theoretical shift in refugee studies from the State to individuals as subjects of international law.

In order to determine whether refugees are subjects of international rights, this section is divided into three sub-sections. Section 3.3.1 examines the historical background to the Refugee Convention in order to show the development of the international refugee law regime from a historical perspective. Section 3.3.2 then focuses on the features of refugees as a special category of individuals from international refugee law regimes, born in the inter-war period in the twentieth century, and international human rights law regime, born in the UN era.

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[555] See, for example, Janis (n 456) 61-78.
[556] See the literature cited in Section 3.1 (n 456).
[557] *Castillo Petruzzi Case*, Preliminary Objections, IACrtHR Series C No 41 (4 September 1998); *Villagrán Morales et al. Case* (the "Street Children" Case), IACrtHR Series C No 63(19 November 1999). On the significance of rights of individual petition in accordance with the ACHR mechanism, see the Separate Opinion of Judge Cançado Trindade, *Castillo Petruzzi Case*, Preliminary Objections, IACrtHR Series C No 41 (4 September 1998) paras. 33-35.
[558] See Section 3.2.

The final section, Section 3.3.3, analyses the debate on whether refugees are subjects or beneficiaries of rights enshrined in the Refugee Convention. The analysis will show that international treaties such as the Refugee Convention are able to recognise rights of individuals directly. Such an argument is strengthened by the fact that refugees are arguably already subjects of certain rights in international law. Based on these arguments, the analysis will show that by virtue of developments in international law, today refugees are subjects of specific rights in international law, and hence they can be the subject of the right to durable solutions.

3.3.1 The Historical Development of the International Refugee Law Regime

This section provides an overall background to the topic of the international refugee law regime, focusing upon its historical emergence and development. The historical background to the Refugee Convention is necessary in order to show how the refugee regime developed from offering a basic element of legal status with a very specific time limited mandate into a regime with a permanent mandate that offers comprehensive rights to address refugee problems worldwide.[559] The regime was born in the early twentieth century to find a solution for the plight of refugees.

The displacement of individuals is not a new phenomenon, as prior to the inception of international law, people were displaced for one reason or another. However, the international reaction to address this problem only started to take shape after the First World War. From 1917 until 1921, almost two million Russians were displaced in Europe following civil war in the country.[560] To address this displacement, the international community first created an institution,[561] the League of Nations of High Commissioner for Refugees, and created a set of standards and legal rules to protect those displaced.[562] The 1922 agreement on the issue of certificates of identity to Russian refugees is the first refugee law treaty. [563] This agreement required States to recognise

[559] For an in-depth analysis on the development of international refugee regime see, for example, MacAlister-Smith and Alfreosson (n 498) 180-244.
[560] James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33(2) *International and Comparative Law Quarterly* 348, 350-352.
[561] 1921 LNOJ 227.
[562] Conference on the Question of the Russian Refugees (adopted 24 August 1921) 13 LNCM 53.
[563] Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees (adopted 5 July 1922) 13 LNTS 237.

the displaced Russian as refugees having certain rights and benefits. As a result, States agreed to afford some measure of protection to refugees, namely providing them with a travel document, which gave the Russian refugees a legal identity and enabled them to travel internationally.[564] However, the document did not have the same effect as the national passport, and did not attach an obligation on States to re-admit the Russian refugees.[565] The travel document is famously known as the 'Nansen Passport', named after the first High Commissioner for Refugees, Fridtjof Nansen, which was recognised by the 54 States.[566] At this point in time, the refugee protection at an international level first emerged. This development set the pattern for the further advancement of the international refugee law regime that came about subsequently.

In 1924, this protection was extended to 320,000 Armenians after Fridtjof Nansen requested the Council of the League of Nations, the predecessor of the UN, to provide identity certificates for Armenians who fled prosecution from and massacre by the Turkish Government.[567] The Council approved Nansen's request by adopting a resolution, which gave the Armenians similar rights to those provided to Russian refugees. A total of 38 States recognised the extension of the 'Nansen Passport' to Armenian refugees.[568]

Subsequently, two other arrangements were agreed between States in order to define the legal and personal status of Russian and Armenian refugees in order to address the problem governments encountered while issuing the travel document for refugees of these two countries.[569] However, the above-mentioned arrangements were specifically mandated to Russian and Armenian refugees only. The League of Nations therefore voted to extend protection to 'other categories of refugees who, as a consequence of the

[564] Shauna Labman, 'Looking Back, Moving Forward: The History and Future of Refugee Protection' (2010) 10 *Chicago-Kent | Journal of International and Comparative Law* 1, 3.
[565] John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship And The State* (CUP 2000) 128.
[566] On the history of the international protection of refugees, see Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) *International Review of the Red Cross* 727-737; MacAlister-Smith and Alfreosson (n 498) 16-25; Claudena M. Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 3-36; and Labman (n 564) 1-24.
[567] Plan for the Issue of a Certificate of Identity to Armenian Refugees (adopted 28 September 1923) League of Nations, Official Journal, No.7-10, 1924, pp. 969-970.
[568] Hathaway, 'The Evolution of Refugee Status in International Law' (n 560) 352.
[569] Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922, and May 31, 1924 (adopted 21 May 1926) 89 LNTS 47; and Arrangement relating to the Legal Status of Russian and Armenian Refugees (Adopted 30 June 1928) 89 LNTS 53.

war, [were] living under analogous conditions [to those of the Russian and Armenian refugees]'.[570] The other categories of refugees, included Assyrians, Assyro-Chaldaeans, and Turks.[571] Grahl-Madsen notes that the 1928 Arrangement is a forerunner of the Refugee Convention and its Protocol because it incorporated a number of provisions, including the personal status of refugees, exemption from reciprocity, freedom of residence, and travel documents which laid foundation for the international refugee regime that emerged after the Second World War.[572] However, it should be noted that these arrangements constituted mere recommendations to concerned States. States were not obliged to comply with provisions enshrined in these arrangements. This lack of obligation meant that it was left to States to decide whether to accept refugees in their territories.[573]

1933 saw the further development of the international refugee regime when States agreed to the League of Nations' proposal to establish a convention in order to address the ongoing refugee situation.[574] The 1933 Convention Relating to the International Status of Refugees was a step forward in comparison to previous agreements because it gave refugees a number of rights including, the right to work, social welfare, education, access to courts and the recognition of legal status.[575] In fact, the Convention was the first comprehensive legal framework for refugees that incorporated provisions for the enjoyment of civil, social, and economic rights. More importantly, the Convention was the first international instrument to guarantee the right to *non-refoulement*.[576] The Convention therefore has been regarded to have set 'a milestone in the protection of refugees and served as a model for the 1951 Convention'.[577]

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[570] (1927) 8(2) League of Nations Official Journal 155. Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees (Adopted 30 June 1928) 89 LNTS 2006, 65-67.
[571] For a brief account of international instruments during this period see, for example, Hathaway, 'The Evolution of Refugee Status in International Law' (n 560) 354-357. See also, Vanessa Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (2012) Legal and Protection Policy Research Series No. 28, PPLA/2012/05, 8 <http://www.unhcr.org/504748069.html> accessed 24 October 2015.
[572] MacAlister-Smith and Alfreosson (n 498) 183.
[573] For an an in-depth analysis on the historical development in the international refugee regime see, for example, Labman (n 564) 1-22.
[574] For an in-depth analysis on this Convention see, for example, Peter Fitzmaurice, 'Between the Wars – the Refugee Convention of 1933: A Contemporary Analysis' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Elgar 2012) 236-255; Peter Fitzmaurice, 'Anniversary of the Forgotten Convention: The 1933 Refugee Convention and the Search for Protection between the World Wars' (2013) 8(1) *The Researcher* 2-7.
[575] Convention Relating to the International Status of Refugees (28 October 1933) 159 LNTS 199. Arts. 6, 7, 10, and 12.
[576] ibid. Art. 3.
[577] Jaeger (n 566) 730.

Authors, such as Paul Weis,[578] argue that the effect of the 1933 Convention is limited due to the fact that only a few States ratified it and even those that did had incorporated broad reservations.[579] However, the Convention should not be consigned to the annals of history as such a lack of ratification may be due to the fact that fewer States existed in 1933 than today. More importantly, from the perspective of public international law, the Convention was revolutionary because this was the first time an international treaty was adopted to provide legal protection for refugees. This illustrated the acknowledgement of the States that refugee protection was necessary and important[580] and therefore, for the first time ever in history the States agreed internationally to commit to each other in terms of recognition of the rights of displaced individuals. In this way, in Gil-Bazo's view, 'the understanding developed that refugees were a special group of migrants that required a response from the international community'.[581] Furthermore, the 1933 Convention was a gradual development from enacted arrangements between 1922 and 1928 because the arrangements provided identity documents to refugees of specific categories, but the Convention gave a wider spectrum of rights to refugees *vis-a-vis* the host States. By the time the 1938 Convention was adopted, refugees already possessed numerous rights *vis-a-vis* the host States, including the right to *non-refoulement*, travel documents, education and employment.[582]

In 1933, the rise of Hitler and his brutal regime caused a large displacement of individuals, especially the Jewish community, in Germany. To address the emerge of new refugees, the League of Nations first appointed a new High Commissioner for Refugees[583] and secondly adopted a Provisional Arrangement concerning the Status of

[578] Paul Weis, 'The International Protection of Refugees' (1954) 48 *The American Journal of International Law* 193, 194; Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 10-11; Goodwin-Gill, 'Convention Relating To The Status Of Refugees Protocol Relating To The Status Of Refugees' (n 167) 4. See also Fitzmaurice (n 574).
[579] In fact, only nine States ratified the Convention: Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain and Northern, Ireland, Italy and Norway. Available at: <http://www.refworld.org/pdfid/3dd8cf374.pdf> accessed 20 October 2015.
[580] Emily Mattheisen, 'From Political Tool to Humanitarian Stalemate: A Critical Appraisal of International Refugee Law as a Global Protection Mechanism' (Masters Dissertation, the American University in Cairo May 2012) 10-11.
[581] María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From *Non-Refoulement* to Residence and Citizenship' (2015) 34(1) RSQ 11, 12.
[582] Convention Relating to the International Status of Refugees (adopted 28 October 1933) 159 LNTS 199. Arts. 2, 3, 7 and 9.
[583] James G. McDonald was the High Commissioner for Refugees coming from Germany between 1933-1935 and then Sir Neill Malcolm succeeded him between 1936-1938. 17(2) League of Nations Official Journal (February 1936) 90th Session, Sixth Meeting (24/I/1936) 126-138.

Refugees coming from Germany.[584] The 1936 Provisional Arrangement was adopted after a special committee report was presented to the League of Nations,[585] which emphasised the importance of burden sharing among States; either physically by providing resettlement or financially by providing additional support for host States. In order to address the growing refugee problems, the Committee found that 'no solution of the problem would be satisfactory unless it were based on the principle of close co-operation between all States'.[586]

After much deliberation, the international community, represented by the League of Nations convened a conference to draft a convention in order to provide more comprehensive legal protection for refugees coming from Germany in 1937.[587] The conference resulted in the establishment of a Convention concerning the Status of Refugees Coming from Germany in 1938 to provide protection for such refugees.[588] This convention was a replication of the 1933 Convention. However, it did not include provisions on *non-refoulement,*[589] but it did have an explicit provision on resettlement.[590] Apart from the adoption of international instruments, this period also saw the creation of international agencies for the protection of refugees.[591] Therefore, '[t]he two elements of the refugee protection system, namely, an international agreement between States and an agency under the authority of the international community, were present then as they are today'.[592]

However, as noted above, international instruments established prior to the Second World War were designated to address specific groups of refugees and had a very

[584] Provisional Arrangement Concerning the Status of Refugees Coming from Germany (signed 4 July 1936) 3952 LNTS 77.
[585] 17(2) League of Nations Official Journal (February 1936) 90th Session, Annex 1576, Official No. C.2.M.2.x936.XII. 142-159.
[586] ibid. For further analysis on the work of Committee, see Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (OUP 1995) 71.
[587] 18 League of Nations Official Journal (March 1937) Official No. C.L.58.1937.XII. 142-159.
[588] Convention concerning the Status of Refugees Coming From Germany (10 February 1938) 192 LNTS 59.
[589] Jaeger (n 566) 727, 731.
[590] Convention concerning the Status of Refugees Coming From Germany. Art. 15.
[591] High Commissioner for Russian Refugees (1921), The Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946), United Nations Relief and Rehabilitation Administration (1943–47), and the Intergovernmental Committee on Refugees (1938-1947). For a detail analysis on the work of these agency, see Weis, 'The International Protection of Refugees' (n 578) 207-218.
[592] María-Teresa Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice' (2015) 33(1) *Netherlands Quarterly of Human Rights* 42, 43.

specific time limited mandate to address refugee situations as they emerged. In fact, they only conferred upon refugees the basic elements of personal legal status.[593] Jenning notes that the object of the refugee regime was 'to confer upon the individual refugee the rudiments of a legal status' and this did 'not in itself offer any final solution of the major problem: it is a necessary interim measure of alleviation'.[594] However, it has to be noted that the aim of the refugee regime at the time was to recognise some legal status to those undocumented individuals who moved across a border. It was not the aim of the regime to solve refugee problems. In fact, it is only in the language of the UNHCR that durable solutions emerged to address refugee problems and it is only once its mandate expanded that the international community recognised that the work of these durable solutions is ongoing. Therefore, if one takes these instruments into perspective, the establishment of them was truly innovative because they emerged at a time of absolute need was a completely novel approach by the international community to respond to the refugee problems.

A point worth mentioning here is that a reading of international instruments prior to the Second World War also show that the approach of these instruments to refugees was group-based.[595] This is clearly identifiable in the definitions of a refugee in both the 1933 and 1938 Conventions.[596] According to these conventions, the individual refugee did not have to establish his claim in order to receive refugee status because Russian and Armenian refugees fled *en masse* and the reasons for their flight were the basis for determining their refugee status.[597] Stevens notes that these provisions were 'an early example of the *prima facie* presumption that individuals within a group were refugees'.[598] However, following the Second World War, the international community developed a more individualised approach to the definition of a refugee: an approach where individuals had to satisfy this definition in order to determine their refugee status. The IRO, the predecessor of the UNHCR, was the first international agency that

[593] Weis, 'The International Protection of Refugees' (n 578) 194.
[594] Robert Yewdall Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 BYBIL 106, 113.
[595] For an in-depth analysis on the group-based approach, see for example, Dallal Stevens, 'Shifting Conceptions of Refugee Identity and Protection: European and Middle Eastern Approaches' in Susan Kneebone, Dallal Stevens, Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 74-79; and Jean-François Durieux, 'The Many Faces of "Prima Facie": Group-based Evidence in Refugee Status Determination' (2008) 25 *Refuge* 151-163.
[596] Convention Relating to the International Status of Refugees (28 October 1933) CLIX LNTS 3663. Art 1; and Convention concerning the Status of Refugees Coming From Germany, 10 February 1938, CXCII 4461 LNTS 59. Art 1.
[597] Ivor C. Jackson, *The Refugee Concept in Group Situations* (Martinus Nihhoff 1999) 1.
[598] Stevens, 'Shifting Conceptions of Refugee Identity and Protection' (n 595) 74-79.

enshrined in its mandate a non-group based definition.[599] However, the focus on an individualised approach to the definition of a refugee is manifested most clearly by the UNHCR Statute[600] and the international refugee instruments post-Second World War.[601]

The development of the international regime for the protection of refugees in the inter-war period has helped to establish refugees as a special category of individuals because the instruments adopted during this era, albeit basic in their nature, set the standards for the treatment of refugees and to some extent, they influenced the shape of domestic laws and practices. More importantly, the said instruments were able to lay a foundation for the farmers of the Refugee Convention to build upon.[602]

The post Second World War era saw the establishment of the 1951 Refugee Convention and later the 1967 Protocol.[603] As mentioned above, these two instruments did not suddenly emerge, but rather the drafters of the Convention had the instruments from the interwar era to draw on a legal tradition and build upon a legal legacy, which was provided during the League of Nations era.[604] This is also noted by Gil-Bazo who stated that '[t]he Refugee Convention constitutes a continuation of the legal regime for the protection of refugees established in international law in the early 20th century and it predates the establishment of the international regime for the protection of human rights born in the UN era'.[605]

The Convention and its Protocol provide an international status and protection for refugees that was not offered in such great detail previously. Initially, the Convention only applied to European refugees prior to 1951; however, once the international community realised that political repression was not only occurring in Europe, they adopted the 1967 Protocol, which removed the temporal and geographical limitations of the Convention.[606] The expansion of the scope of the Refugee Convention was

[599] Constitution on the International Refugee Organization, 15 December 1946, 18 UNTS 3, Annex 1, Section A, para. 1.
[600] UNHCR Statute, para. 6.
[601] Refugees Convention; and Protocol.
[602] Skran (n 567) 3-36. For the historical development of refugee regime during the interwar era see, for example, Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (OUP 1995).
[603] Refugees Convention; and Protocol.
[604] Skran (n 567) 3-36.
[605] Gil-Bazo, 'From *Non-Refoulement* to Residence and Citizenship' (n 581) 11-12.
[606] Protocol. Art. 1(3).

necessary since it became apparent that the refugee problem had an international dimension; thus, making it a global problem.

Today, the Convention, together with its 1967 Protocol, is regarded as 'the cornerstone of the international refugee protection regime'[607] and it is 'the only international agreement that covers the most important aspects of the life of a refugee'.[608] Indeed, the Convention constitutes the latest and most far-reaching, universally observed treaty law on the subject of international refugee law. It further 'constitutes one of the milestones in the development of the law on Human Rights'.[609] In fact, the Refugee Convention has been ratified widely and some States have incorporated it within their national legislation.[610]

In addition, the adoption of the Convention has resulted in the establishment of 'a uniform legal status for the existing groups of "United Nations protected persons"' within the Member States.[611] The Convention also provides numerous rights for the refugees; this forms the foundation of the international refugee protection regime.[612] These rights entitle refugees to be treated in the same way as the nationals of the asylum country. The Convention contains some of the most important rights attributed to refugees including, the right to work, housing, education, freedom of religious expression, movement, access to food and shelter, healthcare, and court.[613] However, the most important right granted to refugees in the Convention is the right not be returned to a place where they might be subjected to persecution (principle of *non-refoulement*),[614] discussed in more detail in the Section 3.3.3.1.

In sum, today, it is generally agreed that the development of the international refugee law regime since 1951 has long been seen as a necessary and positive development for

[607] ExCom Conclusion No. 103 (LVI) 'Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection' (7 October 2005) preamble (para. 1). UNHCR, 'Declaration of States Parties' (n 169) Preamble para. 2.
[608] UNHCR, 'Conventions: Key Legal Documents' available at: <http://www.unhcr-centraleurope.org/en/resources/conventions.html> accessed 20 October 2015.
[609] Krenz (n 38) 99 and 110. See also, Vicuña (n 456) 55.
[610] UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (n 171).
[611] Weis, 'The International Protection of Refugees' (n 578) 194.
[612] Anne Evans Barnes, 'Realizing Protection Space for Iraqi Refugees: UNHCR in Syria, Jordan and Lebanon' (2009) New Issues in Refugee Research, Research Paper No. 167, 4-5 <http://www.unhcr.org/4981d3ab2.pdf> accessed 24 October 2015.
[613] Refugees Convention. Arts. 4, 16, 17, 21, 22, and 26.
[614] ibid. Art. 33.

the legal personality of refugees within the international legal order. The access and entitlement to a number of civil and political rights has contributed to their status as a special category of individuals, which is subject to further discussion in the next section.

3.3.2 Refugees as a Special Category of Individuals

Refugees are one of the many categories of individuals who benefit from protection provided not only by the international refugee law regime, but also by the international human rights law. Indeed, many international instruments are directly applicable to refugees. The enumerated rights enshrined in the Refugee Convention have given refugees special status in international law. Gil-Bazo, notes that today '[r]efugees enjoy a distinct and unique standard of protection under international law within the framework of the international regime for the protection of refugees, which is based on the [Refugee] Convention and its 1967 Protocol'.[615] Likewise, Doebbler argues that 'all individuals have equal status and have been recognized as participants under international law. Nevertheless there are some individuals who because of their membership in a specific group have been provided with special rights and responsibilities that enhance their participation in the process of international human rights law'.[616] Doebbler identifies refugees as one of these groups.

Doebbler rightly raises the point that due to their membership in a specific category of individuals, refugees have had special rights bestowed upon them: rights that have contributed to the enhancement of their position and participation in the international legal order. Therefore, there has been a gradual shift towards the acceptance of refugees as subjects of international law. Refugees are in a special situation in international law due to their vulnerability and enhanced protection. This situation has provided refugees with greater rights in international law. This is in addition to those rights that all individuals are entitled to in accordance with international human rights instruments.[617] The explicit rights of refugees in international law are discussed further in the section below.

[615] Gil-Bazo, 'From *Non-Refoulement* to Residence and Citizenship' (n 581) 11-12.
[616] Doebbler (n 442) 175-176.
[617] ibid 380.

Unlike nationals of a State, refugees cannot be protected through the traditional means by which most non-nationals are protected (i.e. through the exercise of authority by their country of nationality).[618] Weis notes that

> [w]ithin a State one distinguishes normally between nationals and aliens. But among the aliens there is a particular group—the refugees—whose position in traditional customary international law is especially precarious. This is due to the fact that in classic international law nationality is considered as the link between the individual and international law. […] In the case of the refugee, this link is not effective; it has been broken.[619]

This means that the lack of protection from their regions of origin has resulted in international refugee law and human rights law instruments granting refugees comprehensive legal protection. In particular, the adoption of the Refugee Convention means refugees are granted with a form of enhanced international status. According to Doebbler, ['t]his status provided [refugees] with protection under international law. This was a development from the then prevailing practice that individuals must rely on their country of nationality for the protection of their human rights. It thus signifies a greater willingness by states to treat individuals as relevant to international law'.[620]

The international regime for the protection of refugees and the international regime for the protection of human rights provides special protection for refugees. As a consequence of this, refugees enjoy a vast array of rights in international law. This was noted by Norgaard in 1962, who argued that individuals become the subjects of international law if they fall under international treaties that provide certain legal protections for the nationals of one of the State Parties. He identified refugees as one of the several groups of individuals who 'are subjects of rights under special rules of international law protecting certain particular human rights'.[621]

In particular, as noted above, refugees enjoy special treatment due to the provisions of the Refugee Convention, which accords them treatment as favourable as that provided to nationals of the asylum country. In fact, there are a number of provisions enshrined in the Convention, which take note of the very special situation of refugees. The very best

[618] Weis, 'The International Protection of Refugees' (n 578) 218. See also, Doebbler (n 442) 175-176. See generally, *The Mavrommatis Palestine Concessions (Greece v. Britain)* PCIJ Series A No 2 (30 August 1924) 12; and Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95. Art. 3(l)(b)
[619] Weis, 'Human Rights and Refugees' (n 474) 20.
[620] Doebbler (n 442) 179.
[621] Norgaard (n 456) 97-98.

example of this is Article 33(1), which is the right of an individual not to be returned forcibly to a place where he might face prosecution (the principle of *non-refoulement*).[622] The importance of this provision is to guarantee the *bona fide* refugee a sanctuary.[623] This sanctuary was recognised as early as the sixteenth century, for example, Grotius, who wrote that '[n]or ought a permanent residence to be refused to foreigners, who, driven from their own country, seek a place or refuge'.[624] Equally, Vattel, 133 years after Grotius, recognised a right of an individual to seek refuge somewhere. He stated that '[i]f the sovereign undertakes to interfere with those who have the right to emigrate he does them a wrong, and such persons may lawfully ask for the protection of the States which is willing to receive them'.[625] Today, it is generally agreed within the literature that due to the development in international human rights law in the twentieth century, the protection under this right is absolute.[626] The principle of *non-refoulement* is regarded as a cardinal principle of modern refugee law,[627] and an accepted principle of customary international law.[628]

In addition, Article 31(1) of the Refugee Convention, which allows refugees to move in an irregular manner is another right that is bestowed upon refugees due to their special position. This provision imposes on State Parties not to punish refugees for irregular entry or presence in their territory without documentation.[629] This is because their only purpose is to seek asylum; therefore, their predicament is one of necessity.[630] Due to the

[622] Refugees Convention. Art. 33(2).
[623] MacAlister-Smith and Alfreosson (n 498) 162-163.
[624] Campbell (n 476) book 2, ch 2, para. 16.
[625] Charles G. Fenwick (tr), *Emer de Vattel: The Law of Nations or The Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns, VIII, 1758* (The Carnegie Institution of Washington 1916) 90 (para. 224). For further information on this right, see Atle Grahl-Madsen, *The Status of Refugees in International Law* (VII, Leyden, A. W. Sijthoff 1972) 12-16.
[626] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Art 3.
[627] ExCom Conclusion No.65 (XLII) 'General Conclusion on International Protection' (11 October 1991) para. (c).
[628] For a detailed analysis on the principle of *non-refoulement* as a norm of customary international law, see, for example, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees (Ministerial Meeting of States Parties, 12–13 December 2001) UN Doc. HCR/MMSP/2001/09. Preamble para. 4; and UNHCR, the Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (31 January 1994) available at: <http://www.refworld.org/docid/437b6db64.html> accessed 20 October 2015. For a comprehensive study of the principle of *non-refoulement*, see for example, Lauterpacht and Bethlehem (n 189) 89–177; and Goodwin-Gill and McAdam (n 111) 345-354. However, there are minority views who argue that principle of *non-refoulement* is not an accepted principle of customary international law see, for example, Hathaway (n 203) 263–370.
[629] Refugees Convention. Art. 31(1).
[630] See, for example, *R v Uxbridge Magistrates Court ex parte Adimi* [1999] EWHC Admin 765, para. 4.

nature of their displacement, most refugees might not have appropriate documentation. This reliance on unlawful methods was recognised in the 1950 Memorandum by the drafters of the Convention who noted that refugees fleeing from their country are rarely in a position to obtain and use (genuine) passports or obtain visas of the country of asylum. Therefore, the Memorandum recommended that States would preserve the notion of asylum if they exempted refugees from penalties for such an act.[631] Indeed, this provision sets refugees in a better position than nationals of the asylum country because the latter have to comply with certain restrictions while entering their own country; while, the same cannot be applied to refugees.[632]

Further, Article 28 of the Refugee Convention imposes on State Parties the need to issue travel documents to refugees who are lawfully staying in their territory for the purpose of travel outside of their country.[633] Such travel documents are important to refugees because being in the possession of these documents demonstrates that the individual is a recognised refugee. In fact, many refugees who attempt to obtain travel documents are not doing this for the purpose of travelling 'but merely to have tangible evidence of their being recognized under the Convention'.[634] Therefore, travel documents have special value for refugees because they prove that they are a distinct category of persons.[635]

Due to their vulnerable position, Article 30 of the Refugee Convention requires State Parties to permit refugees to transfer their assets to a third country once they have been resettled.[636] This provision shows that the position of refugees in international law is especially precarious and the international community should be more accommodating to meet their needs. The said provisions are not the only articles in the Convention to demonstrate the special position of refugees, there are other provision which show that refugees are a distinct category of individuals, and they hold a special position under the international legal order.[637] Hathaway also shares this view, as he notes that there are a

[631] Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General (3 January 1950) UN Doc E/AC.32/2, para. 2.
[632] MacAlister-Smith and Alfreosson (n 498) 162-163.
[633] Refugees Convention. Art. 28.
[634] MacAlister-Smith and Alfreosson (n 498) 164.
[635] ibid.
[636] Refugees Convention. Art. 30.
[637] ibid. Arts. 7, 8, 9, 25, and 27. for further information on the special regime of refugees, see, MacAlister-Smith and Alfreosson (n 498) 162-172.

number of provisions in the Refugee Convention, including article 8, 30 and 31 that 'represent net additions to the conceptualization of refugee rights'.[638]

The international regime for the protection of refugees was drafted to guarantee refugees the rights that nationals expect their governments to provide and protect. Those who are recognised as refugees receive international protection: a protection, which is more than assistance or physical safety. This is a rights-based regime that guarantees a bundle of rights enshrined in the Refugee Convention and its Protocol.[639]

Apart from the international refugee law regime itself, the international regime for the protection of human rights contributes significantly to strengthening the position of refugees in international law. This section shows that the international human rights law has supplemented the international regime for the protection of refugees. The protections offered by human rights instruments are wider in scope than those provided by the Refugee Convention. In fact, international human rights law instruments have been the main field where rights of individuals and in particular refugees have been developed extensively. Although these instruments are 'not specifically geared towards the protection of refugees, […] they are directly applicable to refugees'.[640] In ExCom Conclusion No. 50 (XXXIX), the High Commissioner asserted that 'States must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice bearing in mind the moral dimension of providing refugee protection'.[641] In fact, the very reason that refugees exist is that States are failing to observe their human rights obligations. Therefore, the relationship between the two regimes is complementary rather than mutually exclusive.[642]

The Refugee Convention reflects the principles of the UDHR,[643] international human rights covenants; the ICCPR,[644] and the ICESCR.[645] An explicit reference in the first

[638] Hathaway (n 203) 94.
[639] Aleinikoff and Poellot (n 9) 202-203.
[640] Barnes (n 612) 4-5.
[641] ExCom Conclusion No. 50 (XXXIX), 'General Conclusion on International Protection' (10 October 1988) para. (c).
[642] María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: Maintaining the Difference While Enjoying Equal Treatment' in Daniel Sarmento, Daniela Ikawa, and Flávia Piovesan (eds), *Igualdade, Diferença e Direitos Humanos* (Lumen Juris 2008) 827.
[643] Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A(III).
[644] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[645] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

paragraph of the preamble of the Refugee Convention to the UDHR, in Sternberg's view, shows a 'desire for the refugee definition to evolve in tandem with human rights principles'.[646] The declaration was complemented when two international covenants, the ICCPR and the ICESCR, were adopted to protect individuals and minority rights in international law.[647] These instruments are of great importance to refugees' entitlement of rights because they offer considerably broader protection than those enshrined in the refugee law regime. According to these instruments, refugees, as a special category of individuals, are entitled to enjoy detailed and expansive civil, political, economic, social and cultural rights in international law. Such rights include: the right to self-determination, life, protection from torture and ill-treatment, access courts, freedom of thought, conscience and religion, movement, and leave any country, including his or her own.[648] All persons are entitled to these rights regardless of their nationality and status in international law.[649]

In particular, the ICCPR states explicitly in a number of its provisions that the protection offered in the Covenant applies to 'everyone' or to 'all persons'.[650] Article 2(1) of the ICCPR illustrates this obligation

> [e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.[651]

The HRC has elaborated as to whether the rights embodied in the ICCPR are applicable to all individuals regardless of their status in international law. The Committee stressed that 'the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens must receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed by the Covenant'.[652] In another of its general comments, the Committee explicitly held the view that 'the enjoyment of the Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness,

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[646] Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff 2002) 314.
[647] See (n 644 and n 645).
[648] ICCPR, Arts. 1, 2, 6, 7, and 12.
[649] Barnes (n 612) 5.
[650] ICCPR, Preamble (para. 3), Arts. 9, 10, 12, 14, 16, 17, 18, 19, 22, and 26.
[651] ibid. Art 2(1)
[652] HRC, 'General Comment No. 15: The Position of Aliens under the Covenant' (1986) UN Doc. HRI/GEN/1/Rev.7, para. 2.

such as refugees, […] who might find themselves in the territory or subject to the jurisdiction of the State Party'.[653]

These general comments by the HRC has manifested clearly that international human rights instrument, in this case the ICCPR, apply to every person irrespective of their international status. Hence, the protection of refugees must be seen in the wider context of the protection of human rights. The outcome of the Second World War resulted in establishing two entities to deal with human rights and refugees separately. However, despite having two distinct organisations, these issues are interrelated.[654] In fact, the work of the UN in the field of human rights and that of the UNHCR is inseparably linked in the sense that both organisations share a common purpose, which is the safeguarding of human dignity. For instance, the UNHCR was established to provide protection and safeguard the right of refugees in asylum countries, while international human rights instruments were established to address the rights of individuals in the territory of States.[655] The UNHCR rightly emphasised that

> [t]he refugee problem is in many respects an issue of human rights – of rights which have been violated, for which respect must be reinstated. Ultimately, the entire refugee experience, from forcible displacement, through the search for asylum, to the securing of a durable solution, is an important indication of the respect accorded to basic human rights principles worldwide. The by now extensive array of international human rights instruments, together with their monitoring mechanisms, offer important complementary tools for enhancing refugee protection.[656]

Similarly, the Supreme Court of Canada in *Ward* stated that international refugee law increasingly refers to and clearly recognises its base in international human rights law.[657] In other words, the international regime for the protection of refugees is generating a serious body of law that elaborates the fundamental standard of human rights and has important repercussions in-and beyond- the refugee framework.[658]

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[653] HRC, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc. HRI/GEN/1/Rev.7, para. 10. See also, *Juridical Conditions and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion OC-18/03, (2003) Series A, No. 18.
[654] UNHCHR, 'Fact Sheet No. 20, Human Rights and Refugees' (July 1993) 6. Available at: <http://www.unhcr.org/refworld/docid/4794773f0.html> accessed 20 October 2015.
[655] ibid 6.
[656] UNHCR, 'Note on International Protection' (2 July 2003) UN Doc A/AC.96/975, para. 49. Available at: <http://www.unhcr.org/refworld/docid/3f1feb6d4.html>accessed 20 October 2015.
[657] *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.
[658] Deborah E. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133.

There is an overwhelming amount of literature on the close relationship between the international human rights law and the international refugee law regime. There is a shared view among commentators that the international human rights law strengthens, enriches and complements the existing international regime for the protection of refugees.[659] Gil-Bazo extensively covers this debate when she attempts to identify how the international human rights law and the international refugee law interact with each other to answer the claim of individuals for protection. Exploring from the perspective of individuals, she argues that the protections offered by international human rights instruments are wider in scope than those provided by the Refugee Convention.[660] The particular contribution of the international human rights law to the protection of refugees, which Gil-Bazo focuses on, is strengthening the protection against *refoulement* and recognising the right of individuals to asylum.[661] On that basis, she comes to the conclusion that the protection of the two regimes is complementary rather than mutually exclusive.[662]

Apart from the UDHR, the ICCPR and the ICESCR, there are a number of regional human rights instruments that have not only enriched the legal personality of refugees in international law but have also endowed them with procedural capacity to allow them to bring claims against States.[663] These instruments offer greater protection to refugees since they have enshrined provisions, which are directly applicable to refugees. For instance, the IACrtHR in its advisory opinion in *Juridical Condition and Human Rights*

[659] See, for example, Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law* (n 38); Hathaway (n 203): Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 29-33; Foster (n 218); Ninette Kelley and Jean-François Durieux, 'UNHCR and Current Challenges in International Refugee Protection' (2004) 22 *Refuge* 6-17; and Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) 19-72.
[660] Gil-Bazo, 'Maintaining the Difference While Enjoying Equal Treatment' (n 642) 827.
[661] María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of The European Union And The Right to Be Granted Asylum in The Union's Law' (2008) 27(3) RSQ 33-52.
[662] Gil-Bazo, 'From *Non-Refoulement* to Residence and Citizenship' (n 581) 11-42.
[663] See, for example, Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; International Convention for the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277; International Convention against Torture: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83; ECHR; ACHR; and ACHPR.

of the Child held that human rights instruments strengthen the universal characteristics of the individuals independently of their existential or legal status.[664]

Indeed, currently, refugees increasingly depend on the regional human rights instruments such as the the ECHR,[665] the ACHR,[666] and the ACHPR.[667] These instruments were adopted progressively to strengthen the UN human rights treaty body system and offer greater protection to refugees since they have enshrined provisions, which are directly applicable to refugees.[668] Moreover, these instruments have not only enriched the legal personality of refugees, but have also endowed them with procedural capacity, which has allowed refugees to seek the enforcement of their rights in international law.

Apart from international human rights law instruments, regional refugee regimes have contributed in broadening the rights to which refugees are entitled. They have also contributed to the very special nature of the refugee regime in the international legal order. The regional refugee law instruments have had a positive impact on the position of refugees in international law since they have provided refugees with the broader scope of protection and greater entitlement of rights than those offered by the Refugee Convention. In fact, regional instruments such as the 1969 OAU Convention[669] and the 1984 Cartagena Declaration[670] have filled some of the gaps and addressed some of the mooted questions on the Refugee Convention. For instance, the OAU Convention has enshrined a broader refugee definition, has made an explicit reference to voluntary repatriation and addresses the subject of asylum.[671]

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[664] *Advisory Opinion on Juridical Condition and Human Rights of the Child*, IACrtHR OC-17/02, (28 August 2002) para. 34.
[665] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5.
[666] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 36 OAS TS 1; 1144 UNTS 123.
[667] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.
[668] Hermann Mosler 'The International Society as a Legal Community' (1974) 140(4) *Recueil des Cours* 1, 76.
[669] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.
[670] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984). (Cartagena Declaration)
[671] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45. Arts. 1, 2 and 5. African Refugee Convention

The Cartagena Declaration, likewise, offers a broader definition of the term 'refugee'. It also contains provisions strongly supporting the importance of finding lasting solutions to eradicate the refugee problems in Central America.[672] Although the Declaration is not legally binding on the Member States, its provisions have been incorporated into the domestic legislation of various countries. In fact, the Declaration has 'laid down the legal foundations for the treatment of refugees in Latin America'.[673] This shows that the provisions of the OAU Convention and Declaration complement those enshrined in the Refugee Convention.[674]

To sum up, presently, due to the development in international law, refugees are entitled to a greater scope of general human rights protection offered to all individuals as a result of the vast array of instruments which have been adopted in the past sixty years. These rights including those offered in the Refugee Convention have undoubtedly supplemented the position of refugees in international law, 'underscoring the need for and informing the content of principled responses to refugee needs'.[675]

3.3.3. Refugees: Subjects or Beneficiaries of Rights in the Refugee Convention?

There is an argument that refugees are seen as the beneficiaries, rather than subjects, of the Refugee Convention. The fact that they enjoy rights in an asylum country does not necessarily mean that they are regarded as direct subjects of international law but that they are the beneficiaries of the rights derived from the Refugee Convention.[676] Such a question arose in the *NAGV and NAGW* case as to whether Australia's obligations under the Refugee Convention are capable of being owed to individual refugees, or whether they are owed exclusively to State Parties. Although the Court rejected the view that obligations are owed to refugees, there was a consensus that while the obligations under the Refugee Convention are owed by States to each other, they are owed in relation to refugees, who are the substantive beneficiaries of the Convention.[677] For instance, Justice Gleeson claims that although the Refugee Convention is an example of a treaty

[672] Cartagena Declaration. Arts. I (para. 6) and III (para. 3).
[673] Barnes (n 612) 4-5.
[674] Hathaway (n 203) 118-119.
[675] Kelley and Durieux (n 659) 7.
[676] Grahl-Madsen, *Volume I—Refugee Character* (n 507) 63.
[677] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 213 ALR 668.

that offers absolute freedom to States in their treatment of nationals, it is not capable of conferring upon refugees international legal personality.[678]

Dissenting with the majority view, Justice Kirby argues that although the Refugee Convention represents a binding obligation between the Contracting States, and refugees are not party to the Convention,[679] the last century has seen enormous growth by recognising individuals as subjects of international law. Indeed, he notes that the trend of States being the sole subjects of international law is no longer seen as a valid view.[680] Therefore, according to Justice Kirby, the provisions of the Refugee Convention are not only owed to the State Parties but to refugees as well. In fact, he argues that it would be 'potentially misleading' to deny the existence of protection obligations owed to refugees in the Convention. Based on this, he concludes that while refugees are not party to the Convention, they are certainly its subjects.[681] There are provisions in the Refugee Convention demonstrating that obligations are owed to individuals. For example, Article 3 states that

> [t]he Contracting States shall apply the provisions of this Convention to refugees.[682]

As Grahl-Madsen argues, although the Refugee Convention and many international treaties are concluded between States for the benefits of individuals, these conventions do not speak only of 'benefits' and 'treatment', but also of 'rights'.[683] As mentioned above, there are numerous provisions within the Refugee Convention that speak of refugees rights.[684] Therefore, refugees being in special positions – attained by the Refugee Convention – acquire rights. This is also noted by Aleinikoff and Poellot, who argue that the international regime for the protection of refugees is fundamentally a

[678] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 213 ALR 668. (Chief Justice Gleeson) para. 15. Chief Justice Gleeson referred literature such as Menon (n 442) 151-182; and Orakhelashvili (n 447) 241-276.
[679] *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 213 ALR 668, para. 67 (Justice Kirby).
[680] ibid, para. 68 (Justice Kirby). While making these remarks Justice Kirby was referring to the legal literature namely, Brownlie (n 456) 529-557; Christopher Gregory Weeramantry, *Universalising International Law* (Martunis Nijhoff 2004)171-172, 178-179; Sohn (n 456) 1-64; Menon (n 442) 151-182; and Orakhelashvili (n 447) 241-276.
[681] ibid. (Justice Kirby) para. 68.
[682] Refugees Convention. Art. 3.
[683] Grahl-Madsen, *Volume I—Refugee Character* (n 507) 59.
[684] Refugees Convention. Arts. 7, 12, 13, 14, 17, 18, 24, 25, and 26.

rights-based regime that guarantees a bundle of rights provided by the Refugee Convention and its Protocol.[685]

Likewise, Norgaard explored the position of individuals in their private capacity and questioned whether individuals who enjoy a certain right under rules of international law could become the subject of rights under those rules. He argued that '[u]nder the majority of the rules of international law, the individual in his private capacity is a subject of rights. […] the individual is also a subject of rights with respect to certain human rights under rules of international law relating to special groups of individuals'.[686] Norgaard identifies refugees as one of these groups that 'are subjects of rights under special rules of international law protecting certain particular human rights'.[687] This implies that refugees in their capacity must be considered subjects of rights under some of the rules of international law. These rules confer certain privileges and immunities upon them during their stay in the asylum country. Therefore, when rules of international law, such as the international human rights law and international refugee law instruments, grant refugees certain rights, refugees are subjects of those rights under such rules.

Although it is generally undisputed that treaties might create individual rights, there is a debate as to whether a certain treaty creates individual rights.[688] For example, in the *LaGrand Case* a similar issue arose as to whether the rights enshrined in the Vienna Convention on Consular Relations,[689] were owed to States only or the concerned individuals as well. The Court confirmed that the obligation of the State in accordance with the treaty is not only owed to the State but to the individual as well.[690] Spiermann strongly argues that it is undisputed that the judgment 'contributed to the understanding of the involvement of individuals in international law, including the direct effect of international law on individuals'.[691] The court significantly did not follow its predecessor's traditional view in the *Danzig Railway Officials case*,[692] that individuals

[685] Aleinikoff and Poellot (n 9) 202-203.
[686] Norgaard (n 456) 97.
[687] Ibid 95-98.
[688] Christian Walter, 'Subjects of International Law' (2007) 9 MPEPIL 634, 639.
[689] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261. Art. 36(1).
[690] *LaGrand (Germany v. United States)* [2001] ICJ Rep 466, para. 77.
[691] Spiermann (n 456) 208.
[692] *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)* (Advisory Opinion), 1928 PCIJ Rep Series B No 15, 17, para. 37.

may only exercise their rights within domestic law.[693] This decision also confirmed that rights of individuals do not have to derive only from international human rights treaties or from 'self-executing' treaties, but they may also come from any treaty concluded between States.[694] The case, therefore, is 'a striking illustration of treaty provisions giving rise to individual rights when construed in accordance with the general principle of treaty interpretation'.[695]

More importantly, the ICJ for the first time in the history of its existence confirmed that international treaties, other than human rights instruments, might recognise rights of individuals directly.[696] Prior to this case, international treaties were not necessarily conceived to give rights to individuals as they were seen as instruments purely between States. However, in the *LaGrand* Case the way the provision was formulated led the ICJ in interpreting Article 36 (1) of the Vienna Convention on Consular Relations[697] created individual rights.[698] This meant that international treaties might recognise rights of individuals directly. The ICJ in *Ahmadou Sadio Diallo* made similar remarks,[699] as noted in the Section 3.2.3.

These cases, therefore, opened the door for other treaties in international law to confer individual rights.[700] For example, one could apply the same interpretation to refugees in relation to the Refugee Convention. The *LaGrand* and *Diallo* cases are essential in arguing that refugees are subjects of rights of the Convention. Therefore, on a second reading of the Refugee Convention it could be argued that State Parties are under an obligation to recognise the rights of refugees, which are derived from the Convention. This is because, based on the judgment in the *LaGrand* and *Diallo*, treaties bestow rights to individuals and the Refugee Convention is an instrument that is not different; it

[693] Spiermann (n 456) 208.
[694] Kaczorowska (n 534) 208.
[695] Spiermann (n 456) 198. See also, Pierre-Marie Dupuy and Cristina Hoss, 'LaGrand Case (Germany v United States of America)' (2009) 6 MPEPIL 629-637. The ICJ in *Avena and Other Mexican Nationals Case (Mexico v United States of America)* [2004] ICJ Rep 12, confirmed the *LaGrand* interpretation. For further analysis on these two cases, see generally Enrico Milano, 'Diplomatic Protection before the International Court of Justice: Refashioning Tradition?' (2004) 35 *Netherland Yearbook of International Law* 85-142.
[696] Dupuy and Hoss (n 695) 629-630; and Walter (n 688) 634-643.
[697] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261. Art. 36(1).
[698] *LaGrand (Germany v. United States)* [2001] ICJ Rep 466, para. 77.
[699] *Ahmadou Sadio Diallo* case (n 526) para. 2.
[700] Gorski (n 450) 151; and Dupuy and Hoss (n 695) 629-630.

is a treaty like any other treaty. Although the subjects are arranged between the States, these obligations are owed to individuals.

Furthermore, there is a general agreement in the legal literature, as shown above, that the international refugee regime has undergone an evolutionary development in respect of the position of refugees in international law. In addition, the numerous international and regional human rights treaties, which have been adopted since 1945, have complemented and contributed in consolidating their position and rights of refugees in the international legal order. As McAdam argues, refugee rights are a subspecies of human rights,[701] since there is no doubt that international human rights instruments do create rights of individuals and those rights are owed to individuals. Therefore, if refugee rights are subspecies of human rights then the same features apply to refugees.

In summary, as a matter of strict law, there can be little doubt that the *LaGrand* and *Diallo* judgments, particularly when read in tandem with the significant development of the international human rights law and its complementary nature to the refugee regime, leads one to conclude that refugees are subjects of the rights enshrined in the Refugee Convention. Therefore, the State Parties of the Convention owe an obligation not only to each other but to the refugees as well.

3.3.3.1 Refugees as Subjects of Rights in Contemporary International Human Rights Law

The argument that refugees are subjects of international rights are further strengthened by the fact that refugees arguably are already subjects of certain rights in international law including the right of an individual to be granted asylum and the right of *non-refoulement* on the broader scope, which refugees now enjoy. This sub-section, therefore, analyses such developments in contemporary international human rights law. With regards to the right to asylum, although their legal nature as a right of individuals has remained as one of the most controversial matters in refugee studies, this study argues that due to the development in international human rights law, such a right is

[701] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 29-33. See also, Jane McAdam, 'Human Rights and Forced Migration' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 203-214; Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) *Netherlands Human Rights Quarterly* 389-410.

bestowed upon an individual as opposed to States having the power to grant or deny asylum.[702]

As it has been indicated above, Gil-Bazo has extensively covered this debate, where she argues that there are two areas of international law when interaction between international human rights instruments and international refugee regime are evident namely, the right of an individual to be granted asylum and the principle of *non-refoulement* on the broader scope.[703] In particular, she argues that refugees are subjects of specific rights: such as the right to be granted asylum in international law. She makes this argument based on the principle of *non-refoulement* as well as international human rights treaties of regional scope, which explicitly recognise the right of an individual to be granted asylum as one of the rights to which refugees are entitled in international law.[704]

Gil-Bazo's position on the existence of a right to asylum is developed from the views of contemporary scholars such as Grahl-Madsen and Weis, who strongly argued for a subjective right to asylum for the individual. The right to asylum according to these scholars derived from the duty of States on the principle of *non-refoulement*.[705] In particular, Grahl-Madsen, analysed this issue extensively. Writing in 1972, he astutely argued that although traditionally the right of asylum had been referred to as a right that States granted, the development of international law and State practice in relation to refugee protection has opened the door for one to speak of a right of an individual to be granted asylum.[706] Later in 1980, in a monograph explicitly dedicated to asylum, Grahl-Madsen spoke of a right of asylum for the individual and noted that there is 'an impressive development towards an internationally guaranteed right for the individual to be granted asylum'. [707] He went further in arguing that '[a]rticle 33 [of the Refugee

[702] See, for example, Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980); Grahl-Madsen, *Volume II-Asylum, Entry and Sojourn* (n 625) 3-194; Paul Weis, 'Territorial Asylum' (1966) 6 *Indian Journal of International Law* 173-194; and Gil-Bazo, 'The Charter of Fundamental Rights of the European Union' (n 661) 33-52.
[703] Gil-Bazo, 'Maintaining the Difference While Enjoying Equal Treatment' (n 642) 813-827.
[704] Gil-Bazo, 'The Charter of Fundamental Rights of the European Union' (n 661) 33-52; María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27(1) IJRL 3, 10-14.
[705] Paul Weis, 'Territorial Asylum' (1966) 6 *Indian Journal of International Law* 173-194: Paul Weis, 'The Development of Refugee Law: Transnational Legal Problems of Refugees' (1982) 3 *Michigan Yearbook of International Legal Studies* 27-42; and Atle Grahl-Madsen, *Territorial Asylum* (n 720); Grahl-Madsen, *Volume II-Asylum, Entry and Sojourn* (n 625) 3-194.
[706] Atle Grahl-Madsen, *Territorial Asylum* (n 702) 2. For an in-depth analysis see, for example, ibid 3-194.
[707] ibid 2, 42.

Convention] creates an obligation to grant asylum to persons entitled to invoke it.[708] In fact, as will be shown in this section below, in 2013, the IACtHR in *Caso Familia Pacheco Tineo v Estado Plurinacional de Bolivia* held that States have an obligation to grant asylum based on their duty on the principle of *non-refoulement*.[709] This echoes the views of the said scholars on the relationship between the right to asylum and the principle of *non-refoulement*.

However, there is a contrary view, which holds that individuals have no right to be granted asylum, instead 'every sovereign state has the right to grant or deny asylum to persons located within its boundaries'.[710] For instance, Boed argues that '[i]International and regional instruments dealing with human rights, asylum, and refugees, as well as the failure of the international community to agree on a convention on territorial asylum illustrate the general proposition that, in international law today, an individual has no right to asylum enforceable *vis-d-vis* the state of refuge'.[711]

However, as noted above by Gil-Bazo, the international human rights in their regional scope contradict such a view. For instance, Article 18 of the 2000 Charter of Fundamental Rights of the European Union,[712] Article 22(7) of the ACHR,[713] and Article 12(3) of the ACHPR[714] recognise asylum as one of the rights to which refugees are entitled. [715] To date, regional human rights instruments have filled the gap left by the international human rights instruments and the refugee law regime in recognising the right to be granted asylum as a subjective right of individuals, rather than as a sovereign right of States. This should result in refugees being able to enjoy such a right as an individual, so that the right of asylum is not a State granted right to individuals. In other

[708] ibid 43.
[709] *Caso Familia Pacheco Tineo vs. Estado Plurinacional De Bolivia, IACtHR* 25 November 2013, Series C No. 272. The judgment is available in Spanish only, see <http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_esp.pdf> accessed 19 October 2015.
[710] Boed (n 489) 3. See also, Atle Grahl-Madsen, *Territorial Asylum* (n 702) 23; Hersch Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 BYBIL 354, 373; and Felice Morgenstern, 'The Right of Asylum' (1949) 26 BYBIL 327, 335.
[711] ibid 8-9.
[712] Charter of Fundamental Rights of the European Union (adopted 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01)).
[713] ACHR. Art 22(7). See also, American Declaration of the Rights and Duties of Man (Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948) Art 27.
[714] ACHPR. Art 12(3).
[715] For an in-depth analysis on the right of individuals to be granted asylum see, for example, Gil-Bazo, 'The Charter of Fundamental Rights of the European Union' (n 661) 33-52.

words, the host country must not restrict or limit the individuals' compatibility to enjoy the right to asylum.[716]

Apart from regional instruments where such rights do exist, the State practice shows that there are number of States, including France,[717] Italy,[718] and Germany[719] that have incorporated provisions in their domestic legislation, which confers upon the individual a subjective right to asylum.[720] In Grahl-Madsen's view,

> [t]he idea that States might agree on a binding convention guaranteeing the individual a right to be granted asylum is not entirely utopian. As a matter of fact, in many countries there are provisions of municipal law laying down a more or less perfect right of asylum for individuals […] In some countries such provisions are embodied in the national constitutions; in others they are of statutory character.[721]

Likewise, Wies notes that

> [t]he constitutions of a number of countries provide for a right to asylum, in particular those of the Federal Republic of Germany, France, […] Other countries have provisions in their aliens' legislation that either explicitly or *de facto*, as a result of the prohibition of *refoulement*, including rejection at the frontier, establish a right to asylum. In the Anglo-Saxon countries, the grant of asylum is a matter of executive discretion.[722]

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[716] Gil-Bazo, 'Maintaining the Difference While Enjoying equal Treatment' (n 642) 817. One has to bear in mind that the right of an individual to be granted asylum is not a new phenomenon, in fact, the founding fathers of international law as early as the sixteenth century recognised the right of asylum as the natural right of an individual, as noted in Section 3.2.1.

[717] 'Anyone persecuted because of his action for freedom has a right of asylum in the territories of the Republic'. Preamble to the Constitution of 27 October 1946 [France] para. 4. Available at: <http://www.refworld.org/docid/3ae6b56910.html> accessed 20 October 2015.

[718] Article 10(3) of the Italian Constitution of 1948 stipulates that '[a]n alien who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country has the right of asylum in the territory of the Italian Republic in accordance with the conditions established by law'. The Constitution of the Italian Republic (adopted 22 December 1947, entered into force 1 January 1948, amended 12 June 2003) 27 December 27 1947 Official Gazette 298. Available at: <http://www.constitutionnet.org/files/Italy.Constitution.pdf> accessed 20 October 2015.

[719] Article 16(II)(2) of the German Basic Law stipulated that 'Persons persecuted on political grounds shall have the right of asylum'. Now Article 16a inserted by 39th Amendment (28 June 93), The Basic Law (Grundgesetz) 1993: The Constitution of the Federal Republic of Germany (23 May 1949). Available at: <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 20 October 2015.

[720] Weis, 'Human Rights and Refugees' (n 474) 25. Boed (n 489) 14-16. For further analysis on the examination and historical perspective of the right of asylum in the Constitutions of France, Italy, and Germany, see Helene Lambert, Francesco Messineo, and Paul Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat In Pace?' (2008) 27(3) RSQ 16-32. On the right of an individual to be granted asylum in the municipal law, see generally, S. Prakash Sinha, *Asylum and International Law* (Martinus Nijhoff 1971) 59-88.

[721] Grahl-Madsen, *Territorial Asylum* (n 702) 24.

[722] Weis, 'The Development of Refugee Law' (n 705) 38.

Today, indeed, as mentioned above, the domestic legislation of a number of countries have incorporated a right to asylum for individuals.[723] Such an incorporation, in Grahl-Madsen's view '[laid] down a more or less perfect right of asylum for individuals'.[724] Worster went further in arguing that the practice of States suggest an *opinio juris* that States must grant asylum to refugees.[725] Even authors, such as Boed, who deny such rights exist in international law, have conceded that due to the development in international law, there is 'an evolving international consensus on *opinio juris* and State practice that refugees must receive asylum. Thus, it appears that the right to asylum for refugees exists under customary international law'.[726] This is a view shared by Worster, who stated that 'customary international law has evolved to embrace a right of the refugee to receive asylum, supplementing the state right vis à vis other states to grant asylum'.[727]

More significantly, the right to asylum is not only recognised in treaties but is also enforceable in international law. For instance, in the case of *Pacheco Tineo* for the first time in the history of its existence, the IACtHR confirmed that the expulsion of the *Pacheco Tineo* family was contrary to the right to seek and be granted asylum under Article 22(7) of the ACHR.[728] The court requested State Parties to give every consideration possible to asylum claims and the principle of *non-refoulement*.[729] Accordingly, this case shows that refugees have not only acquired substantive but also procedural rights in international law in order to enforce their right to asylum. The judgment is a fine piece of treaty implementation, which establishes a series of minimum requirements for asylum and expulsion proceedings deriving from the provisions of the ACHR.

With regards to the right of *non-refoulement*, it is generally agreed within the literature that due to the development in international human rights law in the twentieth century, the protection under this right is absolute. The principle of *non-refoulement* prohibits

[723] María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27(1) IJRL 3, 23-27.
[724] Grahl-Madsen, *Territorial Asylum* (n 702) 24.
[725] William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26(4) IJRL 1, 14. See also, Lambert, Messineo, and Tiedemann (n 720) 16-32.
[726] Boed (n 489) 14-16. See also, Grahl-Madsen, *Territorial Asylum* (n 702) 2.
[727] Worster (n 725) 22.
[728] *Caso Familia Pacheco Tineo vs. Estado Plurinacional De Bolivia* (n 709).
[729] The ECRE, 'Inter-American Court of Human Rights' (ELENA Weekly Legal Update, 24 January 2014). Available at: <http://www.ecre.org/component/content/article/64-elena-publications/573-weekly-legal-update-24-january-2014.html#caso> accessed 20 October 2015.

the return of refugees or asylum seekers to territories where there are substantial grounds for believing that they would be in danger of being subjected to torture or ill-treatment.[730] Today, this principle is an accepted principle of customary international law.[731]

Although Article 33(1) of the Refugee Convention offers protection to refugees from *non-refoulement,*[732] Article 33(2) allows exceptions to this principle where there are reasonable grounds that the refugee represents a danger to the national security or has been convicted of a serious crime.[733] However, such limitations do not exist under the international human rights law. Therefore, the protection offered by the refugee regime has a specific and unique standard of treatment in comparison with the international human rights regime.[734] The wider protection of the international human rights regime to refugees has been recognised by the ECtHR in the case of *Chahal*, where the court explicitly stated that the protection offered by the international human rights law is wider in scope than those offered by the Refugee Convention.[735]

Today, there is a wide range of international human rights treaties that have incorporated a provision on the right of refugees to *non-refoulement*.[736] These provisions provide refugees with an absolute right without any exceptions to or derogations from this obligation. More importantly, such a right is not only recognised in treaties, but also enforceable in international law. In fact, there is a large volume of

[730] For further analysis on this principle, see Lauterpacht and Bethlehem (n 189) 87-177.
[731] For a detailed analysis on the principle of *non-refoulement* as a norm of customary international law, see the literature cited in the Section 3.3.2. (n 628).
[732] Refugees Convention. Art. 33(1).
[733] ibid. Art. 33(2).
[734] Gil-Bazo, 'Maintaining the Difference While Enjoying equal Treatment' (n 642) 818.
[735] *Chahal v.The United Kingdom*, App No 70/1995/576/662 (ECtHR, 15 November 1996) para. 80.
[736] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Art. 3; ICCPR Art. 7; ACHR. Art. 22(8); ACHPR. Art. II(3); and ECHR. Art. 3.

cases from the CAT,[737] the ECtHR[738] and the IACtHR,[739] which recognise the absolute nature of this right and have rejected completely any exceptions to or derogations from the *non-refoulement* obligation. These cases show that a common trend and consistent pattern of judicial decisions is that the practice of *refoulement* would violate the provisions of international instruments and the right to not be *refouled* is the absolute right of refugees.

In sum, in cases of violations of human rights, including the right to asylum and the right of *non-refoulement*, international human rights law mechanisms are available to protect a vast array of rights, which are continuously expanding; this has been done either in global terms or on broad regional scales. These mechanisms have had a continuous impact on the development of the legal personality of refugees in the international legal order. Therefore, the right to be granted asylum and the right of *non-refoulement* are not only subjective rights that refugees are entitled to in international law, but also rights which are enforceable through the relevant international human rights court.

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[737] See, for example, *Mutombo v. Switzerland*, Communication No. 13/1993 (27 April 1994) UN Doc. A/49/44 at 45 (1994); *Aemei v. Switzerland*, Communication No. 34/1995 (29 May 1997) UN Doc. CAT/C/18/D/34/1995; *Khan v Canada*, Communication No 15/1994 (15th November 1994) UN Doc. CAT/C/13/D/15/1994; Ismail *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996 (28 April 1997) UN Doc. CAT/C/18/D/39/1996 (1997); *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998 (14 May 1999) UN Doc. CAT/C/22/D/120/1998 (1999); *A.D. v. Netherlands*, Communication No. 96/1997 (12 November 1999) UN Doc. CAT/C/23/D/96/1997 (2000); *Agiza v. Sweden*, Communication No. 233/2003 (20 May 2005) UN Doc. CAT/C/34/D/233/2003 (2005); *Adel Tebourski v. France*, Communication No. 300/2006 (11 May 2007) UN Doc. CAT/C/38/D/300/2006; *Mükerrem Güclü v. Sweden*, Communication No. 349/2008 (11 November 2010) UN Doc. CAT/C/45/D/349/2008; *Said Amini v. Denmark*, Communication No. 339/2008 (15 November 2010) UN Doc. CAT/C/45/D/339/2008.

[738] See, for example, *Soering v. the United Kingdom*, App no. 14038/88 (ECtHR, 7 July 1989) para. 162; *Ahmed v. Austria*, App no. 25964/94 (ECtHR 17 December 1996) paras. 42, 47; *Chahal v.The United Kingdom*, App no. 70/1995/576/662 (ECtHR, 15 November 1996) para. 80; *Mohammed Lemine Ould Barar v. Sweden*, App no. 42367/98 (ECtHR, 19 January 1999) para. 1; *Labita v. Italy*, App No. 26772/95 (ECtHR, 6 April 2000) para. 120; *Salah Sheekh v. the Netherlands*, App no. 1948/04 (ECtHR, 23 May 2007) paras. 140-41, 149; *Saadi v. Italy*, App no. 37201/06 (ECtHR, 28 February 2008) 137; *N v. the United Kingdom*, App no. 26565/05 (ECtHR, 27 May 2008) paras. 35-40; *Sufi and Elmi v. the United Kingdom*, App nos. 8319/07, 11449/07 (28 June 2011) paras. 225, 226, 241-250 and 293-296; *MMS v. Belgium and Greece*, App no. 30696/09 (ECtHR 21 January 2011) para. 40; *Hirsi Jaama and others v. Ita*ly, App no. 27765/09 (ECtHR, 23 February 2012) para. 117. For further information on ECtHR cases concerning Article 3 of the Convention, see ECtHR, 'Expulsions and Extraditions: Factsheet' (July 2013) 1-12. Available at: <http://www.echr.coe.int/Documents/FS_Expulsions_Extraditions_ENG.pdf> accessed 20 October 2015.

[739] *Juridical Conditions and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion OC-18/03, (2003) Series A, No. 18, para. 149; *Tibi v. Ecuador*, IACtHR, 7 September 2004, Series C No. 114, para. 139; *Lori Berenson-Mejía v. Peru*, IACtHR, 25 November 2004, Series C No. 119, para. 100; *González et al. ("Cottonfield") v. Mexico*, 16 November 2009, IACtHR, Series C No. 205, paras. 389, 402 and 409-11; and *Caso Familia Pacheco Tineo vs. Estado Plurinacional De Bolivia* (n 709).

3.4 The Right of Refugees to Durable Solutions in International Law

The primary question that this thesis seeks to address is whether refugees have the right to durable solutions in international law. However, Goodwin-Gill and McAdam argue that '[a] refugee movement necessarily has an international dimension, but neither general international law nor treaty obliges any State to accord durable solutions.'[740] Although it is true, in principle, this right is not explicitly stated in any international instrument; however, this chapter in addition to Chapter Two have shown that there are several legal sources that support the existence of such a right. This study first examined the obligations that States have towards refugees and then explored whether refugees are subject of rights in the public international law. The study has explored these two elements in order to test the hypothesis that refugees have this right.

In a recently published article, Aleinikoff and Poellot considered a right to solutions. Their argument puts forward two key points. Firstly, refugees have a right to a solution, which the international community has a duty to recognize and fulfil. Secondly, the international community has a responsibility to solve refugee problems to end their plights. However, after much elaboration, they conclude that such a right does not exist in international law because they claim 'it will be difficult to sustain the argument that there is a "right to a solution" that refugees can assert or that the international community, at this time, would be willing to recognize'.[741] Instead, they argue that 'perhaps there is another way to provide the moral fulcrum that would be important to the resolution of protracted refugee situations—one that focusses on the *responsibility* of the international community, rather than a *right* of a refugee'.[742]

Although their focus on the responsibility of the international community to solve the refugee problem is a plausible line of argument, the object of the study can be explored differently. To identify the existence of the right to a solution, Aleinikoff and Poellot first explore the provisions of the Refugee Convention and they conclude that 'such a right cannot be found in the Convention'.[743] Then, they claim that a 'membership is vital to the effective protection of human rights' and if refugees were provided a membership in a national community, they would have access to an effective assertion

[740] Goodwin-Gill and McAdam (n 111) 489.
[741] Aleinikoff and Poellot (n 9) 206.
[742] ibid 206.
[743] ibid 204-205.

and protection of human rights. However, they believe that 'this is not an implausible line of argument'.[744] A different approach to explore this matter could be by focusing on the growing position of refugees and their legal personality in international legal order, and analysing the legal framework where international obligations of States towards refugees can be found. These two elements are the focus of this research.

It should be noted that the angle chosen by Aleinikoff and Poellot is more policy driven and therefore different from the viewpoint of this research, which is more of an academic and scholarly approach. In addition, this research has adopted a different method to support the existence of such a right: a method that firstly focuses on the refugees being subjects of specific rights in international law, hence enabling them to be subjects of the right to durable solutions. Such an argument is strengthened by the fact that refugees arguably are already subjects of certain rights in international law. In particular, international human rights have already complemented refugee law in a way to make refugees subjects of certain rights that were not originally conceived of, as noted in Section 3.3.3.1. Such rights include the right to be granted asylum and the right of *non-refoulement*. Such rights are not only recognised in treaties but are also enforceable in international law That refugees are the subjects of these two rights in contemporary international human rights law shows the evolution of international law on this subject matter. Moreover, since it is also undisputed that international law is always evolving, this evolution, one might argue, opens the door for the potential recognition of refugees as subjects of other international rights, among them the right to durable solutions.

The obligation of States to co-operate on refugee matters was the second line of argumentation considered in order to test the hypothesis that refugees have the right to durable solutions. The analysis, in Chapter Two, showed that States have obligations in international law to co-operate vis-à-vis each other and with the UN, including the UNHCR, whose mandate is to find durable solutions on refugee matters. These obligations can be found in the combined effect of the UN Charter,[745] the Refugee Convention,[746] the UNGA resolutions,[747] the UNHCR Statute,[748] and ExCom

[744] ibid 205.
[745] UN Charter. Arts. 1(3), 2(2), 2(5), 13, 55(c), 56 and 60. See Chapter 2, Section 2.2.
[746] Refugees Convention. Art. 35, preamble (para. 4) and recommendation D. See Chapter 2, Section 2.3.
[747] See, for example, UNGA Res. 22 (27 January 2010) UN Doc. A/RES/64/127, paras. 6 and 22.
[748] UNHCR Statute, para. 1. See Chapter 2, Section 2.4.

conclusions.[749] The analysis aimed to fill a gap in the literature on the obligation of States towards refugees.

The analysis from both lines of argumentation allows one to conclude that there is a right to durable solutions in international law in the making (*lege ferenda*) and that refugees are the subject of this right. Hence, this is a right of refugees as a matter of international law rather than merely a policy tool at the discretion of the State. As such, the international community, acting through the UNHCR, has the responsibility to recognise, fulfil and implement effectively this right.

This thesis suggests that the international community might consider taking steps towards a formal recognition of this right in an internationally binding instrument. A right that refugees should be entitled to access and that the international community has not only a responsibility to work towards addressing refugee problems, but also an obligation to recognise and fulfil. An explicit recognition of this right will significantly contribute to alleviating the plight of refugees.

3.5 Conclusion

This chapter has attempted to establish that refugees are subjects of rights in international law, and hence they can be subjects of the right to durable solutions. In order to explore such an argument, the researcher first discussed the status of individuals as subjects of international law, which then led to a specific consideration of refugees as a special category of individuals.

The analysis showed that by virtue of developments in international law, in particular the recognition of rights in international human rights law, as well as the right of legal standing, both active and passive, in international proceedings before international human rights courts and international criminal law courts, it is now generally accepted that individuals do enjoy the status of subjects of international law.

[749] See, for example, ExCom Conclusion No. 85(XLIX) 'Conclusion on International Protection' (9 October 1998) para. (d); and ExCom Conclusions No. 46 (XXXVIII), 'General Conclusion on International Protection' (12 October 1987) para. (n).

In order to analyse the emerging position of refugees as subjects of rights in international law, the chapter then examined the evolution of the international refugee regime and then examined the debate as to whether refugees are subjects of rights in the Refugee Convention. This debate was examined in the light of the latest development of the international human rights law and the ICJ's judgements. By virtue of these developments, it was argued that today refugees are regarded as subjects, rather than beneficiaries, of rights enshrined in the Refugee Convention. This is because analysis showed that it is no longer refutable to argue that international treaties, other than human rights instruments, are able to recognise rights of individuals directly.

It should be noted that today, refugees have a stronger position than they did prior to 1950 due to the protection provided by the international regime for the protection of refugees and the numerous international human rights instruments safeguarding their rights. Human rights belong to everyone as a matter of birth and inalienability. In fact, the majority of international and regional human rights instruments are applicable to everyone under any jurisdiction. The purpose of these conventions and mechanisms is to safeguard the rights of individuals and oblige States to abide by them.

The argument that refugees can be subjects of specific rights, such as the right to durable solutions, is further strengthened by the fact that refugees arguably are already subjects of certain rights in international law namely, the right of an individual to be granted asylum and the scope of the principle of *non-refoulement*. Such rights are not only recognised in treaties, but are also enforceable in international law. These rights, therefore, show that international human rights law instruments have the effect of conferring upon refugees the international legal personality by offering them broader entitlement and by consolidating their growing position in the international legal system.

It was argued that refugees, being the subjects of these two rights in the contemporary international human rights law, show the evolution of international law on this subject matter. One might argue that such an evolution opens the door for the potential recognition of refugees as subjects of other international rights, one of which is the right to durable solutions. Such an argument will contribute to the literature significantly and in particular to the emerging debates on the theoretical shift in refugee studies from the State to individuals as subjects of international law.

Chapter 4. The Role of the UNHCR in Finding Durable Solutions for Refugees

4.1 Introduction

Seeking permanent solutions for refugees, the UNHCR's slogan states: '[o]ne refugee without a durable solution is too many'.[750] However, the latest the UNHCR figures show that 14.4 million refugees were displaced worldwide, which is the highest number of refugees since 1995, and 2.7 million more than the previous year.[751] The UNHCR notes that historical refugee data suggest that such a year-to-year net increase is almost unprecedented in the agency's existence.[752] This shows that a large number of refugees been displaced and, moreover, their plights have consistently worsened rather than improved. This is a gloomy reality faced by millions of refugees around the world, with no access to timely and durable solutions.[753] These figures are alarming, in the UNHCR High Commissioner's view, and they highlight the inability of the international community to tackle the growing refugee problem, whilst also showing their inability to promote permanent solutions.[754]

This chapter aims to examine the role of the UNHCR in finding durable solutions for refugees. There is an extensive literature on the general responsibility of the UNHCR towards refugees; the literature so far has focused on its growing role towards the world's refugee population since its establishment in 1951. Since others have examined the evolution and development of the role of the UNHCR,[755] this chapter, instead,

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[750] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (18th Annual Tripartite Consultations on Resettlement, Geneva: 9-11 July 2012) 7.
[751] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2, 9. This figure does not include the 5.1 million Palestinian refugees registered by UNRWA. Available at: <http://www.unrwa.org/> 18 October 2015.
[752] ibid 9.
[753] UNHCR, 'Agenda for Protection: Global Consultations on International Protection' (3rd edn, October 2003) Goal 3 (pp 55-61) and Goal 5 (pp 73-81). Available at: <http://www.refworld.org/docid/4714a1bf2.html> accessed 15 October 2015.
[754] UNHCR, 'New UNHCR Report Says Global Forced Displacement at 18-year High' (News Stories, 19 June 2013). Available at: <http://www.unhcr.org/51c071816.html> accessed 19 October 2015.
[755] Lewis (n 322); Gil Loescher, Alexander Betts, and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics And Practice Of Refugee Protection Into The Twenty-First Century* (Routledge 2008); Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP 2001); Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 153-

explores one specific mandate of the Refugee Agency, which is seeking permanent solutions to refugee problems. The critical examination of UNHCR policies on the subject matter is necessary in order to identify whether, so far, it has been successful in its pursuit of durable solutions for refugees.

This chapter is divided into two parts; in the first part, the series of initiatives, conferences, and expert meetings held by the UNHCR from its establishment until the time of writing to enhance durable solutions is explored. Indeed, since its creation, the UNHCR has developed various frameworks with the aim of providing methodological models to facilitate the implementation of three durable solutions: voluntary repatriation, local integration, and third country resettlement. Inevitably, the chapter is unable to provide a complete detailed account of all UNHCR initiatives, given the vast sweep adopted by the Refugee Agency. Therefore, it only discusses the most important initiatives, conferences, and expert meetings in relation to the research question, which is determining the role of the UNHCR in finding a durable solution for refugee problems.

The chapter highlights the progress and challenges facing the UNHCR in improving refugee situations. It explores procedures such as how they began, what they have in common, whether they have met refugees' needs in terms of finding sustainable solutions, and whether these international protection initiatives have been able to respond to refugee problems in a dynamic way, or whether their responses are merely ephemeral.

One of the research questions concerns identifying a solution for Iraqi refugees in protracted situations. In order to do this, the second part of the chapter examines the State practice and the UNHCR's policy towards one durable solution, voluntary repatriation. Chapters Five and Six consider local integration and resettlement in a third country, respectively. The historical analysis of the position of the UNHCR shows that its role and responsibility towards refugees has changed dramatically.[756] In particular, its role in regard to the three durable solutions and their priority has changed over time. Although three durable solutions are available to address the refugee predicament, State

174; and Alex S. Cunliffe, 'The Refugee Crisis: a Study of the UNHCR' (1995) 43(2) *Political Studies* 278-290.

[756] Lewis (n 322) 50.

practice shows that, over time, these solutions have not been equally taken into account, but are instead given hierarchy. The solution of voluntary repatriation has been prioritised and promoted, while the other two, local integration and third country resettlement, were least favoured and relegated, as will be examined in Section 4.4.

The development of a hierarchical system for the three durable solutions means that today the international community practices repatriation of refugees, acting through the UNHCR, and this is often involuntary. The involuntary return of refugees to their regions of origin before it is safe to do so constitutes a constructive *refoulement*: returning refugees against their free will.[757] Hence, such a practice is a violation of the principle of *non-refoulement*, which prohibits any State from returning a person to a country where his or her life or freedom would be threatened.[758]

A considerable amount of literature has been published on voluntary repatriation. Some studies have focused on the legality, application and timing of repatriation, whilst others have emphasised the voluntariness of repatriation.[759] The available literature is rightly critical of State practice and the UNHCR's approach in regard to voluntary repatriation. The analysis of voluntary repatriation in the second part of the chapter further reinforces the argument made in Chapter Six that resettlement in third countries is the best solution for Iraqi refugees in protracted situations.

[757] International Detention Coalition, 'What is Immigration Detention? And Other Frequently Asked Questions'. Available at: <http://idcoalition.org/aboutus/what-is-detention/> accessed 20 October 2015.
[758] Refugees Convention. Art. 33(1).
[759] See, for example, Marjoleine Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 562-585: Katy Long, 'Back to Where You Once Belonged: A Historical Review of UNHCR Policy and Practice on Refugee Repatriation' (2013) UNHCR's Policy Development and Evaluation Service, PDES/2013/14, 1-42 <http://www.refworld.org/docid/5226d8f44.html> accessed 20 October 2015; Agata Bialczyk, '"Voluntary Repatriation" and the Case of Afghanistan: A Critical Examination' (2008) Refugee Studies Centre Working Paper No. 46, 1-35 <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp46-voluntary-repatriation-case-afghanistan-2008.pdf> accessed 20 October 2015; Megan Bradley 'Back to Basics: The Conditions of Just Refugee Returns' (2008) 21 (3) JRS 285-304; Bhupinder Singh Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) RSQ 55-73; Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23(3) RSQ 1-32; Michael Barnett, 'UNHCR and the Ethics of Repatriation' (2001) 10 FMR 31-34; and Barbara E. Harrell-Bond, 'Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research' (1989) 32(1) *African Studies Review* 41-69.

4.2 The Mandate of the UNHCR: Seeking Permanent Solutions for Refugee Problems

The human catastrophe caused by the Second World War left States with no choice but to demand the legal protection of individuals in international law. Consequently, States agreed to establish the UN in order to bring back peace and tranquillity between nation States, and safeguard the rights of individuals in international law. It is the ultimate objective of the UN Charter to promote universal respect for human rights and fundamental freedoms.[760] In addition, the Charter, as the pioneer, focuses on the gravest violations of human rights.[761] This is evident in those provisions of the Charter which explicitly refer to human rights,[762] and make the subject matter the central theme of the instrument.[763]

From its inception, the UN has sought to address the ever growing refugee problem.[764] The very first action the UN took to address such problems resulting from the Second World War was the creation of the IRO.[765] It was the object of this specialised agency 'to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons'.[766] The IRO had broad responsibilities not only to protect refugees and displaced persons but also to provide care and maintenance, and facilitate repatriation, resettlement and re-establishment.[767] However, the Agency's temporary mandate ended in 1951.[768]

[760] UN Charter. Arts.1, 55 and 56.
[761] Waldheim (n 134) 134.
[762] UN Charter. Arts.1(3), 13(l)(b), 55(c) 62(2), 68, and 76(c).
[763] See, for example, Stavrinides (n 142) 38-48; and Cot (n 153) 242.
[764] Weis, 'Human Rights and Refugees' (n 474) 21.
[765] For a detailed analysis on the history and work of this specialised agency, see Louise Wilhelmine W Holborn, *The International Refugee Organization, a Specialized Agency of the United Nations: its History and Work, 1946-1952* (OUP 1956); and Lewis (n 322) 1-49.
[766] Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3. Annex 1, Art. 1(a).
[767] ibid. Art. 2(1).
[768] Weis, 'Human Rights and Refugees' (n 474) 21. However, prior to the establishment of the IRO, a number of other international agencies for the protection of refugees with a limited mandate were created to respond to specific refugee problems, see High Commissioner for Russian Refugees (1921), The Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946), United Nations Relief and Rehabilitation Administration (1943-47), and the Intergovernmental Committee on Refugees (1938-1947). For a detailed analysis on the work of these agency, see Weis, 'The International Protection of Refugees' (n 578) 207-218; and Lewis (n 322) 1-22.

Although the mandate of the IRO ended, the refugee problems continued. The international community realised that it had to take action to address the ever increasing number of refugees from not only Europe but other parts of the world.[769] In 1947, the Commission on Human Rights adopted a resolution requesting that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation'[770] In 1951, after much deliberation among the concerned parties, the UNHCR determined, under the auspices of the UN, to provide international protection and seek permanent solutions for refugee problems.[771] Although the purpose of all the international agencies was to find a solution to refugee plights, in Ben-Nun's view, 'the nature of the early instruments was *ad hoc* and tailored for specific refugee groups in geographically limited areas, the creation of the [UNHCR] marked a shift towards a global refugee regime, applicable the world over'.[772]

The UNHCR's Statute states that the High Commissioner should 'seek permanent solutions for the problem of refugees by assisting Governments and, […] private organisations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities'.[773] The former UNHCR High Commissioner, Poul Hartling, astutely observed that 'in refugee matters, the objective of the international community, of governments, of my office and of other organisations concerned is, from the very first moment, to identify and implement durable solutions'.[774] In fact, Gil-Bazo notes that, '[w]hen the international regime for the protection of refugees was born in the early twentieth century, it was driven by the need of States to work together towards a solution of the refugee plight'.[775]

Although the original mandate was only valid for three years,[776] which shows the expectations that States had at that time of solving refugee problems, the UNHCR's

[769] See generally, Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 153-174.
[770] Report of the Commission on Human Rights, 2nd Session, 2-17 December 1947 (ECSOCO Official Records, Third Year: Sixth Session Supplement No. 1) UN Doc. E/600, para 46 (Art. 1(a)).
[771] UNHCR Statute, para 1.
[772] Gilad Ben-Nun, 'From *Ad Hoc* to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954' (2015) 34(2) RSQ 23, 23.
[773] UNHCR Statute, para. 1.
[774] Statement by Mr. Poul Hartling (n 60) 1.
[775] Gil-Bazo, 'The Safe Third Country Concept' (n 592) 43.
[776] UNHCR Statute, para. 13.

mandate was regularly renewed for a five-year period by the UNGA until December 2003.[777] Realising that refugee problems are unlikely to disappear, the increasing refugee problems and the emergence of refugees in other regions left the UNGA with no choice but to remove the time limitation on the UNHCR's mandate until the refugee problem is solved altogether.[778] Such a move could be interpreted as a defeat by the international community for their inability to end the problems of refugees.

When examining the role of the UNHCR in relation to finding durable solutions for refugees, it could be observed that this role has evolved since 1950 when it was first established.[779] Although the Agency's mandate has remained the same as the years passed, its responsibilities have broadened to respond to the rise in the number of refugees and the greater challenges it has faced. Initially, the Agency focused on 400,000 refugees predominantly from Europe. However, today, there are 59.5 million persons of concern to the UNHCR,[780] which is a new record high. In 1951, the UNHCR had only 34 staff members in comparison to 8,600 national and international members of staff, and 126 offices around the globe in 2014.[781] Its budget has also grown from US$300,000 in its first year to more than $5.3 billion by the end of June 2013, which is again a record high.[782] Furthermore, UNGA resolutions initially included three to five paragraphs that focused on the Report of the High Commissioner on refugees. However, recently the length and number of paragraphs has increased to thirty. This is due to the evolution of the UNHCR's role, the increasing numbers of displacement, and the issues with which it deals.[783]

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[777] UNGA Res 319 A(IV), (3 December 1949) UN Doc. A/RES/319; UNGA Res 428(V), (14 December 1950) UN Doc. A/RES/428(V); UNGA Res. 727 (VIII), (23 October 1953) UN Doc. A/RES/727; UNGA Res 1165 (XII), (26 November 1957) UN Doc. A/RES/1165; UNGA Res 1783 (XVII), (7 December 1962) UN Doc. A/RES/1783; UNGA Res 2294 (XXII), (11 December 1967) UN Doc. A/RES/2294; UNGA Res 2957(XXVIJ), (12 December 1972) UN Doc. A/RES/2957; UNGA Res 32/68, (December 1977) UN Doc. A/RES/32/68; UNGA Res 37/196, (18 December 1982) UN Do. A/RES/37/196; UNGA Res 42/108, (7 December 1987) UN Doc. A/RES/42/108; UNGA Res 47/104, (16 December 1992) UN Doc. A/RES/47/104; UNGA Res 52/104 (12 December 1997) UN Doc. A/RES/52/104; UNGA Res 57/186, (18 December 2002) UN Doc. A/RES/57/186; and UNGA Res 58/153, (22 December 2003) UN Doc. A/RES/58/153.

[778] UNGA Res 58/153, (24 February 2004) UN Doc A/RES/58/153, para. (9).

[779] UNGA Res 319 A (IV) (3 December 1949) UN Doc. A/RES/319, para. 1; UNHCR, Protecting Refugees & the Role of UNHCR (October 2012) UN Doc. UNHCR/ CPIS/B.3/ ENG 1, p 17-19. Available at: <http://www.unhcr.org/509a836e9.html> accessed 20 October 2015.

[780] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2.

[781] UNHCR, 'History of UNHCR' (n 22).

[782] UNHCR, 'Financial Figures' available at: <http://www.unhcr.org/pages/49c3646c1a.html> accessed 20 October 2015.

[783] Mike McBride, 'Anatomy of a Resolution: the General Assembly in UNHCR History' (2009) New Issues in Refugee Research, Research Paper No. 182, 5 <http://www.unhcr.org/4b192a069.pdf> accessed 20 October 2015.

In sum, despite broadening its scope, the UNHCR's aims have remained the same, which is strengthening international protection and seeking to provide more durable solutions for refugee problems. In order to respond to refugee situations more effectively, the UNHCR has adopted a number of initiatives not only to enhance refugees' accessibility to durable solutions, but also to supplement the existing instruments of the international regime for the protection of refugees. This is a significant step by the UNHCR to meet the modern challenges that it faces because the drafters of the Refugee Convention and the UNHCR Statute did not predict such a huge rise in the number of refugees.

4.3 The Initiatives Adopted by the UNHCR to Improve Durable Solutions

This section explores the series of UNHCR policy initiatives and conferences to show how the UNHCR has attempted to strengthen international protection for refugees and expand the availability of durable solutions through enhanced multilateral cooperation. Both recent and older initiatives will be compared and contrasted to show whether the UNHCR has learned from past experience.

This section is divided into two sub-sections; the first sub-section will explore the five international conferences convened by the UNHCR to respond to specific refugee plights in four different regions. Namely, the First International Conference on Assistance to Refugees in Africa (ICARA I), the Second International Conference on Assistance to Refugees in Africa (ICARA II),[784] the International Conference on Refugees in Central America (CIREFCA),[785] the International Conference on Indo-Chinese Refugees (Indo-China), and the International Conference on Addressing the Humanitarian Needs of Iraqi Refugees.[786] The analysis shows how each conference has evolved and developed into one another. To gain the support of the majority of States,

[784] Apart from the two conferences mentioned, there were other conferences in Africa, which the UNHCR cooperated in its establishment, including the International Conference on the Plight of Refugees, Returnees, and Displaced Persons in Southern Africa (SARRED) 1988. For a general overview on the conference, see International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED): Report of the Secretary-General (19 October 1988) UN Doc. A/43/717.
[785] The CIREFCA is a Spanish acronym for '*Conferencia Internacional sobre Refugiados Centroamericanos*'. International Conference on Central American Refugees (adopted 15 December 1989) UNGA Res. RES/44/139.
[786] UNHCR, 'International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons inside Iraq and in Neighbouring Countries. Conference Secretariat Note' (18 April 2007) 1-3. Available at: <http://www.refworld.org/docid/46499c1f2.html> accessed 12 October 2015.

the UNHCR focused on ensuring a global approach to specific regional refugee situations on an *ad hoc* basis.

The second sub-section considers three initiatives: the Convention Plus Initiative, the Framework for Durable Solutions for Refugees and Persons of Concern, and the UNHCR's initiative to Address Protracted Refugee Situations. The purpose of these initiatives is to enhance refugee protection and provide durable solutions more efficiently for refugee problems.[787] In particular, this involves the development of a coherent global framework through negotiations special agreement between States in situation-specific contexts.

4.3.1 Responses by the International Community to Specific Refugee Situations: ICARA I, ICARA II, CIREFCA, Indo-China, and International Conference to address Iraqi Refugee Problems

As noted above, in 1951 the UNHCR was established to provide international protection and seek permanent solutions for refugees. However, towards the end of the 1950s, the plight of refugees resulting from the Second World War was still unresolved. Despite the fact that the war had ended almost fifteen years earlier, there were still a large number of refugees confined in camps who were in need of durable solutions.[788] To address the remaining European refugees in camps, the UNHCR supported by the international community declared 1959 a 'World Refugee Year'.[789] The UNHCR hoped it had acquired international cooperation to clear all the camps by providing permanent solutions. Briefly, the UNHCR successfully enabled the remaining refugees to resettle and resolve PRSs in Europe.[790] However, the emergence of new refugees in other parts of the world soon tested the UNHCR's role and responsibilities to address new and upcoming refugee problems.

[787] See Sections 4.3.2, 4.3.3 and 4.3.4.
[788] See, generally, Peter Gatrell, 'World Refugee Year, 1959-60 and the History of Population Displacement' (2011) Slavic Research Centre, 1-12 <http://src-h.slav.hokudai.ac.jp/BorderStudies/events/detail/110112/Peter_Gatrell_Hokkaido_presentation.pdf> accessed 20 October 2015; UNHCR, *The State of the World's Refugees: 2006* (n 6) 119; and Loescher (n 755) 89.
[789] UNGA Res. 1390 (XIV), 'World Refugee Year' (20 November 1959) UN Doc. A/RES/1390 (XIV).
[790] UNHCR, *The State of the World's Refugees: 2006* (n 6) 119; and Loescher (n 755) 89-91.

To address these refugees from Europe and the emergence of new refugees elsewhere, the UNGA authorised the UNHCR to provide assistance to all refugees anywhere in the world under its mandate.[791] This resolution empowered the UNHCR to deal with old as well as new emerging refugees, including refugees in Africa, South East Asia, and Central America.

4.3.1.1 The First International Conference on Assistance to Refugees in Africa (ICARA I) 1981

To address the continuing rise of refugees in Africa during the 1960s and 1970s,[792] the UNGA passed a resolution that called for the ICARA to be held in Geneva from April 1981.[793] The General Assembly was alarmed by the serious situation of refugees in Africa and acknowledged 'the consequent social and economic burden placed on African countries of asylum as a result of the increased influx of refugees and the subsequent impact on their development'.[794] The resolution urged the international community, in particular donor States, to provide additional assistance to alleviate the plight of refugees in Africa.

The purpose of the conference was to make the international community aware of Africa's refugee problems. By doing this, the conference then hoped to achieve additional resources for problems which would support the development needs of the host countries.[795] More importantly, to facilitate durable solutions for African refugees in particular self-sufficiency and local integration, the UNHCR adopted the Refugee Aid and Development (RAD) approach.[796] This approach was adopted in conjunction with host States to close the gap between relief and assistance. The aim of RAD was to

[791] UNGA Res. 1166 (XII) 'International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees' (26 November 1957) UN Doc. A/RES/1166 (XII).
[792] Robert F. Gorman, 'Linking Refugee Aid and Development in Africa' in Robert F. Gorman (ed), *Refugee Aid and Development: Theory and Practice* (Greenwood Press 1993) 61.
[793] International Conference on Assistance to Refugees in Africa (25 November 1980) UNGA Doc. A/RES/35/42. International Conference on Assistance to Refugees in Africa (18 December 1982) UNGA Doc. A/RES/37/197.
[794] ibid.
[795] Loescher, Betts, and Milner (n 755) 38-46; and James Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan 2009) 27.
[796] Sarah Meyer, 'The "Refugee Aid and Development" Approach in Uganda: Empowerment and Self-Reliance of Refugees in Practice' (2006) New Issues in Refugee Research, Research Paper No. 131, 1 <http://www.unhcr.org/4538eb172.html> accessed 20 October 2015. For a comprehensive analysis on this approach, see Gorman (792) 61-81.

create a link between refugees and host communities through inter-connectedness of assistance, protection, and solutions.[797]

However, the conference was unsuccessful in achieving the initial aims and a number of factors contributed to this failure. Namely, the donor States failed to provide additional assistance for refugees. This occurred due to their doubts that additional funding would have focused on the needs of nationals rather than those of refugees. According to Stein, donor States considered the request by host States for additional support to be 'unrealistic and exaggerated' and have selected 'old, rejected development projects that had been lying on the shelf were dusted off and given a refugee label, and were submitted for funding'.[798] Such action resulted in host States becoming disenchanted with the conference and its RAD approach altogether.[799] The initial aim to provide host States with much required assistance in order to strengthen their social and economic infrastructure so that they were able to cope with significantly large numbers of refugees failed to take root. At the end, the conference hardly left any legacy.[800] During the General Assembly meeting, it was conceded that:

> while the Conference succeeded in raising world consciousness about the plight of refugees and returnees in Africa, as well as the problems of asylum countries, the over-all results of the Conference in terms of financial and material assistance have fallen short of the expectations of the African countries.[801]

The conference's lack of success with its initial aims, in particular the use of development planning to address African refugee situations, was the major contributing factor in the UNHCR and its partners' decision to convene another conference to formulate a comprehensive regional approach to resolve the PRSs in Africa and review the results of ICARA I.[802]

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[797] Goodwin-Gill and McAdam (n 111) 500-501.
[798] Barry Nathen Stein, 'ICARA II: Burden Sharing and Durable Solutions' in John R. Rogge (ed), *Refugees: A Third World Dilemma* (Rowman and Littlefield 1987) 49.
[799] Alexander Betts, 'Development Assistance and Refugees: Towards a North-South Grand Bargain?' (2009) Refugee Studies Centre, Forced Migration Policy Briefing 2, 7-8 and 13 <http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb2-development-assistance-refugees-2009.pdf> accessed 20 October 2015.
[800] Loescher (n 755) 228. See also, Loescher, Betts, and Milner (n 755) 38-40.
[801] International Conference on Assistance to Refugees in Africa (18 December 1982) UNGA Doc. A/RES/37/197.
[802] Loescher, Betts, and Milner (n 755) 38-46.

4.3.1.2 The Second International Conference on Assistance to Refugees in Africa (ICARA II) 1984

The second conference re-emphasised the importance of development assistance for host countries to support refugees by providing protection and access to durable solutions. Unlike its predecessor, this conference addressed issues and sought to close the gap between humanitarian relief and development assistance. However, a number of States questioned the need for another conference, since the last one failed to address the burdens faced by host States.[803] The alarming increase in refugee numbers in Africa resulted in creating a Steering Committee, which adopted the Final Declaration and Programme of Action. The Committee set several key principles to solve refugee problems in Africa and bridge the gap between refugee aid and development assistance.[804]

The General Assembly recognised the importance of global responsibility and burden sharing to alleviate 'the urgent and overwhelming burden of the problem of African refugees'.[805] It also emphasised the significance of the complementarity between providing additional support for refugees and development assistance for the host State.[806] Unlike its predecessor which focused primarily on emergency assistance for refugees, this conference had as its main theme 'Time for Solutions'. It focused on long-term needs of refugees and additional support for host countries. The UNHCR and its partners hoped that by providing additional support the host States would in return provide self-sufficiency and local integration to refugees.[807]

Despite extensive reports discussing how to address the needs of refugees, the States' response was inadequate. Donor and host States had different views on how to address refugee burdens. Host States expected to receive additional support to invest in the infrastructure to cope better with hosting a large number of refugees. However, the fund generated by the conference was far short of meeting the demands of the growing needs

[803] Gorman (792) 63.
[804] Second International Conference on Assistance to Refugees in Africa (14 December 1984) UNGA Doc. A/RES/39/139, para. 2.
[805] ibid.
[806] ibid.
[807] Betts, 'Development Assistance and Refugees' (n 799) 7.

on the ground. This resulted in the failure to implement the generic principles set in the Final Declaration and Programme of Action.[808]

On the one hand, host States wanted the conference to focus on global responsibility and burden sharing. They argued that the additional support for refugees therefore should be over and beyond that they would have received had they no refugees. On the other hand, the donor States wanted to focus on durable solutions for refugee situations, in particular self-sufficiency leading to local integration. However, the host States, for their part, were reluctant to provide self-sufficiency and local integration and instead preferred refugees to be repatriated to their country of origin. Like its predecessor, the ICARA II failed to engage developing and developed States in linking refugee aid with assistance. The disagreement and emergence of refugee problems elsewhere in the region resulted in the conference waning, eventually leading to a short-lived legacy.[809]

In sum, the effort of both conferences mainly focused on the repatriation of refugees to address the growing African displacements during the late 1970s and 1980s. Reflecting on the refugee situation in Africa, Crisp observed that 'lasting solutions to their plight have proved elusive. In many parts of Africa, "temporary" refugee camps have become semi-permanent settlements'.[810] Although the international community, through the ICARA I and ICARA II, attempted to address this issue by incorporating refugees into development plans to encourage repatriation of refugees to their regions of origin, they failed to achieve the success that was required to address the protracted displacement in Africa.[811]

4.3.1.3 The International Conference on Refugees in Central America (CIREFCA) 1989

The outbreak of civil war in Central America during the late 1970s and the 1980s resulted in large numbers of displacement of refugees and IDPs in the region. In 1987,

[808] See generally, ibid 1-23.
[809] Loescher, Betts, and Milner (n 755) 41. Betts, 'Development Assistance and Refugees' (n 799) 7.
[810] Jeff Crisp, 'Ugandan Refugees in Sudan and Zaire: the Problem of Repatriation' (1986) 85(339) *African Affairs* 163, 163-180.
[811] Aleinikoff and Poellot (n 9) 219-220; and Loescher (n 755) 228. See also, Katy Long, 'Permanent Crises? Unlocking the Protracted Displacement of Refugees and Internally Displaced Persons' (2011) Refugee Studies Centre Policy Briefing Series, 2 <http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb-unlocking-protracted-displacement-2011.pdf> accessed 12 October 2015.

to address the estimated two million displaced,[812] a Consultative Working Group established by the UNHCR to contemplate the possibility of convening a conference. The purpose of the Working Group was to build on the legacy of Cartagena Declaration,[813] in terms of the search for political consensus and finding a viable solution to refugee problems in the region. The work of the Group eventually led to the elaboration of CIREFCA.[814] The aim of the conference therefore was, *inter alia*, the sustainable re-integration of returnees.[815] To achieve this, the States adopted a three-year Concerted Plan of Action in 1989.[816] The success of the plan resulted in it being extended for a further two years.[817]

The Concerted Plan of Action was adopted to address displacement through implementation of an integrated development assistance approach, which was based on promoting self-reliance and local integration of refugees. The plan was a central part of the peace, democracy and development programmes in the region.[818] In addition, the aim of the CIREFCA was to promote and implement a process which develops projects and programmes to promote inter-state cooperation and facilitate durable solutions for refugee plights. [819]

The focus of the CIREFCA was to build on the RAD approach, which initially failed to succeed in both the ICARA I and II. The initiatives successfully facilitated self-sufficiency and local integration for the Guatemalans in Mexico, Nicaraguans in Belize, and El Salvadorans in Costa Rica.[820] The CIREFCA not only provided protection for

[812] UNHCR, *The State of The World's Refugees: 2000* (n 167) Ch 5.
[813] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).
[814] Alexander Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' (2006) New Issues in Refugee Research, Working Paper No. 120, 8 <http://www.refworld.org/pdfid/4ff163c82.pdf> accessed 20 October 2015. For further information on this conference, see G. Perez del Castillo and M. Fahlen, 'CIREFCA: An Opportunity and Challenge for Inter-agency Cooperation' (Joint UNDP/UNHCR Review, May 1995).
[815] UNHCR, 'Comprehensive and Regional Approaches to Refugee Problems' (International Protection (SCIP), EC/1994/SCP/CRP.3, 3 May 1994).
[816] International Conference on Central American Refugees (CIREFCA) (Guatemala City, 29-31 May 1989). Cited in (1989) 1 (4) IJRL 582-596.
[817] UNHCR, 'Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the First Meeting of the High Commissioner's Forum' (27 June 2003). Available at: <http://www.unhcr.org/3f12b8d34.html> accessed 20 October 2015.
[818] ibid.
[819] UNHCR, 'Comprehensive and Regional Approaches to Refugee Problems' (International Protection (SCIP), EC/1994/SCP/CRP.3, 3 May 1994). Betts, 'Development Assistance and Refugees' (n 799) 1-2 and 6-7; and Loescher, Betts, and Milner (n 755) 44.
[820] Betts, 'Development Assistance and Refugees' (n 799) 7.

refugees and facilitated refugees' access to durable solutions, it also contributed to consolidating peace in the region.

The conference was regarded as a success, based on a number of factors which include the diversity and range of agencies and parties involved. Bradley notes that the conference was able to pursue durable solutions due to the 'unprecedented levels of cooperation; innovative protection and assistance initiatives; and openness to a range of durable solutions'.[821] Unlike the two conferences in Africa, the CIREFCA was not being considered in isolation. Instead, it was intertwined with the wider peace and post-conflict reconstruction initiatives in Central America. The UNHCR High Commissioner has described the conference as 'the most ambitious effort in the UNHCR's history to consolidate peace through durable solutions and integrated development'.[822]

4.3.1.4 The International Conference on Indo-Chinese Refugees 1989

In 1975, the establishment of the communist government in Vietnam resulted in more than three million people being displaced between 1975 and 1995.[823] To address refugee crisis in Southeast Asia, States agreed to organise a conference in 1979.[824] An unprecedented multilateral agreement was reached based on Southeast Asian States providing temporary asylum in exchange for being resettled in western States.[825] Unlike the previous conferences mentioned above, the concerned parties at the conference recognised that third country resettlement is the only viable durable solution that would address the refugee problems in the region. Troeller notes that by the late 1970s, the UNHCR was involved in the resettlement of 200,000 refugees annually, and in fact at one point in 1979 'resettlement was viewed as the only viable solution for 1 in 20 of the global refugee population under the responsibility of UNHCR'.[826]

Despite this, there were instances of involuntary repatriation by Thai soldiers of Cambodian refugees at the border. However, 'UNHCR effectively kept silent, despite

[821] Megan Bradley, 'Unlocking Protracted Displacement: Central America's "Success Story" Reconsidered' (2011) 30(4) RSQ 84, 84-121. See also, Betts, 'Comprehensive Plans of Action' (n 814) 1-63.
[822] UNHCR, 'Statement by Mr. Ruud Lubbers (n 817).
[823] UNHCR, *The State of The World's Refugees: 2000* (n 167) 79.
[824] ibid 84.
[825] W. Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 17(3) JRS 319, 319.
[826] Gary Troeller, 'UNHCR Resettlement: Evolution and Future Direction' (2002) 14(1) IJRL 85, 87.

the fact that this was the single largest instance of forced return (*refoulement*) the organization had encountered since it was established'.[827] This period has been described as one of the low points in the history of the UNHCR's protection.[828]

Initially, the conference persuaded host States to provide temporary asylum and western States to increase resettlement opportunities. However, States could not cope with the dramatic rise of the 'boat people'.[829] The host States were reluctant to provide temporary asylum while the third countries restricted their quota, which resulted in decreasing resettlement opportunities. The decline in resettlement places resulted in overcrowded camps and the restriction of rights in the host States. By the end of 1988, the situation reached a level that required international cooperation among a wide range of actors to find a comprehensive solution. Consequently, in 1989 the UNHCR, the host State, donor States, and a number of other international organisations agreed to convene another conference on Indo-Chinese refugees.[830] The Steering Committee of the Conference adopted the Comprehensive Plan of Action (CPA) programme.[831] The CPA has been defined as 'a "*systématique*" or methodology to address large outflows of refugees with a focus on effective protection, burden sharing and permanent solutions'.[832] This is done by States 'having a stake in the solution of these particular situations, such as countries of origin, countries of asylum, resettlement countries, as well as humanitarian and development actors' while 'the roles and responsibilities of the UNHCR and other regional and international organisations would also be delineated in such plans'. [833]

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[827] UNHCR, *The State of The World's Refugees: 2000* (n 167) 92.
[828] Statement by Michel Moussalli, UNHCR Director of International Protection (memorandum, 3 July 1984) UN Doc. 100/PAK/AFG, F/HCR 11.2.
[829] UNHCR, *The State of the World's Refugees: 2006* (n 6) 119.
[830] International Conference on Indo-Chinese Refugees, Geneva: Declaration and Comprehensive Plan of Action (Adopted 13-14 June 1989) UN Doc. A/CONF.148/2, 26 April 1989.
[831] International Conference on Indo-Chinese Refugees (Geneva, 13 and 14 June 1989) cited in (1989) 1(4) IJRL9) 574-581. The CPA was also developed in other specific situations to address a complex refugee situations, for instance, in the Commonwealth of Independent States (the CIS Conference on Refugees and Migrants, 1996). For the general overview on the conference see Luise Druke, 'Refugee Policy in Eurasia: The CIS Conference and EU Enlargement Process 1996-2005' (2006) New Issues in Refugee Research, Research Paper No. 129, 1-182 <http://web.mit.edu/cis/pdf/phrjproject.pdf> accessed 20 October 2015. There was also a Comprehensive Plan of Action for Somali Refugees. See, UNHCR, 'Framework Document for the Comprehensive Plan of Action (CPA) For Somali Refugees' (September 2005).
[832] UNHCR, Chairman's Summary: High Commissioner's Forum (12 March 2004) para. 3. Available at: <http://www.refworld.org/docid/471dcaef5.html> accessed 20 October 2015.
[833] UNHCR, 'Statement by Mr. Ruud Lubbers (n 817).

The programme aimed to address the continuing influx of Indochinese boat people and urged States to increase resettlement opportunities for refugees. According to Feller, '[t]he CPA for Indo-Chinese refugees was the first attempt to implicate all concerned parties […] in a coordinated, solutions-oriented set of arrangements for the sharing of responsibilities for the refugee population'.[834] During the programme, the States reiterated some of the elements of the 1979 agreement; namely, the host State, the resettlement countries, and first asylum countries in Southeast Asia agreed a three-way commitment to address the displacement of refuges. The asylum countries in Southeast Asia agreed to provide temporary asylum pending a resettlement in third countries. Likewise, third countries agreed to provide resettlement as long as first asylum countries provided temporary protection. The host State, Vietnam, agreed not only to accept the returnees that were not eligible for refugee status but also organise an 'orderly departure programme' which will benefit the people try to flee the country.[835] The UNHCR was responsible for the implementation of such a task.[836]

By 1996, the three way commitment contributed significantly to the reduction of refugees in camps. The conference was able to reduce the number of clandestine departures, handle the flow of boat people, and pursue durable solutions for refugees.[837] The UNHCR claimed that the problems of the Vietnamese boat people were resolved and the CPA has successfully met its objectives.[838] However, the conference was criticised for introducing screening interviews to determine refugee status.[839] This procedure resulted in the involuntary return of persons who were not eligible for refugee status. In addition, the first asylum countries in Southeast Asia opened detention centres for these persons until they were forcefully returned. In Cunliffe's view, the UNHCR's handling of the situation was therefore criticised because it compromised on practising the largest instance of forced return (*refoulement*) in order to gain the support of all the

[834] Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5(29) *Washington University Journal of Law and Policy* 129, 133.
[835] UNHCR, *The State of The World's Refugees: 2000* (n 167) 88.
[836] Robinson (n 825) 321.
[837] UNHCR, *The State of the World's Refugees:2006* (n 6) 120.
[838] UNHCR, 'Comprehensive Plan of Action for Indo-Chinese Refugees to End in June' (Press Release REF/1135, 6 March 1996). Available at: <http://www.un.org/News/Press/docs/1996/19960306.ref1135.html> accessed 25 October 2015.
[839] For a general overview on the determination of refugee status in Indochina conference, see Shamsul Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment' (1992) 4(4) IJRL 487-513.

parties.[840] This was done because repatriation was 'the only realistic alternative to indefinite subsistence on charity'.[841] Helton is rightly critical of the actions implemented under the CPA, and noted that 'to say that the Comprehensive Plan of Action for Indochinese refugees "restored the principle of asylum" in the region misses the real innovation in 1989, which was to introduce a repatriation option, including forced return'.[842]

However, the former UNHCR High Commissioner, Ruud Lubbers, claimed that 'the CPA had succeeded in bringing the outflow from Vietnam and Laos down to almost zero'.[843] Bronée does not share the High Commissioner's view; he argues that '[w]hile it is generally held that the CPA is a success, it may also be true to say that the CPA is not ideal, and not even entirely comprehensive. The often asked question of whether the CPA is indeed a success will depend on who is asking and who is answering'.[844] Despite its critics, the significant impact of the CPA for Indo-Chinese refugees cannot be denied. Clark and Simeon admitted that '[t]he CPA was not perfect, but with its unique refugee screening carried out by refugee host nations and large-scale use of resettlement, the CPA is a model of shared protection and durable solutions which must not be forgotten'.[845] More importantly, for the first time the conference adopted initiatives to implement and practice third country resettlement. It achieved its objective by providing durable solutions for refugee problems. In fact, between 1976 and 1989, the UNHCR was able to resettle over 1.2 million Indo-Chinese.[846] In addition, also for the first time a conference adopted by the UNHCR was able to overcome long-standing PRSs.[847]

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[840] Cunliffe (n 755) 289-290; and Nicholas Hendry, 'Did the UNHCR Fail Vietnamese Refugees in Hong Kong?' (E-International Relations, 29 June 2012). Available at: <http://www.e-ir.info/2012/06/29/did-the-unhcr-fail-vietnamese-refugees-in-hong-kong/> accessed 25 October 2015.
[841] Jean- Pierre Hocke, 'Beyond Humanitarianism: The Need for Political Will to Resolve Today's Refugee Problem' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (OUP 1989) 37-48.
[842] Arthur Helton (rev), *UNHCR, The State of the World's Refugees: Fifty Years of Humanitarian Action (OUP 2000)* (2001) 13(1/2) IJRL 269-270.
[843] UNHCR, 'Statement by Mr. Ruud Lubbers (n 817).
[844] Sten Andrew Bronée, 'The History of the Comprehensive Plan of Action' (1993) 5(4) IJRL 534, 543.
[845] Tom Clark and James C. Simeon, 'UNHCR International Protection Policies 2000-2013: From Cross-Road to Gaps and Responses' (2014) 33(3) RSQ 1, 24.
[846] Troeller (n 826) 87.
[847] Loescher, Betts, and Milner (n 755) 45. Gil Loescher, 'Indochina' (Protracted Refugee Situations (PRS): Case studies, 17 February 2012). Available at: <http://www.prsproject.org/case-studies/historical/indochina/> accessed 18 October 2015.

Despite their relative success, some academics, including Harrell-Bond, isolated the resettlement success of refugees from Southeast Asia as a one off and predicted that 'it is unlikely that a similar situation will arise in the foreseeable future'.[848] Troeller labels this period as the 'halcyon days of large-scale resettlement'.[849] Likewise, Betts claims that the CPAs in Indo-China and CIREFCA would be hard to replicate because they emerged in a specific historical and regional context.[850] However, contrary to these claims, there have been some significant resettlement programmes implemented since the resettlement of Indo-Chinese refugees.[851] This includes the 2007 resettlement programme of refugees from Bhutan, discussed in Chapter Six, which is praised for its capability of addressing one of the most PRSs in Asia.[852]

However, the success of the CPA came at a high cost for refugees globally. During the 1990s, the State practice changed from practice of resettlement to the promotion of voluntary repatriation. This is partly due to the 'disenchantment with resettlement' that reflected during the Indochinese experience. Even the Refugee Agency has conceded that this experience 'has impacted negatively on the UNHCR's capacity to effectively perform resettlement functions'.[853] The States introduced rigid criteria and brought in quota to restrict resettlement opportunities. The change of attitude of States towards solving refugee problems left the UNHCR with more questions than answers.

4.3.1.5 The 2007 International Conference on Addressing the Humanitarian Needs of Iraqi Refugees

Since the Iraqi refugee situation has progressed beyond the emergency phase and become a long-term problem, the UNHCR called for comprehensive plans of action to

[848] Harrell-Bond (n 759) 50. See also, Clark and Simeon (n 845) 21.
[849] Gary Troeller, 'Asylum Trends in Industrialized Countries and Their Impact on Protracted Refugee Situations' in Gil Loescher and others (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press 2008) 59.
[850] Betts, 'Comprehensive Plans of Action' (n 814) 54.
[851] For a historical account of UNHCR's practice of resettlement, see UNHCR, 'UNHCR Resettlement Handbook' (Revised edn, July 2011) 47-53.
[852] UNHCR, 'Refugee Resettlement Referral from Nepal Reaches Six-Figure Mark' (26 April 2013). Available at: <http://www.unhcr.org/517a77df9.html> accessed 24 October 2015. For a comprehensive analysis of this programme, see Susan Banki, 'Resettlement of the Bhutanese from Nepal: The Durable Solution Discourse' in Howard Adelman (ed), *Protracted Displacement in Asia: No Place to Call Home* (Ashgate 2008) 29-54.
[853] John Frederiksson and Christine Mougne, 'Resettlement in the 1990s: A Review of Policy and Practice (UNHCR Evaluation Report, EVAL/RES/14, December 1994) paras. 10-11.

find a sustainable solution to alleviate the prolonged suffering of Iraqi refugees.[854] In 2007, the UNHCR, with its partners, convened a ministerial conference in Geneva. It was the objective of the conference to make the international community aware of the Iraqi refugee problem. Then, it hoped to achieve expressions of international solidarity from host countries, resettled countries, donor States, and other international organisations, in order to find a sustainable solution.

The involved States were urged to provide additional resources for Iraqi refugee problems, which would support the development needs of the government of Iraq and host countries. More importantly, there was a need to facilitate durable solutions in the form of increasing resettlement opportunities, and to improve prospects for self-sufficiency and local integration, until voluntary repatriation becomes a viable option.[855] In a statement, HRW urged States to provide for both the humanitarian and protection needs of Iraqi refugees. This includes observing the principle of *non-refoulement*, cooperating with the UNHCR in the registration of Iraqi asylum seekers, and providing third-country resettlement opportunities.[856]

Barnes argues strongly that the lack of solutions to the emergence of new refugee problems in the Middle East region might be due to the absence of a regional instrument on refugee problems.[857] Such instruments do exist in other regions, including ECHR,[858] ACHR,[859] and ACHPR,[860] all of which have been a contributing factor in solving refugee problems. Kagan notes that 'there is basically no refugee policy in the Middle East, [and] that there are only refugee problems'.[861] As discussed in Chapter Five,

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[854] UNHCR, 'International Conference' (n 786) paras. 8 and 13.
[855] UNHCR, 'Humanitarian Needs of Persons Displaced within Iraq and Across the Country's Borders: An International Response' (30 March 2007) UN Doc. HCR/ICI/2007/2, para 4, 35. Available at: <http://www.refworld.org/docid/46499cb62.html> accessed 19 October 2015; UNHCR, 'International Conference' (n 786) para 3.
[856] HRW, 'Iraq: Neighbors Stem Flow of Iraqis Fleeing War: US and UK Bear Special Duty to Aid Refugees' (HRW Statement, 17 April 2007). Available at: <http://www.hrw.org/news/2007/04/16/iraq-neighbors-stem-flow-iraqis-fleeing-war> 16 October 2015.
[857] Barnes (n 612) 17.
[858] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5.
[859] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 36 OAS TS 1; 1144 UNTS 123. See also, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).
[860] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. See also, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force (20 June 1974) 1001 UNTS 45.
[861] Kagan (n 58) 10.

although an instrument on refugee protection does exist in the Middle East region,[862] it lacks a binding force and ratification to implement their provisions in the region.

Frederiksson and Mougne argued that the lack of an international conference to make the international community aware of Iraqi refugee problems was the main contributing reason why the UNHCR's programme in 1991 to resettle 33,000 Iraqi refugees in Rafha Camp failed to continue and quickly waned.[863] This programme is discussed further in Chapter Six, Section 6.2.4. The UNHCR, therefore, attempted to learn from its experience and hoped by organising a conference they would be able to replicate the success of the other regional conferences mentioned above.

The UN Secretary-General, Ban Ki-Moon, hoped that the conference 'will galvanize international support to provide [Iraqi refugees] with more protection and assistance,' and 'it will mobilize resources in establishing much needed protection space'.[864] He therefore urged the international community, *inter alia*, to provide resettlement opportunities for the most vulnerable, and further encouraged States to make the commitment to ease the burden on countries that host large numbers of refugees. In particular, countries neighbouring Iraq were already under severe economic pressure because of hosting a significantly large number of Palestinian refugees.[865] A senior Jordanian official noted that 'the UNHCR was instrumental in highlighting the refugee crisis and maintaining attention on it. It also succeeded in raising the awareness and underlining the obligations of those states that were responsible for creating the crises'.[866]

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[862] See, for example, Declaration on the Protection of Refugees and Displaced Persons in the Arab World (adopted 19 November 1992). The first three seminars of Arab Experts on Asylum and Refugee law were convened on 16-19 January 1984, 15-18 May 1989, and 2-4 November 1991; and Arab Convention on Regulating Status of Refugees in the Arab Countries (Adopted by the League of Arab States, 1994). For general overview on the benefit of a convention in the Arab world, see Khadija ElMadmad, 'An Arab Convention on Forced Migration: Desirability and Possibility' (1991) 3(3) IJRL 461-481.

[863] John Fredriksson and Christine Mougne, 'Resettlement in the 1990s: A Review of Policy and Practice (UNHCR Evaluation Report, EVAL/RES/14, December 1994) para. 68.

[864] Statement by Ban Ki-Moon, the, 'Video Message to the International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons Inside Iraq and in Neighbouring Countries' (Geneva, 17 April 2007). Available at: <http://www.un.org/sg/statements/?nid=2522> accessed 22 October 2015.

[865] ibid.

[866] Cited in Crisp J and others, 'Surviving in the City: A Review of UNHCR's Operation for Iraqi Refugees in Urban Areas of Jordan, Lebanon and Syria' (PDES/2009/03, July 2009) 43.

During the conference, the UNHCR recognised the search for durable solutions, including increasing resettlement opportunities as the most critical elements of protection for refugees from Iraq. They also did not want Iraqi refugee displacement to become another unresolved issue and an extended long-term refugee problem in the region. The UNHCR acknowledged that the host States prefer refugees to repatriate voluntarily rather than integrate locally; however, the Refugee Agency admitted that voluntary repatriation is not a viable option for Iraqi refugees.[867] In addition, all the States in the Middle East region deny the possibility of local integration and they see Iraqi refugee problems as a temporary situation, as outlined in Chapter Five. In these circumstances, resettlement in a third country is the only durable solution available to address their plight.[868] Even the UNHCR High Commissioner argued that voluntary repatriation is the ideal solution for Iraqi refugees; however, he stressed that the current state of affairs in Iraq does not allow for this solution to occur.[869] Therefore, the UNHCR noted that,

> [g]iven the deterioration of the security environment in Iraq, the deteriorating protection environment in countries of first asylum, the large number of Iraqi refugees on the territory of 50 neighbouring states and the fact that the prospect for other durable solutions appears remote or absent, states are strongly encouraged to consider the resettlement of Iraqi refugees.[870]

Accordingly, the UNHCR responded by emphasising the significance of resettlement in a third country as a tool of responsibility and burden sharing to address the issue of Iraqi refugees in protracted situations.[871]

The UNHCR significantly increased its resettlement staff in the Middle East region in order to resettle more refugees. The Agency also adopted a faster processing system to identify and process the most vulnerable cases and encouraged the States to do likewise. The UNHCR requested from States that do not yet have resettlement programmes to show international solidarity by providing resettlement opportunities. It also urged the States that already had a resettlement programme to increase their quota and accommodate the growing need for resettlement places. The States were also urged to adopt better and less rigid resettlement criteria to ensure as many Iraqi refugees as

[867] UNHCR, Humanitarian Needs of Persons Displaced within Iraq and Across the Country's Borders' (n 855) paras. 32, 33, and 35.
[868] ibid para. 36.
[869] UNHCR, 'International Conference' (n 786) para. 8.
[870] Crisp J and others, 'Surviving in the City' (n 866) 49-50.
[871] Barnes (n 612) 26.

possible benefit from this solution. This durable solution is all the more important given the absence of the other two durable solutions.[872]

The conference was successful in attracting international attention to the plight of Iraqi refugees and IDPs. The conference also recognised and praised the great international solidarity shown by the States that host significantly large numbers of Iraqi refugees. In Barnes's view, the conference was able to bring worldwide attention to the ongoing Iraqi refugee crisis, which enabled States to increase their resettlement quota, while States without such a programme agreed to introduce, implement, and develop resettlement programmes.[873]

At the end of the conference, the UNHCR High Commissioner hoped that a sustained dialogue and a comprehensive and coordinated response to the Iraqi refugees' situation would have been achieved. Despite its relative success in bringing international attention to the Iraqi refugee situation and increasing resettlement opportunities, to a certain extent, the outcome of the conference was a mere statement by the UNHCR High Commissioner.[874] The UNHCR failed to create a single document, in the form of a declaration, with even soft law status. Therefore, one may conclude that the inability of the conference to proffer solutions to Iraqi refugee problems and engage with the related issues has contributed to the lack of debate emanating from the conference. Although the international community, acting through the UNHCR, has attempted to address Iraq refugees through the convening a conference, it has failed to achieve a solution that constitutes a resolution to their on-going displacement crisis.

4.3.2 The UNHCR's Initiative to Address Long-Standing Refugee Situations: Convention Plus Initiative

The adoption of this initiative was the result of the Global Consultations on refugee protection between 2000 and 2002 on the 50th anniversary of the Refugee Convention.[875] The aim of the consultation was to review developments in international

[872] UNHCR, Humanitarian Needs of Persons Displaced within Iraq and Across the Country's Borders (n 855) paras. 36 and 37.
[873] Barnes (n 612) 26.
[874] UNHCR, 'International Conference' (n 786) paras. 8 and 13.
[875] The papers and roundtable conclusions of these meetings have been published in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003).

refugee protection in the previous 50 years, address gaps that might exist in the international protection framework, and make suggestions on how to improve and fill these gaps.[876] During the consultation, a series of expert roundtable discussions was held to review the various issues facing the current refugee regime.[877] The two-year process of ministerial and expert meetings resulted in the establishment of the joint Agenda for Protection,[878] which sought to 'explore how best to revitalize the existing international protection regime while ensuring its flexibility to address new problems'.[879] The Agenda was endorsed by the ExCom[880] and welcomed by the UNGA.[881]

The Agenda was a programme of action, whose purpose was to enhance the protection of refugees globally. In addition, the UNHCR and its partners intended to use the Agenda as a guide for concrete action on refugee matters. The Agenda, *inter alia*, emphasised the necessity of the parties being involved to redouble their efforts to search for durable solutions.[882] Despite the fact that the Agenda for Protection is not a legally binding document, it has considerable political weight as it reflects a broad consensus among States on refugee protection.[883]

The initiative brought a number of parties together to reach multilateral agreements to improve the protection of refugees in various fields of international law that are not covered adequately by the existing international refugee regime.[884] In fact, such an initiative was considered 'a stronger multilateral commitment to finding durable,

[876] Kelley and Durieux (n 659) 12.
[877] For an in-depth analysis of the issues discussed in the meeting see, for example, Erika Feller, Volker Türk, and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003).
[878] The Agenda was comprised of two sections, namely the Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees and a Programme of Action. UNHCR, 'Agenda for Protection [Global Consultations on International Protection/General]' (26 June 2002) UN Doc. A/AC.96/965/Add.1, p 2. UNHCR, 'Declaration of States Parties' (n 169); UNHCR, 'Agenda for Protection' (n 753) 9.
[879] UNHCR, 'Agenda for Protection' (n 753) 5.
[880] ExCom Conclusion No. 92 (LIII) 'General Conclusion on International Protection' (8 October 2002) para. (a).
[881] UNGA Res. 56/135 (19 December 2001) UN Doc. A/RES/56/135, para. (7); UNGA Res. 56/137 (19 December 2001) UN Doc. A/RES/56/137, para. (5); UNGA Res. 56/166 (19 December 2001) UN Doc. A/RES/56/166, preamble (para. 5); UNGA Res. 57/183 (18 December 2002) UN Doc. A/RES/57/183, para. (7); and UNGA Res. 57/187 (18 December 2002) UN Doc. A/RES/57/187, para. 6.
[882] UNHCR, *The State of the World's Refugees: 2006* (n 6) 129.
[883] UNHCR, 'Agenda for Protection' (n 753) 29-88.
[884] For a critical analysis of the initiative see, for example, Marjoleine Zieck, 'Doomed to fail from the Outset? UNHCR's Convention Plus Initiative Revisited' (2009) 21(3) IJRL 387-420; and Clark and Simeon (n 845) 19-24. For a general overview of the Convention Plus, see UNHCR, 'Convention Plus at a Glance' available at: <http://www.unhcr.org/403b30684.html> accessed 20 October 2015.

sustainable solutions to refugee problems in a burden sharing framework' than the Refugee Convention and its Protocol.[885] The lack of success in the pursuit of durable solutions was the main reason for the adoption of this initiative. For this reason, the re-doubling of efforts to find durable solutions was identified as a priority concern within the Convention Plus Initiative framework.[886]

The UNHCR High Commissioner at the time, Lubbers, highlighted the importance of the initiative, stating that 'it is not acceptable that refugees spend years of their lives in confined areas',[887] and 'without the prospect of durable solutions, our common duty to protect refugees cannot be fulfilled effectively'.[888] He requested the developed and developing States to put their differences aside and work together to find sustainable solutions for refugees. The States conceded during the Global Consultations process that the search for durable solutions is 'not functioning well enough [therefore] a strong wish was expressed that we had to do better with burden-sharing and durable solutions' in order to effectively implement these solutions.[889]

In order to accomplish the objectives of initiative, the UNHCR intended to draft the special and multilateral agreements with States to improve the Irregular Secondary Movements, Targeting Development Assistance and Strategic Use of Resettlement.[890] These three strands were highlighted during the expert meetings to reach agreements that would apply to situation-specific contexts for the purpose of improving the refugee protection and providing durable solutions.

Despite the fact the initiative was an innovative UNHCR idea to address the gaps that exist in international refugee law, it could not attract the States to enter into special agreements to accept burden and responsibility sharing on refugee matters.[891] In fact, during the implementation of the initiative, the unwillingness of States to commit to a binding normative framework was clear.[892] Zieck, understandably, was critical of the

[885] UNHCR, 'Statement by Mr. Ruud Lubbers (n 817).
[886] ibid.
[887] Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, to the European Conference on Migration (Brussels, 16 October 2001). Available at: <http://www.unhcr.org/3bdd46c17.html> accessed 20 October 2015.
[888] UNHCR, 'Lubbers Launches Forum on Convention Plus Initiative' (n 32).
[889] ibid.
[890] The Strategic Use of Resettlement is discussed in more detail in Chapter Six, Section 6.2.4.1.
[891] Lewis (n 322) 127.
[892] UNHCR, *The State of the World's Refugees:2006* (n 6) 148.

initiative, and in her words 'the Convention Plus initiative was doomed to fail from the outset for systemic reasons'. [893] She lists a number of reasons for such a failure, among others, failing to address the question of why Member States to the Refugee Convention should commit themselves to a binding normative framework on burden sharing.[894]

Indeed, there were a number of reasons that contributed to the failure of the initiative, including that the developing States viewed the Convention Plus Initiative as a European-led initiative because, firstly, from its early stage the initiative debated on issues that interested European States, such as transit processing and irregular secondary movements. Secondly, the UNHCR's selection of the three strands (Targeting Development Assistance, Irregular Secondary Movements, and Strategic Use of Resettlement) and their relation to the situation-specific Comprehensive Plan of Action for Somali refugees[895] was an indication of the bias of the UNHCR towards donor States. Thirdly, the UNHCR was further criticised by developing States when the agency selected members from developed States (Denmark and Japan) to chair the Core Groups, which made developing States feel marginalised. It jeopardised the reliability of the process by creating the perception that the initiative was biased in favour of developed countries.[896] These factors made the developing countries which host large numbers of refugees view the initiative as burden shifting by developed States, instead of burden sharing.

There are other reasons – apart from those mentioned above – that have contributed to the downfall of the initiative, most notably Higher Commissioner Lubbers' close relationship with the initiative. The short mandate of the initiative (only two and half years) impeded its ability to develop and engage with the State on complex issues.[897] In fact, in 2005 Lubbers' successor, Guterres, conceded that the debates conducted in the past two years have not brought consensus and States have failed to reach an agreement on all strands of the initiative.[898] Consequently, in November 2005, the Convention Plus

[893] Zieck, 'Doomed to Fail from the Outset?' (n 884) 387-420.
[894] ibid 387.
[895] For a general overview in the CPA for Somali refugees, see, UNHCR, 'Framework Document for the Comprehensive Plan of Action (CPA) For Somali Refugees' (September 2005).
[896] Lewis (n 322)128.
[897] Alexander Betts and Jean-François Durieux, 'Convention Plus as a Norm-Setting Exercise' (2007) 20(3) JRS 509, 527.
[898] UNHCR, 'Opening Statement by Mr. Antonio Guterres, United Nations High Commissioner for Refugees, to the High Commissioner's Forum' (Geneva, 17 November 2005). Available at: <http://www.unhcr.org/437dee284.html> accessed 20 October 2015; and Barutciski (n 391) 138.

Initiative mandate ended without having accomplished its goal.[899] The generic agreements that the UNHCR was supposed to adopt had failed and it further failed to create a single document with even soft law status.[900]

However, although Clark and Simeon argue that the initiative was a success to a certain extent,[901] they seem to hold the minority view in the literature. They argue that the initiative was quite short lived, yet fruitful. They give examples of documents and guidance including the Multilateral Framework of Understandings on the Strategic Use of Resettlement,[902] that resulted from the Convention Plus Initiative. The failure of the initiative in Clark and Simeon's view was because of a change of personnel (the High Commissioner, Lubbers, who had championed the initiatives, resigned) rather than the lack of productivity of the initiative. Moreover, the UNHCR faced financial difficulties that prevented the Refugee Agency from supporting the continuation of the initiative.[903] However, even the head of Convention Plus Unit, Durieux, conceded that 'the whole process eventually collapsed' and it is 'mission impossible' to find 'a consensual formula of responsibility-sharing' at the global level.[904]

4.3.3 The UNHCR's Initiative to Redouble the Search for Durable Solutions

In 2003, in pursuit of sustainable solutions for refugee problems,[905] the UNHCR adopted the Framework for Durable Solutions for Refugees and Persons of Concern. The framework introduced three concepts, namely: (1) Repatriation, Reintegration, Rehabilitation and Reconstruction (4Rs), development assistance for refugees (DAR) and (3) development through local integration (DLI) to improve the integration process of refugees into development plans and facilitate sustainable repatriation of returnees.[906] The 4Rs concept focused on the State of origin, while the latter two concepts, DAR and

[899] ibid.
[900] Zieck, 'Doomed to Fail from the Outset?' (n 884) 394.
[901] Clark and Simeon (n 845) 19-24.
[902] UNHCR, 'Multilateral Framework of Understandings on Resettlement' (FORUM/2004/6, 16 September 2004). Available at: <http://www.refworld.org/docid/41597d0a4.html> accessed 20 October 2015.
[903] Clark and Simeon (n 845) 19-24.
[904] Jean-François Durieux, 'Opinion: Protection Where? – or When? First Asylum, Deflection Policies and the Significance of Time' (2009) 21(1) IJRL 75, 77-78.
[905] UNHCR, 'Agenda for Protection' (n 753) Goal 5 (pp 73-81). See also, UNHCR, *The State of the World's Refugees:2006* (n 6) 129-199.
[906] UNHCR, 'Framework for Durable Solutions for Refugees and Persons of Concern' (Core Group on Durable Solutions, Geneva, May 2003) 1-26. Available at: <http://www.refworld.org/pdfid/4124b6a04.pdf> accessed 20 October 2015.

DLI, focused on asylum countries. In contrast with the 4Rs, both DAR and DLI went beyond the humanitarian relief phase and moved towards improving the quality of life of refugees and fostering a community spirit of self-reliance and cooperation, to prepare them for durable solutions.[907] These concepts have been analysed extensively in the literature; hence, it is beyond the scope of this chapter to discuss it any further.[908]

It was the aim of the framework to achieve, through these concepts 'sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees and redoubling the search for durable solutions'.[909] Furthermore, the goal of these concepts was to show that refugees can be seen as agents of development rather than burdens on the host State. The framework emerged as a means to bridge the gap between humanitarian relief and development assistance.[910] However, just like the pervious initiatives, these concepts were short-lived and did not leave a lasting legacy. Therefore, development assistance, which was the crux of these concepts, failed to promote inter-State cooperation and solidarity, or provide long-lasting solutions.[911]

Although the UNHCR attempted to implement these concepts in specific countries, apart from the successful local integration of Angolan refugees in Zambia,[912] most of

[907] ibid 3-26; and Amadou Tijan Jallow and Sajjad Masood Malik, 'Handbook for Planning and Implementing Development Assistance for Refugees (DAR) Programmes' (January 2005) iii. Available at: <http://www.refworld.org/docid/428076704.html> accessed 20 October 2015.

[908] For an in-depth analysis of these concepts see, for example, Rebecca M. M. Wallace and Diego Quiroz, 'Refugees and Internally Displaced: A Challenge to Nation-Building' (2008) 60(2) *Maine Law Review* 409-428; Francesca Hansen, Jean Jacques Mutabaraka and Priscila Ubricao, 'Repatriation, Resettlement, Integration: A Study of the Three Refugee Solutions' (2008) The Niapele Project/Sciences Po, 1-24 <http://www.theniapeleproject.org/files/Niapele-ScPo-Study2008.pdf> accessed 20 October 2015; Jallow and Malik (n 907); Robert Muggah, 'the Death-Knell of '4R': Rethinking Durable Solutions for Displaced People' (2006) 36 *Humanitarian Exchange Magazine* 25-27; and Betsy Lippman and Sajjad Malik, 'The 4Rs: The Way Ahead?' (2004) 21 FMR 9-11.

[909] UNHCR, 'Framework for Durable Solutions for Refugees and Persons of Concern' (n 906) 3.

[910] ibid.

[911] For a general overview of factors that contributed to the failure of the framework see, for example, Betts, 'Development Assistance and Refugees' (n 799) 1-23; Meredith Hunter, 'The Failure of Self-Reliance in Refugee Settlements' (2009) 2 *POLIS Journal* 1, 30; Gil Loescher, Alexander Betts and James Milner, *The United Nations High Commissioner for Refugees (UNHCR) The Politics and Practice of Refugee Protection into The Twenty-First Century* (Routledge 2008) 116; Meyer (n 796) 1-95; Sarah Dryden-Peterson and Lucy Hovil, 'A Remaining Hope for Durable Solutions: Local Integration of Refugees and Their Hosts in the Case of Uganda' (2004) 22(1) *Refuge* 29-31; Tania Kaiser, 'UNHCR's Withdrawal from Kiryandongo: Anatomy of a Handover' (2002) 21(1-2) RSQ 210–227; and Eric Werker, 'Refugees in Kyangwali Settlement: Constraints on Economic Freedoms' (2002) Refugee Law Project, Working Paper No. 7, 32 <http://refugeelawproject.org/files/working_papers/RLP.WP07.pdf> accessed 20 October 2015.

[912] For further analysis on the pilot-studies adopted see, for example, Watabe Masaki, 'The Zambia Initiative' (2005) 24 FMR 69; Johan Brosché and Maria Nilsson, 'Zambian Refugee Policy: Security, Repatriation and local Integration' (Uppsala University, Department of Peace and Conflict Research, Minor Field Study, 2004)1-50. Available at: <http://www.pcr.uu.se/digitalAssets/67/67531_1mfs24_broche.pdf> accessed 20 October 2015; and

the pilot studies failed to achieve their goals. The UNHCR was unable to replicate the success of the Zambian initiative. The UNHCR, in Muggah's view, has failed to learn lessons from the similar past experience.[913] One has to agree with Muggah that the UNHCR is not learning from its past success or the failure of the initiatives. Instead, the Refugee Agency has adopted new initiatives with different names but still faces similar problems. Generally speaking, to date, the future of targeting development assistance is bleak and uncertain, unless major efforts are made by the international community to show international solidarity and share responsibility, development assistance might not enhance the quality of protection offered to refugees.

4.3.4 The Recent Initiative by the UNHCR to Address Protracted Refugee Situations

The UNHCR has acted on a number of occasions as a broker to facilitate cooperation between and among States to address refugee challenges. This was done to show its dynamic nature to engage with States in order to draw attention from the unsuccessful past experiences in different regions. Although the UNHCR, in its expert meetings, did not designate a roundtable discussion to address PRSs, it was discussed in the overall context of an expert meeting on International Cooperation to Share Burden and Responsibilities in 2011.[914] This was one of a series expert meetings convened to mark the 60th Anniversary of the Refugee Convention.[915]

To date, this initiative is the latest attempt by the UNHCR to enhance refugees' access to durable solutions and improve their efficient delivery. Accordingly, this section provides an opportunity to reflect on the UNHCR's latest attempts to enhance durable solutions to refugee problems. The analysis of the initiative will show whether the UNHCR has adopted the same approach or made a dynamic attempt to improve durable solutions for refugees.

UNHCR, 'Report of the Mid-Term Review: Self-Reliance Strategy for Refugee Hosting Areas in Moyo, Arua and Adjumani Districts, Uganda' (2004) Report of the Mid-term Review Geneva, RLSS Mission Report 2004/03, <http://www.unhcr.org/41c6a4fc4.pdf> accessed 20 October 2015.

[913] Muggah (n 908) 25.

[914] UNHCR, International Cooperation to Share Burden and Responsibilities: Discussion Paper (Expert Meeting in Amman, Jordan, 27 and 28 June 2011). Available at: <http://www.unhcr.org/4df871e69.html> accessed 20 October 2015.

[915] All documents from the UNHCR's expert meetings are available at: <http://www.unhcr.org/3e5f78bc4.html> accessed 20 October 2015.

The purpose of the meetings was to review the current developments and examine the emerging issues in the international regime for the protection of refugees. It was also an opportunity for the UNHCR and its partners to create a coherent global framework to enhance international cooperation and burden sharing.[916] During expert meetings, the UNHCR facilitated roundtable discussions which resulted in background papers in different emerging issues in international refugee law.[917]

To end PRSs, cooperative arrangements mainly emphasised the provision of international assistance, development planning and capacity-building in host States. It also encouraged self-sufficiency, local integration and the strategic use of resettlement, as part of the plan to pursue durable solutions for refugees.[918] Generally speaking, cooperative arrangements focus on activities at the end of the displacement cycle.[919] This was also the case in the abovementioned conferences in Africa (ICARA I and II), Southeast Asia (indo-Chinese) and Latin America (CIREFCA), discussed in Section 4.3.1. The UNHCR through expert meetings hoped to replicate the success of international cooperation in Southeast Asia and Central America to promote inter-state cooperation and access to durable solutions. As mentioned above, in these two conferences, the UNHCR with its partners responded to large numbers of refugees through cooperative arrangements between the country of origin, host States and donor States.[920] Accordingly, it was the purpose of the roundtable discussion 'to analyze, from a concrete and operational perspective, parameters, lessons learned and positive aspects of previous cooperative arrangements to share burden and responsibilities'.[921]

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[916] All documents from the UNHCR's expert meetings are available at: <http://www.unhcr.org/3e5f78bc4.html> accessed 20 October 2015.
[917] UNHCR, International Cooperation to Share Burden and Responsibilities' (n 914). The expert meetings were: International Cooperation to Share Burden and Responsibilities, the 1984 Cartagena Declaration on Refugees, Roundtable on Temporary Protection, Roundtable on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence, Roundtable on Temporary Protection, Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea – How Best to Respond?, Global Roundtable on Alternatives to Detention Geneva, ICTR-UNHCR Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Maintaining the Civilian and Humanitarian Character of Asylum, Effective Protection, Religious Persecution, and Rescue-at-Sea.
[918] UNHCR, 'International Cooperation to Share Burden and Responsibilities' (n 914) para. 19.
[919] UNHCR, 'The Strategic Use Of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement)' (ExCom Standing Committee 27th meeting, 3 June 2003) UN Doc. EC/53/SC/CRP.10/Add. 1. Available at: <http://www.refworld.org/docid/41597a824.html> accessed 20 October 2015.
[920] Kathleen Newland, 'Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations short of Mass Influx' (Discussion Paper prepared for a UNHCR Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Amman, Jordan, 27-28 June 2011) 1. Available at: <http://www.unhcr.org/4ef332d29.pdf> accessed 20 October 2015.
[921] ibid 1.

So far, States have agreed to cooperate on an *ad hoc* basis to address particular refugee situations, and this is partially due to the lack of a binding instrument on international cooperation on refugee protection. In refugee matters, it has been the main object of these cooperative arrangements to provide appropriate durable solutions for refugees in a timely manner.

During the expert meeting on the International Cooperation to Share Burden and Responsibilities, four working groups were identified to address refugee challenges, including PRSs.[922] The UNHCR hoped that through these working groups it would be able to adopt a concrete and practical approach to address refugee situations more equitably. The role of cooperative arrangement among States is significant in addressing PRSs. The lack of cooperation between States might result in lack of effective delivery of resettlement, local integration, and self-reliance opportunities for refugees, which would result in refugees remaining in camps for years without a solution.

During the roundtable discussions, two successful cooperative arrangements were reviewed: the 2007 resettlement programme for Bhutanese refugees [923] and the 2010 Brazil-Ecuador Agreement for Integration of Colombian Refugees.[924] The careful selection of these two situation specific cases shows that the practice of resettlement and local integration between States can improve international solidarity on refugee protection. It also shows that resettlement and local integration, once implemented appropriately, are capable of addressing PRSs. As discussed in Chapter Six, the successful resettlement programme of the Bhutanese refugees is an important counter-example to the prevalent belief among many scholars that resettlement is incapable of resolving the issue of Iraqi refugees in protracted situations.[925]

[922] ibid para. 10.
[923] UNHCR, 'Refugee Resettlement Referral from Nepal Reaches Six-Figure Mark' (n 852). For further analysis on this programme, see Banki (n 852) 29-55.
[924] UNHCR, 'Brazil Helps Ease Local Integration of Refugees in Northern Ecuador' (17 February 2011). Available at: <http://www.unhcr.org/4d5d4afd6.html> accessed 20 October 2015.
[925] See, for example, Dawn Chatty and Nisrine Mansour, 'Unlocking Protracted Displacement: An Iraqi Case Study' (2011) 30(4) RSQ 50-83; Heloise Ruaudel, 'Iraqi Protracted Displacement' (2012) Refugee Studies Centre, Workshop Report, 1-11 <http://www.rsc.ox.ac.uk/files/publications/event-reports/er-iraqi-protracted-displacement-2012.pdf> accessed 20 October 2015: and Sadek (n 925) 43-54; and Long 'Permanent Crises?' (n 811) 1-44.

Likewise, in 2010, Brazil signed an agreement with Ecuador to integrate Colombian refugees. Being in a border area, a large number of refugees from Colombia sought protection in Ecuador.[926] Due to the deterioration of security in Colombia, refugees were unable to return to their regions of origin. Hence, local integration and third country resettlement were the only two durable solutions available to resolve Colombian refugee problems. A cooperative arrangement was agreed between Ecuador and Brazil, and the latter pledged to provide international assistance and support for Colombian refugees to facilitate their self-reliance and integration with the local communities in Ecuador. The UNHCR noted that this arrangement was 'the first cooperation agreement of its sort in Latin America'.[927]

The two case studies of the resettlement programme for Bhutanese and local integration for Colombians show the significant role international cooperation can play in pursuing durable solutions for refugee problems. It can also facilitate all forms of durable solutions, in particular resettlement and local integration opportunities for refugees, which are the main crux for international solidarity between States. In both cases, the UNHCR played an important role in enhancing international cooperation between and among States to address refugee challenges in Southern Asia and Latin America.

However, one could argue that the UNHCR's expert meeting on International Cooperation to Share Burden and Responsibilities should have also mentioned Brazil's weighty impact on the creation of a regional resettlement programme for Latin American refugees. Indeed, in 2004 Brazil as one of the emergent resettlement countries proposed the Regional Solidarity Resettlement Programme.[928] The programme has had a significant impact on the increase of resettlement opportunities for refugees in Latin America and the rest of the world, as discussed in detail in Chapter Six, Section 6.2.4.1.1.

[926] UNHCR, '2015 UNHCR Country Operations Profile – Colombia' available at: <http://www.unhcr.org/pages/49e492ad6.html> accessed 20 October 2015. See also, UNHCR, '2013 UNHCR Country Operations Profile – Ecuador' available at: <http://www.unhcr.org/pages/49e492b66.html> accessed 20 October 2015.
[927] UNHCR, 'Brazil Helps Ease Local Integration of Refugees in Northern Ecuador' (17 February 2011). Available at: <http://www.unhcr.org/4d5d4afd6.html> accessed 20 October 2015.
[928] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, 16 November 2004). Available at: <http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf> accessed 20 October 2015.

In a nutshell, during the expert meetings, the participants recognised the significance of international cooperation in resolving PRSs through cooperative arrangements between States. Generally speaking, international cooperation is a key principle of the international refugee regime as it brings States together to pursue appropriate durable solutions in a timely manner for refugee problems. Past initiatives have failed to translate international cooperation, and burden and responsibility sharing, into a coherent global framework. Therefore, it was the main aim of the participants to 'inform the development of a Common Framework on International Cooperation to Share Burden and Responsibilities'.[929]

However, there is hardly any literature on these expert meetings. One could argue that this might be due to the fact that there was a lack of agreement in any of the issues discussed. In fact, the outcomes of the meeting were a mere set of understandings and some initial suggestions as to how it would be best to support the framing of specific cooperative arrangements.[930] Although participants explored ways to enhance international cooperation to address contemporary refugee challenges, ultimately it was left to the States as to whether to comply with these cooperative arrangements.

Despite the fact that during the meetings the participants emphasised the importance of building on past examples and learning lessons from them, the adoption of a concrete and practical approach to the cooperative arrangements to address PRSs requires full international commitment and State solidarity to respond to refugee situations. This implies that the UNHCR has convened expert meetings on a number of issues, but it has failed to achieve concrete action on refugee protection. This means that the latest UNHCR initiative has replicated other initiatives. Instead, it should have been something new and different in order to address the growing contemporary refugee challenges.

4.4 Voluntary Repatriation or Constructed *Refoulement*?

State practice shows that the international community, acting through the UNHCR, has paid relatively little attention to resettlement and local integration in recent years, and has preferred to pursue durable solutions that focus mainly on the repatriation of

[929] UNHCR, 'International Cooperation to Share Burden and Responsibilities' (n 914) paras. 35-36.
[930] ibid 4-6.

refugees to their home country. The current State practice also shows that the repatriation of refugees has often been involuntary. The return of refugees involuntarily to their regions of origin might constitute a constructive *refoulement*. Such a practice is a violation of the principle of *non-refoulement*, which prohibits any State from returning a person to a country where his or her life or freedom would be threatened.[931]

The term voluntary repatriation has not been mentioned in the Refugee Convention or its Protocol. If voluntary repatriation is not practised appropriately, it could violate the principle of *refoulement*. In fact, due to developments in international human rights law in the twentieth century, the protection under this right is absolute.[932] The principle of *non-refoulement* is regarded as a cardinal principle of modern refugee law,[933] and is an accepted principle of customary international law.[934]

The principle of *non-refoulement* is vital for the refugee predicament because, in Wallace and Quiroz's view, 'it accords with the UNHCR's mandate to facilitate the voluntary repatriation of refugees. By proscribing coercive return by host nations, *non-refoulement* provides an essential safeguard that protects refugees from being forcibly thrust into the midst of post-conflict turmoil'.[935] Likewise, Hofmann argues that 'the principle of non-refoulement [...] protects any refugee from being returned to his country of origin against his will. The principle of *non-refoulement* thus implies the necessity of any repatriation being voluntary'.[936] Therefore, there is a close relationship between voluntary repatriation and *non-refoulement* because non-compliance with the former might lead to the violation of the latter. In Bialczyk's view, through this principle the Refugee Convention has shaped and contextualised voluntary repatriation's legal elements.[937]

[931] Refugees Convention. Art. 33(1).
[932] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Art. 3.
[933] ExCom Conclusion No.65 (XLII) 'General Conclusion on International Protection' (11 October 1991) para. (c).
[934] For a detailed analysis on the principle of *non-refoulement* as a norm of customary international law, see the literature cited in the Section 3.3.2. (n 628).
[935] Wallace and Quiroz (n 908) 415.
[936] Hofmann (n 472) 333.
[937] Bialczyk (n 759) 4.

To date, the OAU Convention is the only binding instrument that has enshrined voluntary repatriation. The convention explicitly codifies the notion of voluntariness as a necessary corollary to repatriation, stating that:

> [t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.[938]

Likewise, Article 12 of the 1984 Cartagena Declaration emphasise that

> the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin.[939]

Even prior to these treaties, the UNGA stated in its resolution that '[n]o refugees or displaced persons who have freely expressed their desire not to be repatriated shall be compelled to return to their country of origin'.[940]

For the purpose of this research, voluntary repatriation is a process when an individual chooses to return home 'voluntarily'. The repatriation should *only* occur because the circumstances which the refugee left have ceased to exist.[941] In other words, repatriation can never be a durable solution unless the conditions that created the conflict are resolved in the first place. Otherwise, the repatriation process may only contribute to increasing instability in regions of origin.[942] In its handbook, the UNHCR admitted that involuntary repatriation of refugees would amount to *refoulement*:

> [t]he principle of voluntariness is the cornerstone of international protection with respect to the return of refugees. While the issue of voluntary repatriation as such is not addressed in the 1951 Refugee Convention, it follows directly from the principle of *non-refoulement*: the involuntary return of refugees would in practice amount to *refoulement*. A person retaining a well-founded fear of persecution is a refugee, and cannot be compelled to repatriate.[943]

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[938] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 October 1969, entered into force 20 June 1974) 1001 UNTS 45. Art. 5(1).
[939] Cartagena Declaration. Art. 12.
[940] UNGA Res. 3/514, 'Problem of Refugees and Displaced Persons: Uruguay: Proposal' (11 May 1949) UN Doc. A/C.3/514, para. 1.
[941] See generally, UNHCR, 'Handbook Voluntary Repatriation: International Protection' (1996). Available at: <http://www.unhcr.org/publ/PUBL/3bfe68d32.pdf> accessed 20 October 2015.
[942] Bialczyk (n 759) 4.
[943] UNHCR, 'Handbook Voluntary Repatriation' (n 941) para. 2(3).

However, in 1980s, the UNHCR's approach towards repatriation changed dramatically, and such a change can be noticed in the language of ExCom conclusions.[944] For instance, in the ExCom Conclusion No.18 (XXXI), the High Commissioner '[r]ecognized that voluntary repatriation constitutes generally […] the most appropriate solution for refugees problems'.[945] Likewise, in ExCom Conclusion No. 104 (LVI), the High Commissioner notes that although 'voluntary repatriation, local integration and resettlement are the traditional durable solutions, and that all remain viable and important responses to refugee situations', he concedes that 'voluntary repatriation […] remains the most preferred solution in the majority of refugee situations'.[946]

Equally, the UNHCR's documents have repeatedly emphasised that voluntary repatriation is preferred of the three durable solutions. For instance, in 1980, in a submitted note on voluntary repatriation, the High Commissioner for Refugees stated that '[v]oluntary repatriation, whenever feasible, is of course the most desirable solution to refugee problems'.[947] In a number of its resolutions, the UNGA has also endorsed voluntary repatriation as the 'ideal solution to refugee problems'.[948]

Such an approach is reflected in a State's attitude towards voluntary repatriation. The latest UNHCR figures show that between 2002 and 2012, only 836,500 refugees were resettled while 1.1 million refugees became citizens in the country of asylum,[949] in comparison with 7.2 million refugees who repatriated.[950] The UNHCR notes that '[a]vailable data indicate that, over the past four decades, the number of refugee returns

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[944] See, for example, ExCom Conclusion No. 29 (XXXIV) 'General Conclusion on International Protection' (20 October 1983) para. (i); ExCom Conclusion No. 79 (XLVII) 'General Conclusion on International Protection' (11 October 1996) para. (q); ExCom Conclusion No. 101 (LV) 'Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees' (8 October 2004) preamble.
[945] ExCom Conclusion No. 18 (XXXI) 'Voluntary Repatriation' (16 October 1980) para. (a)
[946] ExCom Conclusion No. 104 (LVI) 'Conclusion on Local Integration' (7 October 2005) preamble (para. 1).
[947] UNHCR, 'Note on Voluntary Repatriation' (Submitted by the High Commissioner, International Protection (SCIP), EC/SCP/13, 27 August 1980) para. 1. Available at: <http://www.unhcr.org/3ae68cce8.html> accessed 20 October 2015.
[948] See, for example, UNGA Res. 50/152 (9 February 1996) UN Doc. A/RES/50/152, para. 17; UNGA Res. 51/75 (12 February 1997) UN Doc. A/RES/51/75, para. 16; UNGA Res. 52/103 (9 February 1998) UN Doc. A/RES/52/103, para. 12; UNGA Res. 53/125 (12 February 1999) UN Doc. A/Res./53/125, para. 11; UNGA Res. 54/146 (22 February 2000) UN Doc. A/Res./54/146, para. 12; UNGA Res. 55/74 (12 February 2001) UN Doc. A/Res./55/74, para. 15; UNGA Res. 56/135 (11 February 2002) UN Doc. A/Res./56/135, para. 19; and UNGA Res. 57/183 (6 February 2003) UN Doc. A/Res./57/183, para. 22.
[949] UNHCR, 'Local Integration: Accepted by a Generous Host' available at: <http://www.unhcr.org/pages/49c3646c101.html> accessed 15 October 2015
[950] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 7; and UNHCR, 'UNHCR Global Trends 2012' (Displacement: the New 21st Century Challenge, 19 June 2013) 17. See also UNHCR, 'UNHCR Global Trends 2013' (War's Human Cost, 20 June 2014) 19-21.

has always been higher than the total number of resettled refugees'.[951] Between 1995 and 20014, some 18.2 million refugees returned to their regions of origin, 10.8 million of them with the UNHCR's assistance.[952] In fact, the former UNHCR High Commissioner, Sadako Ogata, declared the 1990s the 'decade of voluntary repatriation'.[953] However, according to Long, in 1951 when the UNHCR's Statute adopted 'the voluntary repatriation of refugees, or their assimilation within new national communities', both these solutions were regarded as equally desirable and feasible solutions.[954] This is not the case anymore. The continuous emphasis of the international community on voluntary repatriation as the ideal solution for refugee problems, in Fitzpatrick's view, 'reflects an erosion of political support for the other classic durable solutions for refugees, local integration, and resettlement'.[955]

Indeed, historical analysis into the position of the UNHCR shows that its role and responsibility towards refugees has changed.[956] In particular, its mandate towards the practice of voluntary repatriation has been refined and extended; initially, the voluntary character of repatriation was the central criterion in the 1980s. However, the UNHCR has gradually moved away from the requirements to repatriation, and this can be noticed in its Handbook on Voluntary Repatriation.[957] Ultimately, the claims of the UNHCR and the interest of donor States are given primacy over that of refugees under the new concept of return in 'safety and dignity'.[958] Goodwin-Gill and McAdam note that 'the promotion of (voluntary) repatriation by governments is seen as suspect, particularly when presented in the context of "safe return", rather than on the basis of the voluntary choice of the individual'.[959]

[951] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 20.
[952] ibid 20.
[953] Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the International Management Symposium (St. Gallen, Switzerland, 25 May 1992). Available at: <http://unhcr.org/3ae68faec.html> accessed 20 October 2015.
[954] Long, 'Back to Where You Once Belonged; (n 759) 4.
[955] Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1999) 13(3) *Georgetown Immigration Law Journal* 343, 343.
[956] Lewis (n 322) 50. See also, Türk, 'The Role of UNHCR in the Development of International Refugee Law' (n 358) 153-174.
[957] UNHCR, 'Handbook Voluntary Repatriation' (n 941). For critical analysis of this Handbook, see Saul Takahashi, 'The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection' (1997) 9 IJRL 593-612.
[958] Bialczyk (n 759) 25.
[959] Goodwin-Gill and McAdam (n 111) 494.

There is a general agreement among commentators that the principle of voluntariness has been 'weakened' and 'eroded' as a result of such practice.[960] This is due to States' pressure on the UNHCR 'to initiate, maximize and accelerate refugee returns' in order to achieve results that interest its donor States.[961] Likewise, Cunliffe argues that the UNHCR prioritised the needs of donor States above those of refugees to gain the required funds for their projected needs.[962] Hathaway shares Cunliffe's view and astutely argues that:

> [r]epatriation – often not really voluntary, often not really safe, often not really warranted by international law – nonetheless delivers a solution to refugeehood. It thus serves the political and economic interests of host governments anxious to divest themselves of protective responsibilities. The rush to repatriation also serves the interests of the refugee agency itself, which is increasingly prone to trumpet its own value to powerful states not simply by reference to the quality of life it has secured for refugees, but instead by pointing to its success in bringing refugee status to an end.[963]

The UNHCR recognises that 'the issue of "voluntariness" as implying an absence of any physical, psychological, or material pressure is, however, often clouded by the fact that for many refugees a decision to return is dictated by a combination of pressures due to political factors, security problems or material needs'.[964] The UNHCR has emphasised the voluntary character of repatriation, and while practising repatriation, States must take into account the condition in the regions of origin and the situation in the host States, allowing the refugee themselves to make a free choice of whether to stay or repatriate.[965] Therefore, the UNHCR looks at the decision of the refugee as a choice between staying in the host country, or returning to their country of origin. If the refugee decides to return, free choice would be permitted that would amount to 'voluntary' repatriation. However, a problem arises when refugees are given the choice to return with the potential offer of finance and support, or the choice to stay and risk being returned involuntarily at some point in the future.[966] State practice shows that voluntary repatriation has been practised due to the political interest of donor States in

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[960] See, for example, Bialczyk (n 759) 4; Barnett (n 760) 31; and Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 63-68.
[961] See, for example, Harrell-Bond (n 759) 62; Long, 'Back to Where You Once Belonged' (n 759) 5.
[962] Cunliffe (n 755) 287-289. Loescher (n 755) 264.
[963] James Hathaway, 'Refugee Solutions, or Solutions to Refugeehood?' (2007) 24(2) *Refuge* 3, 6.
[964] UNHCR, 'UNHCR Handbook on Voluntary Repatriation: International Protection' (1996) para. 2.3. Available at: <http://www.unhcr.org/3bfe68d32.html> accessed 20 October 2015.
[965] UNHCR, 'Handbook Voluntary Repatriation' (n 941) para. 2.3.
[966] Richard Black and Saskia Gent, 'Sustainable Return in Post-conflict Contexts' (2006) 44(3) *International Migration* 15, 19.

returning refugees rather than locally integrating or resettling them; this position doubts the voluntary character of repatriation.

There is a fine line between giving consent to return and being forcefully returned; according to Long, this is the 'grey area between consent, persuasion and coercion [which] mean[s] that refugees may be potentially manipulated into return'.[967] This is exactly what happened in 2002, when the Australian government offered Afghan refugees $10,000 and the cost of travel if they agreed to return home voluntarily; however, they were given 28 days to make the decision. Otherwise, if they refused such an offer and remained they might fail to get refugee status, following which the government would forcefully deport them without the compensation.[968] Such a practice is very common among asylum countries to encourage refugees to return to their regions of origin.[969] Using the UNHCR's language, such acts by States amounts to 'material pressure' on refugees.

Equally, there are States that intentionally make the conditions in camps unbearable to pressurise the refugees to repatriate.[970] Similar actions have been taken by many other States in order to reach the same outcome. For instance, some host States act unilaterally to invoke the cessation clause of the Refugee Convention in order to end the plight of refugees.[971] In 2002, during Global Consultations on International Protection, NGOs criticised the stance taken by some States while practising voluntary repatriation. They noted that '[t]here are also many cases where host governments deliberately make conditions in the camps intolerable in order to encourage refugees to return. According

[967] Long, 'Back to Where You Once Belonged' (n 759) 4.
[968] Hathaway (n 203) 960.
[969] See, for example, Marcel van Hattem, 'Returning Home on a Paid Leave' (Denmark from Different Sights, Insight out Magazine, 18 May 2013). Available at: <http://insightoutmagazine.wordpress.com/2013/05/18/returning-home-on-a-paid-leave/> accessed 20 October 2015; and ECRE, 'Five years on Europe is Still Ignoring its Responsibilities towards Iraqi Refugees' (AD1/03/2008/ext/ADC, March 2008). Available at: <http://www.refworld.org/pdfid/47e1315c2.pdf> accessed 20 October 2015.
[970] Goodwin-Gill and McAdam (n 111) 491. For instance, In between 2002 and 2003, despite the fact that conditions in their country were unstable and not safe, the Burundian refugees were repatriating due to the Tanzanian government limiting access to food rations and restricting them of any kind of movement outside the camps. See, for example, Jesuit Refugee Service (JRS), 'Burundian Refugees Returning Home from Tanzania' (2003) 135 JRS Dispatches. Available at: <http://reliefweb.int/node/409549> accessed 20 October 2015.
[971] See, for example, Long, 'Back to Where You Once Belonged' (n 759) 1-42; UNHCR, '2012 Regional Operations Profile – Central Africa and the Great Lakes' (UNHCR 2013). Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c4d6> accessed 20 October 2015; James C. Hathaway, The Right of States to Repatriate Former Refugees' (2005) 20 *Ohio State Journal on Dispute Resolution* 175, 193-194; Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 66-67; and Crisp (n 810) 174.

to NGOs, such measures may constitute 'constructive' *refoulement*.[972] The same issue arose in *M.S. v. Belgium* case,[973] where the Belgian authorities presented an Iraqi refugee with the choice of either remaining in Belgium where no right to legally reside in the country would be granted, with no release from detention, or accepting return to Iraq, where there was a risk of persecution. The Belgian authorities claimed that by 'accepting' return to Iraq, the applicant had voluntarily returned to Iraq. However, the ECtHR disagreed with Belgium's claim and held that its reliance on the applicant's supposed consent had failed to take into account that by depriving him of his liberty, Belgium had effectively coerced him in such a way as to dissuade him, or at the very least to discourage him, from remaining in Belgium.[974] The court accordingly found Belgium guilty of constructive *refoulement* because the applicant's return to Iraq was considered a forcible one.[975]

The question arises as who decides the appropriateness and quality of choice to be given to refugees in regard to repatriation. For the repatriation to be voluntary, the refugees themselves must be the deciding factor and not the UNHCR, the countries of asylum, or the country of origin.[976] This is unless the factors mentioned in the cessation clause of the Refugee Convention exist.[977] In such circumstances, refugee status ceases to exist. Indeed, according to Articles 1(C)(4) and (5), refugee status will cease if the refugee decides to choose voluntary re-establishment in his own country, or if there is a 'fundamental change in circumstance' in the country of origin. These two paragraphs are the only circumstances that allow asylum countries to end refugee status.[978] In respect of fundamental change of circumstance, the process of return does not have to be voluntary.

However, as discussed in Chapter Six, Section 6.2.1, this study has argued that although voluntary repatriation might provide a solution for some refugees from Iraq, it is

[972] Global Consultations on International Protection; Third Track, Theme 3: The Search for Protection-Based Solutions, 'NGO Statement on Voluntary Repatriation' (22–24 May 2002) (2003) 22(2/3) RSQ 423-4, 420-428.
[973] *M.S. v. Belgium*, App no 50012/08 (ECtHR, 31 January 2012).
[974] *F.G. v. Sweden* Application no. 43611/11 (ECtHR, 10 October 2014) para. 15. Available at: <http://www.airecentre.org/data/files/F.G._v_SWEDEN_AMICUS_AIRE-ECRE-ICJ-FINAL_FILED_10_OCT_2014.pdf> accessed 24 October 2015.
[975] *M.S. v. Belgium*, App no 50012/08 (ECtHR, 31 January 2012) paras. 121-125.
[976] Arthur Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (OUP 2002) 179.
[977] Refugees Convention. Art. 1(C).
[978] ibid. Art. 1(C)(4) and (5).

incapable of constituting a solution of general applicability. This is because in respect of voluntary repatriation even if the country's security is stabilised significantly and there is a 'fundamental change in circumstance' in the country, there are groups of people such as minorities who are often reluctant to repatriate because they do not feel safe or protected, and second-generation refugees who are also reluctant because they have never been to or seen Iraq. Thus, there is a lack of desire among these groups of refugees to return. In fact, the drafters of the Refugee Convention were well aware that there are refugees who, even if the circumstances under which the individual has been recognised as a refugee have ceased to exist, might not want to return to their regions of origin. Hence, they incorporated the term 'unwillingness' in the refugee definition.[979] As Zieck notes, '[r]efugees are by definition "unrepatriable". As long as a person satisfies the definition of refugee in the contemporary instruments, he remains, moreover, "unrepatriable" and consequently benefits from the prohibition of forced return'.[980]

In a nutshell, voluntary repatriation has been explored at length in the literature and it is beyond the scope of this chapter to discuss it any further.[981] It is sufficient to note that scholars such as Hathaway and Chimni who have explored the voluntariness of repatriation are critical of the stances taken by the international community, acting through the UNHCR, to pay relatively little attention to resettlement and local integration in recent years; instead, they have preferred to pursue durable solutions that focus mainly on the repatriation of refugees to their regions of origin.[982]

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[979] Refugees Convention. Art. 1(A)(2).

[980] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff Publishers 1997) 101-102.

[981] See, for example, Long, 'Back to Where You Once Belonged' (n 759) 1-42; Bialczyk (n 759) 1-35; Chetail (n 759) 1-32; Marjoleine Zieck, 'Voluntary Repatriation: Paradigm, Pitfalls, Progress' (2004) 23 (3) RSQ 33-54; Barnett (n 760) 31-34; Zieck, *UNHCR and Voluntary Repatriation of Refugees* (n 980); Takahashi (n 957) 593-612; Daniel Warner, 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics' (1994) 7(2/3) JRS 160-174; Barry Nathan Stein, 'Policy Challenges Regarding Repatriation in the 1990s: Is 1992 the Year for Voluntary Repatriation?' (Program on International and US Refugee Policy, February 1992) 1-39. Available at: <http://repository.forcedmigration.org/pdf/?pid=fmo:826> accessed 20 October 2015; Guy S. Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (OUP 1990) 255-285; Harrell-Bond (n 759) 41-69; and Hofmann (n 472) 327-335.

[982] James Hathaway, 'Refugee Solutions, or Solutions to Refugeehood?' (2007) 24(2) *Refuge* 3-10; Hathaway (n 203) Ch 7; Hathaway, 'The Right of States to Repatriate Former Refugees' (n 971) 193-194; James C Hathaway, 'The Meaning of Repatriation' (1997) 9(4) IJRL 551-558; Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 55-73; Bhupinder Singh Chimni, *International Refugee Law: a Reader* (Sage 2000); Bhupinder Singh Chimni 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) JRS 350-374; Bhupinder Singh Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5 IJRL 442–60; and Bhupinder Singh Chimni, 'Perspectives on Voluntary Repatriation: A Critical Note' (1991) 3(3) IJRL 541-546.

This section has shown that, today, the international community, supported by the UNHCR, has overemphasised voluntary repatriation as the desirable, ideal and preferred solution for refugee problems at the expense of the other durable solutions for refugees. Such a step has impacted the voluntary character of the repatriation and even the Refugee Agency has admitted that 'a large proportion of the world's recent returnees have repatriated under some form of duress'.[983] In between 2011 and 2012, the UNHCR was concerned with the increased practice of *refoulement* among States.[984] However, voluntary repatriation, when done without the refugees' own free will, has become a form of constructive *refoulement* and a violation of the principle of *non-refoulement*; that is, it is the prohibition not to return any individuals to a territory where there are substantial grounds for believing that they would be in danger of being subjected to torture or ill-treatment.[985]

4.5 Conclusions

What has emerged from the analysis is that the future of local integration and third country resettlement is bleak and uncertain. This is because, as demonstrated in Chapter Five, the host States oppose the idea of self-sufficiency and local integration because they see refugees as a burden on their economic, social, and cultural life. Asylum countries that host a large number of refugees accuse donor States of a lack of burden and responsibility sharing by not providing additional support to ease the pressure on them.

Just like local integration, as demonstrated in Chapter Six, Section 6.2.5, resettlement faces a number of obstacles, which hinders its actual implementation and efficient delivery. The donor States, for reasons of economy, security, and culture, are unwilling to provide resettlement opportunities. In fact, today, less than one percent of refugees are resettled.[986] Unless these figures improve and resettlement opportunities increase

[983] UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (OUP 1997) 147.
[984] UNHCR, 'Note on International Protection' (4 July 2012) UN Doc. A/AC.96/1110, para. 12. Available at: <http://www.unhcr.org/refworld/pdfid/5072a4612.pdf> accessed 20 October 2015.
[985] For further analysis on this principle, see Lauterpacht and Bethlehem (n 189) 87-171.
[986] UNHCR, 'UNHCR Global Trends 2013' (n 950) 20-21. See also, UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 7.

significantly, more than half of the refugees who are need of resettlement will remain in limbo without any solution.

The lack of actual implementation and effective delivery of these two solutions is due to the UNHCR policy of promoting voluntary repatriation while relegating the other two solutions. The lack of local integration and third country resettlement leaves refugees with voluntary repatriation as the only solution, which is neither realistic nor viable for most. Even during the Global Consultations process in 2001, academics, donor States, NGOs, and the UNHCR were all in the agreement that the actual implementation and efficient delivery of these solutions was not functioning well and other measures were required to prevent the number of refugee in protracted situations from continuing to rise.

The emergent analysis in the chapter has also shown that the international community, acting through the UNHCR, practises voluntary repatriation often involuntarily to address refugee problems. The UNHCR has made extensive continuous reference to voluntary repatriation in all of its standard-settings. Likewise, States have taken a similar approach by repatriating refugees, often involuntarily, to places where there is still on-going conflict. Such a policy and practice by the international community might be contrary to the principle of *non-refoulement*.

The UNHCR has adopted several approaches and developed various methodological models to improve the prospects of durable solutions for refugees. In this chapter, some of these approaches were critically analysed. The initiatives offered ways to complement and facilitate the access of refugees to the three durable solutions. Most of the initiatives have one point in common: they have not succeeded for one reason or other. There are a number of factors that have contributed to such a failure, *inter alia*, the lack of burden and responsibility sharing among States in order to cooperate on refugee matters.

Türk notes that ‘in the interests of refugee protection globally, it is therefore essential that the UNHCR remains the vehicle for this multilateral dialogue’.[987] However, to address growing refugee problems, the UNHCR needs to review its policies and address

[987] Türk, ‘The Role of UNHCR in the Development of International Refugee Law’ (n 358) 173.

the problems that have faced the Agency. Despite the UNHCR's good efforts to implement, apply, revive, and introduce a number of initiatives, the process has been both limited in scope and inevitably time consuming. Furthermore, the Agency has failed to attract States to join the programmes and put their differences aside. For their part, States need to show international solidarity with States that host large numbers of refugees by providing, *inter alia*, resettlement opportunities and development assistance in order to cope with refugee problems. Indeed, the refugee crisis requires the need for additional and sustainable efforts from the international community to share responsibility and show international solidarity towards refugees. In the wake of the UNHCR's 2014 publication of refugee figures, the UNHCR High Commissioner conceded that the international community is incapable of resolving old conflicts or preventing new ones.[988] If such a trend continues, there will be more refugees confined in camps without a solution in sight.

[988] UNHCR, Statement by Mr. Antonio Guterres, United Nations High Commissioner for Refugees (19 June 2013). Available at: <http://www.unhcr.org/51c071816.html> accessed 20 October 2015.

Chapter 5. Local Integration as a Durable Solution for Iraqi Refugees: An Examination of the State Practice of Turkey, Jordan, and Lebanon

5.1 Introduction

Although providing international protection to refugees is the core mandate of the UNHCR,[989] this responsibility primarily lies on States. It is the task of the UNHCR to facilitate and provide assistance to States to accomplish such duties. Such a task becomes more difficult when dealing with States that have neither ratified the Refugee Convention nor incorporated any legal provisions in their domestic legalisation to regulate the status of refugees.

States such as Turkey, Jordan, and Lebanon host significantly large numbers of refugees, including Iraqi refugees. However, the Refugee Convention is not applicable in these countries to Iraqi refugees. This is because neither Jordan nor Lebanon is a party to the Refugee Convention, while Turkey maintains the geographical limitation of the Convention.[990] Prior to the adoption of the 1967 Protocol,[991] the Refugee Convention only applied to European refugees before 1951. However, the protocol removed the temporal and geographical limitation of the convention and thus gave it universal scope.[992] Despite this, as one of the four remaining States, Turkey still maintains the geographical limitation,[993] which means that it does not accept non-Europeans as refugees.

[989] UNHCR Statute, para.1. For a study of protection in the context of international refugee regime see, for example, Dallal Stevens, 'What Do We Mean by Protection?' (2013) 20(2) *International Journal on Minority and Group Rights* 233–262; Volker Türk and Frances Nicholson, 'Refugee Protection in International Law: An Overall Perspective' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 3-45; and Guy S. Goodwin-Gill, 'The Language of Protection' (1989) 1(1) IJRL 6–19.
[990] For an in-depth analysis on the development of international refugee regime see, for example, MacAlister-Smith and Alfreosson (n 498) 180-244.
[991] Protocol. Art. 1(3).
[992] Refugees Convention. Art. 1(b).
[993] The other three States are Congo, Madagascar, and Monaco. Turkey ratified the Refugee Convention on 30 March 1962. States declarations and reservations, available at: <https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&mtdsg_no=V-5&chapter=5&lang=en> accessed 17 October 2015.

In order to identify a suitable solution to address Iraqi refugees in protracted situations, this chapter examines the State Practice of Turkey, Jordan, and Lebanon in their responses to the protection of Iraqi refugees.[994] More specifically, it is the purpose of this chapter to analyse the status of Iraqi refugees and legal framework applicable to them in these countries in order to determine whether local integration is a feasible option for them in Turkey, Jordan, and Lebanon. The analysis will show that all three countries have incorporated specific provisions in the MoU, in the case of Jordan and Lebanon, or in their domestic legislations, in the case of Turkey, objecting to the idea of local integration for Iraqi refugees. This will further reinforce the argument made in Chapter Six that resettlement is the optimal solution for Iraqi refugees.

The State practice of Turkey, Jordan, and Lebanon is examined in this chapter because they host the great majority of Iraqi refugees due to their geographical location. Iraqis originally crossed into these countries in the 1980s, fleeing authoritarian regimes and conflict, including the Iran-Iraq War, while others followed during the 1991 Gulf War and the 2003 US-led invasion of Iraq. Therefore, the analysis will show that in the past 30 years at various junctures Turkey, Jordan, and Lebanon have become a place of sanctuary for Iraqi refugees. This is in part due to the conflict, persecution or post-conflict situations in the country.[995] In fact, the latest UNHCR figures show that Iraqi refugees are one of the three groups of refugees to have consistently been included among the top 20 source countries of refugees since 1980.[996] An even more important issue is that this will remain the case in the future because, for example, Iraqi refugees as a population group will continue to seek protection in these countries regardless of the cause of their flight.

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[994] It is important to note here that at the inception of this research, it was planned to include Iraqi refugees in Syria into such analysis. However, since then, significant changes have occurred in the displacement procedure. In 2011, there were an estimated one million Iraqi refugees in Syria. However, today, there is an estimated hundred and fifty thousand Iraqi refugees in Syria and, more importantly, there are more than two hundred and twenty thousand Syrian refugees in Iraq. Since 2012, the number of Iraqi refugees has continuously been revised by the Syrian government from one million to 146,200. This is based on the assumption that Iraqi refugees have either returned or moved elsewhere due to the continued conflict and deteriorating situation in the country. These figures show not only that the number of Iraqi refugees in Syria have significantly decreased but also that there has been a clear role reversal as Iraq has now become a destination for Syrian refugees. See, for example, UNHCR, 'UNHCR Mid-Year Trends 2014' (7 January 2015) 4; UNHCR, 'UNHCR Global Trends 2013' (n 950) 11, 15-16, and 24; UNHCR, 'UNHCR Global Trends 2012' (n 950) 13, and 18-19; UNHCR, 2015 UNHCR Country Operations Profile - Syrian Arab Republic' available at: <http://www.unhcr.org/pages/49e486a76.html> accessed 17 October 2015; UNHCR, '2015 UNHCR Country Operations Profile – Iraq' available at: <http://www.unhcr.org/pages/49e486426.html> accessed 17 October 2015.

[995] See, for example, UNHCR, 'Total Refugee Population by Country of Asylum' (n 28).

[996] The other two are Afghanistan, and Viet Nam. UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.

Although these countries have been generous in their admission policies, the protection of refugees in these countries appears to be under threat, as there are many gaps and inconsistencies in their policy and/or practice. This chapter examines the specific measures taken by Turkey, Jordan, and Lebanon to address Iraqi refugee displacement. The analysis will show that these countries are unable to offer the rights enshrined in the Refugee Convention and the required international protection.

This chapter examines the law, practice and policy of Turkey, Jordan, and Lebanon in their response to the protection of Iraqi refugees. To consider this examination, the chapter is divided into three parts; each part focuses on the law, policy and practice of each country in turn. Each part is further divided into two sections: it first reviews the historical displacement of Iraqi refugees in each country and then concludes by identifying the emerging issues from the different practices, and then highlights converging and diverging trends in their response to protect Iraqi refugees.

5.2 The Law and Policy of Turkey towards Iraqi Refugees

The legal framework applicable to Iraqi refugees in Turkey is the new Law on Foreigners and International Protection.[997] In 2014, this law was adopted as the main source of regulation of non-European refugees in Turkey. This section reviews the provisions of the new law to identify how far its provisions reflect international law and standards. The Refugee Convention is not applicable to Iraqi refugees in Turkey, as mentioned in Section 5.1, because Turkey has opted to maintain the geographical limitation of the Refugee Convention. This means that Turkey as a matter of international law is not obliged to recognise Iraqis as refugees. However, Turkey is party to the Convention Against Torture,[998] ICCPR,[999] and the ECHR,[1000] and these conventions impose obligations on Turkey towards persons within its jurisdiction, irrespective of their country of origin.

[997] Law on Foreigners and International Protection (Adopted 4 April 2013) Law No. 6458, Official Gazette No: 28615.
[998] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[999] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[1000] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5.

For Iraqi refugees in Turkey, they are provided with international protection via international human rights instruments such as the ICCPR and its HRC General Comments, the Convention against Torture and its CAT Reports, and regional human rights instruments, such as the ECHR and its ECtHR judgments. However, it should be noted that among the three selected destination countries, Turkey is the only country that has made the declaration under Article 22 of the Convention Against Torture[1001] and Article 41 of the ICCPR to recognise the jurisdiction of the CAT and HRC to hear individual communications.[1002]

The said international and regional treaties and enforcement mechanisms have been instrumental in protecting the rights of Iraqi refugees in Turkey. If a right enshrined in these instruments is not matched by corresponding obligations that Turkey has under the said conventions, Iraqi refugees are able to bring a claim before the said enforcement mechanisms. Zieck notes that:

> the situation of non-European refugees in Turkey differs fundamentally from that of European refugees. Whilst the qualification of the status and plight of the latter is characterised by (structural) non-observance of treaty obligations that Turkey incurred with respect to European refugees, the status and entitlements, if any, of non-European refugees are contingent upon an entirely different form of understanding, which, moreover, appears to be tenuous.[1003]

Although in Turkey the legal framework applicable to European refugees differs from those applicable to non-European refugees, there are various international human rights mechanisms, including those mentioned above, that protect their rights. This is because the provisions of the said international and regional instrument are applicable to everyone in their territory, regardless of their nationality.

[1001] Turkey has recognised the competence of the Committee to receive individual complaints on 2 August 1988. Available at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN > accessed 17 October 2015.

[1002] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171. Turkey has ratified this Optional Protocol 24 November 2006. Available at: <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=TUR&Lang=EN > accessed 17 October 2015.

[1003] Marjoleine Zieck, 'UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks' (2010) 22(4) IJRL 593, 594.

In 2013, Turkey adopted a new law, the Law on Foreigners and International Protection,[1004] which came into force in April 2014 to bring its legislation in the field of international refugee law in line with EU and international standards.[1005] Commentators, such as Soykan have analysed the law. In her view, the attempt to adopt such a law constitutes one of the first main steps towards the accomplishment of Turkey's goal of gaining accession to the EU. However, she notes that 'a closer analysis reveals that […] the law could effectively re-instate the elements of the current asylum system under a new guise'.[1006] Indeed, although the new law brings a significant number of improvements, in particular in its treatment of non-European refugees, in principle one has to agree with Soykan that the law simply reinstates and reiterates the law of 1994 Regulation on Asylum in Turkey.[1007]

Like the 1994 Regulation,[1008] in the new law, the status of non-European refugees is determined by the UNHCR pending durable solutions.[1009] However, the new law gives the Directorate General of Migration Management the 'sole institution responsible for asylum matters'.[1010] This means that the UNHCR's responsibility has been further restricted by the new law. In its guidelines, the Turkish government unequivocally notes that:

> [f]irst you should apply to the Turkish authorities. You cannot have access to asylum procedure in Turkey only by applying to the United Nations High Commissioner for Refugees. Therefore you should apply to the United Nations High Commissioner for Refugees after having applied to Turkish Government authorities.[1011]

[1004] Law on Foreigners and International Protection (n 997).
[1005] European Commission, *Communication from the Commission to the European Parliament and the Council, Commission Staff Working Document: Turkey 2014 Progress Report: Enlargement Strategy and Main Challenges 2014-2015*, COM(2014) 700 final, 8 October 2014, 64.
[1006] Cavidan Soykan, 'The New Draft Law on Foreigners and International Protection in Turkey' (2012) 2(2) *Oxford Monitor of Forced Migration* 38. See also, Kemal Kirişçi, 'Turkey's New Draft Law on Asylum: What to Make of It?' in Seçil Paçacı Elitok and Thomas Straubhaar (eds), *Turkey, Migration and the EU: Potentials, Challenges and Opportunities* (Hamburg University Press 2012) 63-83.
[1007] Regulation on Procedures and Principles related to Mass Influx and Foreigners arriving in Turkey either as individuals or in Groups wishing to seek Asylum either from Turkey or requesting Residence Permits with the Intention of seeking Asylum from a Third Country (adopted 30 November 1994) Decision No 94/6169, the Official Gazette No. 22127. For critical analysis of this Regulation in the literature see, for example, Kemal Kirisci, 'Is Turkey Lifting the "Geographical Limitation"? – The November 1994 Regulation on Asylum in Turkey' (1996) 8(3) IJRL 293-318.
[1008] ibid. Art. 6.
[1009] Law on Foreigners and International Protection (n 997) Art. 62.
[1010] UNHCR, '2015 UNHCR Country Operations Profile – Turkey' available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48e0fa7f&submit=GO> accessed 17 October 2015.
[1011] Turkish General Directorate of Security, 'Basic Information for the Asylum Seekers in Turkey' available at: <http://info.unhcr.org.tr/leaflets/MOI/MOI_English.pdf> accessed 17 October 2015.

This guideline makes clear to asylum seekers who decides their asylum application in Turkey. Although the new asylum law has been praised within the literature[1012] and by the UNHCR[1013] for its 'comprehensive framework for protecting and assisting all asylum seekers and refugees, regardless of their country of origin, in line with international standards',[1014] the law has incorporated a number of provisions, which has drawn strong criticism.[1015] In particular, the lack of incorporation of provision to remove the geographical limitation of the Refugee Convention. According to the ICMC, this means that a 'lack of legal recognition of non-European refugees and their exclusion from mainstream legal processes' continues in new asylum law in Turkey.[1016] Likewise, in its final observations to Turkey's third periodic report, the CAT expressed concern that 'the draft asylum law retains the geographical limitation to the Convention relating to the Status of Refugees, which excludes non-European asylum-seekers from protection under the Convention'.[1017] The committee therefore recommended that the State party should '[c]onsider lifting the geographical limitation to the Convention relating to the Status of Refugees by withdrawing its reservation to the Convention'.[1018]

For non-European refugees, such as Iraqis, the law refers to them as 'conditional refugees'.[1019] The law explicitly states that resettlement is the only available durable solution for Iraqi refugees in Turkey and it is the responsibility of the UNHCR to refer the recognised refugee to a third country.[1020] According to Article 62 of the Law on

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[1012] For the analysis of this new law in the literature see, for example, Rebecca Kilberg, 'Turkey's Evolving Migration Identity' (Migration Policy Institute, 24 July 2014). Available at: <http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity> accessed 17 October 2015; Meral Açıkgöz and Hakkı Onur Ariner, 'Turkey's New Law on Foreigners and International Protection: An introduction' (2014) Turkish Migration Studies Group at Oxford, Centre on Migration, Policy and Society Briefing Paper 2, <https://www.compas.ox.ac.uk/fileadmin/files/Publications/Briefings/TurkMiS/Brief_2_Ariner_Acikgoz_2014.pdf> accessed 17 October 2015; Esra Dardağan Kibar, 'An Overview and Discussion of the New Turkish Law on Foreigners and International Protection' (2013) XVIII (3) *Perceptions* 109-128; Soykan (n 1006) 38-47; and Kirişçi (n 1006) 63-83.

[1013] UNHCR, 'UNHCR Welcomes Turkey's New Law on Asylum' (Briefing Notes, 12 April 2013). Available at: <http://www.unhcr.org/5167e7d09.html> accessed 17 October 2015.

[1014] UNHCR, '2015 UNHCR Country Operations Profile – Turkey' (n 1010).

[1015] See, for example, Soykan (n 1006) 38-47. See also, Mariette Grange and Michael Flynn, 'Immigration Detention in Turkey' (The Global Detention Project April 2014). Available at: <http://www.globaldetentionproject.org/fileadmin/docs/Turkey_report.pdf> accessed 17 October 2015.

[1016] The ICMC, 'Welcome to Europe! A Comprehensive Guide to Resettlement' (July 2013) 65. Available at: <http://www.resettlement.eu/sites/icmc.tttp.eu/files/ICMC%20Europe-Welcome%20to%20Europe_0.pdf> accessed 17 October 2015.

[1017] CAT, Concluding Observations on the Third Periodic Report of Turkey, UN Doc. CAT/C/TUR/CO/3, 20 January 2011, para. 15.

[1018] ibid.

[1019] Law on Foreigners and International Protection (n 997). Art. 62.

[1020] ibid.

Foreigners and International Protection, non-European refugees in Turkey are only allowed to remain temporarily until they are resettled. Article 42(2) states that conditional refugees are not entitled to the right of transfer to a long-term residence permit. Instead, Article 83(2) states that those granted conditional refugee status will be provided with an identity document valid for one year.[1021] Such provisions mean that local integration is not available for Iraqi refugees since the country does not allow non-European refugees to stay and integrate into society.

As noted, although Turkey's new law continues to provide international protection to non-European refugees, it only grants them temporary stay until they are resettled to a third country.[1022] Even then, non-European refugees are only allowed to reside in Turkey temporarily if they register their claims 'within a reasonable period of time'.[1023] Otherwise, even temporary protection is not provided merely on procedural grounds. Another requirement for temporary protection is finding or receiving resettlement assistance. However, the lack of efficient or non-delivery of resettlement within a 'reasonable period of time' would leave refugees in a vulnerable position for deportation and they may lose protection against *refoulement*. This practice, in Zieck's view, 'falls far short of consenting to a customary norm of *non-refoulement* with a universal scope'.[1024]

In sum, the analysis of the law, practice, and policy of Turkey in this section has shown that Turkey objects to the idea of local integration and permanent residence of Iraqi refugees in its territories. In fact, based on the provisions of the new law, once granted RSD, Iraqi refugees are only allowed to reside in Turkey temporarily until they are resettled to a third country. The analysis of the provisions of the new law show that there is no evidence that such a pattern is going to change. This is because, despite having a more sophisticated mechanism and advanced legal framework than Jordan and Lebanon, Turkey has through its new Law framed that Iraqi refugees do not have the possibility of local integration in Turkey.

[1021] ibid. Art. 83(2).
[1022] ibid. Art. 62.
[1023] Ibid. Art. 65(4).
[1024] Zieck, 'UNHCR and Turkey, and Beyond' (n 1003) 616-617.

5.2.1 A Review of the Historical Displacement of Iraqi Refugees to Turkey

In 2014, Turkey has witnessed an unprecedented increase in asylum applications from Iraqis: some 103,000 Iraqi refugees have registered with the UNHCR.[1025] The Refugee Agency states that this figure excludes many thousands of Iraqis in the eastern part of Turkey who have yet to come forward for registration.[1026] These figures are significantly more than those reported by the UNHCR in recent years. During 2013, 25,300 Iraqis lodged asylum applications in Turkey, and this figure was almost quadrupled in comparison with 2012, when it was only 6,900. Overall, in 2013, the UNHCR registered 44,800 asylum applications, the highest figure on record. Such figures made Turkey the seventh largest recipient of asylum applications in the world.[1027] Of this figure, 56% of all asylum claims were lodged by Iraqi asylum seekers.[1028] These figures add to the already thousands of refugees who are in protracted situations in the country.[1029]

Today, Iraqi refugees are one of the largest refugee groups in Turkey.[1030] Many of them crossed into Turkey in the 1980s, fleeing authoritarian regimes and conflict, including the Iran-Iraq War, the 1991 Gulf War, and, to a lesser extent, the 2003 US-led invasion of Iraq. Turkey has seen several major inflows of Iraqi refugees during almost every major conflict in which the country was involved due to its geographical location as a neighbouring country. The displacement of Iraqi refugees in Turkey has generated millions of refugees. More significantly, this scale is set to continue with the latest refugee crisis in the country, discussed in this section below.

The large displacement of Iraqi refugees resulting from the Iran-Iraq War between 1980 and 1988 was the first major inflow of Iraqi refugees to Turkey. The Iraqi government accused Kurds and Shias of siding with the 'enemy', the Iranian government.[1031] The

[1025] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey'(n 26); UNHCR, 'UNHCR Asylum Trends, First Half 2014: Levels and Trends in Industrialized Countries' (9 October 2014) 3, 15; and UNHCR, '2015 UNHCR Country Operations Profile – Turkey' (n 1010).
[1026] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26); and UNHCR, 'UNHCR Asylum Trends, First Half 2014' (n 1025) 3, 15.
[1027] UNHCR, 'UNHCR Global Trends 2013' (n 950) 14.
[1028] UNHCR, 'UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries' (21 March 2014) 11.
[1029] For further analysis on displacement of Iraqi refugees in Turkey see, for example, Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (n 980) 184-194.
[1030] UNHCR, '2015 UNHCR Country Operations Profile – Turkey' (n 1010).
[1031] For a detailed account of the Iraqi refugee crisis, see M. R. Alborzi, *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (Martinus Nijhoff Publishers 2006) 26-48.

fear of chemical weapons being employed by the government led to hundreds of thousands of Kurds and Shias fleeing to Turkey.[1032] As a result, the UNHCR assisted 50,000 mainly Kurds in Turkey. Since they are not recognised as refugees, Iraqis were given temporary sanctuary pending repatriation or resettlement in third countries.[1033]

During the first Gulf War in 1991, [1034] Turkey experienced the second major inflow of refugees from Iraq, when respectively half a million sought asylum.[1035] The aftermath of the failed March 1991 uprising by the Kurds and Shias against the government resulted in a large displacement of Iraqi refugees, mostly Kurds, fleeing to Turkey.[1036] Turkey refused entry and the Iraqis were held in the mountainous border area during winter, which resulted in thousands of deaths.[1037] Turkey was accused of violating the fundamental international refugee law principle of *non-refoulement*.[1038]

The UNHCR estimated that the Gulf War caused over two million Iraqis to flee and seek asylum throughout the world.[1039] The travesty of the situation prompted the UNHCR High Commissioner for Refugees to describe it as 'a human tragedy […] unfolding right in front of my eyes'.[1040] The UNSC passed resolution 688, [1041] which,

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[1032] Iran was another country that experienced the large exodus of Iraqi refugees. UNHCR, 'Report of the United Nations High Commissioner for Refugees General Assembly' (1 September 1989) UN Doc. A/44/12, para. 179. Available at: <http://www.unhcr.org/3ae68c9a0.html> accessed 17 October 2015.
[1033] ibid, para. 158.
[1034] For a detailed account of the war, see HRW, 'Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War' (A Middle East Watch Report 1991). Available at: <http://www.hrw.org/reports/pdfs/u/us/us.91o/us910full.pdf> accessed 17 October 2015.
[1035] UNHCR, 'Chronology: 1991 Gulf War Crisis' (Crisis in Iraq, 20 March 2003). Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3e798c2d4&query=IRAQ%20war> accessed 17 October 2015.
[1036] An estimated one million Shias fled to Iran. Unlike Turkey, Iran opened its borders for most refugees. See, for example, ibid.
[1037] ibid; HRW, 'Iraqi Refugees, Asylum Seekers, and Displaced Persons: Current Conditions and Concerns in the Event of War' (HRW Briefing Paper, February 2003) 9-10; and Minorities at Risk Project, 'Chronology for Kurds in Iraq' (2004). Available at: <http://www.refworld.org/docid/469f38a6c.html> accessed 17 October 2015.
[1038] For further analysis of the displacement of Iraqi refugees in 1991 and the treatment of Turkey, see Zieck, 'UNHCR and Turkey, and Beyond' (n 1003) 595; Katy Long, 'No entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (PDES/2010/07, June 2010) 17-23; Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (n 980) 171-259; and HRW, 'Whatever Happened to the Iraqi Kurds?' (11 March 1991). Available at: <http://www.hrw.org/legacy/reports/1991/IRAQ913.htm> accessed 17 October 2015.
[1039] UNHCR Resettlement Handbook (n 851) 50. See also Amnesty International, 'The Middle East: Fear, Flight and Forcible Exile' (MDE/01/01/97, 3 September 1997). Available at: <http://www.amnesty.org/fr/library/asset/MDE01/001/1997/fr/17e5591e-eaa6-11dd-9f63-e5716d3a1485/mde010011997en.pdf> accessed 17 October 2015.
[1040] UNHCR, Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Donor Information Meeting, (Geneva, 15 May 1991). Available at: <http://www.amnesty.org/fr/library/asset/MDE01/001/1997/fr/1f3991af-eaa6-11dd-9f63-e5716d3a1485/mde010011997en.html> accessed 17 October 2015.
[1041] UNSC Res 5, (5 April 1991) UN Doc. S/RES/688, para. 5.

inter alia, asked the UNHCR to 'address urgently the critical needs of the refugees and displaced Iraqi population'.[1042] The displacement of Iraqi refugees to Turkey in 1991 has been addressed at length by Zieck. Her work focuses on the practice of voluntary repatriation by the UNHCR, and she critically examines its role and the stance adopted by the Turkish government to address the inflow of Iraqi refugees. In her view, Turkey and resettlement countries pressurised the UNHCR to pursue voluntary repatriation for Iraqi refugees as the only available solution.[1043]

In 2003, to avoid another major inflow of Iraqi refugees, in the wake of the US-led invasion of Iraq, Turkey insisted that it would not allow another major influx of Iraqi refugees to enter its territory.[1044] As noted by Aydiner, the Regional Governor in south eastern Turkey, 'in case of a massive influx, it would be necessary to take measures to keep [Iraqi refugees] away from our border, [w]e have our own experience from 1991 in mind. We naturally do not want it to be repeated'.[1045] Despite adopting such a rigid stance towards Iraqi refugees, Turkey has continuously experienced their arrival. In fact, between 1995 and 2009, nearly 70,000 asylum applications were lodged in Turkey, with 40% of the applicants from Iraq.[1046] In addition, the Turkish Directorate of General Security reported that between 2000 and 2010, Iraqis were the highest irregular migrants in Turkey, amounting to 93,862 persons.[1047]

In 2011, after the deteriorating security situation in Syria, a large number of Iraqi refugees who were displaced in Syria moved for secondary displacement to Turkey to seek international protection.[1048] One might add to these various phases of

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[1042] UNHCR, 'Chronology: 1991 Gulf War Crisis' (n 1035). See also, Minorities at Risk Project, 'Chronology for Kurds in Iraq' (2004). Available at: <http://www.refworld.org/docid/469f38a6c.html> accessed 17 October 2015.
[1043] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (n 980) 12-13, 171-259.
[1044] HRW, 'Iraqi Refugees, Asylum Seekers, and Displaced Persons: Current Conditions and Concerns in the Event of War' (A HRW Briefing Paper, February 2003) 14. See also the ICMC (n 1016) 65.
[1045] Statement by Mr. Gokhan Aydiner, the Regional Governor in south eastern Turkey. Cited in Dexter Filkins, 'Turkey Planning Mission to Head off Iraq Refugees' *New York Times* (New York, 24 November 2002) <http://articles.chicagotribune.com/2002-11-24/news/0211240488_1_iraqi-kurds-kurdish-turkish-officials> accessed 17 October 2015.
[1046] Ahmet İçduygu and Damla B. Aksel, 'Irregular Migration in Turkey' (The International Organization for Migration in Turkey, September 2012) 27. Available at: <http://www.turkey.iom.int/documents/IrregularMigration/IOM_Report_11022013.pdf> accessed 17 October 2015. These figures are also mentioned in the European Commission annual progress reports of Turkey. European Commission, 'Strategy and Progress Reports' available at: <http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm> accessed 17 October 2015.
[1047] Cited in İçduygu and Aksel (n 1046) 23.
[1048] The ICMC (n 1016).

displacement, with the latest displacement crisis resulting from the Islamic State of Iraq and Syria (ISIS) takeover of the three major cities of the country.[1049] As the figures given above in this section show, Turkey has once again become the number one destination country for Iraqi asylum seekers.[1050] This latest crisis proves the ongoing history of displacement from Iraq. It also shows that yet again Iraqi refugees are moving towards more protracted situations. The ongoing displacement from Iraq means that the conditions in the country do not make it feasible for Iraqis to return.[1051]

To summarise, this section has shown that in the past 30 years at various junctures Turkey has become a place of sanctuary for Iraqi refugees. An even more important issue is that this will remain the case in the future because, for example, Iraqi refugees as a population group will continue to seek protection in Turkey regardless of the cause of their flight. It was also noted by Zieck that '[T]urkey is and will remain a frontline state owing to its geographical location. Whether it likes it or not, all those who present themselves at the border […] are entitled to protection against treatment or punishment as defined in Article 3 ECHR'.[1052] Indeed, due to its geographical location, there has been a systematic pattern of flight to Turkey and the recent development of large displacement of Iraqi refugees is further proof of this.[1053]

5.2.2 Conclusion

Although Turkey adopted a new law to enhance and improve the regulation of refugee law, the law was subjected to heavy criticism by international human rights mechanisms and observers for retaining the geographical limitation of the Refugee Convention, which means that Turkey's obligations under the Refugee Convention are still only confined to European refugees. This has allowed Turkey to develop a national legal framework whereby Iraqi refugees are 'conditional refugees'. Accordingly, Turkey only grants them temporary protection until they are resettled to a third country.

[1049] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1050] UNHCR, 'UNHCR Asylum Trends, First Half 2014' (n 1025) 3, 15.
[1051] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1052] Zieck, 'UNHCR and Turkey, and Beyond' (n 1003) 617. See also, Sarah Bidinger and others, 'Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing' (Boston University) 111. Available at: <http://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf> accessed 13 January 2015.
[1053] See, for example, UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).

This means that in respect of the three durable solutions, in Turkey local integration is non-existent. The new law explicitly states that non-European refugees who satisfy RSD procedure are provided temporary stay until they are resettled to a third country. For those who do not satisfy the RSD procedure and a resettlement country cannot be found, deportation awaits. The non-availability of voluntary repatriation to Iraq, and the lack of the possibility of local integration in Turkey, further reinforces the argument made in Chapter Six that resettlement is the optimal solution for Iraqi refugees.

5.3 The Law and Policy of Jordan towards Iraqi Refugees

Despite hosting a large number of refugees in its territory, Jordan does not possess any domestic legal framework that regulates refugee law. In addition, as mentioned, Jordan is not a party to the Refugee Convention or its Protocol. In its observations to Jordan's last Regular Report, the CAT regrets the absence of domestic legislation in Jordan. The committee therefore recommended that the State party should formulate and adopt domestic legislation guaranteeing the rights of refugees and asylum-seekers in its territory.[1054]

In the absence of any specific legislation, the 1973 Law on the Residence and Foreigners' Affairs remains applicable to asylum-seekers and refugees.[1055] In addition, the Jordanian Constitution has incorporated a single provision explicitly prohibiting the extradition of a person to another State on account of their beliefs or in defence of liberty.[1056] The extradition of political refugees is available only in exceptional situations and it is not an option available for most refugees.[1057] Both these laws, in Smadi's view, are of a general nature and fail to consider the particulars of the foreigner as a refugee.[1058] According to Stevens, the law on the Residence and Foreigners' Affairs is 'the closest the national law comes to recognition of the concept of asylum or refugee status […] which controls the entry and stay of non-nationals in Jordan'.[1059] However,

[1054] CAT, Concluding Observations of the Committee against Torture: Jordan, UN Doc. CAT/C/JOR/CO/2, 25 October 2010, para. 23.
[1055] Jordan: Law No. 24 of 1973 on Residence and Foreigners' Affairs (adopted 1 January 1973). Available at: <http://www.refworld.org/docid/3ae6b4ed4c.html> accessed 17 October 2015.
[1056] Constitution of the Hashemite Kingdom of Jordan (adopted 1 January 1952) JOR-010. Art. 21. Available at: <http://www.refworld.org/docid/3ae6b53310.html> accessed 17 October 2015.
[1057] Khair Smadi, 'Towards Adopting a Legal System for Asylum in Jordan' (January 2011) 11 *Fahamu Refugee Legal Aid Newsletter* 11: <http://www.pambazuka.org/images/articles/510/FRLANJanuary2011.pdf> accessed 17 October 2015.
[1058] ibid.
[1059] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 7.

this Law only enshrines provisions in respect of entrance and the departure of foreigners to and from Jordan[1060] and does not define the term refugee.[1061] Stevens notes that although there is a tendency among Middle Eastern countries, including Jordan, to rely on immigration laws to monitor the entry and exit of all, and to include reference to refugees within such legislation, in reality little reference is made in the Residence and Foreigners' Affairs in relation to asylum. Instead, those seeking asylum in Jordan are admitted, usually temporarily.[1062]

Jordan does not consider Iraqis as refugees, but rather treats them as guests.[1063] However, not being considered a refugee has subsequently resulted in a lack of access to employment or long-term settlement, and being at risk of deportation after the expiration of visas.[1064] Labelling Iraqis as guests rather than refugees,[1065] in the UNHCR's view, although it ensures that they are secure and respected, fails to provide them with a clear legal status.[1066] The lack of legal status, in the UNHCR's view, 'remains the main protection challenge and inhibits the ability of asylum-seekers and refugees to work legally'.[1067] Therefore, in its submission to the UPR, the UNHCR recommended that the Government of Jordan accede to the Refugee Convention and its Protocol, and adopt a refugee law and establish a national asylum system. The UNHCR notes that adopting such measures would provide a clearer basis for Jordan to provide refugees with international protection and formally recognise Jordan's international solidarity towards refugees, in particular by finding durable solutions for refugee problems. Adopting such measures will also allow Jordan to deal with issues related to

[1060] Jordan: Law No. 24 of 1973 on Residence and Foreigners' Affairs (adopted 1 January 1973) Arts. 4, 5 and 6. Available at: <http://www.refworld.org/docid/3ae6b4ed4c.html> accessed 17 October 2015.
[1061] For further analysis on the provisions of this law see, for example, Oroub El-Abed, 'Illegal Residents in Jordan: Stateless Persons, Illegal Migrants and Refugees' (Statelessness and Nationality Discrimination in the Middle East and North Africa, Open Society Foundation Funded, 2012) 9-10. Available at: <file://tower6/home33/b1027711/Downloads/OSI_report-libre.pdf> accessed 17 October 2015.
[1062] Stevens, 'Shifting Conceptions of Refugee Identity and Protection' (n 595) 83.
[1063] UNHCR, 'UNHCR Global Appeal 2012-2013 – Jordan' available at: <http://www.unhcr.org/4ec231020.pdf> accessed 17 October 2015.
[1064] The ICMC (n 1016).
[1065] For an in-depth analysis on the legal status, labelling and protection of Iraqi refugees in Jordan see, for example, Stevens, 'Legal Status, Labelling, and Protection' (n 419) 1-38.
[1066] UNHCR, 'UNHCR Global Appeal 2012-2013 – Jordan' available at: <http://www.unhcr.org/4ec231020.pdf> accessed 17 October 2015.
[1067] OHCHR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Jordan' (17th UPR Session, 21 October-1 November 2013) 2. Available at: <http://www.refworld.org/pdfid/513d90172.pdf > accessed 17 October 2015.

asylum in a structured manner, hence complementing its obligations under international human rights instruments, as well as provisions in its constitution. [1068]

In 1998, to address Iraqi refugees and their protection needs, Jordan signed the MoU with the UNHCR,[1069] in which it recognised the major principles of international protection, including the definition of a refugee.[1070] The MoU codified a division of responsibilities between the UNHCR and Jordan for refugee protection. Kagan refers to the MoU as a 'shadow legal regime' because it is an alternative legal instrument for regulating the status of refugees in the country.[1071] In other words, the MoU has been used as a substitute for the Refugee Convention and domestic legislation to grant temporary asylum in the wake of rising refugee problems in Jordan. The UNHCR notes that due to the absence of international and national legal refugee instruments, the MoU establishes the parameters for cooperation between the UNHCR and Jordan on the issue of refugees and asylum seekers.[1072]

The UNHCR, as a Refugee Agency, has the prime responsibility for the protection of Iraqi refugees in Jordan. Although its role is not defined clearly in the MoU, in Barnes's view, the UNHCR's role in Jordan in respect of Iraqi refugees focuses on capacity-building activities. This includes advocating with the authorities to accede to the Refugee Convention and its Protocol, and their implementation at the national level. It also involves introducing and promoting national legislation regarding the treatment of refugees and creating a public awareness of refugee-related issues in the country.[1073]

The provisions of the memorandum almost replicate the provisions enshrined in the Refugee Convention and are more advanced in comparison with the provisions of the MoU signed between Lebanon and the UNHCR, discussed in Section 5.4. According to the MoU, asylum seekers may stay in Jordan pending RSD, which is the responsibility of the UNHCR to determine.[1074] Jordan refrains from forcibly returning Iraqi refugees

[1068] ibid 5.
[1069] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998). Available at: <http://www.carim.org/public/legaltexts/LE2JOR002_AREN.pdf> accessed 17 October 2015.
[1070] ibid. Art. 1.
[1071] Kagan (n 58) 16.
[1072] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 17 October 2015.
[1073] Barnes (n 612) 28-29.
[1074] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998) Art. 3.

and complies with the principle of *non-refoulement*,[1075] under the condition that those who are recognised as refugees be resettled in a third country. Therefore, the MoU describes the presence of refugees in Jordan as a 'sojourn' and imposes a strict time limit of six months for refugees to remain in the country.[1076] In other words, the MoU specifies that a durable solution (primarily resettlement in third countries) must be found for recognised refugees after a maximum stay of six months in Jordan.

In its recent submission to the UPR, the UNHCR noted that although 'the MOU outlines the major principles of international protection, [the provisions of] the MOU is outdated and no longer adapted to respond to current protection challenges'.[1077] Therefore, the UNHCR has recommended that the government of Jordan make amendments to bring the provisions of the MoU in line with the international human rights standard. In 2014, the government agreed to make partial amendment to two provisions of the MoU. Firstly, the government agreed to extend the validity of the UNHCR's refugee identification card from six months to one year and the UNHCR was given 90 days instead of 21-30 days to examine asylum applications.[1078] These two changes provide the UNHCR with more time to deal with the large number of refugees.[1079]

Despite signing the MoU with the UNHCR to regulate the refugee matters in the country, Iraqi refugees in Jordan are treated as guests and irregular migrants with the minimum protection, for whom the only durable solutions are voluntary repatriation to their home country or resettlement to a third country. Although recognised refugees in Jordan are issued with a UNHCR asylum seeker certificate valid for six months, in Hart and Kvittingen's view, such status 'does not bring with it any additional privileges in

[1075] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998) Art. 2(1). For a detailed discussion on the Memorandum of Understanding, see Mohamed Y. Olwan, 'Iraqi Refugees in Jordan: Legal Perspective' (CARIM Analytic and Synthetic Notes 2009/22: Legal Module, 2009) 1-11.
[1076] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998) Art. 5.
[1077] OHCHR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Jordan' (17th UPR Session, 21 October-1 November 2013) 1. Available at: <http://www.refworld.org/pdfid/513d90172.pdf > accessed 17 October 2015.
[1078] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998) Arts. 3 and 5.
[1079] Khetam Malkawi, 'Gov't, UNHCR Sign Amendments to Cooperation Memo' *the Jordan Times* (Amman, 31 March 2014). Available at: <http://jordantimes.com/govt-unhcr-sign-amendments-to-cooperation-memo> accessed 17 October 2015.

terms of access to employment or public services'.[1080] In addition, the holders of the certificate are not entitled to long-term settlement in the country.[1081]

Today, 25 years after the 1991 Gulf War and 12 years after 2003 US-led invasion of Iraq, the UNHCR notes that resettlement to third countries is the only possible solution for Iraqi refugees in Jordan,[1082] as the conditions in Iraq do not allow for voluntary repatriation,[1083] nor are there local integration possibilities. Despite adopting generous admission policies and allowing Iraqi refugees a prolonged stay until a solution is found by the UNHCR, Jordan has made it explicitly clear that long-term integration or assimilation is not a viable option for Iraqi refugees in its territory.

As is the case with Turkey, local integration in Jordan is not a solution for Iraqi refugees in the country because the MoU signed between Jordan and the UNHCR contains explicit statements that Jordan is only a transit country and describes the presence of refugees as a 'sojourn'.[1084] As noted by a Jordanian official, 'the solution is in Iraq. We refuse to accept that the solution will be outside Iraq. Everything we do towards Iraqis is temporary, simply to make their lives easier. We cannot make it [Jordan] a natural place to stay'.[1085] In her Mission to Jordan, the Special Rapporteur on Violence against Women, Rashida Manjoo, noted that for Iraqi refugees in Jordan there is no possibility of local integration; instead the UNHCR must resettle them in third countries or assist them to repatriate voluntarily. Such a policy, in her view, is not a plausible option for most Iraqis in the country.[1086]

The lack of protection of Iraqi refugees in Jordan and Lebanon, in Trad and Frangieh's view, is not only because these countries are not signatory to the Refugee Convention and lack effective legislation regulating asylum, but also because of the unresolved predicament of Palestinian refugees, which has had a negative impact on other

[1080] Jason Hart and Anna Kvittingen, 'Tested at the Margins: the Contingent Rights of Displaced Iraqi Children in Jordan' (2015) New Issues in Refugee Research, Research Paper No. 272, 9-10 <http://www.unhcr.org/54cf8de29.html> accessed 17 October 2015.
[1081] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 12.
[1082] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 17 October 2015.
[1083] UNHCR, 'UNHCR Position on Returns to Iraq' (n 30).
[1084] UNHCR, 'Memorandum of Understanding between the Government of Jordan and UNHCR' (5 April 1998) Art. 5.
[1085] Cited in Joseph Sassoon, *The Iraqi Refugees: The New Crisis in the Middle East* (I.B.Tauris 2009) 52.
[1086] HRC, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo Addendum Mission to Jordan (11 to 24 November 2011)' (14 May 2012) UN Doc. A/HRC/20/16/Add.1, para. 49.

upcoming refugees in Lebanon and Jordan.[1087] Indeed, with an estimated more than two million Palestinian refugees, Jordan hosts the largest Palestinian refugee population in the world.[1088] This is also noted by Sassoon, who argues that 'the Lebanese [and Jordan] are wary of hosting another refugee population whose prospects of returning home in the near future are remote'.[1089]

In addition, observers note that the absence of a regional instrument to provide protection for refugees has contributed to the lack of a solution for refugee problems in the Middle East region.[1090] Such instruments do exist in other regions, including ECHR,[1091] ACHR,[1092] and ACHPR,[1093] and these have been a contributing factor in solving refugee problems. Indeed, as Kagan perceptively notes, 'there is basically no refugee policy in the Middle East, […] there are only refugee problems'.[1094]

In a nutshell, the legal framework applied to Iraqi refugees in Jordan is mainly the MoU, and its provisions have been subject to criticism. Although the Refugee Convention is not applicable to Iraqi refugees in Jordan, the applicable international human rights instruments, such as the ICCPR[1095] and the Convention Against Torture[1096] provide Iraqis with international protection. These international instruments assert the fundamental rights of individuals regardless of their status within a given jurisdiction.

[1087] Samira Trad and Ghida Frangieh, 'Iraqi Refugees in Lebanon: Continuous Lack of Protection' (2007) FMR 35.
[1088] United Nations Relief and Works Agency for Palestine Refugees (UNRWA), 'Where We Work: Jordan' (1 July 2014). Available at: <http://www.unrwa.org/where-we-work/jordan> accessed 17 October 2015.
[1089] Sassoon (n 1085) 94.
[1090] See, for example, Kagan (n 58) 10; Barnes (n 612); and Trad and Frangieh (n 1087) 35-36.
[1091] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, ETS 5.
[1092] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 36 OAS TS 1; 1144 UNTS 123. See also, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984).
[1093] ibid. See also, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force (20 June 1974) 1001 UNTS 45.
[1094] Kagan (n 58) 10.
[1095] Jordan ratified the ICCPR on 20 October 1975. Available at: <http://indicators.ohchr.org/> accessed 17 October 2015.
[1096] Jordan has acceded the Convention against Torture on 13 November 1991. Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> accessed 17 October 2015.

5.3.1 A Review of the Historical Displacement of Iraqi Refugees to Jordan

Traditionally, Jordan has always been a welcoming country towards Iraqi refugees; this is due to being a Muslim country and the Islamic tradition between the two States.[1097] However, after the November 2005 bombing in Amman which was perpetuated by Iraqi nationals, Jordan introduced strict measures, such as entry visas to limit the entry of Iraqis to its territory. The introduction of the visa process makes Iraqis the only Arab nationals to be charged for their visas, and they are also required to gain *a prior* approval to enter Jordan.[1098] Instead of six month visas, Iraqis were only given one month visas with the opportunity of renewal. To address the security situation, Jordan restricted the entry of persons between the age of 17 and 35. This and other measures introduced by the Jordanian government resulted in the border being effectively closed on the majority of potential refugees.[1099]

Despite adopting such rigid measures, a continuous pattern of large displacement from Iraq to Jordan has continued. The figures of Iraqi refugees in Jordan have increased significantly in the last 12 months. The UNHCR reports that it has recently witnessed a sharp increase in the number of Iraqis fleeing their country, with 60% of those seeking sanctuary in Jordan.[1100] In fact, in the first nine months of 2014 alone, more than 10,600 Iraqis have registered with the UNHCR in Jordan. In September 2014, the UNHCR reported that in recent months a daily average of 250 Iraqi refugees were seeking asylum in Jordan. In August 2014 alone, 1,383 Iraqis registered with the UNHCR; these figures were the highest monthly tally of new registrations by the UNHCR in Jordan since 2007.[1101] The figures represent a significant increase compared to recent years. However, according to the humanitarian agency, the latest Iraqi refugees are 'coming

[1097] For a comprehensive analysis on the treatment of Iraqi refugees in Jordan, see Stevens, 'Legal Status, Labelling, and Protection' (n 419) 1-38.
[1098] IRIN, 'Iraq-Jordan: Government Introduces Entry Visas for Iraqis' (13 December 2007). Available at: <http://www.irinnews.org/report/75851/iraq-jordan-government-introduces-entry-visas-for-iraqis> accessed 17 October 2015.
[1099] Geraldine Chatelard, Oroub El-Abed and Kate Washington, 'Protection, Mobility and Livelihood Challenges of Displaced Iraqi in Urban Settings in Jordan' (ICMC, May–Oct 2009) 14-15. Available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/751268C72BA0BCD0492575EE0018E0D8-Full_Report.pdf> accessed 17 October 2015. See also, US Committee for Refugees and Immigrants, 'World Refugee Survey 2009, Jordan' (July 2009). Available at: <http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-wrs-country-updates/jordan.html> accessed 17 October 2015.
[1100] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1101] ibid.

with less hope of returning home', 'unlike some of their predecessors'.[1102] In 2012 and 2013, the UNHCR registered 4,060 and 5,110 Iraqi refugees respectively.[1103] The latest UNHCR figures show that Jordan is the world's fourth largest refugee-hosting country, with 55,500 Iraqi refugees.[1104] These figures are set to rise continuously due to the ongoing conflict in Iraq and Syria.

The figures of Iraqi refugees quoted by the Refugee Agency are significantly lower than those claimed by the Jordanian government. Indeed, the offered figures may not fully reflect the real numbers of Iraqi refugees in Jordan. This might be due to a significant number of Iraqi refugees who do not register with the authorities for fear of expulsion and deportation.[1105] This is also noted by Marfleet and Chatty, who argue that 'many Iraqi refugees maintain their distance from the UNHCR, for reasons including loss of faith in the willingness of politicians and officials to assist them, and from fear of repatriation and its consequences'.[1106] Consequently, most of them reside in Jordan without a visa or appropriate documentation.

Recently, Iraqi refugee figures have significantly increased. This is due, firstly, to the ongoing displacement crisis in Iraq resulting from the ISIS takeover of the three major cities in the country. The ISIS takeover has resulted in increasing violence in Iraq; this has caused internal as well as external displacement of Iraqi refugees.[1107] The latest crisis proves the ongoing history of displacement from Iraq. It also shows that yet again Iraqi refugees are moving towards more protracted situations. The latest development of the refugee crisis in Iraq adds to the already dire situation in the region because of the Syrian conflict. Secondly, the ongoing conflict in Syria has also contributed to increasing registrations of Iraqi refugees in Jordan. The conflict has resulted in Iraqi refugees who reside in Syria to take desperate measures to either return to Iraq or seek protection in neighbouring countries, such as Turkey, Jordan and Lebanon.

[1102] IRIN, 'Less Hope of Return for New Wave of Iraqi Refugees in Jordan' (19 May 2014). Available at <http://www.refworld.org/docid/537b347d4.html> accessed 17 October 2015; IRIN, 'Analysis: Iraq's Forgotten Displaced' (22 August 2014). Available at <http://www.irinnews.org/report/100524/analysis-iraq-s-forgotten-displaced> accessed 17 October 2015; and IRIN, 'Amid Syrian Crisis, Iraqi Refugees in Jordan Forgotten' (6 June 2013). Available at: <http://www.refworld.org/docid/51b5b0f74.html> accessed 17 October 2015.
[1103] IRIN, 'Less Hope of Return for New Wave of Iraqi Refugees in Jordan' (n 1102).
[1104] UNHCR, 'UNHCR Global Trends 2013' (n 950) 14.
[1105] Refugee Studies Centre, 'Protracted Refugee Situations: Case Studies: Iraqis (in Iran, Syria, Jordan, and Lebanon)' (17 February 2012). Available at: <http://www.prsproject.org/case-studies/contemporary/iraqis/> accessed 17 October 2015.
[1106] Marfleet and Chatty (n 25) 1. See also, Jeff Crisp and others, 'Surviving in the City' (n 866) 27.
[1107] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).

The continuous instability in Iraq means that the majority of refugees are opting against repatriation; instead they seek protection in neighbouring countries. This situation, thus, has left many Iraqi refugees being 'twice displaced'.[1108] The UNHCR's latest country information notes that Iraq is suffering from internal sectarian tensions, which has polarised the country into sects.[1109] It also notes that 'the security conditions in Iraq explain the lack of interest in voluntary return'.[1110] Despite the fact that 12 years have passed since the US-led invasion of Iraq, the violence instead of improving in Iraq, it has worsened.[1111] The Iraqi Government has failed to create a stable condition for refugees to return. Even those who opted to return, have not returned to their regions of origin, this has led to a new secondary displacement inside Iraq.[1112]

In spite of the fact that the international community initially engaged to address the problem of Iraqi refugees, over the passage of time international attention shifted and their interest in the Iraqi refugee crisis waned. This is, in part, due to the emergence of refugee problems elsewhere in the region. Stevens notes that 'today, beyond the region, limited reference is made to the case of Iraqi refugees'.[1113] Equally, Fitzcharles notes that 'as the Syrian crisis grew bigger, the Iraqi case has become invisible'.[1114] The Refugee Agency warned that '[t]he ongoing influx of Syrian asylum-seekers is likely to have an impact on UNHCR's activities to address the needs of Iraqi refugees in Jordan'.[1115] Also, it warned that Iraqi refugees in Jordan 'will continue to require significant levels of support'.[1116]

[1108] IRC, 'Syria: A Regional Crisis: The IRC Commission on Syrian Refugee' (January 2013) 15-16. Available at: <http://www.rescue.org/sites/default/files/resource-file/IRCReportMidEast20130114.pdf> accessed 17 October 2015. In July 2013, UNHCR reported that some 13,280 Iraqi refugees have fled to neighbouring countries. See, for example, UNHCR, 'UNHCR Projected Global Resettlement Needs: 2014' (19th Annual Tripartite Consultations on Resettlement, Geneva: 1-3 July 2013) 66.

[1109] UNHCR, '2015 UNHCR Country Operations Profile – Iraq' available at: <http://www.unhcr.org/pages/49e486426.html> accessed 17 October 2015.

[1110] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 17 October 2015.

[1111] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).

[1112] UNHCR, '2015 UNHCR Country Operations Profile – Iraq'.

[1113] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 1-2.

[1114] Statement by Mr. Kevin Fitzcharles, CARE International's Country Director in Jordan. Cited in Integrated Regional Information Networks (IRIN), 'Amid Syrian Crisis, Iraqi Refugees in Jordan Forgotten' (6 June 2013). Available at: <http://www.refworld.org/docid/51b5b0f74.html> accessed 17 October 2015.

[1115] UNHCR, '2014 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 17 October 2015; and UNHCR, '2014 UNHCR Regional Operations Profile - Middle East' available at: <http://www.unhcr.org/pages/49e486976.html> accessed 17 October 2015.

[1116] UNHCR, '2013 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 17 October 2013.

While discussing the Iraqi refugee situation in Jordan, most of the literature seems to focus on refugees displaced as a result of the 2003 US-led invasion of Iraq.[1117] However, Jordan has received several influxes of Iraqis during the last 30 years.[1118] To be precise, Jordan has received a mass influx of Iraqi refugees in two stages, mainly during the Gulf War 1991 and the post-US invasion in 2003.[1119] In fact, prior to the 2003 conflict,[1120] Jordan hosted an estimated 250,000 to 300,000 Iraqi refugees.[1121] Hart and Kvittingen note that despite the fact Iraqi refugees have been present in Jordan for several years, and in the case of Iraqis who fled the political violence that followed the US-led invasion of Iraq for more than a decade, their displacement has persisted within an institutional framework of 'crisis'. 'This has remained the case in spite of the passing years and the evolving needs of this population'.[1122]

The emphasis in the literature on refugees displaced as a result of the 2003 US-led invasion of Iraq is understandable because the 2003 conflict overrode the others in terms of the number of Iraqis displaced. The conflict and its aftermath resulted in over two million Iraqis seeking protection mainly in neighbouring countries, as shown in the

[1117] See, for example, Stevens, 'Legal Status, Labelling, and Protection' (n 419) 1-38; Chatty and Mansour (n 925) 50-83; Geraldine Chatelard, 'Jordan: A Refugee Haven' (Migration Policy Institute, 2010). Available at: <http://www.migrationinformation.org/feature/display.cfm?ID=794> accessed 17 October 2015; Alonso (n 31) 321-375; Sadek (n 925) 43-54; Laura Ashbaugh, 'Stranded in Jordan: A Study of Jordan's Iraqi Refugee Policy' (2010-2011) 6 *Northwestern Undergraduate Research Journal (NURJ)* 25-30; Barnes (n 612) 1-34; Sassoon (n 1085) 33-60; Olwan (n 1075) 1-11; Marion Couldrey and Tim Morris (eds), 'Iraq's Displacement Crisis: the Search for Solutions' (2007) (Special Issue) FMR 1-52; and HRW, '"The Silent Treatment": Fleeing Iraq, Surviving in Jordan' (Document No. E1810, 8 November 2006). Available at: <http://www.unhcr.org/refworld/docid/45a4da562.html> accessed 17 October 2015.

[1118] For a comprehensive study of history of the Iraqi refugee crisis see, for example, Alborzi (n 1031); and Géraldine Chatelard, 'Migration from Iraq between the Gulf and the Iraq Wars (1990-2003): Historical and Socio-Spatial Dimensions (2009) Centre on Migration, Policy and Society, Working Paper No. 68, <https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2009/WP0968%20Chatelard.pdf> accessed 17 October 2015.

[1119] UNHCR, '2004 UNHCR Statistical Yearbook – Iraq' (21 August 2005) 349. See also, UNHCR, 'Chronology: 1991 Gulf War Crisis' (n 1035).

[1120] Between 1993 and 2002, there has been an average of 700,000 Iraqi refugees displaced worldwide as shown in the map provided in appendix (C). See, for example, UNHCR, '2002 UNHCR Statistical Yearbook – Iraq' (2 September 2004) 337. See also, United States Committee for Refugees and Immigrants, 'U.S. Committee for Refugees World Refugee Survey 2002 – Iraq' (10 June 2002). Available at: <http://www.refworld.org/docid/3d04c15514.html> accessed 17 October 2015; and Gil Loescher, 'Iraq: Refugees, Be Prepared' (2003) 59(2) The World Today <http://www.theguardian.com/world/2003/feb/02/iraq.immigration> accessed 17 October 2015.

[1121] HRW, 'Iraqi Refugees, Asylum Seekers, and Displaced Persons' (n 1044) 15. However, as shown in the table provided in the appendix (D), this figure is in stark contrast with the figures published by the UNHCR, see UNHCR, '2004 UNHCR Statistical Yearbook – Iraq' (21 August 2005) 349.

[1122] Hart and Kvittingen (n 1080) 4, 23.

table provided in appendix (B).[1123] The conflict led to the creation of the second largest refugee group in the world.[1124] The conflict also produced a humanitarian crisis marked by the world's fastest growing refugee population.[1125] In addition, the nature of the Iraqi displacement was such that one in six Iraqis had the experience of displacement (either internally, internationally or both), with a majority being displaced more than once.[1126]

To sum up, the review of historical displacement of Iraqi refugees to Jordan shows that there is a continuous pattern of large displacement from Iraq to Jordan. Iraqi refugees in the past 30 years at various junctures have sought sanctuary in Jordan fleeing sectarian conflict and violence in Iraq.[1127] More importantly, the figures and findings presented show that this will remain the case and the recent large displacement of Iraqi refugees further reinforces this argument.[1128] Hart and Kvittingen note that despite the fact that more than a decade has passed since the US-led invasion of Iraq, the sectarian conflict in Iraq which emerged strongly in the post-Saddam era has never entirely disappeared, and the displacement of civilians has continued.[1129] Indeed, Iraqi refugees, as a population group, will continue to seek protection in Jordan regardless of the cause of their flight, as is the case with Turkey.[1130]

5.3.2 Conclusion

As one of the world's largest refugee-hosting countries, Jordan has inevitably felt the impact of this influx in its security, economy, and public services. A country of six and a half million people, with almost half of them refugees, Jordan is one of the most

[1123] UNHCR, 'Iraq Displacement' (Maps from UNHCR Mapping Unit, 11 April 2008). Available at: <http://www.unhcr.org/487ef7144.html> accessed 17 October 2015.
[1124] UNHCR, 'UNHCR Global Trends 2010: 60 Years and Still Counting' (June 2011) 3. See also, ICG, 'Failed Responsibility: Iraqi Refugees in Syria, Jordan and Lebanon' (Middle East Report No. 77, 10 July 2008) 1. Available at: <http://www.unhcr.org/refworld/docid/48771acf2.html> accessed 17 October 2015.
[1125] Kristele Younes, 'Iraq: The World's Fastest Growing Displacement Crisis' (Refugees International, March 2007) 1-12. Available at: <http://www.refintl.org/sites/default/files/RI_Iraqreport.pdf> accessed 17 October 2015.
[1126] Elizabeth G. Ferris, 'The Looming Crisis: Displacement and Security in Iraq' (2008) Brookings Policy Paper No. 5, 3 <http://www.brookings.edu/~/media/research/files/papers/2008/8/iraq%20ferris/08_iraq_ferris.pdf> accessed 17 October 2015.
[1127] Hart and Kvittingen (n 1080) 19.
[1128] See, for example, UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1129] Hart and Kvittingen (n 1080) 8.
[1130] See Section 5.2.1.

water-scarce countries in the world.[1131] The continuing influx of refugees to Jordan has created strains in public resources and has had a negative impact on locals, who see refugees as a major contributory factor to that. For these reasons, the hospitality initially shown to Iraqi refugees has slowly waned in Jordan, as significantly large numbers of Iraqi refugees continued to cross the border and it became apparent to the government that the prospect of durable solutions might not be accessible in the foreseeable future.

Iraqis in Jordan are not treated as refugees but as 'guests'. Such labelling has a negative impact on their status in the country. Even those recognised as refugees by the UNHCR are only protected for a limited period and the legal status provided by the Refugee Agency does not bring with it any additional privileges in terms of access to employment, public services, or long-term settlement in the country. As a result, their lives are very much in limbo since they cannot go back to Iraq, local integration is not a possibility and resettlement opportunities are very difficult. Therefore, they do not have any immediate or realistic prospect of a solution.

Jordan is not a party to the Refugee Convention or its Protocol and it does not have legislation that guarantees the rights of refugees and asylum-seekers in the country. Instead, it provides minimum protection based on the MoU signed with the UNHCR. As an alternative legal instrument, the provisions of the MoU have been strongly criticised by the observers for lack of adequate regulation and protection of refugees in the country. As is the case with Lebanon,[1132] the MoU contains explicit provisions objecting to the idea of the local integration and permanent residence of Iraqi refugees. In fact, based on the provisions of the MoU, once granted RSD, Iraqi refugees are only allowed to reside in Jordan temporarily until they are resettled to a third country.

[1131] Health and Environment Linkages Initiative – HELI, 'Jordan: Water is life' available at: <http://www.who.int/heli/pilots/jordan/en/> accessed 17 October 2015.
[1132] See Section 5.4.

5.4 The Law and Policy of Lebanon towards Iraqi Refugees

Although Lebanon is not a signatory to the Refugee Convention,[1133] it does have a policy framework to deal with refugees, albeit with limited practice.[1134] Article 26 of the 1962 Law Regulating the Entry and Stay of Foreigners in Lebanon reads that:

> [a]ny foreign national who is the subject of a prosecution or a conviction by an authority that is not Lebanese for a political crime or whose life or freedom is threatened, also for political reasons, may request political asylum in Lebanon.[1135]

Despite establishing an *ad hoc* committee to adjudicate asylum applications and grant refugee status, this process has never been implemented by the designated governmental department, the General Security Office.[1136] Both the lack of a definition for refugees and limited provisions in the domestic law to address refugee problems have also contributed to the lack of examination of refugee claims. According to the Frontiers Ruwad Association (FRA), the provisions of the said law are little known by the public and legal profession in general.[1137]

In 2003, in order to address this gap and deal with refugee issues in the country, the Lebanese government signed the MoU with the UNHCR which allows individuals to lodge asylum applications to the UNHCR. In fact, the MoU is 'the only framework regulating the non-Palestinian refugees in Lebanon'.[1138] If the criteria of the RSD are met, the UNHCR grants refugee status for six months, renewable once for three months, so that the UNHCR can pursue appropriate durable solutions for recognised refugees within a limited period. In other words, it can identify a resettlement country or arrange for 'voluntarily' repatriation.[1139] The MoU is a significant legal instrument because, for

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[1133] UNHCR, '2015 UNHCR Country Operations Profile – Lebanon' available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486676> accessed 17 October 2015.
[1134] The legislation has incorporated only six provisions- Article 26 to 31- in relation to asylum. Law Regulating the Entry of Foreign Nationals Into, Their Residence In and Their Departure from Lebanon (entered into force 10 July 1962) Journal Official No. 28-1962. Art. 26. Available at: <http://www.refworld.org/pdfid/4c3c630f2.pdf> accessed 17 October 2015.
[1135] ibid.
[1136] ibid. Art. 27.
[1137] Frontiers Association, 'Legality vs. Legitimacy: Detention of Refugees and Asylum Seekers in Lebanon, Legal Study' (May 2006) 1-45. Available at: <http://idcoalition.org/wp-content/uploads/2009/06/lebanon-report-detention.pdf> accessed 17 October 2015.
[1138] OHCHR, 'Submission by the Frontiers Ruwad Association for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Human Rights Of Refugees, Asylum Seekers, Migrants And Stateless In Lebanon' (9th UPR Session, 12 April 2010) para. 22.
[1139] Memorandum of Understanding between the Directorate of the General Security (Republic of Lebanon) and the Regional Office of the UN High Commissioner for Refugees, Concerning the

the first time in its history, Lebanon officially acknowledged that refugees have a temporary right to remain in territory. However, the terms of the MoU do not apply to refugees who have claimed or received refugee status prior to signing of the MoU.

As is the case with Jordan, a MoU was signed between the UNHCR and Lebanon as an alternative legal instrument for regulating the status of refugees in the country. However, the MoU contains a number of flawed provisions, which has restricted the rights provided in the Refugee Convention.[1140] In Kagan's view, the MoU occupies an ambiguous place in international law because, *inter alia*, it focuses 'on codifying the division of labour between host governments and UNHCR' rather than defining the rights and status of refugees, which is the case in the Refugee Convention.[1141]

In the preamble, refugees are described as people who are 'residing unlawfully in Lebanon'.[1142] The MoU also denies granting asylum to refugees, 'Lebanon is not an asylum country' and describes the term asylum seeker as 'a person seeking asylum in a country other than Lebanon'.[1143] The provisions of the MoU have been criticised heavily by the international human rights mechanisms and academics for incorporating provisions inconsistent with the international human rights standards. In its submission to the UPR, the UNHCR noted that although the MoU provides some protection space for refugees and asylum seekers in Lebanon, they are insufficient. This is because the MoU is not designed to respond to a situation of large influx of refugees, as was the case with Iraq refugees.[1144]

The UNHCR also called on States, including Lebanon, to consider displaced Iraqis originating from central and southern of the country as refugees, regardless of their

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processing of cases of asylum-seekers applying for refugee status with the UNHCR Office (9 September 2003) preamble. See also, HRC, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/13/30, 18 January 2010, para. 12.

[1140] For further information on this flows, see for example, Kagan (n 58) 16-21; Frontiers Center, 'Lebanon-UNHCR Memorandum Of Understanding' (November 2003). Available at: <http://www.frontiersruwad.org/pdf/FR_Public_Statement_MOU_Nov_2003.pdf> accessed 17 October 2015; and HRW, 'Rot Here or Die There: Bleak Choices for Iraqi Refugees in Lebanon' (Volume 19, No. 8(E), November 2007) Available at: <http://www.hrw.org/reports/2007/lebanon1207/lebanon1207webwcover.pdf> accessed 17 October 2015.

[1141] Kagan (n 58) 14-16.

[1142] Memorandum of Understanding between Lebanon and UNHCR (n 1139) preamble.

[1143] ibid.

[1144] OHCHR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Republic of Lebanon' (9th UPR Session, 12 April 2010) 1. Available at: <http://www.refworld.org/docid/4bcd705e2.html> accessed 17 October 2015.

means of entry. In its report to the HRC, Lebanon stated that it would not implement this recommendation because it contradicts the agreed provisions of the MoU signed between the parties and Lebanon. As non-signatory of the Refugee Convention, Lebanon is not bound to provide international protection to refugees. In addition, Lebanon claimed that it lacked the capacity to take additional asylum seekers, since they are arguably already hosting a large number of refugees from Palestine and Iraq.[1145] Although such an action is not contrary to the provision of the MoU and Refugee Convention, such practice might jeopardise the right of an individual to seek and enjoy asylum.[1146]

Further, the MoU explicitly states that the only viable durable solution for refugees recognised under the mandate of the UNHCR is resettlement in third countries.[1147] In fact, refugees in Lebanon have to be resettled within one year of their recognition as refugees by the UNHCR.[1148] Although resettlement is promoted as the only solution for the vast majority of Iraqi refugees in Lebanon,[1149] Kagan rightly doubts that the UNHCR would be able to resettle refugees within a time frame because 'only in exceptional cases is UNHCR able to resettle a refugee within one year of her arrival'.[1150] The available figures reflect Kagan's concern. For instance, in 2011 the UNHCR submitted 3,308 refugees from Lebanon for resettlement but only 825 departed to a third country.[1151] Although the UNHCR works tirelessly to submit more refugees, resettlement is a slow process. The lack of efficient delivery of resettlement according to Kagan would 'create a significant protection gap' for refugees in Lebanon.[1152] FRA also notes that since 11 September 2001 and the introduction of further security measures by the largest resettlement countries, it is a wholly unrealistic and

[1145] HRC, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/13/30, 18 Jan 2010, paras. 12-14.
[1146] UDHR Art. 14(1).
[1147] Memorandum of Understanding between Lebanon and UNHCR (n 1139) preamble.
[1148] Initially, refugees are issued with an identification card, which is valid for three months. During this period, the UNHCR determines their refugee status, if recognised as refugees by the UNHCR their identification card permit will be extended for a further 6-9 months. This period is designated for the UNHCR to find a durable solution in the form of resettlement in a third country. However, those who are not recognised they immediately will be detained pending deportation to their regions of origin. See, Memorandum of Understanding between Lebanon and UNHCR (n 1139) Arts.5 and 9.
[1149] The ICMC (n 1016) 65.
[1150] Kagan (n 58) 16.
[1151] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 61 and 64.
[1152] Kagan (n 58) 16. See also, Barnes (n 612).

unachievable target to resettle refugees with the specified time imposed by the Lebanese government on the UNHCR.[1153]

In 2011, the UNHCR drafted proposed changes to the existing MoU, including non-penalisation of refugees for irregular entry or stay and permits allowing refugees to work. The UNHCR states that the current provisions of the MoU are inconsistent with Lebanese obligations in international law and works with Lebanese government to 'eliminate the risk of people being arrested and detained and even deported for the sole reason of having sought sanctuary in Lebanon'.[1154] Unlike Jordan, Lebanon has not yet signed the revised MoU with the UNHCR and negotiations have continued.[1155] The OCHA notes that the lack of revision of the Memorandum means that 'the protection environment for refugees living in Lebanon, including Iraqis, has registered no significant improvement despite efforts to promote the adoption of a more protection-sensitive legal framework. […] This is causing concern among refugees and agencies involved in the protection response'.[1156]

In sum, this section has shown that Lebanon does not have a functioning refugee law in accordance with international standards.[1157] The UNHCR has recommended that Lebanon should '[d]evelop a specific legal framework defining and protecting rights and freedoms of refugees.[1158]

[1153] Frontiers Center, 'Lebanon-UNHCR Memorandum of Understanding' (November 2003). Available at: <http://www.frontiersruwad.org/pdf/FR_Public_Statement_MOU_Nov_2003.pdf> accessed 17 October 2015.
[1154] Olivia Alabaster, 'U.N. Urges Lebanon to do more for non-Palestinian Refugees' (FRA, 28 July 2011). Available at: <https://frontiersruwad.wordpress.com/2011/07/28/u-n-urges-lebanon-to-do-more-for-non-palestinian-refugees-daily-star/> accessed 17 October 2015.
[1155] OCHA, 'Mid-Year Review of the Regional Response Plan for Iraqi Refugees 2012' (10 September 2012) 68. Available at: <https://docs.unocha.org/sites/dms/CAP/MYR_2012_Iraq_RRP.pdf> accessed 17 October 2015. See also, Stevens, 'Shifting Conceptions of Refugee Identity and Protection' (n 595) 94-95.
[1156] ibid 68.
[1157] See, for example, U.S. Committee for Refugees and Immigrants, 'World Refugee Survey 2009: Lebanon' (USCRI, 2009). Available at: <http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-wrs-country-updates/lebanon.html> accessed 17 October 2015.
[1158] UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Republic of Lebanon' (9th UPR Session, April 2010) 3. Available at: <http://www.refworld.org/docid/4bcd705e2.html> accessed 17 October 2015.

5.4.1 A Review of the Historical Displacement of Iraqi Refugees to Lebanon

With a population of 4.5 million, 'Lebanon has the highest per-capita concentration of refugees recorded anywhere in the world in recent history'.[1159] Likewise, the UNHCR notes that 'Lebanon remains the country with the highest refugee density with 257 refugees per 1,000 inhabitants'.[1160] By the end of December 2014, the total number of Iraqi refugees in Lebanon reached 14,550.[1161] This figure, the UNHCR states, is only those who are registered with it. Therefore, there might be many hundreds of Iraqis who have yet to come forward for registration, for reasons similar to those mentioned in relations with Turkey and Jordan.[1162]

The numbers of Iraqi refugees in Lebanon have increased significantly in last 12 months. Firstly, this is due to the ongoing displacement crisis in Iraq resulting from the ISIS takeover of the large territories of the country. The ISIS takeover has resulted in increasing violence in Iraq; this has caused internal as well as international displacement of Iraqi refugees.[1163] Secondly, the ongoing conflict in Syria has also contributed to increasing registration of Iraqi refugees in Lebanon. In fact, in 2014, a study conducted by the Caritas Lebanon Migrant Center found that 21.8% of Iraqi refugees in Lebanon had previously lived in Syria, and had fled to Lebanon in order to escape the conflict there. As the violence in Syria became more generalised, Iraqi refugees were forced to leave.[1164]

The figures of Iraqi refugees in Lebanon are not as great as those mentioned in Turkey and Jordan, primarily because Lebanon does not share a border with Iraq. In addition, the strict visa requirements for Iraqis in Lebanon have contributed to low figures of Iraqis in the country. In order to obtain visas to Lebanon, according to FRA, Iraqis had to provide a return non-refundable ticket, a hotel reservation or the address and phone

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[1159] Mariette Grange and Michael Flynn, 'Immigration Detention in Lebanon' (June 2014) 3. Available at: <http://www.globaldetentionproject.org/fileadmin/docs/Lebanon_report2.pdf> accessed 17 October 2015.
[1160] UNHCR, 'UNHCR Mid-Year Trends 2014' (7 January 2015) 7.
[1161] UNHCR, 'UNHCR Lebanon Monthly Updates' (December 2014). Available at: <file://tower6/home33/b1027711/Downloads/CombinedmonthlyupdatesonUNHCRimplementationDecember2014.pdf> accessed 17 October 2015.
[1162] See Sections 5.2.1 and 5.3.1.
[1163] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1164] Caritas Lebanon Migrant Center, 'Left Behind: A Needs Assessment of Iraqi Refugees Present in Lebanon' (21 October 2014) 45. Available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/Left-Behind-inside-book.pdf> accessed 17 October 2015. See also, Trad and Frangieh (n 1087) 35-36; and the ICMC (n 1016) 65.

number of a person in Lebanon, and $2000 in cash or in a bank account. However, the difficulty of meeting these requirements meant that Iraqis used other routes, including irregular entry with the help of smugglers. Even those who have fulfilled these conditions and were granted entry visas have found it difficult to prolong their stay in Lebanon. This has resulted in Iraqis remaining in the country unlawfully.[1165]

Iraqi refugees have fled to Lebanon mainly in two different phases. Many Iraqi refugees originally crossed into Lebanon in the 1990s, fleeing authoritarian regimes and conflict, including the 1991 Gulf War, while the second wave followed after the 2003 US-led invasion of Iraq.[1166] During the first Gulf War in 1991,[1167] and the aftermath of the failed March 1991 uprising by the Kurds and Shias, Lebanon experienced the first major inflow of an estimated 10,000 Iraqi refugees.[1168] This figure increased to 50,000 following the 2003 US-led invasion of Iraq.[1169] Although today this figure has decreased, still thousands of Iraqi refugees have been in protracted situations since the 1990s.[1170]

In a nutshell, the review of the historical displacement of Iraqi refugees in Lebanon shows that although the number of Iraqi refugees in Lebanon has fluctuated, there is a continuous pattern of large displacements of Iraqi refugees to Lebanon. Since the 1990s, Iraqi refugees at various junctures have sought asylum in Lebanon due to the ongoing conflict, persecution, or post-conflict situations in Iraq. The analysis shows that the systematic pattern of flight by Iraqi refugees will continue, regardless of the cause of their flight, and the recent development of the large displacement of Iraqi refugees proves such a pattern.

[1165] FRA, 'Refugee and Migrant Protection in Lebanon in 2006' (Annual Report 2007) 10. Available at: <http://www.frontiersruwad.org/pdf/FR_Annual%20Report_Eng_2007.pdf> accessed 17 October 2015.
[1166] Caritas Lebanon Migrant Center (n 1164) 45.
[1167] For a detailed account of the War, see HRW, 'Needless Deaths in the Gulf War' (n 1034).
[1168] HRW, 'Rot Here or Die There' (n 1140) 12. See also, Caritas Lebanon Migrant Center (n 1164) 13.
[1169] See, for example, Aziza Khalidi, 'Iraqis Taking Refuge in Lebanon – A Persisting Humanitarian Challenge: Estimating the Size and Geographical Distribution of Iraqis in Lebanon from a Service Need Perspective: A Key Informant Survey' (Danish Refugee Council, December 2009) 5; Aziza Khalidi, 'Iraqi Population Survey in Lebanon: A Report' (Danish Refugee Council Beirut, November 2007) 10; and Danish Refugee Council, 'Iraqi Population in Lebanon: Survey Report' (Beirut, July 2005) 6.
[1170] Caritas Lebanon Migrant Center (n 1164) 11-24.

5.4.2 Conclusion

In comparison to the other two countries considered in this chapter, Lebanon has the least sophisticated system for addressing Iraqi refugees in its territory. In particular, the analysis of Lebanese practice and/or policy shows that its treatment of Iraqi refugees is worse than both Turkey and Jordan. Iraqi refugees in Lebanon rarely, if ever, enjoy protection or are given access to asylum procedures. Even those whose refugee status is determined within the limited period if they are not resettled by the UNHCR will be considered an 'illegal immigrant' and are subject to deportation.

Just like Turkey and Jordan, although some of the international standards are applicable, ultimately the legal status of those fleeing Iraq is mostly governed by the 1962 Law Regulating the Entry and Stay of Foreigners in Lebanon. Although Lebanon has signed the MoU with the UNHCR as a framework to regulate the Iraqi refugee situation in the country, the Memorandum explicitly states that 'Lebanon is not an asylum country' and those refugee and asylum seekers who enter the country are 'residing unlawfully in Lebanon'.[1171] Incorporation of such provisions has left Iraqis at risk of *refoulement*, especially in the absence of mechanisms within the legal framework to differentiate between those who may be in need of international protection, such as people who are recognised as refugees by the UNHCR, and other unlawfully present migrants.

5.5 Concluding Remarks

This chapter examined the State practice of Turkey, Jordan and Lebanon in their response to the protection of Iraqi refugees in their territories. It then outlined the status of Iraqi refugees and the legal framework applicable to them in these countries in order to identify a suitable solution to address Iraqi refugees in protracted situations. In particular, the purpose of the analysis was to determine whether local integration is a feasible option for Iraqi refugees in these countries.

The converging trend among these three countries is that the Refugee Convention is not applicable to Iraqi refugees. This is because neither Jordan nor Lebanon is party to the Refugee Convention, while Turkey maintains the geographical limitation of the

[1171] Memorandum of Understanding between Lebanon and UNHCR (n 1139) preamble.

convention. The non-applicability of the international refugee regime means that, as a matter of international law, these countries are not bound by the Refugee Convention to consider Iraqis as refugees. This means that Iraqi refugees are not entitled to the rights and privileges enshrined in the Refugee Convention. However, the provisions of international and regional human rights instruments, such as the ICCPR, the Convention against Torture and ECHR, in the case of Turkey, provide international protection for Iraqi refugees. This is because the provision of the said international and regional instruments are applicable to everyone in their territories regardless of their nationality.

What emerged from the analysis is that all three countries have incorporated specific provisions in the MoU, in the case of Jordan and Lebanon, or in their domestic legislations, in the case of Turkey, objecting to the idea of local integration for Iraqi refugees. In fact, based on the provisions of the MoU and domestic legislation, once granted RSD, Iraqi refugees are only allowed to reside in Turkey, Jordan and Lebanon temporarily until they are resettled to a third country or they will be returned 'voluntarily' to their home countries. The law, practice and policy of these countries shows that there is no evidence that such a pattern is going to change. Rather, on the contrary, of the three countries compared, Turkey has the most sophisticated mechanism and more advanced legal framework, which has recently framed that Iraqi refugees do not have the possibility of local integration in Turkey.

The review of the historical displacement of Iraqi refugees showed that there is a continuous pattern of large displacement from Iraq to Turkey, Jordan and Lebanon. The figures and findings presented show that in the past 30 years at various junctures Turkey, Jordan, and Lebanon have become a place of sanctuary for Iraqi refugees. This is in part due to the ongoing conflict, persecution or post-conflict situations in the country. An even more important issue is that this will remain the case in the future because, for example, Iraqi refugees as a population group will continue to seek protection in these countries regardless of the cause of their flight. Indeed, due to their geographical location, the systematic pattern of flight by Iraqi refugees will continue as demonstrated by their recent large displacement. This displacement also proves the ongoing history of displacement from Iraq and shows that yet again Iraqi refugees are moving towards more protracted situations.

Unlike Turkey, Jordan and Lebanon have neither ratified the Refugee Convention or its Protocol, nor formalised any legal provisions in their domestic legislation regulating the status of refugees. Although the UNHCR has continuously advocated with the authorities from both countries to accede to the convention and its protocol, and incorporate legal provisions in their domestic legalisation to regulate the status of refugees, the Refugee Agency has conceded that such a task would be difficult to achieve in the near future given the sizeable populations of refugees both of these countries host. This challenge is compounded more often than not in these States because both Jordan and Lebanon struggle to support their own populations and are confronted by mass influxes of refugees from Palestine, Iraq and, more recently, Syria. This means that the UNHCR in Lebanon and Jordan faces a challenge not only to provide continuous international protection and pursue durable solutions but also create protection space.

Turkey's legal framework to provide protection to refugees is more advanced than those of Lebanon and Jordan. As a result of continuous efforts by the UNHCR, Turkey has moved away from the MoU and has developed its own legal framework to enhance the regulation of refugee law in the country. This has allowed Turkey to consider Iraqi refugees as 'conditional refugees' and provide temporary protection.[1172]

There is a converging trend among these three countries in their response to the protection of Iraqi refugees. Iraqis have been fleeing to Turkey, Jordan and Lebanon for over three decades for a number of reasons. The pattern in these countries is that there is no solution for Iraqi refugees in any of them, in terms of local integration, and they cannot go back to Iraq. Moreover, there is no evidence that such a pattern is going to change, so the only way for Iraqi refugees to find any meaningful possible solution is by means of resettlement to a third country.

[1172] Law on Foreigners and International Protection (n 997).

Chapter 6. The Preferred Durable Solution for Iraqi Refugees in Protracted Situations

6.1 Introduction

In 2008, the UNHCR stated that 'unless there is a speedy resolution to the Iraqi refugee situation, the number and proportion of the world's refugees who find themselves in protracted situations will increase significantly'.[1173] Seven years later, the waiting continues. In fact, the UN warns that Iraq is on the brink of a humanitarian disaster due to surging conflict and massive funding shortfall.[1174] Despite having far too many Iraqi refugees in protracted situations with no sign of a solution, the international community has been largely unsuccessful in addressing their plight and the emergence of refugee problems elsewhere in the region has shifted international attention from the tenuous situation of Iraqi refugees.[1175] Fitzcharles notes that 'as the Syrian crisis grew bigger, the Iraqi case has become invisible'.[1176] Indeed, the conflict in Syria has shifted the international community's priority from Iraqi refugees to Syrians.[1177] In fact, there is a growing concern among observers that the plight of Iraqi refugees has become a permanent factor in the international sphere,[1178] alongside the unresolved Palestinian refugee issue in the Middle East region.[1179]

[1173] UNHCR, 'Protracted Refugee Situations: A Discussion Paper Prepared for the High Commissioner's Dialogue on Protection Challenges' (December 2008) UN Doc. UNHCR/DPC/2008/Doc. 02, para. 98.
[1174] UN, 'Iraq on the Brink of Humanitarian Disaster Due to Surging Conflict and Massive Funding Shortfall Warns UN' (4 June 2015). Available <http://www.uniraq.org/index.php?option=com_k2&view=item&id=3882:iraq-on-the-brink-of-humanitarian-disaster-due-to-surging-conflict-and-massive-funding-shortfall-warns-un&Itemid=605&lang=en> accessed 24 October 2015.
[1175] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 1-2.
[1176] Statement by Mr. Kevin Fitzcharles, CARE International's Country Director in Jordan. Cited in IRIN, 'Amid Syrian Crisis, Iraqi Refugees in Jordan Forgotten' (6 June 2013). Available at: <http://www.refworld.org/docid/51b5b0f74.html> accessed 20 October 2015.
[1177] UNHCR, 'UNHCR Mid-Year Trends 2014' (7 January 2015) 4; and UNHCR, 2015 UNHCR Country Operations Profile – Syrian Arab Republic' available at: <http://www.unhcr.org/pages/49e486a76.html> accessed 17 October 2015.
[1178] See, for example, Sara Mohamed Sadek, 'Iraqi "Temporary Guests" in Neighboring Countries' in Ellen Laipson and Amit Pandya (eds), *On the Move Migration Challenges in the Indian Ocean Littoral* (The Henry L. Stimson Center 2010) 43; Roberta Cohen, 'Protracted Refugee Situations: An Iraq Case Study' (Brookings-Bern Project on Internal Displacement, 20 April 2011). Available at: <http://www.refworld.org/docid/4dc7c46f2.html> accessed 12 October 2015; Laura Ashbaugh (n 1117) 29; and Alonso (n 31) 321.
[1179] See, for example, Barnes (n 612) 16; Elizabeth G. Ferris, 'The Looming Crisis' (n 1126) 1; and Long 'Permanent Crises?' (n 811) 9.

Despite the continuous involvement of the international community, the review of the historical displacement of Iraqi refugees, conducted in Chapter Five, showed that their displacement is one of the most significant protracted in the world.[1180] Their plight has become one of the PRSs that desperately needs to be addressed. It is the purpose of this chapter to identify a solution for Iraqi refugees: a solution that is capable of addressing their protracted displacement, since their crisis is a current and urgent issue that must be studied as it continues to evolve.

In order to identify a solution for Iraqi refugees in protracted situations, the structure of this chapter is as follows: after analysing the available solutions to Iraqi refugees in protracted situations, Section 6.2 will show that resettlement is the optimal solution for them, while the other two solutions, voluntary repatriation and local integration, are non-existent. Despite the fact that this study argues that resettlement is the best solution, this is not to say that the other two solutions should be neglected; rather, although they may be a durable solution for some, they may not constitute a solution of general applicability. Next, the reports of the European Commission and UNHCR are reviewed as they also recognise that resettlement is the best solution for Iraqi refugees.

Then, it is argued that the lack of resettlement opportunities for Iraqi refugees has left them with no choice but to commit to dangerous routes of migration to find the protection entitled to somewhere else. The analysis that emerged in Chapter Five is that Iraqi refugees do not have access to international protection in asylum countries and there is a lack of efficient delivery of resettlement. This lack of options has pushed Iraqis to seek protection through dangerous routes.[1181] For these reasons, it is argued that resettlement could efficiently reduce irregular migration and contribute towards reducing lives lost trying to reach safety. However, it is recognised that increasing resettlement opportunities does not stop people taking an irregular route in an attempt to reach asylum countries.

[1180] See, for example Chatty and Mansour (n 925) 50.

[1181] See, for example, Tim Arango, 'A New Wave of Migrants Flees Iraq, Yearning for Europe' *The New York Times* (Middle East, 8 September 2015). Available at: <http://www.nytimes.com/2015/09/09/world/middleeast/iraq-migrants-refugees-europe.html?_r=0> accessed 17 October 2015; and Markus Sperl, 'Fortress Europe and the Iraqi "intruders": Iraqi asylum-seekers and the EU, 2003-2007' (2007) New Issues in Refugee Research, Research Paper No. 144, 1-19 <http://www.refworld.org/docid/4c2472ea0.html> accessed 21 October 2015.

The chapter then reviews the UNHCR's historical practice of resettlement to show that, on the one hand, this solution has not always been the last resort of the three solutions. In fact, in the early twentieth century, this solution was seen by the international community as the preferred durable solution to address refugee problems. On the other hand, the review is important to show that, by making reference to three case studies of successful resettlement: Iraqi refugees in Rafha camp, Indo-Chinese refugees, and Bhutanese refugees, this solution, once implemented effectively, is capable of resolving any PRSs. These successful case studies show that the implementation of resettlement in third countries is capable of addressing Iraqi refugees and replicating their success in a finding home for this particular group of refugees from Iraq. The international community embarked on resettlement to address the Iraqi refugees who were confined in the Rafha camp during the 1990s, when neither return to Iraq nor local integration were available.

Next, the chapter reviews UNHCR initiatives implemented to increase resettlement opportunities for refugees. Since its creation, the UNHCR has implemented several programmes, adopted various concepts, and approved countless plans of action to enhance the availability of resettlement for those in need. They were also implemented to address the unevenness between the three durable solutions. In particular, we consider the extent to which a more strategic use of resettlement (SUR) in third countries could be pursued to address refugee predicaments in a sustainable way. The SUR is one of the three generic strands of the Convention Plus Initiative adopted to reach special agreements between States to increase resettlement opportunities for refugees.[1182] Some of the challenges and limitations of this strand are reviewed to show whether it has achieved its goals in expanding resettlement opportunities and implementing resettlement programmes for those States that still do not have such programmes.

Following discussion of the UNHCR's initiatives to enhance resettlement opportunities, in sub-section 6.2.4.1 a review of significant resettlement programmes within the regional scope of Europe and Latin America are conducted. The progress of these programmes within the regional scope are worth mentioning, as Iraqi refugees benefit

[1182] The Convention Plus Initiative is discussed in more detail in Chapter Four, Section 4.3.2. The other two strands are Irregular Secondary Movements and the Targeting of Development Assistance. UNHCR, 'Convention Plus at a Glance' (n 884) 1.

from such programmes, in particular the resettlement mechanisms recently established in Europe. Indeed, the emerging displacements in a number of countries, including the Middle Eastern countries, as well as the terrible loss of life of thousands of migrants in the Mediterranean. This has brought the plight of forced migrants to the forefront, resulting in a lively debate among world leaders about their duty to protect and address refugee problems, including by establishing resettlement mechanisms. The European Council recalled the seriousness of the situation and expressed its determination that the EU should mobilise all efforts to prevent further loss of life at sea and address growing refugee problems.[1183]

Sub-section 6.2.5 highlights some of the obstacles facing the implementation of this solution. Although this chapter will argue that resettlement is a viable solution to address the displacement of Iraqi refugees, it is not problem-free. Some of the challenges and obstacles that hinder the actual implementation of resettlement is reviewed to show that the obstacles do not undermine the premise that resettlement is the best solution. The literature overemphasises the challenges, such as applicability, restricted quota, political usage, and integration, to argue that this solution will not be able to address Iraqi refugee displacement. However, it is argued here that the lack of appropriate implementation of this solution does not diminish the effect it has in addressing a protracted displacement, because there are a number of considerations that are not purely legal. According to Piper, Power and Thom, '[r]esettlement is an issue that deserves to be taken seriously by those charged with shaping its policy and those delivering it on the ground. The better it is understood, the more effectively it can be used'.[1184] One has to agree with these authors that resettlement in a third country deserves more discussion to show that when this solution is implemented appropriately and delivered efficiently, it has constituted a solution for refugees.

The last section moves beyond identifying resettlement as the preferred durable solution to argue that Iraqi refugees have the right to be resettled in a third country, and that the international community is obliged to deliver this solution. This is because resettlement is the only durable solution available to address their plight and contribute towards

[1183] European Union: European Commission, Commission Recommendation of 8.6.2015 on a European Resettlement Scheme (8 June 2015, C(2015) 3560 final) para. 1.
[1184] Margaret Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond' (2013) New Issues in Refugee Research, Research Paper No. 253, 1 <http://www.unhcr.org/510bd3979.html> accessed 22 October 2015.

addressing their never ending protracted situations. However, this research does not claim that every refugee has a right to resettlement and that this right exists as a matter of choice for every refugee under any circumstances; instead, it argues that this right exists only for those for whom no other alternatives are available, as is the case with Iraqi refugees.

6.2 Resettlement as the Preferred Durable Solution: Why Resettlement?

The Refugee Convention mentions resettlement but only in relation to allowing the transfer of assets of refugees once they have been admitted to a third country.[1185] However, the Conference of Plenipotentiaries that drafted the Refugee Convention included a plea in Recommendation D 'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and *the possibility of resettlement*'.[1186] This solution is unique as it is the only durable solution that involves the relocation of refugees from asylum countries to third countries. The UNHCR has defined resettlement as,

> the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.[1187]

The Refugee Agency is mandated by its Statute and UNGA resolutions to undertake resettlement as one of the three durable solutions. [1188] In order to do that, the UNHCR, in co-operation with States, advocates for and negotiates the implementation of resettlement in third countries.[1189]

This section seeks to establish that resettlement is the most appropriate solution in addressing the problem of the Iraqi refugee predicament. It is argued here that resettlement will be a successful durable solution because, *inter alia*, it provides the

[1185] Refugees Convention. Art. 30.
[1186] ibid. Recommendation D. (Emphasis added).
[1187] UNHCR, 'Resettlement Handbook' (Revised edn, July 2011) 3.
[1188] UNHCR Statute, para. 1.
[1189] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2.

opportunity for Iraqi refugees in protracted situations to build new lives in dignity and peace, and not only integrate with a new society but also contribute to it. This view is generally supported by Piper, Power and Thom; in their seminal article, they list a very wide range of functions that resettlement performs not only as an important protection tool but also as a valuable representation of expression of international solidarity amongst States.[1190] Resettlement in a third country provides refugees with the rights they are entitled to according to the Refugee Convention, such as access to permanent residence which might open the way for their eventual naturalisation.

This process will entitle them to access to rights similar to those provided for the nationals of the resettlement country. While noting the benefits that resettlement offers, Selm argues that this solution provides permanent status for refugees in resettlement countries, bringing with it a whole host of rights, including the rights to employment, education, housing, and more importantly permanent residence.[1191] The solution also crucially provides Iraqi refugees with stability and sustainability in resettlement countries. It is not only an essential tool for refugee protection; it also provides economic and social gains for refugees in developed countries.[1192]

The UNHCR notes that resettlement has three central functions: it is a tool of international protection for refugees; it is an expression of international solidarity among States, and it is one of the three durable solutions.[1193] Resettlement is the only solution that proffers these three functions to respond to refugees whose life, liberty, safety, health or other fundamental rights are restricted or non-existent in asylum countries. In the UNHCR's view, 'resettlement remains the only available measure to guarantee protection and/or offer a refugee a future commensurate with fundamental human rights'.[1194] In fact, the UNHCR's Working Group on Resettlement (WGR), and the Annual Tripartite Consultations on Resettlement (ATCR), has maintained the theme of 'one refugee resettled, many lives protected'.[1195] Goodwin-Gill and McAdam share

[1190] For the benefit of resettlement to refugees and resettlement countries, see Piper, Power and Thom (n 1184) 2-3.
[1191] Joanne Van Selm, 'Refugee Resettlement' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 517.
[1192] Long 'Permanent Crises?' (n 811) 19.
[1193] UNHCR Resettlement Handbook (n 851) 3.
[1194] UNHCR, 'Resettlement as an Instrument of Protection: Traditional Problems in Achieving This Durable Solution and New Directions in the 1990s' (9 July 1991) UN Doc. EC/SCP/65, para. 2.
[1195] UNHCR, 'Annual Tripartite Consultations on Resettlement: Agenda' (1-3 July 2013). Available at: <http://www.unhcr.org/51de6dc89.html> accessed 24 October 2015. See also, UNHCR, 'The Annual

the UNHCR's view that 'resettlement can still mean the difference between life and death. Refugees may be denied basic human rights in the country of first refuge […] The authorities in turn may be unable or unwilling to offer effective protection. In such circumstances, resettlement becomes not the solution of last resort, but the principal objective'.[1196] The idea that resettlement is an important protection tool which addresses the special needs of refugees whose fundamental human rights are at risk in asylum countries has also been noted by Troeller in his work.[1197]

Moreover, resettlement is not only a durable solution for refugees alongside the other durable solutions of voluntary repatriation and local integration, but also, as mentioned, an expression of international solidarity and a responsibility, as a burden sharing mechanism amongst States. The latest UNHCR figures show that over 86% of the world's refugee population, comprising 12.4 million refugees, resides in developing countries, and this is the highest value in more than two decades.[1198] More significantly, 25% of these refugees, comprised of 3.6 million, live in countries where the GDP per capita is below $5,000.[1199] Resettlement is the only solution that can address this imbalance between developing and developed States. In other words, through resettlement, developed countries and donor States can share responsibility and ease burdens with the developing countries that host significantly large numbers of refugees.[1200] In fact, the UNHCR has continuously called and promoted this solution as an expression of international solidarity between States.[1201]

This view has also been echoed in the literature. For instance, Perrin, while analysing the resettlement programmes in the EU, argues that providing resettlement offers the chance for EU States 'to alleviate countries of first asylum of the burden of refugees

Tripartite Consultations (ATCR) and Working Group on Resettlement (WGR)' (Newsletter, Issue 9, July 2013) 2. Available at: <http://www.unhcr.org/51dd24759.html> accessed 24 October 2015.

[1196] Goodwin-Gill and McAdam (n 111) 499.

[1197] Troeller (n 826) 95; and Gary Troeller 'UNHCR Resettlement as an Instrument of International Protection: Constraints and Obstacles in the Arena of Competition for Scarce Humanitarian Resources' (1991) 3(3) IJRL 564-578.

[1198] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2.

[1199] ibid.

[1200] UNHCR Resettlement Handbook (n 851) 3.

[1201] For steps taken by the UNHCR to promote this solution see, for example, Joanne van Selm, 'Great Expectations: A Review of the Strategic Use of Resettlement' (UNHCR Evaluation Reports, PDES/2013/13, August 2013) 1-71. Available at: <file:///E:/Research/The%20Role%20of%20UNHCR%20in%20Finding%20Durable%20Solutions%20for%20the%20Refugees/resettlement/520a3e559.pdf> accessed 20 October 2015.

who can neither return nor be locally integrated'.[1202] Bonney, equally, argues that resettlement is 'the only durable solution that presents an opportunity for industrialised nations to play a more direct role in refugee protection and share their part of the refugee burden, a burden for which they have been avoiding responsibility for decades'.[1203] By genuinely demonstrating international burden-sharing with asylum countries, offering resettlement encourages asylum countries to provide protection and refrain from the *refoulement* of refugees. In the words of Selm, providing resettlement opens 'the way for other refugees to achieve greater local integration through changes in government policies, or as a form of solidarity with host governments which allows them to maintain open borders and access to asylum'.[1204] While advocating for resettlement as the solution for the Iraqi refugee crisis, Verburg also sees resettlement as a necessary tool to the said crisis because, by providing the resettlement, States share the burden and responsibility with the immediate States that host significantly large numbers of Iraqis, and encourages them to offer asylum. In this circumstance, resettlement in a third country becomes a vital protection tool to adhere to the international obligation of *non-refoulement*.[1205]

The UNHCR also argues that resettlement offers the only means to guarantee refugees' protection and their human rights when they are faced with threats, such as *refoulement*, physical security, and arbitrary detention, which seriously jeopardise their continued stay in asylum countries.[1206] In Chapter Five, while analysing the practice of States, such as Turkey, Jordan, and Lebanon, it was noted that Iraqi refugees face deportation and their rights are restricted in these countries. Implementing resettlement, as the UNHCR notes, is the only way to respond and rescue Iraqi refugees from these asylum countries. As the case studies in Section 6.2.4 will show, when resettlement is practised it has constituted a solution by providing refugees with appropriate integration and, in many places, it has led to naturalisation.

[1202] Delphine Perrin (ed), 'Refugee Resettlement in the EU – 2011-2013 Report' (KNOW RESET Research Report 2013/05, 2013) 5. Available at: <http://know-reset.eu/files/texts/00707_20140108161311_knowresetfinalreport2013-05.pdf> accessed 16 October 2015.

[1203] Christine Bonney, 'Is Resettlement in a Western country the Most Viable Solution for Protracted Refugee Situations? 2013 (9) *Journal of Politics & International Studies* 88, 117. See also, Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and International Security Implications* (Routledge 2005) 74.

[1204] Selm (n 1191) 513.

[1205] Matty Verburg, 'The Humanitarian-Security Balance in the Response to the Iraqi Refugee Crisis' (Masters Dissertation, Utrecht University 2008) 15-21.

[1206] UNHCR, 'Resettlement: An Instrument of Protection and a Durable Solution' (1997) 9(4) IJRL 666, 668.

6.2.1 The Lack of Foreseeable Alternative Durable Solutions

This solution is not only the best solution for Iraqi refugees; it is also the only solution since there is nothing else available to address their predicament. In terms of local integration, the analysis of Chapter Five demonstrated that local integration is not available for Iraqi refugees in Turkey, Jordan and Lebanon, as the countries which host most of them. Therefore, even if Iraqi refugees want to integrate, the findings have demonstrated that they are not entitled to a long-term settlement because the law and policy of these countries deny such a possibility. In fact, the asylum countries that host a significantly large number of Iraqi refugees have incorporated specific provisions in the MoU, in the case of Jordan and Lebanon, or in their domestic legislations, in the case of Turkey, which object to the idea of local integration for Iraqi refugees. Based on the provisions of the MoU and domestic legislation, once granted RSD, Iraqi refugees are only allowed to reside temporarily in Turkey, Jordan and Lebanon until they are resettled to a third country, or they will be returned to their home countries. The law, policy and practice of these countries shows that there is no evidence that such a pattern is going to change.

At the same time, Iraqi refugees cannot go back to Iraq because voluntary repatriation is non-existent and politically unfeasible within the foreseeable future, for the reasons mentioned in this section, and indeed the UNHCR continues to advise against voluntary repatriation to Iraq.[1207] The lack of an alternative means that resettlement in third countries has become the only viable durable solution for most Iraqi refugees in protracted situations.

Authors such as Chatty and Mansour have conducted a thorough examination of Iraqi refugees in protracted situations. Even though they oppose the idea of resettlement being able to address the predicament of Iraqi refugees, they came to the conclusion that voluntary repatriation is not a feasible solution since Iraq is suffering from sectarian violence, and there is no indication that this situation will improve soon. In addition, the opportunity for local integration is extremely restricted in asylum countries because most of the countries that host Iraqi refugees are suffering from financial crisis and

[1207] UNHCR, 'UNHCR Position on Returns to Iraq' (n 30) para. 27.

political turmoil. Moreover, some of the host countries are neither signatory to the Refugee Convention nor have any domestic legislation on refugee treatment. The host countries have also adopted inflexible immigration rules to restrict the rights of refugees.[1208]

The UNHCR has warned the international community that Iraq is suffering greatly from sectarian tension and division between Kurds, Sunnis, and Shias, and this has contributed to the instability and insecurity in the country.[1209] The Refugee Agency urges States not to return people to Iraq until 'tangible improvements in the security and human rights situation have occurred'.[1210] Hence, the lack of change in circumstance in their regions of origin means that Iraqi refugees have no intention to voluntary repatriate. As discussed in Chapter Four, the international community, acting through the UNHCR, prioritises voluntary repatriation over local integration and third country resettlement to address refugee problems. It is no surprise then that European States have called for voluntary repatriation as a solution to address Iraqi refugees' plight. However, the crisis within the country is far from over and mass return is unlikely as long as the situation remains the same.[1211] While analysing the situation of Iraqi refugees, Long warned donor States that they 'should be extremely careful to understand the broader context of "post-conflict" settings before moving to promote return as a preferred – or even a possible – solution'.[1212] However, the international community, in Bonney's view, is urged to find a solution 'fast for those who have spent large portions of their lives in protracted exile, yet the search for speedy solutions should not sacrifice the safety of refugees' in terms of premature repatriation.[1213]

Stein strongly argues that those who claim that resettlement is not capable of addressing a large influx of refugees fail to take into account that the other two durable solutions are almost non-existent and resettlement is the only solution that can rescue refugees in camps. Likewise, Bonney notes that this solution provides an alternative for those who have been confined in camps for years waiting for change of circumstances to allow

[1208] Chatty and Mansour (n 925) 82. See also, Perveen R. Ali, 'States in Crisis: Sovereignty, Humanitarianism, and Refugee Protection in the Aftermath of the 2003 Iraq War' (PhD Thesis, the London School of Economics and Political Science 2012) 236-247.
[1209] UNHCR, 'UNHCR Global Appeal 2014-2015 – Iraq' available at: <http://www.unhcr.org/528a0a2c8.html> accessed 12 October 2015.
[1210] UNHCR, 'UNHCR Position on Returns to Iraq' (n 30) para. 27.
[1211] UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1212] Long 'Permanent Crises?' (n 811) 10-11.
[1213] Bonney (n 1204) 117.

them to return to their regions of origin or integrate locally in host countries. In these circumstances, resettlement in a third country is the only feasible solution, and one that provides opportunities for those refugees to start new lives in developed countries.[1214] In fact, resettlement is a solution that refugees themselves also prefer to pursue. Therefore, the international community, according to Stein, while 'assigning weights to durable solutions,' should consider that 'non-resettlement needs to be rejected and resettlement restored'.[1215] In accordance with Stein's argument, it could be seen that today asylum countries prefer refugees to return to their regions of origin. Therefore, they are only prepared to provide temporary protection.[1216] Likewise, voluntary repatriation is hardly available for the majority of refugees in PRSs since the conditions in their regions of origin have remained the same as when they left. In such circumstances, voluntary repatriation is neither safe nor feasible. As Bonney astutely states; 'whilst academics can debate the best solution to refugee problems in general, those trapped in PRS have fewer options, since repatriation and local integration are rarely available'.[1217]

Recently, the IOM reported that since January 2014, about 3.2 million Iraqis are internally displaced in the country.[1218] The latest wave of displacement in Iraq was the consequence of the ISIS takeover of the three major cities of Iraq.[1219] This adds to the already thousands of refugees who are in protracted situations and the new plight of Iraqi refugees proves yet again the ongoing history of displacement from Iraq. [1220] The States, therefore, should refrain from the premature physical return of Iraqi refugees because in their situation 'return is clearly an inappropriate "solution" to displacement'.[1221] As the UNHCR noted, the hurried repatriation of refugees to their country would often lead to them being internally displaced. The UNHCR also noted

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[1214] ibid 118.
[1215] Barry Nathen Stein, 'Durable Solutions for Developing Country Refugees' (1986) 20(2) *International Migration Review* 264, 278.
[1216] See, for example, Karen Jacobsen, 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' (2001) New Issues in Refugee Research, Working Paper No. 45, 2 <http://www.unhcr.org/3b7d24059.html> accessed 12 October 2015.
[1217] Bonney (n 1204) 98.
[1218] IOM, 'Displacement in Iraq Reaches Nearly 3.2 Million: IOM' (11 September 2015). Available at: <https://www.iom.int/news/displacement-iraq-reaches-nearly-32-million-iom> accessed 24 October 2015.
[1219] UNHCR, 'Iraq's Displacement Crisis Deepens as Civilians Flee Latest ISIS Offensive' (Briefing Notes, 14 October 2014). Available at: <http://www.unhcr.org/543d10119.html> accessed 23 October 2015.
[1220] UNHCR, 'UNHCR Concerned about the Challenges Facing Thousands of Iraqis Fleeing Ramadi' (News Stories, 21 April 2015). Available at: <http://www.unhcr.org.uk/news-and-views/news-list/news-detail/article/unhcr-concerned-about-the-challenges-facing-thousands-of-iraqis-fleeing-ramadi.html> 20 October 2015.
[1221] Long 'Permanent Crises?' (n 811) 2.

that due to the worsening situation in Syria, many Iraqis had to return; however, the returnees have not gone back to their regions of origin. Instead, they have moved elsewhere in the country, leading to new secondary displacement inside Iraq.[1222] The hurried repatriation does not constitute part of the solution, but rather it creates an unstable environment within the regions of origin for returnees. This results in transferring the problem from the country of asylum to the country of origin.[1223] In Wallace and Quiroz's view, '[r]epatriation is not a durable solution if it encourages further displacement within the country of origin. The danger exists that repatriation alone is a relocation that converts refugees into IDPs'.[1224] Despite being criticised by many refugee advocates, States still continue to pursue repatriation to the exclusion of other alternatives, local integration, and resettlement.[1225]

During 2008 to 2009, a survey conducted in Jordan by the UNHCR showed that 92% of Iraqi refugees have no intention to return.[1226] Another survey carried out by the UNHCR of returnees between 2007 and 2008 from Jordan and Syria revealed that of those who returned 61% regretted making such a decision, while 34% were unsure whether to stay permanently in Iraq. They also voiced their concern that conditions had to improve, otherwise they would consider once again seeking asylum in neighbouring countries. Most of the returnees participating in the survey stated that they did not want to return to Iraq; however, having no livelihood and the high cost of living in asylum countries left them with no choice but to return. More importantly, approximately 80% had not returned to their regions of origin. This was mainly due to 'physical insecurity, economic hardship and a lack of basic public services' in their regions of origin.[1227]

However, the international community must understand that for the majority of Iraqi refugees voluntary repatriation is not likely to become feasible in the foreseeable future,

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[1222] UNHCR, '2015 UNHCR Country Operations Profile – Iraq' available at: <http://www.unhcr.org/pages/49e486426.html> accessed 12 October 2015.
[1223] For the overview challenges that repatriation and reintegration pose, see Wallace and Quiroz (n 908) 422-426.
[1224] ibid 412-413.
[1225] Long 'Permanent Crises?' (n 811) 2.
[1226] UNHCR, 'UNHCR Jordan Summary: Intention to Return to Iraq Inquiries of 2008 & 2009' (Data Analysis Group – 21 May 2009 –Tracking Code OTH0002.1). Available at: <http://www.unhcr.org/4acb0e429.html> accessed 12 October 2015. See also, Human Rights First, 'Iraqi Refugee Returns: Not a Solution Right Now' (September 2008). Available at: <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080908-RPP-returns-fact-sheet.pdf> accessed 12 October 2015.
[1227] UNHCR, 'UNHCR Poll Indicates Iraqi Refugees Regret Returning Home' (19 October 2010). Available at: <http://www.unhcr.org/4cbdab456.html> accessed 12 October 2015.

unless the country's security improves significantly. Even then there are groups of people, including minorities, who are often reluctant to repatriate because they do not feel safe or have experienced trauma, including loss of family members; for such individuals, even if their country of origin becomes safe again, they may not want to go back. Likewise, second generation refugees are also reluctant because they have never been to or seen Iraq. Thus, there is a lack of desire among these groups to return.

One could also draw from the experience of Rwandan refugees who have been displaced for two decades since the 1994 genocide. Even though the international community, acting through the UNHCR, has designated repatriation as the ideal solution to address their plight, tens of thousands of Rwandan refugees are reluctant to return.[1228] While analysing the problems that arise from mass voluntary repatriations of refugees, Rogge notes that voluntary repatriation is more complicated than the policy makers predict. This is because, *inter alia*, not every refugee wants to return to their region of origin, even if the circumstances in which the individual has been recognised as a refugee have ceased to exist. Among these groups of refugees are the second-generation refugees who have integrated into the host community, since they have been living there all their lives. From the perspective of these refugees, return to their country of origin does not always necessarily mean going home.[1229] In fact, During the Conference of Plenipotentiaries, the drafters recognised such unwillingness among some refugees and incorporated the term in the refugee definition, which reads as follows:

> the term "refugee" shall apply to any person who: 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.[1230]

[1228] See, for example, Cleophas Karooma, 'Reluctant to Return? The Primacy of Social Networks in the Repatriation of Rwandan Refugees in Uganda' (2014) Refugee Studies Centre Working Paper Series No. 103, 1-31 <http://www.rsc.ox.ac.uk/publications/reluctant-to-return-the-primacy-of-social-networks-in-the-repatriation-of-rwandan-refugees-in-uganda> accessed 20 October 2015.
[1229] John R. Rogge, 'Repatriation of Refugees: A Not-So-Simple "Optimum" Solution' *A paper prepared for the United Nations Research Institute for Social Development for presentation to the Symposium on social and economic aspects of mass voluntary return of refugees from one African country to another, Harare, Zimbabwe, 12-14 March 1991* (1991) Refugee Studies Centre, RSC/J-56 CONF BOX 'SYM', 1, 31-36, <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:682> accessed 24 October 2015. See also, Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 55-73.
[1230] Refugees Convention. Art. 1(A)(2). (Emphasis added).

Echoing the drafter's view, Zieck notes that '[r]efugees are by definition "unrepatriable". As long as a person satisfies the definition of refugee in the contemporary instruments, he remains, moreover, "unrepatriable" and consequently benefits from the prohibition of forced return'.[1231]

This section has shown that resettlement for Iraqi refugees is more pertinent today because there is a lack of foreseeable alternative durable solutions since both local integration and voluntary repatriation are not available to address their plight. The recent figures of displaced Iraqi refugees and the law, policy and practice of asylum countries show that there is no evidence that such a pattern is going to change.

6.2.2 The International Community's Recognition of Resettlement as the Best Solution for Iraqi Refugees

The international community for its part has also acknowledged that resettlement is the optimal solution for Iraqi refugees. In 2008, in order to show international solidarity and address Iraqi refugee problems, the Justice and Home Affairs Council of the EU sent a mission to Jordan and Syria to review and assess the Iraqi refugee situation.[1232] The mission, in co-operation with the UNHCR, presented to the council a fact finding report on the situation and identified that resettlement is the only solution capable of resolving the Iraqi refugee predicament. The mission discovered that the majority of Iraqi refugees in Jordan and Syria do not have the access to employment, education, and health treatment. Their situation is deteriorating, and they are in real need of international assistance. Despite the fact that both countries have been generously hosting significantly large numbers of Iraqi refugees, they are incapable of managing the growth in the number of border crossings. Therefore, the report acknowledged that local integration is not a realistic option in both countries.[1233]

In addition, the report recognised that voluntary repatriation is not a safe solution for Iraqi refugees in the foreseeable future, due to the lack of improvement in security and stability in the country. For the reasons mentioned, the report concluded that 'in both

[1231] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees* (n 980)101-102.
[1232] Council of the European Union, 'Report on the EU Fact Finding Mission to Jordan and Syria on Resettlement of Refugees from Iraq' (20 November 2008) EU Ref: 16112/08 ASILE 21 COMEM 217, 3.
[1233] ibid 2.

countries there is a clear need for resettlement, as for many refugees no other durable solution is likely to be available, even in the long term'.[1234]

Although the mission recognised that resettlement is the solution to address Iraqi refugee displacement in these countries, the figures available on the practice of resettlement among EU Member States are lower than required. For instance, Australia, Canada, and the USA resettle more than 90% of refugees every year in comparison with only eight percent from 16 European countries.[1235] As shown in the table provided in appendix (E), between 2000 and 2012, EU countries resettled only 49,465 refugees.[1236] In addition, as shown in the table provided in appendix (F), between 2000 and 2011, European countries resettled only 6,392 Iraqi refugees.[1237] These figures are a small fraction of the total number of refugees, including Iraqis displaced worldwide.

To address this uneven distribution of refugees, the EU had to take measures to resettle more refugees globally, including Iraqi refugees in the Middle East region. The report of the mission and their fact-finding resulted in a joint EU action, which set a target to resettle up to 10,000 Iraqi refugees in Europe. Even the Council of the EU admitted that resettlement of this kind 'would send a positive signal of solidarity to all Iraqis and of cooperation with Syria and Jordan for the maintenance of their area of protection'.[1238]

Hueck and Williams described the EU approach as the most significant example of international solidarity to respond to refugee predicaments.[1239] The joint action was successful in encouraging Member States to increase their quota. The programme also encouraged the States that had not yet participated in resettlement to provide resettlement opportunities. Consequently, the joint effort of EU Member States saw the emergence of new States and those already offering places increase their quotas, and even adopt an *ad-hoc* resettlement programme.[1240] Initially, only six of the 27 Member

[1234] Council of the European Union, 'Report on the EU Fact Finding Mission to Jordan and Syria on Resettlement of Refugees from Iraq' (20 November 2008) EU Ref: 16112/08 ASILE 21 COMEM 217, 2.
[1235] UNHCR, 'Progress Report on Resettlement' (ExCom Standing Committee 54th meeting, 5 June 2012) UN Doc. EC/63/SC/CRP.12, para. 3.
[1236] Perrin (n 1202) 13.
[1237] Ibid 16, 19.
[1238] European Union Council, Council Conclusions on the reception of Iraqi refugees, 2987th Justice and Home Affairs Council meeting, Brussels (27-28 November 2008) EU Ref: CL08-228EN, para. 2.
[1239] Petra Hueck and Hazel Williams, 'Introduction: Paving the Way' in Hazel Williams and others (eds), Paving the Way: A Handbook on the Reception and Integration of Resettled Refugees (ICMC 2011) 7.
[1240] Salome Phillmann, Nathalie Stiennon and Petra Hueck, '10,000 Refugees from Iraq: A Report on Joint Resettlement in the European Union' (ICMC and IRC, May 2010) 28-34. Available at:

States were involved in resettlement activities; however, one year into the programme the numbers doubled. Such action, naturally, resulted in more Iraqi refugees being resettled.

The said optimism was short-lived, as in 2010 a study conducted by Phillmann, Stiennon and Hueck reported that the programme had failed to achieve the initial target to resettle 10,000 refugees from Iraq.[1241] The study indicated that despite the success it achieved, the programme caused its own downfall by failing to provide a time-scale, and it was unclear how and when the remaining refugees would be resettled. In addition, the indicative nature of the quota of 10,000 is a tiny amount of the overall number of Iraqi refugees who desperately need a solution. The nominated figure does not reflect the size of the Member States that want to play an important role in addressing the long-term problems of refugees.[1242] This suggests that Member States were not prepared to commit to the programme to address the continuing needs of Iraqi refugees.

In 2009, in order to build on the relative success of a joint EU action and learn a lesson from the programme, the European Commission proposed the establishment of a Joint EU Resettlement Programme.[1243] In 2012, after more than two years of negotiations between Member States on the proposal, the EU adopted a Joint Resettlement Programme to find a sustainable solution for refugees.[1244] The aim of the programme was to increase 'the impact of the Union's resettlement efforts in providing protection to refugees' as well as 'maximising the strategic impact of resettlement through a better targeting of those persons who are in greatest need of resettlement'.[1245] The programme was welcomed by the UNHCR.[1246] More importantly, the programme led to the establishment of common EU resettlement priorities for 2013. The programme identified Iraqi refugees in Turkey, Syria, Lebanon, and Jordan as one of the six EU

<http://www.icmc.net/system/files/publication/10000_refugees_from_iraq_a_report_on_joint_resett_17063.pdf> accessed 24 October 2015.

[1241] ibid 3.

[1242] ibid 16.

[1243] European Union: European Commission, 'Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme' (2 September 2009) EUI Ref: COM(2009) 447 final.

[1244] Decisions 281/2012/EU of 29 March 2012 of the European Parliament and of the Council [2012] OJ L 92/1.

[1245] This programme has been explored in detail in Section 6.2.4.1.1. Decisions 281/2012/EU of 29 March 2012 of the European Parliament and of the Council [2012] OJ L 92/1. Preamble (para. 1).

[1246] UNHCR, 'UNHCR Welcomes Adoption of Joint EU Resettlement Programme' (30 March 2012). Available at: <http://www.refworld.org/docid/4f7d70e92.html> accessed 24 October 2015.

priority situations for resettlement.[1247] Whether such a programme will succeed remains to be seen, since it is relatively new and still on-going. However, the programme recognises that, through resettlement, Europe can not only address the Iraqi refugee crisis but also show international solidarity with Iraqi neighbouring counties that host a significantly large number of refugees.

Likewise, in 2011, the UNHCR's ATCR and WGR programme identified Iraqi refugees in Lebanon, Jordan and Syria as one of the seven priority situations for the SUR.[1248] Although the list for resettlement priorities for 2013 selected by the Council of the EU is quite different from those of the UNHCR, Iraqi refugees in Jordan, Lebanon, and Syria are still highlighted by both organisations as being in a priority situation that requires urgent address.[1249] This reflects the international community's recognition of the seriousness of Iraqi refugees in protracted situations. The UNHCR repeatedly calls States to provide resettlement opportunities for refugees.[1250] In terms of Iraqi refugees, the UNHCR expects third-country resettlement to remain the primary durable solution for them in 2015 because this solution remains the essential protection element for them.[1251]

This section examined the recent reports of the international community to address the plight of Iraqi refugees. The international community, acting through UNHCR, has realised that with no prospect of voluntary repatriation to Iraq, as well as a lack of legal status and poor conditions in the immediate asylum countries, resettlement to a third country is the only durable solution that is able to address their predicament.[1252]

[1247] Decisions 281/2012/EU of 29 March 2012 of the European Parliament and of the Council [2012] OJ L 92/1. Annex.
[1248] The SUR strand has been discussed in Section 6.2.4.1. UNHCR, 'Working Group on Resettlement: Discussion Paper on the Implementation of the Strategic Use of Resettlement' (Geneva, 11-12 October 2011) paras. 1-7. Available at: <http://www.refworld.org/pdfid/4ff147912.pdf> accessed 24 October 2015. See also, the ICMC (n 1016) 65-67.
[1249] ibid para. 7.
[1250] UNHCR: 'UNHCR Calls for More Resettlement Places and Better Integration Support for Resettled Refugees' (4 July 2011). Available at: <http://www.unhcr.org/4e11735e6.html> accessed 24 October 2015.
[1251] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 20 October 2015; UNHCR, '2015 UNHCR Regional Operations Profile - Middle East' available at: <http://www.unhcr.org/pages/49e486976.html> accessed 20 October 2015; and UNHCR, 'UNHCR Global Appeal 2014-2015 – Jordan' (2014) 2. Available at: <http://www.unhcr.org/528a0a2c13.pdf> accessed 12 October 2015.
[1252] Council of the European Union, 'Report on the EU Fact Finding Mission to Jordan and Syria on Resettlement of Refugees from Iraq' (16112/08 ASILE 21 COMEM 217, 20 November 2008) 2. Available at: <http://www.statewatch.org/news/2011/jan/eu-council-com-report-on-iraq-08.pdf> accessed 24 October 2015.

6.2.3 The Lack of Resettlement Opportunities Contributes to Irregular Migration

Every year, tens of thousands of people risk their lives trying to enter the EU in an irregular way and many die in the attempt, as demonstrated by recent events, notably in the Mediterranean[1253] and Andaman seas.[1254] This study argues that due to the lack of resettlement opportunities and efficient delivery of this solution, thousands of Iraqi refugees every year take irregular or dangerous routes to find safety. Indeed, the efficient implementation of this solution would benefit those who do so. However, this is not to say that increasing resettlement opportunities would stop others. Troeller likewise notes that '[t]here is no necessary or proven correlation between increased resettlement and a reduction in the number of those legitimately or illegitimately seeking asylum'; he admits, however, that 'increased resettlement opportunities may reduce the motivation to move "irregularly" in search of asylum'.[1255]

According to Djajić, asylum seekers have two main ways of reaching industrialised countries: irregular migration, which comes at a high cost and risk, with the aid of human smugglers and often without appropriate documentation, or through the UNHCR's resettlement submission programmes, which are available for only a small proportion of refugees.[1256] The UNHCR argues that '[r]esettlement can have a positive, mitigating influence on irregular movements when it is implemented on the basis of clear and consistent criteria, and when it is used as a policy tool to reinforce protection in countries of first asylum'.[1257] Loescher and Milner go further by stating that PRSs are a principal source of many of the irregular movements of people around the world.[1258] In fact, a number of European States have taken measures such as increasing

[1253] UNHCR, 'Another Weekend of Tragedy Marks the Mediterranean, with up to 40 Refugees Dead' (News Stories, 20 September 2015). Available at: <http://www.unhcr.org/55ff19226.html> accessed 13 October 2015.
[1254] UNHCR, 'UNHCR Urges Governments to Continue High Seas Live-Saving Operations' (News Stories, 12 May 2015). Available at: <http://www.unhcr.org/5551f31cfdd.html> accessed 13 October 2015.
[1255] Troeller (n 826) 92.
[1256] Slobodan Djajić, 'Asylum Seeking and Irregular Migration' (2014) 39 *International Review of Law and Economics* 83-84.
[1257] UNHCR, 'Resettlement: An Instrument of Protection and a Durable Solution' (1997) 9(4) IJRL 666, 671.
[1258] Gil Loescher and James Milner, 'Protracted Refugee Situations: Domestic and International Security Implications' (2005) 375(45) *Adelphi Papers* 7.

resettlement opportunities to address and manage irregular migration.[1259] However, as noted by Troeller, there is no empirical evidence that increasing resettlement opportunities would halt irregular migration.

Chapter Five examined the situation of Iraqi refugees in asylum countries and discovered that the rights of Iraqi refugees in these countries are restricted. In addition, all the neighbouring countries object to providing anything other than temporary protection. Their treatment in these countries, alongside the lack of resettlement opportunities to third countries, is the contributing factor for many Iraqis who have been left with no choice but to commit to the dangerous route of irregular migration with the assistance of smugglers to European countries.[1260] Iraqi refugees have chosen this route in order to escape the risk of being arrested, detained or forcibly returned. In fact, irregular migration has become the only option for Iraqi refugees to find safety since there are no other legal ways to find protection.

Alonso notes that limited places for resettlement have made irregular migration an attractive alternative for Iraqi refugees to seek much needed protection in the industrialised countries.[1261] Equally, the former UNHCR High Commissioner, Ruud Lubbers, noted that if European countries apply durable solutions better and support the States that host large numbers of refugees, then there will be fewer refugees who seek dangerous solutions in the form of human trafficking and smuggling in order to find safety. However, he warned that not finding a durable solution would result in refugees being forced to go on the move irregularly, using criminal networks.[1262] Between 2008 and 2011, Iraqi refugees were amongst the most common irregularly present migrants in the EU.[1263]

While examining the policy of EU Member States towards Iraqi asylum seekers, Sperl notes that the lack of legal ways for Iraqi refugees to enter Europe means that they

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[1259] Joanne Van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?' (2004) 22(1) *Refuge* 39. The European Migration Network, 'Practical Measures to Reduce Irregular Migration' (October 2012) 3-135. Available at: <http://www.emn.lv/wp-content/uploads/EMN_Synthesis_Report_Irregular_Migration_April_2013.pdf> accessed 12 October 2015.
[1260] See, for example, Sperl (n 1181) 16.
[1261] Alonso (n 31) 331.
[1262] UNHCR, 'Statement by Mr. Ruud Lubbers, to the European Conference on Migration, Brussels' (n 18).
[1263] The European Migration Network (n 1259) 120.

resort to irregular ways of entering Europe. In Sperl's view, the '[r]esettlement of the most vulnerable Iraqi refugees to EU member states with UNHCR's assistance could have allowed this problem to be bypassed'.[1264]

The EU Agency for Fundamental Rights (FRA) has called on the EU and its Member States to offer more possibilities for persons in need of international protection to arrive in the EU legally, and in safety. The FRA notes that this can be done through the implementation of resettlement programmes to explore distinct humanitarian admission schemes which are not limited to those who qualify as refugees. By putting in place such programmes, the EU Member States not only enable more persons in need of international protection to enter the EU, but also contribute to reducing their need to resort to smuggling networks to reach safety.[1265] Indeed, this is a viable alternative solution to risky irregular entry.

The figures show that opportunities to enter the EU lawfully, through resettlement, are extremely limited for persons in need of international protection. For instance, in 2013, a total of 98,400 refugees were admitted to 21 resettlement countries worldwide. Of these, 91,600 were resettled to Australia, Canada, and the United States.[1266] In comparison, only 4,840 refugees were resettled in the EU as a whole.[1267] In fact, almost half of the Member States do not even have a regular resettlement programme in place.[1268] However, the UNHCR warns that increasing resettlement opportunities alone would not combat irregular migration.[1269]

The general view among observers is that there is no available route for Iraqi refugees to find safety in third countries as a result of lack of resettlement opportunities.[1270] The

[1264] See, for example, Sperl (n 1181) 14-15.
[1265] The European Union Agency for Fundamental Rights (FRA), 'Legal Entry Channels to the EU for Persons in Need of International Protection: a Toolbox' (FRA Focus 02/2015). Available at: <http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf > accessed 16 October 2015.
[1266] UNHCR, 'UNHCR Global Trends 2013' (n 950) 20.
[1267] UNHCR, 'Progress Report on Resettlement' (ExCom Standing Committee 54th meeting, 5 June 2012) UN Doc. EC/63/SC/CRP.12, para. 3.
[1268] The ICMC (n 1016) ch vi.
[1269] UNHCR, 'Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities' (Global Consultations on International Protection 4th Meeting, EC/GC/02/7 25 April 2002) paras. 10 and 11(c). Available at: <http://www.refworld.org/pdfid/3d62679e4.pdf> accessed 5 February 2015. For further analysis in the literature see, for example, Selm, 'Great Expectations' (n 1201) paras. 37-50.
[1270] See, for example, Alonso (n 31) 321-375; and Sperl (n 1181) 16.

analysis that emerged in Chapter Five is that Iraqi refugees do not have access to international protection in asylum countries and there is lack of efficient delivery of resettlement. The lack of options in Middle Eastern countries has pushed these refugees to seek protection through dangerous routes.[1271] Establishing a resettlement mechanism to enhance the availability of this solution could efficiently reduce irregular migration and contribute towards reducing lives lost, as noted by the FRA. However, increasing resettlement opportunities might not stop people taking an irregular route to reach asylum countries.

6.2.4 The UNHCR's Resettlement of Iraqi Refugees from Rafha Camp

The UNHCR first practised resettlement for Iraqi refugees in the 1990s. During the late 1980s and the beginning of 1990s, the aftermath of the Iran-Iraq War and the first Gulf War, resulted in thousands if not millions of Iraqi refugees in need of significant resettlement opportunities. The UNHCR recognised the complications of the situation since neighbouring countries preferred Iraqis to return home rather than integrate locally. To avoid the Iraqi refugee situation becoming protracted, the UNHCR shifted its major resettlement activity to the Middle East region. For example, between 1991 and 2001, a total of 70,000 Iraqi refugees were resettled.[1272] Moreover, from 1993 to 2002, the UNHCR helped 49,683 Iraqi refugees to resettle, the highest number of refugees to be resettled in that period by the UNHCR in the world.[1273]

In 1991, the aftermath of the Gulf War resulted in thousands of Iraqi refugees, mostly Kurds, seeking asylum in Turkey,[1274] as discussed in Chapter Five. Apart from this, the 1991 Gulf War also resulted in more than 30,000 Iraqi refugees, mostly Shias, fleeing to Saudi Arabia.[1275] In 1992, to address the problem of these refugees, the UNHCR attempted to either help them to return to Iraq or facilitate their local integration in

[1271] See, for example, Arango (n 1181); and Sperl (n 1181) 1-19.
[1272] UNHCR, 'Iraqi Refugee and Asylum-Seeker Statistics' (March 2003) 1. Available at: <http://www.unhcr.org/3e79b00b9.html> accessed 24 October 2015.
[1273] UNHCR, 'UNHCR Statistical Yearbook 2002' (UNHCR Statistics, 2 September 2004) Statistical Annex I - B12. Available at: <http://www.unhcr.org/413598454.html> accessed 12 October 2015.
[1274] See, for example, UNHCR Resettlement Handbook (n 851) 50.
[1275] It should also be noted that during the Iran-Iraq War approximately 17,000 Iraqi refugees, mostly Shias, fled to Saudi Arabia. However, unlike Iraqis in Rafha Camp, these 17,000 Iraqis enjoyed a *de facto* refugee status in the eastern provinces of the country. See, UNHCR, 'Preliminary Repatriation and Reintegration Plan for Iraq' (April 2003) 6. Available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/D62A336EDA42595F85256D330068FB11-unhcr-irq-30apr.pdf> accessed 24 October 2015.

Saudi Arabia. However, the UNHCR failed to provide either solution. On the one hand, the Iraqi Government did not guarantee the safety of the returnees. On the other hand, the local integration opportunities were not available in Saudi Arabia. Iraqi refugees were confined in the Rafha camp and felt like prisoners due to the regular checkpoints, armed vehicles, and the imposed night curfew by the Saudi soldiers.[1276] Subsequently, the UNHCR became concerned with their deteriorating situation and suggested that resettlement in a third country was the only viable option for those refugees since the efforts to secure voluntary repatriation and local integration have failed. The UNHCR implemented a multi-year larger scale movement, which resulted in 21,800 Iraqi refugees being accepted for resettlement by 1997.[1277]

However, due to the lack of interest from the international community to resettle the remaining refugees and of the slow process for departure of those accepted for resettlement, the UNHCR's programme failed to continue and quickly waned. The disinterest by the international community in the programme, in Frederiksson and Mougne's view, was because of the lack of a major international forum, like the International Conference on Indo-Chinese Refugees, mentioned in Chapter Four, Section 4.3.1.4, which was capable of attracting international interest that resulted in the successful resettlement of the majority of the Vietnamese boat people.[1278] Additional reasons contributing to the failure of the programme, in their view, were that the resettlement of Iraqi refugees was rather low-key, it did not have a concrete plan on burden and responsibility sharing, and did not also proceed in a co-ordinated manner.[1279]

In 2003, the UNHCR reported that although a total of more than 25,000 Iraqi refugees in Rafha camp have been resettled, over 5,000 Iraqis remained in the camp without a solution, 12 years from their initial displacement.[1280] To address the seriousness of the

[1276] UNHCR, 'Overview of Numbers and Conditions of Iraqi Refugees in the Middle East and Internally Displaced Persons in Iraq' (US Committee for Refugees and Immigrants Report, 27 January 2003). Available at: <http://reliefweb.int/report/iraq/overview-numbers-and-conditions-iraqi-refugees-middle-east-and-internally-displaced> accessed 24 October 2015.
[1277] UNHCR Resettlement Handbook (n 851) 50. See also, Frederiksson and Mougne (n 853) para. 67.
[1278] International Conference on Indo-Chinese Refugees (adopted 13 and 14 June 1989) UN Doc. A/CONF.148/2. For an overview analysis on Indo-Chinese Comprehensive Plans of Action, see Robinson W. Courtland, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 17(3) JRS 319-333.
[1279] Frederiksson and Mougne (n 853) para. 68.
[1280] UNHCR, 'Iraqi Refugee and Asylum-Seeker Statistics' (March 2003) 1. Available at: <http://www.unhcr.org/3e79b00b9.html> accessed 24 October 2015. See also, United States Committee

situation, the Saudi government agreed to provide permanent residence to 2,000 Iraqi refugees in exchange that the remaining Iraqi refugees were provided resettlement in third countries. The former UNHCR High Commissioner, Lubbers, praised the Saudi authority for this goodwill gesture and he valued the country's humanitarian assistance to the Iraqi refugees in Rafha camp.[1281]

Although it took longer than expected, the UNHCR was successful in closing the Rafha camp and finding a durable solution in the form of resettlement in a third country for this group of refugees from Iraq. This case study does not stand alone, as the UNHCR throughout its history has practised resettlement when it was clear that the other two solutions were not available. In Chapter Four, the case study of the resettlement of Indo-Chinese was discussed and it was shown that the resettlement was able to respond to a mass influx of refugees. [1282] To address the refugee crisis in Southeast Asia, States agreed to organise an International Conference on Indo-Chinese Refugees in 1979,[1283] and adopted a CPA programme in 1989, respectively.[1284] The programme met its objectives by successfully addressing the plight of the Indo-Chinese.[1285] In the former UNHCR High Commissioner's view, the programme 'succeeded in bringing the outflow from Viet Nam and Laos down to almost zero'.[1286] However, some academics, including Harrell-Bond, isolated the resettlement success of refugees from Southeast Asia as a one off and predicted that 'it is unlikely that a similar situation will arise in the foreseeable future'.[1287] Troeller labels this period as the 'halcyon days of large-scale resettlement'.[1288]

for Refugees and Immigrants, 'U.S. Committee for Refugees World Refugee Survey 2002 – Iraq' (10 June 2002). Available at: <http://www.refworld.org/docid/3d04c15514.html> accessed 12 October 2015.

[1281] Arab News, 'Lubbers Happy with Iraqi Refugees' Camp in Rafha' *Arab News* (Jeddah, 18 October 2002) <http://www.arabnews.com/node/225129> accessed 24 October 2015. See also, UNHCR, 'Iraqi Refugees Return from Saudi Arabia' (Press Releases, 29 July 2003). Available at: <http://www.unhcr.org/3f26b0a44.html> accessed 23 October 2015.

[1282] International Conference on Indo-Chinese Refugees (Geneva, 13 and 14 June 1989) cited in (1989) 1(4) IJRL9) 574-581.

[1283] UNHCR, *The State of The World's Refugees: 2000* (n 167) 84.

[1284] International Conference on Indo-Chinese Refugees (n 830).

[1285] UNHCR, 'Comprehensive Plan of Action for Indo-Chinese Refugees to End in June' (Press Release REF/1135, 6 March 1996). Available at: <http://www.un.org/News/Press/docs/1996/19960306.ref1135.html> accessed 24 October 2015.

[1286] UNHCR, 'Statement by Mr. Ruud Lubbers (n 817).

[1287] Harrell-Bond (n 759) 50. See also, Clark and Simeon (n 845) 21.

[1288] Troeller, 'Asylum Trends in Industrialized Countries and Their Impact on Protracted Refugee Situations' (n 849) 59.

However, contrary to these claims, some significant resettlement programmes have been carried out since the resettlement of Indo-Chinese refugees.[1289] For example, the 2007 resettlement programme of refugees from Bhutan was a programme adopted by the UNHCR to resettle approximately 110,000 Bhutanese confined in camps in Nepal since the early 1990s.[1290] In November 2005, a Core Group was organised in Geneva to peruse durable solutions for this group of refugees.[1291] After an initial attempt to repatriate refugees to Bhutan failed and local integration could not be achieved in Nepal,[1292] as was the case for Iraqi refugees in the Rafha camp, the UNHCR, in collaboration with the Core Group, launched a resettlement programme for Bhutanese refugees.[1293] So far, the programme has been able to refer 100,000 Bhutanese for resettlement. As of December 2014, 94,651 Bhutanese have already started their new lives in resettled countries.[1294] Since the programme attracted the highest acceptance rate in the world, the majority of the remaining refugees are expected to be resettled soon. The UNHCR praised the programme for its ability to address one of the most PRSs in Asia.[1295] According to Selm, the Bhutanese form 'the largest post-Cold War group of refugees whose situation has been addressed by the international community through mass resettlement.[1296]

This, and other case studies mentioned in Chapter Four, shows that resettlement plays a significant role in resolving protracted displacement of refugees worldwide. They also show that almost all refugees in protracted situations, including Iraqi refugees, prefer to be resettled even if it means staying longer in camps to achieve that. According to Lindley and Haslie, this is because 'the prospect of potential resettlement is big in the imaginations of refugees and has a significant indirect impact in terms of fostering hope in difficult circumstances, providing opportunities to influence the behaviour of refugees, and through the backflow of remittances'.[1297] Likewise, Long argues that

[1289] For a historical account of UNHCR' practice of resettlement, see UNHCR Resettlement Handbook (n 851) 47-53.
[1290] For further information on this programme, see Banki (n 852) 29-54; and the ICMC (n 1016) 59-61, 77.
[1291] UNHCR Resettlement Handbook (n 851) 58.
[1292] Banki (n 852) 29.
[1293] UNHCR Resettlement Handbook (n 851) 58.
[1294] IOM, 'Resettlement of Bhutanese Refugees' available at: <http://nepal.iom.int/jupgrade/index.php/en/aboutus/18-topic-details/52-about-us-2> accessed 24 October 2015.
[1295] UNHCR, 'Refugee Resettlement Referral from Nepal Reaches Six-Figure Mark' (n 852).
[1296] Selm (n 1191) 520.
[1297] Anna Lindley and Anita Haslie, 'Unlocking Protracted Displacement: Somali Case Study' (2011) Refugee Studies Centre Working Paper Series No. 79, 4

resettlement in third countries is more appealing to refugees than the other two solutions since it provides for refugees not only a much-needed protection but also the opportunity for economic and social gains in the developed countries.[1298]

6.2.4.1 The UNHCR's Strategic Use of Resettlement to Enhance Resettlement Capacity

As noted previously, the UNHCR continues to advocate for more countries to offer resettlement places. Despite this, States see resettlement as the third choice solution to practice when the other two solutions are not available. However, this section shows that in the early twentieth century, this solution was seen by the international community as the preferred durable solution to address refugee problems. This is not the case anymore. Today, there is a hierarchy with the three durable solutions. One solution, voluntary repatriation, has been prioritised and promoted while the other two, local integration and third country resettlement, were least favoured.

This section reviews some of the initiatives the UNHCR adopted to increase the resettlement opportunities for refugees. In particular, the SUR strand is one of the three generic strands of the Convention Plus Initiative adopted to reach special agreements among States to increase the resettlement opportunities for refugees.[1299] Some of the challenges and limitations of this strand are reviewed to show whether it has achieved its goals in expanding resettlement opportunities and implementing resettlement programmes for those States that still do not have such programmes. Apart from reviewing the UNHCR's resettlement activities and highlighting its progress so far, the section also outlines the challenges ahead to enhance resettlement capacity to respond to a larger refugee crisis.

Traditionally, this solution has been practised mainly because the country of first destination refuses to provide continuous protection to refugees in the form of local integration, and the situation in the regions of origin has not improved for refugees to

<http://www.rsc.ox.ac.uk/publications/unlocking-protracted-displacement-somali-case-study> accessed 20 October 2015.

[1298] See, for example, the Liberian refugees in Ghana in 2008 who demonstrated and went on hunger strike when the authorities decided to scale back the resettlement programme. Refugees reacted angrily because the majority of them hoped to resettle eventually, even if it meant staying in camps for a little longer. Long 'Permanent Crises?' (n 811) 19-20.

[1299] UNHCR, 'Convention Plus at a Glance' (n 884) 1.

voluntary repatriate. In other words, resettlement in third countries has only been practised once the other two solutions are not available.[1300] The former UNHCR High Commissioner, Sadako Ogata, stated that 'the description of resettlement as a "last resort" should not be interpreted to mean that there is a hierarchy of solutions and that resettlement is the least valuable or needed among them. For many refugees, resettlement is, in fact, the best – or perhaps, only – alternative'.[1301]

However, State practice shows that this is the case. Many States consider resettlement to be the last resort for refugees. Despite continuous effort from the UNHCR to increase the number of resettlement opportunities, the total number resettled each year is a tiny portion of the overall number of refugees. For instance, between 1912 and 1969 approximately 50 million European refugees were displaced and they were all resettled.[1302] However, today, less than one percent of refugees are resettled, and so unless resettlement opportunities increase significantly more than half of the refugees who need resettlement will be confined in camps or be in state of limbo in asylum countries without any solution in sight.[1303] According to Bialczyk, with the declining numbers of refugees being resettled, it is evident that 'the concern of and for the state is given primacy over that of refugees'.[1304]

This shows that there are relatively small numbers of refugees who benefit from resettlement in comparison with the other two durable solutions. In fact, in ExCom Conclusion No. 67 (XLII), the High Commissioner admitted that 'UNHCR pursues resettlement only as a last resort, when neither voluntary repatriation nor local integration is possible'.[1305] However, being labelled the 'last resort' would no doubt have a significant impact on protection for many refugees, for whom resettlement is in fact the best and only alternative solution available to address their plight, as noted by the former UNHCR High Commissioner above.[1306] In applying resettlement, the UNHCR and resettlement countries give priority to vulnerable refugees such as

[1300] See, for example, Shauna Labman, 'Resettlement's Renaissance: A Cautionary Advocacy' (2007) 24(2) *Refuge* 35, 36.
[1301] UNHCR, 'Resettlement Handbook' (Revised edn, April 1998) ch 1.
[1302] Bhupinder Singh Chimni 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) JRS 350, 363-364.
[1303] UNHCR, 'UNHCR Global Trends 2013' (n 950) 20-21. See also, UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 7.
[1304] Bialczyk (n 759) 10.
[1305] ExCom Conclusion No. 67 (XLII) 'Resettlement as an Instrument of Protection' (Committees 42nd Session, 1991) para. (g).
[1306] UNHCR, 'Resettlement Handbook' (Revised edn, April 1998) ch 1.

children, women, and families.[1307] However, in Fredriksson's view, resettlement should apply to all refugees equally, not only those who need legal protection but for thousands who have been trapped in the camps for many years. He further argues that it is time for the UNHCR,

> to discard the notion that there is a hierarchy of durable solutions, ie dubbing some as 'preferred' and others as 'undesirable'. [The UNHCR should develop] a clear policy on the intrinsic link between resettlement and the need for durable solutions will result in operational guidelines and criteria for this type of resettlement activity, which are now virtually absent from the UNHCR Resettlement Handbook.[1308]

However, the historical analysis of this solution shows that the international community initially saw resettlement as the preferred durable solution to respond to refugee crisis. For instance, in the wake of the Second World War, the IRO, due to the 1956 Hungarian Revolution, practised resettlement as the primary solution for the 200,000 refugees.[1309] Its successor, the UNHCR, continued the practice by resettling more than 40,000 refugees on the verge of expulsion from Uganda in 1972[1310] and 5,000 refugees from Chile in 1973.[1311] Troeller notes that by the late 1970s the UNHCR was involved in the resettlement of 200,000 refugees annually. In fact, at one point in 1979 'resettlement was viewed as the only viable solution for 1 in 20 of the global refugee population under the responsibility of UNHCR'.[1312] Most notably, in 1989, the implementation of the CPA for Indo-Chinese resulted in almost two million Vietnamese being resettled.[1313] There are also the recent examples of Bhutanese refugees,[1314] and the continuous resettlement of refugees from Myanmar.[1315] The latter programmes, which are soon expected to finish, contribute to addressing one of the most PRSs in Asia.[1316]

Although the practice of resettlement has continued for a number of decades, in the mid-1980s, the position started to change as resettlement places were restricted and

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[1307] Hansen, Mutabaraka and Ubricao (n 908) 14.
[1308] John Fredriksson, 'Reinvigorating Resettlement: Changing Realities Demand Changed Approaches' (2002) 13 FMR 28, 29.
[1309] See generally, Marjoleine Zieck 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement' (2013) 5(2) *Amsterdam Law Forum* 45-63.
[1310] UNHCR Resettlement Handbook (n 851) 47.
[1311] UNHCR, *The State of The World's Refugees: 2000* (n 167) 126-127.
[1312] Troeller (n 826) 87.
[1313] International Conference on Indo-Chinese Refugees (15 December 1989) UN Doc. A/RES/44/138.
[1314] UNHCR, 'Refugee Resettlement Referral from Nepal Reaches Six-Figure Mark' (n 852). See also, the ICMC (n 1016) 59-61, 77.
[1315] UNHCR, 'US Wraps up Group Resettlement for Myanmar Refugees in Thailand' (News Stories, 29 January 2014). Available at: <http://www.unhcr.org/52e90f8f6.html> accessed 20 October 2015.
[1316] For an in-depth analysis see, for example, Banki (n 852) 29-55.

States started to reduce resettlement opportunities. In fact, by the mid-1990s, voluntary repatriation became the preferred solution for protracted refugees and at times it was the only available option for the majority of refugee situations.[1317] For instance, the latest UNHCR figures show that between 2002 and 2012, only 836,500 refugees were resettled,[1318] in comparison with 7.2 million refugees who were repatriated.[1319] These figures indicate that State practice prefers refugees to return home instead of being resettled in third countries or integrated locally in asylum countries.[1320] As noted in Chapter Four, Section 4.4, the UNHCR for its part has reinforced such a position for more than two decades by reiterating that voluntary repatriation is the preferred solution of the three durable solutions for refugee problems.[1321] There are a number of reasons why States prefer voluntary repatriation over other solutions, including States' concerns of security risks, financial turmoil, growing unemployment, and safeguarding cultural boundaries.[1322] In the literature, authors such as Chimni have explored the hierarchical position of the three durable solutions and criticised the international community's approach and the position adopted in respect of the three durable solutions.[1323]

While addressing refugee problems the international community, represented by the UNHCR, should implement a more flexible decision making process that combines different methods and strategies in different circumstances. The chosen approach needs to suit the particular crisis because this process can be seen to be more just than isolating voluntary repatriation and adapting it as the only feasible solution. In other words, the international community should avoid imposing a hierarchy on the three

[1317] See, for example, Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 55-73.
[1318] UNHCR, 'Local Integration' (n 949).
[1319] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 7. UNHCR, 'UNHCR Global Trends 2012' (n 950) 17.
[1320] For further analysis on the hierarchical position of the three durable solutions in the literature see, for example, Long, 'Back to Where You Once Belonged' (n 759) 1-42.
[1321] See, for example, ExCom Conclusion No. 68 (XLIII) 'General Conclusion on International Protection' (9 October 1992) para. (s); ExCom Conclusion No. 71 (XLIV) 'General Conclusion on International Protection' (8 October 1993) para. (p); ExCom Conclusion No. 79 (XLVII) 'General Conclusion on International Protection' (11 October 1996) para. (q); ExCom Conclusion No. 81 (XLVII) 'General Conclusion on International Protection' (1997) para. (q). ExCom Conclusion No. 87 (L) 'General Conclusion on International Protection' (8 October 1999) para. (r); ExCom Conclusion No. 89 (LI) 'General Conclusion on International Protection' (13 October 2000) preamble; ExCom Conclusion No. 90 (LII) 'General Conclusion on International Protection' (5 October 2001) para. (j); ExCom Conclusion No. 95 (LIV) 'General Conclusion on International Protection' (10 October 2003) para. (i); ExCom Conclusion No. 99 (LV) 'General Conclusion on International Protection' (8 October 2004) para. (u); ExCom Conclusion No. 100 (LV) 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (8 October 2004) para. (m) (i); ExCom Conclusion No. 101 (LV) 'Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees (8 October 2004) preamble; and ExCom Conclusion No. 109 (LXI) (n 13) para. (d).
[1322] Chimni, *International Refugee Law* (n 982) 331.
[1323] Chimni, 'From Resettlement to Involuntary Repatriation' (n 759) 55-73; and ibid.

durable solutions (i.e. labelling one solution as 'preferred' and others as 'undesirable').[1324] Although in this research it is argued that resettlement constitutes the best solution for Iraqi refugees in protracted situations, it might not work for others in protracted situations.

To address the unevenness with the implementation of the three durable solutions and put resettlement on an equal footing with voluntary repatriation, the UNHCR has implemented several programmes, adopted various concepts, and approved countless plans of action. Since its creation, the UNHCR has also reflected and re-assessed the role of resettlement in order to enhance its availability for those in need. In 1994, the UNHCR's evaluation report on resettlement activities criticised the lack of commitment by States and urged the UNHCR to promote the international profile of resettlement. The report provided a number of suggestions for the interested parties to enhance the position of resettlement in international law.[1325] The outcome of the report resulted in the creation of the WGR, soon followed by ATCR in 1995.

The ATCR is an annual event in which resettlement States, NGOs, and the UNHCR share information and develop joint strategies in an informal environment to enhance global resettlement opportunities.[1326] The WGR and ATCR process is 'the primary vehicle for collaborative efforts between UNHCR, governments, NGOs, and international organizations to enhance the use of resettlement, identify and address challenges, and shape joint strategies and directions for the future'.[1327]

In 2000, the UNHCR further intensified its reflection and re-assessment of resettlement during the Global Consultations process to re-focus and shape a joint strategy on resettlement among the parties involved. The consultation provided a platform for parties that are interested in and devoted to the solution of the refugee problems to discuss and reflect upon the challenges facing refugees. Multiple issues were raised during the consultation, and States, in particular, strongly emphasised the provision of orderly durable solutions for refugees. In fact, it was concluded that the international

[1324] John Fredriksson, 'Reinvigorating Resettlement: Changing Realities Demand Changed Approaches' (2002)13 FMR 28, 29.
[1325] Frederiksson and Mougne (n 853) 1-53.
[1326] UNHCR, 'Annual Tripartite Consultations on Resettlement' (2013). Available at: <http://www.unhcr.org/pages/4a2cd39e6.html> accessed 20 October 2015.
[1327] UNHCR Resettlement Handbook (n 851) 5.

community should place greater emphasis on resettlement in third countries to strengthen respect for the international regime for the protection of refugees.[1328]

The joint effort between the WGR and the ATCR saw the emergence of new States that offered resettlement places. Such action, naturally, resulted in more refugees being resettled, which led to the increase of quotas regarding the global availability of resettlement places.[1329] This shows that if resettlement is to succeed, it requires States' commitment to offer resettlement places for refugees as part of their global responsibility and burden sharing[1330] and it will only be expected for various States to show solidarity with the States that are hosting a significantly large number of refugees.

In 2001, while launching a Global Consultation on International Protection, States identified resettlement as one of the central components of the consultation. It was their goal to achieve a better global burden and responsibility sharing, and enhance States' capacity to accept and protect refugees as well as provide durable solutions.[1331] Core groups of interested States led by Canada in the WGR agreed to focus on the SUR.[1332] This was adopted as one of three generic strands of the UNHCR's Convention Plus Initiative in order to maximise the resettlement opportunities, improve the resettlement capacities, adopt better and less rigid resettlement criteria and, more importantly, create generic agreements between States on resettlement.[1333] The States hoped that the implementation of this strand would facilitate the safeguarding of the right of resettled refugees and provide better opportunities for refugees to enjoy the social, economic, and cultural life in the resettlement countries.[1334] The SUR was conceived as 'the planned use of resettlement that maximizes the benefit of resettlement, either directly or

[1328] UNHCR, 'The Strategic Use of Resettlement' (n 919) paras. 1-2.
[1329] Among the new emerging States to offer resettlement were: Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland, Spain and the United Kingdom. Cited in UNHCR, *The State of the World's Refugees:2006* (n 6) 142.
[1330] James Milner, 'Recent Developments in International Resettlement Policy: Implications for the UK Programme' in V. Gelthorpe and L. Herlitz (eds), *Listening to the Evidence: the Future of UK Resettlement* (Home Office 2003) 2. Available at: <http://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/7918/Milner-Resettlement.pdf?sequence=1> accessed 20 October 2015.
[1331] UNHCR, 'Agenda for Protection' (n 753) Goal 3 (pp 55-61) and Goal 5(pp 73-81).
[1332] UNHCR, 'Framework for Durable Solutions for Refugees and Persons of Concern' (n 906) 6.
[1333] UNHCR, 'Convention Plus Core Group on the Strategic Use of Resettlement: Multilateral Framework of Understandings on Resettlement' (21 June 2004). Available at: <http://www.unhcr.org/40e409a34.html> accessed 20 October 2015.
[1334] Kelley and Durieux (n 659) 7.

indirectly, other than to those being resettled. Those benefits accrue to other refugees, the host states, other states, and the international protection regime in general'.[1335]

The UNHCR attempted through SUR to encourage States to offer resettlement places and States that were already offering such places have been encouraged to increase their quota. The States were also urged to diversify the refugee groups while providing resettlement opportunities, and were strongly recommended to adopt less rigid resettlement criteria for refugees.[1336] In order to process the resettlement application in a more efficient way and anticipate the need for resettlement of groups, the UNHCR, alongside the States, were urged by the Core Group to improve the analysis of the refugee registration data.[1337] The Convention Plus Initiative intended that the generic agreements reached in this strand would be implemented on the ground to specific refugee situations with the intention of enhancing the protection and the accessibility of refugees to durable solutions. During the discussion, it became apparent that resettlement would be more influential once applied alongside the other two durable solutions. Resettlement can also function as a mechanism to leverage temporary asylum for refugees who are to be resettled, which would have a significant impact on the other two solutions.[1338]

In 2004, the outcome of the negotiation among the States resulted, most notably, in the Multilateral Framework of Understandings on Resettlement agreement.[1339] While not legally binding, this understanding enhances the policy and practice in relation to resettlement. According to Zieck, the understanding was the most elaborated document among the three strands of the Convention Plus Initiative.[1340] The aim of the understanding was to enhance refugee protection and facilitate the accessibility of durable solutions for refugee predicaments. This is done through multilateral special agreements by many States that are interested in resettlement.[1341]

[1335] UNHCR, 'The Strategic Use of Resettlement' (n 919) para. 6.
[1336] ExCom Conclusion No. 109 (LXI) (n 13) para. (i).
[1337] UNHCR, 'Agenda for Protection' (n 753) 5.
[1338] Betts and Durieux (n 897) 510-512. For further analysis on this Strand, see Selm, 'The Strategic Use of Resettlement' (n 1259) 39-48.
[1339] UNHCR, 'Multilateral Framework of Understandings on Resettlement' (FORUM/2004/6, 16 October 2004) available at: <http://www.refworld.org/docid/41597d0a4.html> accessed 20 October 2015.
[1340] Zieck, 'Doomed to Fail from the Outset?' (n 884) 405.
[1341] UNHCR, 'UNHCR Position Paper on the Strategic Use of Resettlement' (Annual Tripartite Consultations on Resettlement, Geneva, 6-8 July 2010) para. 6.

Although the formal agreement reached among States contributed in a small increase in the number of countries participating in the resettlement programme,[1342] by the end of 2005, the SUR had failed to meet its initial aims. Although the Multilateral Framework of Understandings on Resettlement was the only document produced, it lacked a legally binding nature or soft law status. In addition, the document could not act on its own; it had to be applied with the agreements produced from the other two strands, Targeting Development Assistance and Irregular Secondary Movement.[1343]

The Core Group focus throughout was on resettlement as a durable solution and as a tool of protection rather than being addressed in terms of burden sharing. In Zieck's view, this narrow focus also contributed towards the failure of the strand.[1344] The group did not focus on new commitments; it was simply reiterated that resettlement is seen as a central component of international solidarity and a responsibility sharing mechanism.[1345] Even authors such as Clark and Simeon, who were the vocal supporters of the Initiative, conceded that the Multilateral Framework of Understandings on Resettlement 'is not breath taking when compared with the use of resettlement in the 1989 CPA on Indo-Chinese Refugees'.[1346]

In 2009, a WGR led by Sweden together with the UNHCR initiated a discussion on intensifying their strategy to address the problems of resettlement. This was a part of the UNHCR re-launch of the SUR, which identified seven situations as priority cases, including Iraqi refugees in Jordan, Lebanon and Syria; these cases were intended to be the focus of making the SUR more effective.[1347] The UNHCR's selection of the seven priority situations was a way to gain support for the resettlement from the international community and to strike a geographical balance.[1348] However, not all States agreed with the selected priority situations, and the UNHCR admitted that its 'resettlement objectives and priorities do not always match those of States'.[1349]

[1342] Clark and Simeon (n 845) 24.
[1343] Betts and Durieux (n 897) 514.
[1344] Zieck, 'Doomed to Fail from the Outset?' (n 884) 405.
[1345] UNHCR, 'Resettlement And Convention Plus Initiatives: "How Can Resettlement Be Used In The Context Of Possible Convention Plus Agreements And What Elements Related To Resettlement Might Be Considered For Inclusion In Possible Convention Plus Agreements"?' (UNHCR Forum, 18 June 2003) UN Doc. FORUM/2003/02, para. 2. Available at: <http://www.unhcr.org/3ef1b79a4.pdf> accessed 20 October 2015.
[1346] Clark and Simeon (n 845) 24.
[1347] UNHCR, 'Working Group on Resettlement' (n 1248) paras. 1-7.
[1348] Selm, 'Great Expectations' (n 1201) 25.
[1349] ibid para. 7.

In 2013, Selm reviewed the concept of the SUR to examine its origins and development in order to identify the challenges and pinpoint the achievements of the concept so far.[1350] Although she described the concept as a brilliant idea, Selm conceded that the implementation of the SUR has not lived up to its potential. In her view, the UNHCR showed signs of confusion and its line of presentation of the concept lacked consistency. This may be due to the approach that the Refugee Agency adopted, which was based on hopes rather than evidence. In Selm's view, so far there are few, if any, examples illustrating that resettlement has been achieved for priority situations,[1351] and whether this will be achieved and the programme successful remains to be seen. The WGR claimed that '[t]he inability to achieve the concrete objectives and outcomes intended should not be considered as a failure of the strategic use of resettlement'.[1352] However, Selm notes that the 'consistent non-achievement can be a problem. Governments are accountable, and expect UNHCR to be held accountable for its actions. If ambitious targets are set, such as return or local integration resulting from strategic use of resettlement, and those targets are not met, then a SUR programme can have appeared to fail'.[1353]

This section has shown that the international community, acting through the UNHCR, has adopted and implemented a number of programmes to enhance resettlement capacity. However, so far, there has been a relatively limited success. In particular, in increasing numbers of resettlement places available for refugees. Today, there is no doubt that the need for protection outweighs the current available resettlement places offered to refugees.[1354] For instance, in 2012, the UNHCR reported that 292,165 refugees were in need of resettlement and, 'unless the total number of resettlement places, which currently stands at 81,000, increases significantly, more than half of refugees in need of resettlement in 2013 will be left without any solution in sight'.[1355] This trend is set to continue. Long also notes that the '[c]urrent resettlement

[1350] ibid 1-71.
[1351] ibid 1-3.
[1352] UNHCR, 'Working Group on Resettlement' (n 1248) para. 14(c).
[1353] Selm, 'Great Expectations' (n 1201) 31.
[1354] UNHCR, 'The Strategic Use of Resettlement' (n 919) para. 29.
[1355] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 7; and UNHCR, 'UNHCR Global Trends 2013' (n 950) 20-21.

programmes do not meet UNHCR-identified needs (let alone refugee demand) for resettlement'.[1356]

6.2.4.1.1 Enhancement of Third Country Resettlement with Regional Scope

Apart from the UNHCR's initiatives to enhance resettlement opportunities, resettlement has also seen progress within the regional scope, in Europe and Latin America, but less so in Asia[1357] and Africa.[1358] The almost total absence of resettlement initiatives in Asia and Africa is understandable due to the fact that most of the countries in these regions are already hosting a significant number of refugees and are struggling to absorb hundreds of thousands of asylum seekers from neighbouring countries. Therefore, it is unlikely that the UNHCR would pressurise these countries since they are already sufficiently contributing to refugee problems in the respective regions.

As noted in Section 6.2.3, the latest figures on resettlement show that there is imbalance among States that offer resettlement. In 2009, to address this uneven distribution of refugees, the European Commission proposed the establishment of a Joint EU

[1356] Long 'Permanent Crises?' (n 811) 20-21.

[1357] In Asia, Japan is the only country to have a resettlement programme. In 2008, Japan agreed to a three-year pilot resettlement programme to resettle 30 Myanmar refugees from Thailand annually. However, the programme has been widely criticised 'as ill-thought-out, half-hearted and even exploitative'. Although Japan was generous in providing resettlement opportunities to refugees from Myanmar, it restricted granting asylum to individuals. For instance, in 2011 out of 1,867 applications made to claim asylum only 21 were approved. This figure shows that Japan is not so generous after all with extremely low intake of asylum seekers in comparison with the rest of the world. See, for example, Brian Barbour, 'Protection in Practice: The Situation of Refugees in East Asia' (2012) 81(2) *Nanmin Kenkyu Journal [Refugee Studies Journal]* 10-11; Gianni Simone, 'Refugee Groups Slam Japan's Struggling Resettlement Plan' (The Japan Times: Community, 17 Jul 2012). Available at: <http://www.japantimes.co.jp/community/2012/07/17/our-lives/refugee-groups-slam-japans-struggling-resettlement-plan/> accessed 20 October 2015; Brian Barbour, 'Japan Announces that "0" Refugees Will Be Resettled This Year' (Fahamu Refugee Legal Aid Newsletter (FRLAN), 1 December 2012). Available at: <http://frlan.tumblr.com/post/36945934059/japan-announces-that-0-refugees-will-be-resettled> accessed 20 October 2015; and Yukiko Iriyama, 'Overview of Global Resettlement and Current Challenges' (11 October 2011) 11. Available at: <http://www.refugeestudies.jp/journal/Iriyama_Overview%20of%20Global%20Resettlement_2010.pdf> accessed 20 October 2015.

[1358] In 1998, Benin and Burkina Faso adopted a resettlement programme to provide resettlement opportunities to African refugees, including refugees from Chad, the Great Lakes region, Equatorial-Guinea, Sudan, Sierra-Leone, and Algeria. However, the programme was short-lived, ended in 2001 and only 226 refugees were resettled. See, for example, UNHCR, 'Refugee Resettlement in Developing Countries: The Experience of Benin and Burkina Faso, 1997 – 2003: An Independent Evaluation' (April 2004) UN Doc. EPAU/2004/04-Rev.1, para. 3; and Mike Nicholson, 'Refugee Resettlement Needs Outpace Growing Number of Resettlement Countries' (The MPI, 1 November 2012) available at: <http://www.migrationpolicy.org/article/refugee-resettlement-needs-outpace-growing-number-resettlement-countries> accessed 20 October 2015.

Resettlement Programme.[1359] Despite the growing number of refugees in need of resettlement, the opportunities to resettle were at a standstill. The programme attempted 'to play a more substantial and strategically coordinated role in global resettlement'.[1360] Through the programme, the EU wanted to show international solidarity to host States overburdened by accommodating significantly large numbers of refugees. According to Brolan, the EU also wanted to enhance the co-ordination of its external policies and credibility in the international sphere.[1361]

To encourage Member States and maximise the strategic impact of resettlement, the EU Commission proposed an amendment to the European Refugee Fund.[1362] The aim of the proposal was to provide financial support to resettled countries. However, the success of the proposed joint programme was dependent on the Member States' commitment to resettle refugees since the programme was entirely voluntary. Furthermore, the programme did not set a target as to how many refugees or when they are expected to be resettled. Operational mechanisms to co-ordinate the resettlement efforts of Member States were also absent. The programme was criticised because it 'constituted a political framework and an amendment to the resettlement funding rules in the ERF [European Refugee Fund] Decision'.[1363]

The programme also caused disagreement between the EU Commission, the Council, and Parliament because they were concerned by the procedure of how resettlement priorities would be adopted. In 2012, after more than two years of negotiations between Member States on the 2009 Commission proposal, the EU adopted a Joint Resettlement Programme to find a sustainable solution for refugees.[1364] The programme attempted 'to

[1359] European Union: European Commission, Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme (2 September 2009, COM(2009) 447 final). Available at: <http://www.refworld.org/docid/4aa51b632.html> accessed 20 October 2015.
[1360] ibid.
[1361] Claire E. Brolan, 'Commentaries: Joint EU Resettlement Programme: the Health of Refugee and Humanitarian Arrivals' (2010) 20(3) *European Journal of Public Health* 248, 248.
[1362] European Union: European Commission, 'Proposal for a Decision of the European Parliament and of the Council Amending Decision No 573/2007/EC Establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme "Solidarity and Management of Migration Flows" and Repealing Council Decision 2004/904/EC' (2 September 2009, COM(2009) 456). Available at: <http://www.refworld.org/docid/4a54bc02d.html> accessed 20 October 2015.
[1363] The ICMC (n 1016) 109.
[1364] Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 on Amending Decision No 573/2007/EC Establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' 30.3.2012 OJ L 92/1.

involve more EU States in resettlement activities, to provide for orderly and secure access to protection for those resettled and to demonstrate greater solidarity with non-EU countries in receiving refugees'.[1365]

The programme was welcomed by the UNHCR,[1366] and the UNHCR High Commissioner, Antonio Guterres, hailed the significance of the programme for refugees, and argued that resettlement in third countries is not only a critical protection tool for the most vulnerable refugees but also the most concrete demonstration of international solidarity with countries that host large numbers of refugees. The programme, if implemented efficiently, is capable of improving resettlement opportunities and responding to refugees who find themselves in desperate situations.[1367] The High Commissioner noted that the countries in the developed world must not forget that today over 86% of the world's refugee populations are residing in developing countries. Therefore, he urged these States to act and show more international solidarity to ease some of the burden on the counties in the immediate region.[1368]

Accordingly, the programme was a significant step by the EU to increase resettlement opportunities each year and provide better durable solutions for a greater number of refugees. The programme allows EU countries to identify certain refugee situations as a priority situation to make resettlement more effective, as noted in Section 6.2.2.[1369] Such an initiative almost replicates the UNHCR re-launch of the SUR, which identified seven situations as priority cases to enhance resettlement capacity.[1370] Appendix (G) shows a number of States that provide resettlement opportunities as of 2014,[1371] but whether the programme will succeed remains to be seen. There is no doubt that the success of the programme depends on the international solidarity among States, especially the countries in the developed world, to respond to a major refugee crisis.

[1365] European Commission, 'Resettlement of Refugees in the EU' (14 August 2013). Available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm> accessed 20 October 2015.
[1366] UNHCR, 'UNHCR Welcomes Adoption of Joint EU Resettlement Programme' (n 1246).
[1367] Statement by Antonio Guterres, United Nations High Commissioner for Refugees, in Rui Tavares, Resettlement of Refugees – A New Life (European Parliament 2012) 7.
[1368] ibid.
[1369] UNHCR, 'UNHCR Welcomes Adoption of Joint EU Resettlement Programme' (n 1246).
[1370] UNHCR, 'Working Group on Resettlement' (n 1248) paras. 1-7.
[1371] UNHCR, 'Resettlement Fact Sheet' (April 2014). Available at: <http://www.resettlement.eu/sites/icmc.tttp.eu/files/Global-Resettlement-Fact-Sheet_0.pdf> 20 October 2015.

In 2015, in the wake of the terrible loss of life of thousands of migrants in the Mediterranean[1372] and Andaman seas[1373] which has brought the plight of forced migrants yet again to the forefront, the European Commission adopted a recommendation inviting Member States to provide resettlement opportunities for those in need of international protection, mainly from Africa and Middle East. Unlike previous programmes, this recommendation urges EU Member States to resettle 20,000 people over the next two years.[1374] The European Council recalled the seriousness of the situation and expressed its determination that the EU should mobilise all efforts to prevent further loss of life at sea and address growing refugee problems, including by establishing resettlement mechanisms.[1375]

However, the UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, calls the EU proposal a 'disappointment'.[1376] He notes that although the resettlement proposal is good in principle, it is woefully inadequate in its scale. In terms of the nominated figure, Crépeau notes that '[t]he number of resettlement places initially envisaged seems utterly insufficient, […] 20.000 places in the EU regional block is not an adequate response to the current crisis which in 2014 saw over 200,000 irregular migrants – a majority of whom were asylum seekers – arrived in Europe by boat'.[1377]

Although the proposed figures are inadequate in comparison to people in need of resettlement places, it can be argued that the establishment of resettlement mechanisms is a step forward. This is because European States have continuously refused to respond to refugee crises in the form of resettlement. However, through this proposal the

[1372] UNHCR, 'Another Weekend of Tragedy Marks the Mediterranean, with up to 40 Refugees Dead' (News Stories, 20 September 2015). Available at: <http://www.unhcr.org/55ff19226.html> accessed 13 October 2015.
[1373] UNHCR, 'UNHCR Urges Governments to Continue High Seas Live-Saving Operations' (News Stories, 12 May 2015). Available at: <http://www.unhcr.org/5551f31cfdd.html> accessed 13 October 2015.
[1374] European Union: European Commission, Commission Recommendation of 8.6.2015 on a European Resettlement Scheme (8 June 2015, C (2015) 3560 final) paras. 10-11.
[1375] ibid para. 1.
[1376] HRC, 'Statement by the Special Rapporteur on the Human Rights of Migrants, François Crépeau, Migrants: "EU's Resettlement Proposal Is a Good Start but Remains Woefully Inadequate" – UN expert' (15 May 2015). Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15961&LangID=E> accessed 18 October 2015.
[1377] ibid.

commission achieves agreement among Member States that Europe should provide resettlement. If the scheme is adopted and States agree to resettle, it would result in reversing a trend that has not existed until now.

In September, the European Commission also adopted a legal instrument on relocation, which is the transfer of an individual in clear need of international protection from one EU Member State to another.[1378] This measures was adopted by the commission to respond to the immediate refugee crisis and prevent further loss of life at sea. The commission proposed an emergency relocation of 120,000 people from Italy and Greece to another EU Member State.[1379] Of direct relevance to this study, the relocation mechanism only applies to those nationals who have an average EU-wide asylum recognition rate equal to or higher than 75%.[1380] According to the data for 2015, Iraqi refugees are among the three nationalities falling within the 75% threshold.[1381] The EU Commission introduced this threshold rate 'to ensure that all applicants who are in clear and urgent need of protection can enjoy their right of protection as soon as possible; and to prevent applicants who are unlikely to qualify for asylum from being relocated and unduly prolonging their stay in the EU'.[1382] This mechanism entitles selected Iraqi asylum seekers living in Italy and Greece to have their asylum applications examined by other EU Member States through relocation. As of September 2015, the 75% rate is recognised by the EU as making an Iraqi asylum seeker someone 'in clear and urgent need of international protection'. This stands, whether they are eventually relocated or not.

Resettlement programmes are not only established in Europe, but also in other regions, in particular Latin America. For instance, in 2004, Brazil, is one of the emergent resettlement countries proposed and pioneered the Regional Solidarity Resettlement

[1378] European Commission, 'Refugee Crisis – Q&A on Emergency Relocation' (European Commission - Fact Sheet, Brussels, 22 September 2015) Available at: <http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm#_ftnref1> accessed 20 October 2015.
[1379] European Commission, Council Decision (EU) 2015/1601 of 22 September 2015, Establishing Provisional Measures in the area of International Protection for the Benefit of Italy and Greece, 24 September 2015, L 248/80. Art. 4.
[1380] This figure is on the basis of EUROSTAT data.
[1381] The Syrian and Eritrean are the other two groups of refugees. European Commission, 'Refugee Crisis – Q&A on Emergency Relocation' (European Commission - Fact Sheet, Brussels, 22 September 2015) Available at: <http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm#_ftnref1> accessed 20 October 2015.
[1382] European Commission, 'Refugee Crisis' (n 1378).

Programme[1383] in light of the 20th anniversary of the Cartagena Declaration.[1384] The programme was mainly adopted to address the displacement of Colombian refugees, the largest refugee population in Latin America. The UNHCR's continuous effort to enhance resettlement opportunities, in Jubilut and Carneiro's view, has played a fundamental role in implementing a solidarity resettlement programme in Latin America.[1385] The programme is one of the most innovative mechanisms of the Mexico Plan of Action,[1386] which has received new impetus. Notably, since 2004 the programme has grown significantly, this is evidenced by the fact that a number of new countries have joined the programme.[1387] States such as Brazil, Chile, Argentina, and Uruguay have contributed significantly to the adoption of resettlement programmes and increased places in the region.[1388]

Furthermore, the UNHCR notes that the programme is 'the concrete expression of the will of Latin American countries to provide support to the countries hosting a large number of refugees in the region'.[1389] Generally speaking, the objects of the programme were 'responsibility-sharing, international solidarity, and the promotion of the strategic use of resettlement in the region, the latter through inter alia maintaining an open space for asylum and promoting local integration opportunities'.[1390]

In 2006, two years after its establishment, resettlement countries, the UNHCR, NGOs, and other partners met to evaluate and review the Regional Solidarity Resettlement Programme in order to strengthen and improve the sustainability of the programme in

[1383] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, 16 November 2004). Available at: <http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf> accessed 20 October 2015. However, this is not the first time such a programme being adopted in Latin America. Similar programme on resettlement was initially implemented in Chile and Brazil with the UNHCR collaboration in 1999. The programme has been resettling small numbers of refugees since 2002.
[1384] Cartagena Declaration.
[1385] Liliana Lyra Jubilut and Wellington Pereira Carneiro, 'Resettlement in Solidarity: a New Regional Approach towards a More Humane Durable Solution' (2011) 30(3) RSQ 63, 69.
[1386] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, 16 November 2004).
[1387] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 27. For an in-depth analysis on this programme see, for example, Ana Guglielmelli White, 'A Pillar of Protection: Solidarity Resettlement for Refugees in Latin America' (2012) New Issues in Refugee Research, Research Paper No. 239, 1-26 <http://www.unhcr.org/4fd5d9c79.html> accessed 20 October 2015.
[1388] For further analysis of this programme, see Jubilut and Carneiro (n 1385) 63-86; and White (n 1387) 1-26.
[1389] UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (n 750) 27.
[1390] ibid7.

the region.[1391] During the meeting, the significance of resettlement 'as the means to strengthen the right to seek asylum and find appropriate durable solutions' was re-emphasised.[1392] The parties also attempted to identify the difficulties and challenges the programme has encountered. A number of issues were raised, including the lack of appropriate funding for developing countries that could not cope with the very high costs of resettlement and the lack of national mechanisms to regulate integration prospects for resettled refugees into community.[1393] During the meeting, States proposed means to overcome these challenges.[1394] In 2010, the UNHCR regional representative, Eva Demant, noted that the participants 'must recognize that, despite the progress made in implementing the Solidarity Resettlement Programme in Latin America, some challenges remain, including financing which is a crucial issue, as well as the difficulties faced by refugees to achieve economic self-sufficiency, and successful integration in resettlement countries'.[1395]

The programme is relatively new, and so it is difficult to evaluate its success. However, if the Solidarity Resettlement Programme is able to achieve the aims and purposes set out by the States during the preparatory meetings, then there is no doubt it can greatly contribute to the enhancement of resettlement and protection of refugees in Latin America. According to Jubilut and Carneiro, '[r]esettlement in solidarity is an idea in progress that, if successful, can lead to both a new approach to refugee protection in light of acute refugee crises, and to a new model of dialogue among States and among actors involved in refugee protection'. [1396]

In a nutshell, throughout its history, the UNHCR has encouraged States to provide resettlement opportunities for refugees and has continuously advocated for more countries to implement resettlement programmes. Although resettlement is often seen as

[1391] UNHCR, 'Solidarity Resettlement in Action: Policies, Programmes and Needs: Opportunities for Cooperation' (Quito 2 and 3 February 2006, Summary of the Debate between Participating Governments, NGOs and UNHCR, 3 January 2006). Available at: <http://www.refworld.org/docid/441047bb4.html> accessed 20 October 2015.
[1392] ibid.
[1393] Jubilut and Carneiro (n 1385) 75-76.
[1394] Other meetings followed, for example, the regional meeting on solidarity resettlement in Buenos Aires in 2007, Santiago in 2008, and Porto Alegre in 2010. See White (n 1387) 18.
[1395] UNHCR, 'Resettlement in Latin America and Benefits over a Thousand People' (8 November 2010). Available at: <http://www.acnur.org/t3/index.php?id=559&no_cache=1&tx_ttnews%5Btt_news%5D=1696&cHash=f0623b26%207d3154bbc3b5d58ddec26357> accessed 20 October 2015.
[1396] Jubilut and Carneiro (n 1385) 64.

a last resort by the international community,[1397] the UNHCR has adopted a number of methods to address this, namely, introducing innovative ideas, such as the SUR, playing an effective role in implementing regional resettlement programmes, such as the EU's Joint Resettlement Programme and Regional Solidarity Resettlement Programme in Latin America. However, despite such steps to improve resettlement, the latest UNHCR efforts have not been breath taking when compared with the 1989 Comprehensive Plans of Action adopted for the International Conference on Indo-Chinese Refugees. However, as it stands 'resettlement needs continue to vastly outnumber the places made available by States'.[1398] This has to change in order to address growing refugees who are in need of resettlement.

6.2.5 The Obstacles to Resettlement in a Third Country

Although there is an overwhelming amount of literature on the significance of resettlement in a third country to address refugee displacements,[1399] some observers argue for alternative solutions and identify challenges for resettlement in third countries. For instance, Long claims that resettlement might not be capable of unlocking protracted displacements of refugees because, on the one hand, resettlement as one durable solutions starts from a narrow base due to its applicability only to recognised refugees and not to IDPs, or the significant number who are not registered with the UNHCR. On the other hand, the total number resettled each year is a tiny amount of the overall number of refugees displaced each year.[1400]

Although Long admitted that resettlement in a third country for Iraqi refugees has played a significant role, the number of refugees who have already resettled is a small percent when compared with all Iraqis in protracted situations.[1401] Therefore, the lack of success of resettlement in third countries is closely linked to a failure of quantity. For instance, this durable solution is only available for less than one percent of refugees

[1397] UNHCR, 'Resettlement as an Instrument of Protection' (n 1194) para. 2.
[1398] UNHCR, 'UNHCR Projected Global Resettlement Needs: 2014' (19th Annual Tripartite Consultations on Resettlement, Geneva: 1-3 July 2013) 5.
[1399] See, for example, Stein (n 1215) 264-282; Troeller (n 826) 85-95; John Fredriksson, "Reinvigorating Resettlement: Changing Realities Demand Changed Approaches" (2002) 13 FMR 28-31; Verburg (n1205) 15-21; Selm, 'The Strategic Use of Resettlement' (n 1259) 39-48; Labman, 'Resettlement's Renaissance' (n 1300) 35-47; Gil Loescher and others, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press 2008); Ali (n 1208) 230-275; Bonney (n 1204) 88-125; and Piper, Power and Thom (n 1184) 1-29; and Selm (n 1191) 512-524.
[1400] Long 'Permanent Crises?' (n 811) 18.
[1401] ibid. See also, Chatty and Mansour (n 925) 76-80.

worldwide.[1402] Jacobsen argues that the lack of quantity is the main reason that the majority of refugees who are restricted in camps 'think of resettlement as akin to winning the lottery'.[1403] Selm shares Jacobsen's view that although resettlement is the only viable solution for some refugees who cannot be protected in the asylum country, it 'clearly cannot be the solution for all refugees as the number of places available is simply too low.[1404]

After resettling large numbers of Indo-Chinese refugees successfully, in 1991 the UNHCR conceded that future resettlement exercises are likely to be more protection-oriented, and would involve smaller numbers of refugees. The UNHCR notes that 'in any given year, resettlement is only sought and obtained for a minute fraction of the overall number of refugees for which the Office is responsible worldwide'.[1405] Likewise, Troeller doubts that resettlement would be able to unlock PRSs, because even in the unlikely event that resettlement places were doubled or tripled it would not make a difference in offering solutions for the millions refugees in PRS.[1406] Even the UNHCR admits that unless resettlement opportunities increase significantly, more than half of the refugees who need resettlement will remain in camps without any solution in sight.[1407]

Although resettlement quotes have increased in recent years due to the commitment of more States adopting resettlement programmes, the figures of resettlement by new States according to Long, are 'at best symbolic and at worst a figleaf'.[1408] For example, States such as Japan and Romania have offered to resettle 30 and 40 Myanmar refugees

[1402] UNHCR, 'UNHCR Global Trends 2012' (n 950) 17. UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (18th Annual Tripartite Consultations on Resettlement, 9-11 July 2012) 7.
[1403] Karen Jacobsen, *The Economic Life Of Refugees* (Kumarian Press 2005) 55.
[1404] Selm (n 1191) 513.
[1405] UNHCR, 'Resettlement as an Instrument of Protection' (n 1194) paras. 7-8.
[1406] Statement by Gary Troeller, UNHCR's Head of Resettlement (2005). Cited in Bonney (n 1204) 96.
[1407] UNHCR, 'UNHCR Global Trends 2012' (n 950) 17. UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (18th Annual Tripartite Consultations on Resettlement, 9-11 July 2012) 7.
[1408] Megan Bradley, 'Unlocking protracted displacement: Central America's "success story" reconsidered' (2011) Refugee Studies Centre Working Paper Series No. 77, 18 <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp77-unlocking-protracted-displacement-central-america-2011.pdf> accessed 20 October 2015.
See also, Global Consultations on International Protection; Third Track, Theme 3: The Search for Protection-Based Solutions, 'NGO Statement on Voluntary Repatriation' (22–24 May 2002) (2003) 22(2/3) RSQ 420, 433; and Troeller 'UNHCR Resettlement as an Instrument of International Protection' (n 1197) 568.

from Thailand respectively a year.[1409] These figures are a small fraction compared to the large number of Myanmarians who are in need of resettlement.[1410] In addition, a number of European States, including Bulgaria, the Czech Republic, France, Hungary, Ireland, Portugal, and Spain offer annual resettlement programmes not exceeding 200 refugees per year.[1411]

The number of Iraqi refugees resettled in 2014 was the largest in five years and constituted the largest group of refugees to be resettlement by the UNHCR. In fact, between 2011 and 2014, the UNHCR referred 69,754 Iraqi refugees for resettlement in third countries.[1412] Prior to 2011, between 2007 and 2010 the UNHCR referred 100,000 Iraqi refugees for resettlement to third countries, which it celebrated as a landmark.[1413] This figure constituted less than five percent of the total Iraqi refugees, and approximately one fourth of the total number registered with the UNHCR at the time. Ali rightly raises the question as to how, out of two million Iraqi refugees in the Middle East, only 100,000 were selected by the Refugee Agency for resettlement in that period, despite the fact that the majority of Iraqi refugees had no other prospect of solution.[1414]

The figures of Iraqi refugees submitted for resettlement between 2007 and 2014 are a small fraction in comparison to the overall numbers of Iraqi refugees in protracted situations. It can be argued that at the current pace the resettlement of Iraqi refugees would take a significant number of years for all refugees to depart to a third country. The UNHCR representative in Jordan, Andrew Harper, warned that Iraqi refugees in the country think that they will all be resettled in third countries; however, in reality this is

[1409] Iriyama (n 1357) 11; and UNHCR, Refugees from Myanmar Arrive in Bucharest as Romania Joins Ranks of Resettlement Countries (8 June 2010). Available at: <http://www.unhcr.org/4c0e76e29.html> accessed 12 October 2015.
[1410] UNHCR, '2015 UNHCR Country Operations Profile – Myanmar' available at: <http://www.unhcr.org/pages/49e4877d6.html> accessed 20 October 2015.
[1411] Selm (n 1191) 512.
[1412] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 21; UNHCR, 'UNHCR Projected Global Resettlement Needs: 2014' (19th Annual Tripartite Consultations on Resettlement, Geneva: 1-3 July 2013) 7, 63, 68, and 73; UNHCR, 'UNHCR Global Trends 2013' (n 950) 20; and UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (18th Annual Tripartite Consultations on Resettlement, 9-11 July 2012) 7.
[1413] UNHCR, 'UNHCR Projected Global Resettlement Needs: 2012' (17th Annual Tripartite Consultations on Resettlement, Geneva: 4-6 July 2011) 54-55; and UNHCR, 'UN Chief Announces 100,000 Landmark in Resettlement of Iraqi Refugees' (Press Release, World Refugee Day, 18 June 2010). Available at: <http://www.unhcr-northerneurope.org/no_cache/print/search/artikel//un-chief-announces-100000-landmark.html> accessed 24 October 2015.
[1414] Ali (n 1208) 231.

not the case.[1415] According to Nusair, this is in part due to the slow process of resettlement, the continuing financial crisis in developed countries, and the introduction of rigid immigration rules that make it considerably harder for refugees to satisfy the rules. This situation means that 'many Iraqi refugees will remain in limbo for some time to come'.[1416] The report on the situation of Iraqi refugees in Jordan, Lebanon and Turkey conducted by the International Rescue Committee echoes the views expressed by Harper and Nusair that they prefer to be resettled in a third country. However, the mentioned challenges and obstacles mean that most Iraqis feel that they are trapped since they have no chance of a return or resettlement in a third country.[1417]

Despite the low submission of refugees for resettlement, not all those submitted by the UNHCR will be resettled to third countries. The UNHCR concedes that 'whether individual refugees will ultimately be resettled depends on the admission criteria of the resettlement State'.[1418] There is a gap between the UNHCR's resettlement submissions and departures.[1419] For instance, over 160,110 Iraqi refugees were submitted for resettlement by the UNHCR between 2007 to 2013; however, only half have departed to resettlement countries.[1420] As shown in the table provided in appendix (H), there is a gap between the numbers of refugees submitted by the UNHCR for resettlement in comparison with the numbers accepted by the resettlement countries.[1421] For this reason, the UNHCR has acknowledged that it would not be able to resettle all those identified as vulnerable by the Agency. According to Ferris, both a lengthy and bureaucratic process and the adoption of inflexible security procedures have contributed to the

[1415] Statement by Mr. Andrew Harper, UNHCR representative in Jordan. Cited in IRIN, 'Amid Syrian Crisis, Iraqi Refugees in Jordan Forgotten' (6 June 2013). Available at: <http://www.refworld.org/docid/51b5b0f74.html> accessed 12 October 2015.
[1416] Isis Nusair, 'Permanent Transients: Iraqi Women Refugees in Jordan' (2013) 43(266) *Middle East Report* 20, 22.
[1417] IRC, 'Iraqi Displacement: Eight Years Later Durable Solutions Still Out of Reach' (22 September 2011) 1-2.
[1418] UNHCR, 'Self-Study Module: Resettlement Learning Programme: 2013 - 2014 Version' (October 2012) 29. Available at: <http://www.refworld.org/docid/4ae6b9b92.html> accessed 18 October 2015.
[1419] Between 2010 and 2012, the total number of submissions of Iraqi refugees was 42,211 in comparison with total number of departure 27,123. UNHCR, 'UNHCR Projected Global Resettlement Needs: 2014' (19th Annual Tripartite Consultations on Resettlement, Geneva: 1-3 July 2013) 83.
[1420] ibid 6-7, 57, 63, 66, 68, and 73; UNHCR, 'UNHCR Projected Global Resettlement Needs 2013' (18th Annual Tripartite Consultations on Resettlement, 9-11 July 2012) 8, 49, 51, and 60; UNHCR Projected Global Resettlement Needs: 2012 (n 1413) 3-4, 44-45, 54-55 and 61-62; and UNHCR, 'UNHCR Projected Global Resettlement Needs: 2011' (16th Annual Tripartite Consultations on Resettlement, Geneva: 6-8 July 2010) 3-4 and 37-39.
[1421] ibid 'UNHCR Projected Global Resettlement Needs: 2014' 73; UNHCR, 'Resettlement Fact Sheet' (28 April 2014). Available at: <http://www.resettlement.eu/sites/icmc.tttp.eu/files/Global-Resettlement-Fact-Sheet_0.pdf> accessed 10 October 2015; UNHCR Projected Global Resettlement Needs: 2011 (n 1420) 54; and UNHCR, 'Frequently Asked Questions about Resettlement' (April 2012) 6. Available at: <http://www.unhcr.org/4ac0873d6.pdf> accessed 24 October 2015.

existing gap between submission and departure, and caused delays in the resettlement application procedure for years.[1422] Accordingly, instead of increasing resettlement opportunities, the UNHCR has slowed down the referrals process to avoid creating a large backlog and elicit false hopes of resettlement among refugees.[1423]

Further, State practice shows that resettlement opportunities have been used as a political tool by some States to meet their own agenda.[1424] The eligibility criteria introduced to qualify for resettlement have been selective in including refugees of a certain ethnicity, nationality, gender, locations, while excluding others. Therefore, resettlement countries as well as controlling the number of refugees they admit each year, also decide who they admit through a selection of pre-planned refugees from first asylum countries. For instance, a number of countries, including France, Germany, and the Netherlands, have prioritised the resettlement of Christian minorities from Iraq, and yet deprioritised former Baath party members from their resettlement programmes because they were considered to be potential security threats, while Christian minorities have a better chance of integration and are a politically unthreatening refugees.[1425]

Likewise, Canada dismisses the resettlement applications of any individual whose family might have profited from Saddam Hussein's regime.[1426] Consequently, the prospect of resettlement among these States was measured upon the 'integration potential' of refugees rather than in terms of their protection needs.[1427] However, as Ali notes, between these two poles of prioritised and deprioritised exists a vast majority of Iraqi refugees who have no foreseeable durable solution.[1428] Likewise, Zieck criticised States' implementation of additional criteria, and found such a practice 'cherry picking'. According to Zieck, this process is unacceptable because it is 'short for selecting the most attractive refugees'.[1429]

[1422] Elizabeth Ferris, 'Remembering Iraq's Displaced' (the Brookings, 18 March 2013). Available at: <http://www.brookings.edu/research/articles/2013/03/18-iraq-displaced-ferris> accessed 24 October 2015.
[1423] UNHCR, 'Frequently Asked Questions about Resettlement' (n 1421) 5-6.
[1424] Ali (n 1208) 236-247. See also, Long 'Permanent Crises?' (n 811) 18.
[1425] Amanda Ufheil-Somers, 'Iraqi Christians: A Primer' (2013) 43(267) *Middle East Report* 18; and Chatty and Mansour (n 925) 78.
[1426] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 29.
[1427] Susan Banki and Hazel Lang, 'Difficult to Remain: the Impact of Mass Resettlement' (2008) 30 FMR 42, 43; Chatty and Mansour (n 925) 77-78; and Long 'Permanent Crises?' (n 811) 18.
[1428] Ali (n 1208) 231, 236-247.
[1429] Marjoleine Zieck, 'UNHCR's Parallel Universe: Marking the Contours of a Problem' (2010) the University of Amsterdam Inaugural lecture 363, 12-13 <http://www.oratiereeks.nl/upload/pdf/PDF-7256oratie_Zieck_DEF_zonder_snijlijnen.pdf> accessed 18 October 2014.

Moreover, there is also a problem of integration once the refugees are resettled.[1430] The arrival marks the beginning of a long process of settlement and integration for resettled refugees. For instance, the USA is the largest country that provides resettlement opportunities for Iraqi refugees in the world;[1431] however, it does not have a formal mechanism to regulate resettlement.[1432] A survey conducted of Iraqi refugees in the USA showed that once resettled they have been neglected, and their basic needs were not met; instead, they were left 'high and dry' in the resettled country.[1433] The lack of additional assistance for refugees has contributed to their lack of integration in the resettled countries.[1434] Being left in such position, Iraqis felt that resettlement has not been the solution they once envisaged.[1435]

The UNHCR recognises the challenge facing refugees once resettled; therefore, it considers resettlement countries should perform a number of obligations toward the resettled refugees, including 'to ensure ongoing protection and the long-term durability of their resettlement'.[1436] To ensure the efficient delivery of resettlement, the 'UNHCR has two key follow-up responsibilities: first, to ensure that resources are made available in order to meet identified needs; and second, to ensure that resettlement is implemented in the most effective and durable manner possible'. [1437] Therefore, the UNHCR issues regular pleas to States to support the better integration and also vows to implement measures to enhance the integration of refugees once resettled.[1438]

[1430] See, for example, Ali (n 1208) 236-247.
[1431] US Citizenship and Immigration Services, 'Iraqi Refugee Processing Fact Sheet' (June 2013). Available at: <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/iraqi-refugee-processing-fact-sheet > accessed 24 October 2015. See also, the ICMC (n 1016) 22, 29, and 64-67. See also, UNHCR, 'Progress Report on Resettlement' (ExCom Standing Committee 54th meeting, 5 June 2012) UN Doc. EC/63/SC/CRP.12, para. 3.
[1432] For further information on the resettlement programme in the US, see Kate Brick and Alan Krill, 'Refugee resettlement in The United States – An Examination of Challenges and Proposed Solutions' (Columbia University School of International and Public Affairs (SIPA), May 2010) iii. Available at: <http://www.sipa.columbia.edu/academics/workshops/documents/IRCFINALREPORT.pdf> accessed 24 October 2015.
[1433] Interview with Kate Washington, Technical Advisor, CARE Jordan, Refugees Program (22 July 2010). Cited in Stevens, 'Legal Status, Labelling, and Protection' (n 419) 29.
[1434] Brick and Krill (n 1432) iii.
[1435] Stevens, 'Legal Status, Labelling, and Protection' (n 419) 29. For the challenges faced Iraqi refugees once resettled, see Frauke Riller, 'Observations and Recommendations On the Resettlement Expectations of Iraqi Refugees in Lebanon, Jordan and Syria' (ICMC, 31 May 2009) 1-38. Available at: <http://www.refworld.org/pdfid/4cb8083b2.pdf> accessed 3 October 2015.
[1436] The ICMC (n 1016) 285.
[1437] UNHCR, 'Resettlement: An Instrument of Protection and a Durable Solution' (1997) 9(4) IJRL 666, 671.
[1438] UNHCR: 'UNHCR Calls for More Resettlement Places and Better Integration Support for Resettled Refugees' (4 July 2011).

For the reasons mentioned above, commentators such as Chatty and Nisrine, have suggested that alternative solutions should be considered for Iraqi refugees because the three traditional solutions, including resettlement, are incapable of addressing many of the contemporary cases of PRSs, including Iraqi refugees in protracted situations.[1439] They argue that resettlement in a third country is 'largely unworkable for the majority of Iraqis in exile in the Middle East'.[1440] This is because the lack of international solidarity amongst States, the introduction of rigid selection criteria, and the slow process of the applications means that resettlement of Iraqi refugees to a third country is difficult.

However, contrary to existing literature, it is argued here that despite having obstacles which hinder the efficient delivery of resettlement, such obstacles do not undermine the premise that resettlement is the best solution for Iraqi refugees. The lack of appropriate implementation of this solution by the international community for reasons which are not purely legal do not detract from the fact that resettlement is able to address the mass displacement of Iraqi refugees as a matter of law. The case studies of Indo-Chinese, Bhutanese and Myanmar refugees, and Iraqi refugees in Rafah Camp, mentioned above, are further evidence of this argument. These case studies are a counter argument for those who argue that resettlement is not capable of resolving protracted situations.

One could also draw from examples, such as the right of *non-refoulement*, which is a well-accepted right of refugees not to be returned to places where they might face persecution.[1441] However, in practice States do *refoule* refugees for reasons which are not purely legal. In fact, it is argued that international politics tend to hinder the application of the law on refugees. As noted earlier, it is well accepted that as a matter of law the right of *non-refoulement* is a right of refugees and despite non-legal problems attempts to hinder the actual implementation or efficient delivery of this right, it is nevertheless still a right that refugees are entitled to. Just as in the case of *non-refoulement*, the same political hindrances seem to be affecting the efficient application of resettlement.

[1439] Chatty and Mansour (n 925) 80-82. See also, Ruaudel (n 925) 2, 7-9; Sadek (n 925) 43, 52-4; and Long 'Permanent Crises?' (n 811) 8.
[1440] Chatty and Mansour (n 925) 82.
[1441] Refugees Convention. Art. 33(1).

6.3 The Right of Iraqi Refugees to Resettlement

It is argued here that, for Iraqi refugees, the right to durable solutions is to be materialised in resettlement in a third country. So far, this chapter has shown that resettlement in a third country is the only solution feasible for Iraqi refugees in protracted situations and the other two durable solutions –local integration and voluntary repatriation– are not available. Hence, resettlement is the preferred durable solution for Iraqi refugees not because it is the most attractive solution or the solution Iraqis themselves prefer to pursue but because it is the only viable and feasible solution capable of finding a home for this particular group of refugees from Iraq. The UNHCR also admits that resettlement is 'promoted when it is evident that the individual refugee will not be able to return home in the foreseeable future, [and] is not able to integrate locally'[1442] However, it is commonly claimed in the literature and seen in State practice that refugees have no right to resettlement, and States have no obligation to resettle refugees.[1443]

Although it is true, in principle, there is nothing that obliges States to provide resettlement, States discretion must be exercised in a way that allows them to comply with their international obligations to co-operate on refugee protection. As argued in Chapters Two and Three, in the context of the intertwined world of legal relations and the evolution of positions of individuals in international law, it is no longer sustainable for refugees to remain in protracted situations for decades because States are unwilling to provide durable solutions to their plight. Accordingly, given that States have an international obligation to co-operate and resolve the refugee crisis, they are obliged to respond to Iraqi refugee crises. Although States might not provide resettlement as such, they have to address the growing refugee problem and when resettlement is the only available solution, in the ongoing plight of Iraqi refugees, they must offer it. In that case, what was an option for States becomes an obligation.

[1442] UNHCR, 'Resettlement: An Instrument of Protection and a Durable Solution' (1997) 9(4) IJRL 666, 670.
[1443] See, for example, UNHCR, 'Frequently Asked Questions about Resettlement' (n 1421) 2; UNHCR, 'Resettlement And Convention Plus Initiatives' (n 1345) para. 4; the ICMC (n 1016) 15; and Gregor Noll and Joanne van Selm, 'Rediscovering Resettlement' (2003) MPI Insight No 3, 2 <http://www.migrationpolicy.org/research/rediscovering-resettlement> accessed 20 October 2015.

States therefore do not have an obligation to resettle refugees but they do have obligations in international law to co-operate vis-à-vis each other and the UN, including the UNHCR, whose mandate is to find durable solutions, on refugee matters. Since resettlement in a third country is the only solution available for the Iraqi refugee crisis, States have to offer this solution to address the plight of Iraqi refugees.

In sum, regarding Iraqi refugees in their circumstances, it is argued that since resettlement is the only available solution to address their plight, this is not a matter of choice but because there is nothing else available for them. This suggests that the obligation to resettle is a rule *de lege ferenda* and thus Iraqi refugees have the right to resettlement in a third country. However, this research does not claim that every refugee has a right to resettlement and that this right exists as a matter of choice for every refugee under any circumstances, but only to those for whom no other alternatives are available, as is the case with Iraqi refugees.

6.4 Conclusion

So far, the international community, acting through the UNHCR, has failed not only to find a solution for Iraqi refugees in protracted situations, but also to prevent the emerging mass displacement to neighbouring countries. The Iraqi refugee crisis cycle is therefore set to continue for the foreseeable future. Indeed, 25 years after the 1991 Gulf War and 12 years after the 2003 US-led invasion of Iraq, Iraqi refugees are still waiting for a solution to address their never ending plight. In fact, the latest UNHCR figures show that Iraqi refugees are one of the three groups of refugees to have consistently been among the top 20 source countries of refugees since 1980.[1444] This figure shows that Iraqi refugees have been waiting for a solution for the last 35 years and their predicament has become a permanent factor in the international sphere, alongside the unresolved Palestinian refugee issue in the Middle East region.

Today, the international community has realised that an early resolution to the Iraqi refugee crisis is unrealistic. According to Alonso, this means that '[n]either Iraq's neighbours nor European countries can ignore the situation and implement a closed-door policy. Most of the Iraqi refugees are already in the host countries and a massive

[1444] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.

return to Iraq is neither feasible nor recommended by the international organisations'.[1445] This means that it is important that the international community, in collaboration with the UNHCR, envisage mechanisms not only to meet the basic needs of Iraqis in the short term, but also to find a durable solution in the form of resettlement in a third country. Otherwise, the longer the situation lasts, the more difficult it is to find a solution for their plight. Therefore, Iraqi refugees cannot wait much longer for their prolonged displacement to be resolved. They have waited long enough.

It was the purpose of this chapter to identify the most appropriate solution for Iraqi refugees in protracted situations. Although the options open to Iraqi refugees in terms of the three durable solutions were explored, it was demonstrated that third country resettlement is the best possible solution for Iraqi refugees in protracted situations. Although it was recognised that obstacles such as applicability, restricted quota, political usage, and selection hinder the actual implementation of this solution, it does not challenge the argumentation that resettlement is the only viable option for Iraqi refugees. However, this is not to say that the other two solutions, voluntary repatriation and local integration, should be neglected, but rather that although they may be a durable solution for some they may not constitute a solution of general applicability.

[1445] Alonso (n 31) 321.

Chapter 7. Conclusions

In 1950, in the wake of the establishment of the international refugee regime and the UNHCR, the UN Secretary General predicted that,

> the refugees will lead an independent life in the countries which have given them shelter. […], the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and those of their families. This will be a phase of the settlement and assimilation of the refugees.[1446]

Although 65 years have passed since the Secretary General made such a statement, it is quite clear that his prediction was rather ambitious in regards to the current situation of refugees. As demonstrated throughout this research, the refugee problem is not only still alive, new refugees are also unable to find local integration in asylum countries. Today, refugees do not live an independent life and are still supported by the UNHCR and other international humanitarian organisations. Therefore, the phase of the settlement and assimilation for refugees that the Secretary General predicted has yet to be seen.

The UNHCR was established in 1951 by the UN General Assembly with a mandate from the international community to find durable solutions for refugee problems.[1447] However, it was originally meant to be a short-term agency, whose mandate was valid for a term of only three years. This shows the expectations of solving refugee problems that States had at that time.[1448] Today, more than 60 years later, the refugee plight has become a permanent factor in the international arena and the removal of the time limitation on the UNHCR's mandate is further evidence of this permanence.[1449] Such a move could be interpreted as a defeat by the international community for their inability to end refugee problems.

Today, refugee numbers are much higher, and fewer refugees have access to durable solutions. In other words, new refugee situations are emerging at the same time as the

[1446] UNHCR, 'Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons' (Memorandum by the Secretary-General Statelessness Conference, 3 January 1950) para. 1(f). Available at: <http://www.unhcr.org/3ae68c280.html> accessed 20 October 2015.
[1447] UNHCR Statute, para. 1.
[1448] ibid, para. (5). UNHCR, 'History of UNHCR' (n 22).
[1449] UNGA Res 58/153 (24 February 2004) UN Doc. A/RES/58/153, para. 9.

old situations have become protracted over time. Indeed, in the aftermath of the Second World War, an estimated one million people were uprooted.[1450] The UNHCR was established to assist these people to return home. However, today, the total number of refugees of concern to the UNHCR has been increased to 14.4 million.[1451] This is the highest number of refugees since 1995, and these figures continue to rise as a result of persecution, conflict, generalised violence, or human rights violations.

In 2014, there were 6.4 million refugees in PRSs living in 26 host countries; this constitutes a total of 33 protracted situations in the world.[1452] In fact, by the end of 2014, the average length of refugees in protracted situations was about 25 years, in comparison with 2003 which was 17 years, and 1991 which was nine years.[1453] These figures mean that refugees spend the best part of their lives in asylum countries and refugee camps; this results in new generations being born into a situation of forced displacement. At present, the international community has neither been capable of dealing with deteriorating refugee situations in Iraq nor able to prevent the emerging mass displacement of refugees from Syria. Therefore, the displacement cycle is likely to continue in the foreseeable future.

The main question that this thesis has sought to address is whether refugees have the right to durable solutions in international law. This right has not been explicitly stated in any international instrument, nor has it been considered in literature systematically. The lack of existence of a right of refugees to durable solutions in positive law may explain the lack of implementation of durable solutions. Indeed, the recent figures of refugees, mentioned above, is further evidence that the lack of implementation of durable solutions for refugee problems has contributed to the fact that there are millions of refugees confined in camps and asylum countries for years without long lasting solutions, while the vast majority have nowhere to go in the foreseeable future. Despite this, the international community has so far failed to respond. This is mainly because States do not feel that they have obligations to respond to these crises. Although this thesis explores a right that is not written anywhere, there are several legal sources which

[1450] UNHCR, 'Refugee Figures' available at: <http://www.unhcr.org/pages/49c3646c1d.html> accessed 20 October 2015.
[1451] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2, 9. This figure does not include the 5.1 million Palestinian refugees registered by UNRWA. Available at: <http://www.unrwa.org/> 18 October 2015.
[1452] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 11.
[1453] ibid; and ExCom Conclusion, 'Protracted Refugee Situations' (n 12) para. 6.

support the existence of such a right. In doing so, this thesis is divided into seven chapters, which address the following interlinked research questions:

A. Do States have an obligation to co-operate on refugee matters?

B. What is the role of the UNHCR in finding a durable solution for refugees?

C. What is the preferred durable solution for Iraqi refugees?

D. Is there a right of Iraqi refugees to resettlement in a third country?

The findings of the research will contribute greatly to the relevant literature, given the growing concern and global nature of refugee crises around the world.

7.1 A Right of Refugees to Durable Solutions in International Law

Conclusion One: The thesis concludes that there is a right to durable solutions in international law in the making (*lege ferenda*) and that refugees are the subject of this right. Hence, this is a right of refugees as a matter of international law rather than merely a policy tool at the discretion of the State. As such, the international community, acting through the UNHCR, has the responsibility to recognise, fulfil, and effectively implement it. An explicit recognition of this right will significantly contribute to alleviating the plight of refugees.

To explore the existence of this right, the research first examined the obligations of States to cooperate, under UN Charter, Refugee Convention, UNGA resolutions, UNHCR Statute, and ExCom conclusions, on refugee matters.[1454] Since this thesis focuses on the right of individuals as opposed to the right of States, it explored the international legal personality of individuals.[1455] It also examined the role of the UNHCR, as a UN agency, which was established to find durable solutions for refugee problems.[1456] The exploration of the right of refugees to durable solutions was demonstrated in the context of Iraqi refugees in protracted situations since their crisis is

[1454] See Chapter Two.
[1455] See Chapter Three.
[1456] See Chapter Four.

a current and urgent issue that must be studied as it continues to evolve, despite the continuous involvement of the international community. Hence, this thesis explored the three durable solutions to identify a suitable solution for Iraqi refugees in protracted situations.[1457]

Conclusion Two: States have obligations in international law to co-operate with each other and with the UN, including the UNHCR, whose mandate is to find durable solutions on refugee matters. These obligations can be found in the combined effect of the UN Charter, Refugee Convention, UNGA resolutions, the UNHCR Statute, and ExCom conclusions, as illustrated in Table 1. The analysis aimed to fill a gap in the literature on the obligation of States towards refugees.

The obligation to co-operate on refugee matters is one of the elements this thesis considered in order to address the main research question of whether refugees have the right to durable solutions in international law. Chapter Two considered this question by first examining the obligations of States under the UN Charter.[1458] The Charter explicitly obliges States to promote human rights and fundamental freedoms and to co-operate with each other to solve international problems.[1459]

Chapter Two then examined the obligations of States under the Refugee Convention including its preamble. [1460] The Convention imposes on Member States the duty to co-operate with the UNHCR,[1461] whose mandate is to find durable solutions[1462] while the preamble recognises that refugee problems cannot be achieved without international co-operation.[1463] Indeed, the drafters of the Refugee Convention, just like the UN Charter, saw international cooperation as a necessary requirement for the adequate fulfilment of States' obligations towards refugees. This can be noticed in Recommendation D: '[G]overnments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement'.[1464]

[1457] See Chapters Five and Six.
[1458] See Chapter Two, Section 2.2.
[1459] UN Charter. Arts. 1(3), 55(c), and 56.
[1460] See Chapter Two, Section 2.3.
[1461] Refugees Convention. Art. 35.
[1462] UNHCR Statute, para. 1.
[1463] Refugees Convention. Preamble (para. 4).
[1464] ibid. Recommendation D.

Chapter Two also examined documents considered to be soft law, such as UNGA resolutions, the UNHCR Statute, and the ExCom conclusions.[1465] This examination helped to identify what is reflected in the soft law on this obligation that might eventually become hard law. As noted in Section 2.4, soft law instruments not only can codify the existing rules of customary law but they are also used to interpret hard law.

The analysis has more importantly shown that explicit provisions contained in these instruments promote international cooperation to protect refugees, urge and encourage States to pursue durable solutions for refugee problems, and alleviating the refugee crises.[1466] They also recognise that 'international protection is best achieved through an integrated and global approach to protection, assistance and durable solutions'.[1467]

Conclusion Three: Refugees can be the subject of the right to durable solutions in international law. To consider whether refugees are the subjects of the specific rights, Chapter Three first explored the position of individuals as the subjects of international law. The analysis showed that by virtue of developments in international law, in particular the recognition of rights in international human rights law, as well as the right of legal standing, both active and passive, in international proceedings before international human rights and international criminal law courts, it is now generally accepted that individuals do enjoy status as subjects in international law.[1468]

The chapter then examined specifically the position of refugees as the subjects of rights in public international law. This analysis contributes to the existing knowledge on the international legal personality of refugees, and in particular by exploring the emerging tendency that refugees can be the subjects of specific rights in international law. This contribution comes from the fact that although there is an overwhelming amount of literature describing the position of individuals in international law, there is limited

[1465] See Chapter Two, Section 2.4.
[1466] See, for example, the resolutions cited in section 2.2.1 (n 81). See also, ExCom Conclusion No. 89 (LI) 'Conclusion on International Protection' (13 October 2000) preamble (para. 8). For an analysis of the status and role of UNGA resolutions, ExCom conclusions, and the UNHCR Statute in refugee protection, see Chapter Two, Sections 2.4.1, 2.4.2, and 2.4.3.
[1467] ExCom Conclusions No. 46 (XXXVIII), 'General Conclusion on International Protection' (12 October 1987) para. (n).
[1468] See Chapter Three, Section 3.2.

research specifically devoted to the legal personality of refugees in public international law.[1469]

The analysis showed both that individuals are the subjects of international law, and that refugees are also emerging as the subjects of international rights. It also showed that due to their membership in a specific category of individuals, refugees have been recognised as having specific rights in international law. It was argued that refugees are the subjects of rights under the Refugee Convention. This was based on developments in international treaties and judicial decisions, which confirmed that international treaties such as the Refugee Convention are able to recognise the rights of individuals directly.[1470] The analysis established that there has been a theoretical shift in refugee studies from States to individuals as the subjects of international law.

This argument was strengthened by the fact that refugees are already the subjects of certain rights in international law, including the right to be granted asylum and the right of *non-refoulement*, recognised in international human rights treaties of regional scope; these are rights which are enforceable before the relevant international human rights court.[1471] Also, the argument was proposed that, as refugees are the subjects of these two rights in contemporary international human rights law, this shows the current evolution of international law. Such an evolution suggests that refugees can possess other international rights, among them the right to durable solutions.

Conclusion Four: The research has shown that the UNHCR's role and responsibility towards refugees has changed dramatically, including with regard to durable solutions.[1472] Although three durable solutions are available to address refugee predicaments, over time these solutions have not been taken into account equally and are instead given a hierarchical status. One solution, voluntary repatriation, has been prioritised and promoted while the other two, local integration and third country resettlement, were least favoured. Indeed, the analysis demonstrated that the UNHCR has made extensive reference to voluntary repatriation in all of its standard-settings. States have taken a similar approach by repatriating refugees, often involuntarily, to places where there is still on-going conflict.

[1469] See Chapter Three, Section 3.3.
[1470] ibid, Section 3.3.3.
[1471] ibid, Section 3.3.3.1.
[1472] See Chapter Four, Section 4.4.

The analysis showed that such overemphasis on one solution at the expense of the other two durable solutions has compromised the voluntary character of the repatriation. This practice may constitute constructive *refoulement*. Indeed, by the UNHCR's own admission, contrary to the principle of *non-refoulement*, a large proportion of returnees have been repatriated involuntarily and States increasingly practice *refoulement* to address the growing influxes of refugees.[1473]

Conclusion Five: Resettlement in a third country is the only feasible solution for Iraqi refugees in protracted situations, while the other two durable solutions –local integration and voluntary repatriation– are not available. This view echoes the UNHCR's position that resettlement to third countries is the only possible solution for Iraqi refugees.[1474] It was argued that resettlement in third countries is the only way for Iraqi refugees to find any meaningful possibility of solution: a solution that is capable of finding a home for this particular group of refugees. Resettlement is a vital protection tool to adhere to the international obligation of *non-refoulement* and to provide economic and social gains for refugees in developed countries. This solution provides the opportunity for Iraqi refugees to build new lives with dignity and peace, and not only integrate within a new society but also contribute to it. It provides them with the rights entitled to them, according to the international refugee regime, and might open the way for their eventual naturalisation in the asylum country. This process will entitle Iraqi refugees to access rights similar to those provided for the nationals of the resettlement country.[1475]

Despite the fact this research concludes that resettlement is the optimal solution for Iraqi refugees, it has recognised that there are challenges and obstacles that hinder the actual implementation and efficient delivery of this solution. It was acknowledged that this solution is not problem-free; however, the obstacles do not undermine the conclusion, which is that resettlement is the best solution for Iraqi refugees. In other words, the lack

[1473] UNHCR, *The State of the World's Refugees: 1997* (n 984) 147; and UNHCR, 'Note on International Protection' (4 July 2012) UN Doc. A/AC.96/1110, para. 12. Available at: <http://www.unhcr.org/refworld/pdfid/5072a4612.pdf> accessed 21 October 2015.
[1474] UNHCR, '2015 UNHCR Country Operations Profile – Jordan' available at: <http://www.unhcr.org/pages/49e486566.html> accessed 13 October 2015. See also, UNHCR, 'UNHCR Position on Returns to Iraq' (n 30).
[1475] See Chapter Six, Section 6.2.

of appropriate implementation of this solution does not diminish the effect it has in addressing a protracted displacement.[1476]

This study has also considered that the other two durable solutions might provide solutions for some refugees, but that they are incapable of constituting a solution of general applicability. This is because, on the one hand, the lack of stability in security, the continuous political turmoil, and the consistent sectarian division in Iraq means that it is unlikely voluntary repatriation will be achieved for Iraqi refugees in the foreseeable future. Today, 25 years after the 1991 Gulf War and 12 years after 2003 US-led invasion of Iraq, the UNHCR advises that return to Iraq is unsafe, and also that Iraqi refugees are entitled to international protection. Therefore, it urges States not to return people to Iraq until 'tangible improvements in the security and human rights situation have occurred'.[1477] In fact, the UN warns that Iraq is on the brink of humanitarian disaster due to surging conflict and massive funding shortfall.[1478] Recently, the IOM reported that since January 2014, about 3.2 Million Iraqis have become internally displaced in the country.[1479] In addition to IDPs, a new UNHCR Asylum Trends report indicates that between January and June 2014 alone, 21,300 Iraqi asylum claims were lodged in 44 industrialised countries.[1480] This figure was the second largest source of asylum-seekers in industrialised countries. Therefore, as of September 2015,[1481] Iraqi refugees are continuously being forced to flee rather than return to their regions of origin. This adds to the already thousands of refugees who are in protracted situations and the new plight of Iraqi refugees proves yet again the ongoing history of displacement from Iraq.

In fact, even if the country's security is significantly stabilised, there are groups of people such as minorities who are often reluctant to repatriate because they do not feel safe or protected, and second-generation refugees are also reluctant because they have never been to or seen Iraq. Thus, there is a lack of desire among these groups of refugees to return.[1482]

[1476] See Chapter Six, Section 6.2.1.
[1477] UNHCR, 'UNHCR Position on Returns to Iraq' (n 30) para. 27.
[1478] UN, 'Iraq on the Brink of Humanitarian Disaster' (n 1174).
[1479] IOM, 'Displacement in Iraq Reaches Nearly 3.2 Million' (n 1218).
[1480] UNHCR, 'UNHCR Asylum Trends, First Half 2014' (n 1025) 15.
[1481] UNHCR, 'UNHCR Concerned about the Challenges Facing Thousands of Iraqis Fleeing Ramadi' (n 1220).
[1482] Refugees Convention. Art. 1A(2)

On the other hand, even if Iraqi refugees want to integrate into an asylum country, the findings have shown that Iraqi refugees in the three countries that host the majority of them (Turkey, Jordan and Lebanon) are not entitled to long-term settlement because the law and policy of these countries denies such a possibility.[1483] The analysis demonstrated the inability of these countries to offer the rights enshrined in the Refugee Convention and the required international protection. Indeed, all three countries have incorporated specific provisions in the MoU, as is the case of Jordan and Lebanon, or in their domestic legislations, in the case of Turkey, who object to the idea of local integration for Iraqi refugees. Based on the provisions of the MoU and domestic legislation, once granted RSD, Iraqi refugees are only allowed to reside in these countries temporarily until they are resettled to a third country or they will be returned 'voluntarily' to their home countries. The law, policy, and practice of these countries shows that there is no evidence that such a pattern is going to change. Rather, on the contrary, of the three countries compared, Turkey has the most sophisticated mechanism and more advanced legal framework, which has recently framed that Iraqi refugees do not have the possibility of local integration in Turkey. The analysis also showed the strain that the Iraqi refugee plight has placed on Iraq's neighbouring countries.

Conclusion Six: the figures and findings presented in this research have confirmed that there is a long history of forced displacement from Iraq.[1484] This is in part due to the conflict, persecution or post-conflict situations in the country over the past three decades.[1485] In fact, Iraqi refugees are one of the three groups of refugees to have consistently been among the top 20 source countries of refugees since 1980.[1486] Turkey, Jordan, and Lebanon in the past 30 years at various junctures have become a place of sanctuary for Iraqi refugees. An even more important issue is that this will remain the case in the future because, for example, Iraqi refugees as a population group will continue to seek protection in these countries regardless of the cause of their flight. Due to their geographical location, the systematic pattern of flight to Turkey, Jordan, and Lebanon by Iraqi refugees will continue, as demonstrated by their recent large

[1483] See Chapter Five.
[1484] See Chapter Five, Sections 5.2.1, 5.3.1, and 5.4.1.
[1485] See, for example, UNHCR, 'Total Refugee Population by Country of Asylum' (n 28).
[1486] The other two countries are Afghanistan, and Viet Nam. UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.

displacement.[1487] This displacement also proves the ongoing history of displacement from Iraq and shows that yet again Iraqi refugees are moving towards more protracted situations.

Conclusion Seven: this research concludes that the right to a durable solution for Iraqi refugees is to be materialised in resettlement in third countries. This solution is the preferred durable solution for Iraqi refugees not because it is the most attractive solution or the solution Iraqis themselves prefer to pursue but because it is the only viable and feasible solution capable of addressing their protracted situations. Hence, it is not a matter of choice but because there is nothing else available for them. However, it should be noted that this research does not claim that every refugee has a right to resettlement and that this right exists as a matter of choice for every refugee under any circumstances; it is only for those for whom no other alternatives are available, as is the case with Iraqi refugees.

However, it is commonly claimed in the literature and seen in State practice that refugees have no right to resettlement, and States have no obligation to resettle refugees.[1488] Although it is true in principle, there is nothing that obliges States to provide resettlement. This discretion must be exercised in a way that allows States to comply with their international obligations to co-operate on refugee protection, as outlined in Conclusion Two.

This research has shown that Iraqi refugees have spent decades in protracted situations. Given that States have an international obligation to resolve the refugee crisis, they are obliged to respond to Iraqi refugee crises. Although States might not provide resettlement as such, they have to address the growing refugee problem and when resettlement, in their circumstances, is the only available solution in the ongoing plight of Iraqi refugees, they must offer it. In this case, what was an option for States becomes an obligation. This suggests that the obligation to resettle is a rule *de lege ferenda*. This conclusion contributes to the literature because it develops a theoretical framework that applies to the law on resettlement.

[1487] See, for example, UNHCR, 'UNHCR Reports Sharp Increase in Number of Iraqis Fleeing to Jordan and Turkey' (n 26).
[1488] See, for example, UNHCR, 'Frequently Asked Questions about Resettlement' (n 1421) 2; and Noll and Selm, (n 1443) 2.

7.2 Suggestions and Recommendations

Based on the research findings, the right of refugees to durable solutions is in the making (*lege ferenda*). Therefore, this thesis suggests that the international community might consider taking steps towards a formal recognition of this right in an internationally binding instrument. This is a right that refugees are entitled to access and given the urgency of refugee situations, the international community has not only the responsibility to develop and implement effectively but also an obligation to recognise and fulfil this right fully and swiftly.

As noted, the research further concluded that for Iraqi refugees in protracted situations, this right is to be materialised in resettlement in a third country. As mentioned, the international community has the responsibility to work towards addressing the plight of Iraqi refugees and their deteriorating situation. Some observers rightly warn that if the predicament of Iraqi refugees is not resolved, it might become yet another unresolved Palestinian refugee issue in the Middle East region. In fact, today, the emergence of refugee problems elsewhere in the region, such as Syria, has shifted international attention from the tenuous situation of Iraqi refugees.[1489] Therefore, on the basis of these findings, this thesis suggests that States acting together within the international community have an obligation of international law to find a comprehensive solution in the form of resettlement in third countries for this protracted situation.

The latest displacement crisis of Iraqi refugees shows that a massive return to Iraq is neither feasible nor recommended by the UNHCR.[1490] Therefore, asylum countries, in particular the neighbouring countries, should avoid implementing a closed-door policy and refrain from expulsion and deportation. Instead, they should accept more asylum seekers and provide local integration until Iraqi refugees are able to repatriate or resettle in a third country. As noted by the UNHCR High Commissioner, 'without the prospect of durable solutions, [the] duty to protect refugees cannot be fulfilled effectively'.[1491]

Resettlement, as the UNHCR has confirmed, is not only one of the three durable solutions but also an important tool of international protection and a valuable

[1489] See Chapter Six, Section 6.1.
[1490] UNHCR, 'UNHCR Position on Returns to Iraq' (n 30).
[1491] UNHCR, 'Lubbers Launches Forum on Convention Plus Initiative' (n 32).

representation of expression of international solidarity amongst States.[1492] However, today 86% of refugees are hosted by developing countries, which is the highest percentage in more than 20 years.[1493] As argued, given that States have obligations towards refugees, resettlement countries must show such solidarity to provide additional assistance, and enhance resettlement opportunities to ease the burden on the States that host significantly large numbers of refugees. In particular, Iraqi neighbouring countries with limited resources have felt the strain the Iraqi refugee predicaments has caused. One of the ways to show international solidarity is to enhance the actual implementation and efficient delivery of resettlement. This can be done by introducing more flexible criteria for refugees to qualify for resettlement and by refraining from adopting rigid criteria and quotas to restrict resettlement opportunities.

States have an obligation to cooperate on refugee matters and have obligation to cooperate with the UNHCR to find durable solutions for refugee problems. One of the ways to deliver on their obligation is to find resettlement for this group of refugees from Iraq, to alleviate their protracted displacement. Hence, it is suggested that unless the international community, acting through the UNHCR, takes the necessary measures to resolve the refugee crisis, the number of refugees in protracted situations will continue to rise.

[1492] UNHCR Resettlement Handbook (n 851) 3.
[1493] UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 2.

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Appendices

Appendix A:

The Iraq refugee population from 1979 to 2014.[1494]

Year	Refugee Numbers	Year	Refugee Numbers	Year	Refugee Numbers
1979	31,000	1991	1,321,853[1495]	2003	368,580
1980	31,098	1992	1,343,824	2004	311,905
1981	66,589	1993	771,077	2005	262,299
1982	103,766	1994	749,834	2006	1,450,905[1496]
1983	103,721	1995	718,719	2007	2,309,245
1984	101,724	1996	714,730	2008	1,903,519
1985	401,503	1997	707,338	2009	1,785,212
1986	400,745	1998	675,030	2010	1,683,579
1987	410,818	1999	604,002	2011	1,428,308
1988	508,468	2000	526,179	2012	746,206[1497]
1989	507,986	2001	530,511	2013	401,400[1498]
1990	1,133,805	2002	422,119	2014	426,000

[1494] The figures of Iraqi refugees in the past 35 years indicate a consistent displacement cycle from Iraq. Although the figures fluctuated from one year to another, so far there is no solution to address their protracted displacement. The table shows that refugee figures have increased since 1979, and the figures should be put into the context of population increase. See UNHCR, 'Total Refugee Population by Country of Asylum' (n 28); and UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.

[1495] The figures show a rise in the number of refugees between 1990-1991 because of the failed uprising by the Kurds and Shias against the government. This resulted in over one million Iraqi refugees seeking asylum mainly in Turkey and Iran. See UNHCR, 'Chronology: 1991 Gulf War Crisis' (n 1035).

[1496] Between 2006 and 2007, the figures of Iraqi refugees increased dramatically due to the escalation of sectarian violence and ethnic division in the country, which resulted in the world's fastest growing refugee movement. See, for example, Younes (n 1125) 1-12.

[1497] In 2012, the figures of Iraqi refugees were revised from 1.4 million to 746,400 because the governments of both Syria (from 750,000 to 471,400) and Jordan (from 450,000 to 63,000) revised their numbers based on the assumption that Iraqi refugees have either returned or moved elsewhere. See UNHCR, 'UNHCR Global Trends 2012' (n 950) 13, 18-19.

[1498] By the end of 2013, Iraq had the seventh largest refugee population in the world with an estimated 401,400 refugees. See, for example, UNHCR, 'UNHCR Global Trends 2013' (n 950) 11, 15-16, and 24.

Appendix B:

The estimated number of Iraqi refugees displaced as a result of 2003 conflict, in particular those displaced in the immediate region.[1499]

Syria	Jordan	Lebanon	Turkey	Iran	Egypt	Other Gulf Countries
1.5 million	500,000	20-50,000	5,000	57,000	120,000	200,000

Appendix C:

The table below shows the estimated number of refugees and asylum seekers from Iraq prior to 2003.[1500]

1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
771,077	749,834	718,719	714,730	707,338	675,030	642,886	526,179	530,511	421,719

Appendix D:

The figures of Iraqi refugees registered by the UNHCR in Jordan prior to 2003 US-led invasion of Iraq.[1501]

1996	1997	1998	1999	2000	2001	2002
5,981	5,049	7,872	7,727	6,623	4,096	2,324

Appendix E:

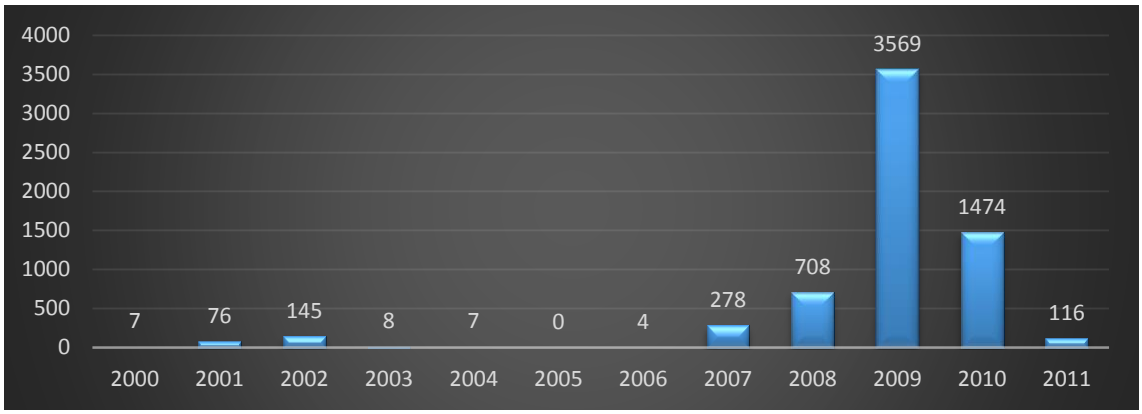
The overall number of refugees resettled in the EU countries between 2000 and 2012.[1502]

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
2,960	2,634	2,284	2,439	3,439	3,103	3,903	4,251	5,115	7,399	5,405	4,326	2,207

[1499] UNHCR, 'Iraq Displacement' (n 1123).
[1500] UNHCR, '2002 UNHCR Statistical Yearbook – Iraq' (2 September 2004) 337.
[1501] ibid 349.
[1502] Perrin (n 1202) 13.

Appendix F:

Resettlement of Iraqi refugees in the EU countries between 2000 and 2011.[1503]



Appendix G:

The States that provide resettlement opportunities as of 28 April 2014.[1504]

Continent	**Resettlement Countries**
Asia	Japan.
Europe	Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom
North America	Canada and the United States of America
Oceania	Australia and New Zealand
South and America	Argentina, Brazil, Chile, Paraguay, and Uruguay

[1503] ibid 16, 19.
[1504] UNHCR, 'Resettlement Fact Sheet' (April 2014). Available at: <http://www.resettlement.eu/sites/icmc.tttp.eu/files/Global-Resettlement-Fact-Sheet_0.pdf> accessed 20 October 2015.

Appendix H:

The UNHCR's Submissions and Departures between 2005 and 2012.[1505]

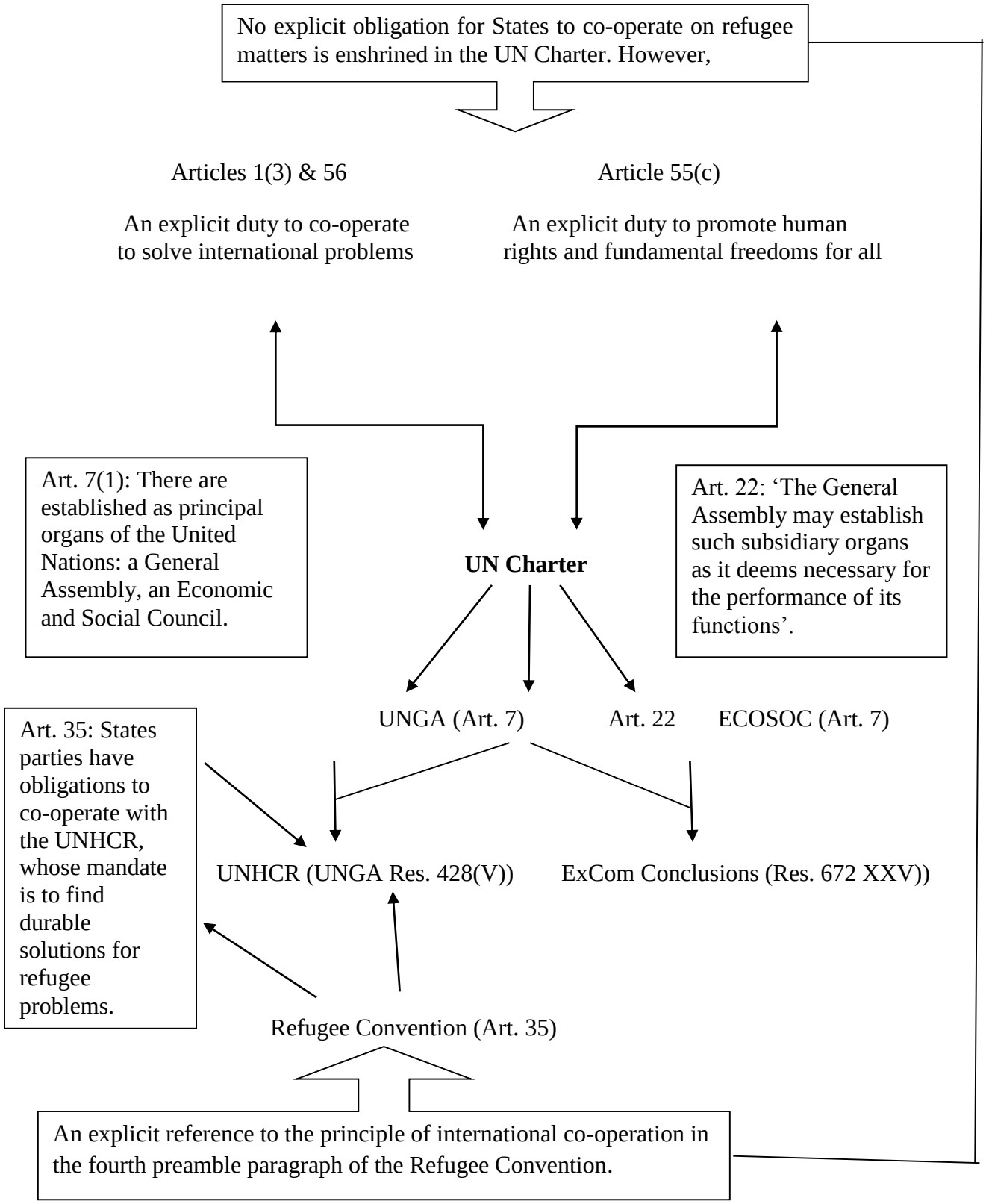
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Submissions	46,260	54,182	98,999	121,214	128,558	108,042	91,843	74,835	93,226	103,800[1506]
Departures	38,507	29,560	49,868	65,859	84,657	72,914	61,649	69,252	71,411	105,200[1507]

[1505] UNHCR, 'UNHCR Projected Global Resettlement Needs: 2014' (19th Annual Tripartite Consultations on Resettlement, Geneva: 1-3 July 2013) 73; UNHCR, 'Resettlement Fact Sheet' (28 April 2014). Available at: <http://www.resettlement.eu/sites/icmc.tttp.eu/files/Global-Resettlement-Fact-Sheet_0.pdf> accessed 10 October 2015; UNHCR Projected Global Resettlement Needs: 2011 (n 1420) 54; and UNHCR, 'Frequently Asked Questions about Resettlement' (n 1421) 6.

[1506] The UNHCR's submitted figure only. UNHCR, 'UNHCR Global Trends Forced Displacement in 2014' (n 1) 16.

[1507] This figure is according to government statistics. It was admitted in 26 countries with or without the UNHCR's assistance. This is the largest figure since 2009. ibid.

Table 1.


No explicit obligation for States to co-operate on refugee matters is enshrined in the UN Charter. However,
Articles 1(3) & 56
An explicit duty to co-operate to solve international problems
Article 55(c)
An explicit duty to promote human rights and fundamental freedoms for all
Art. 7(1): There are established as principal organs of the United Nations: a General Assembly, an Economic and Social Council.
UN Charter
Art. 22: 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions'.
UNGA (Art. 7)
Art. 22
ECOSOC (Art. 7)
Art. 35: States parties have obligations to co-operate with the UNHCR, whose mandate is to find durable solutions for refugee problems.
UNHCR (UNGA Res. 428(V))
ExCom Conclusions (Res. 672 XXV))
Refugee Convention (Art. 35)
An explicit reference to the principle of international co-operation in the fourth preamble paragraph of the Refugee Convention.