

# HUMANE RIGHTS: THE REFUGEE CONVENTION AS A BLUEPRINT FOR COMPLEMENTARY PROTECTION STATUS

Jane McAdam\*

## A INTRODUCTION

Since coming into force in 1954, the Refugee Convention<sup>1</sup> has been the central international instrument on refugee status, supplemented by the 1967 Protocol<sup>2</sup> which extended its temporal and (with respect to some States) geographical application. In the half-century since the Convention's inception, international human rights law has evolved as a sophisticated system of rights and duties between the individual and the State, which has affected traditional notions of State sovereignty and behaviour in an unprecedented manner.<sup>3</sup> Yet, despite the influence of 'international human rights law' in regulating State behaviour, there has been a general reluctance by States, academics and institutions to view human rights law, refugee law and humanitarian law as branches of an interconnected, holistic regime,<sup>4</sup> particularly when it comes to triggering eligibility for protection beyond the scope of article 1A(2) of the Refugee Convention.

Complementary protection is largely about this intersection. It is a relatively new term in the Australian context,<sup>5</sup> but is a feature of most other western protection

---

\* BA (Hons) LLB (Hons) (*Syd*) DPhil (*Oxon*); Faculty of Law, University of Sydney. I would like to thank the anonymous reviewers for their thoughtful comments, and also Peter Bailey of ANU for his helpful suggestions. Email: [janem@law.usyd.edu.au](mailto:janem@law.usyd.edu.au).

<sup>1</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>2</sup> Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>3</sup> eg Human Rights Act 1998 c 42 (UK).

<sup>4</sup> It is refreshing to note, however, that the 2006 International Law Association (British Branch) conference will consider these issues under the general conference theme: 'Tower of Babel: International Law in the 21<sup>st</sup> Century—Coherent or Compartmentalised?'

<sup>5</sup> Australia has no formal system of complementary protection. The only means for an asylum seeker to have a non-Convention protection claim considered in Australia is if, following a negative primary decision and an unsuccessful appeal to the Refugee Review Tribunal, he or she seeks to invoke the

regimes. It describes protection granted by States to individuals on the basis of international protection needs falling outside the 1951 Convention framework. It may be based on human rights treaties, such as the prohibition on return to torture in article 3 of the CAT<sup>6</sup> and to torture, inhuman or degrading treatment or punishment in article 7 of the ICCPR,<sup>7</sup> or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.<sup>8</sup> Importantly, complementary protection derives from legal obligations preventing return, rather than from compassionate reasons or practical obstacles to removal.

For many years, many States have offered some kind of protection to people they have variously described as ‘de facto refugees’, ‘B status refugees’, ‘OAU and Cartagena-type refugees’ and ‘humanitarian refugees’. But one of the chief problems has been the ad hoc nature of the protection offered to these non-Convention refugees, and the lack of a clear status for those permitted to remain. These regimes have varied from granting them identical rights to Convention refugees, to nothing more than a tolerated status with protection from *refoulement* but little more. Protection has

---

non-compellable, non-delegable and non-reviewable discretion of the Minister for Immigration and Multicultural and Indigenous Affairs under section 417 of the Migration Act 1958 (Cth). For a critique of this section and suggested alternatives to it: Senate Select Committee on Ministerial Discretion in Migration Matters: Senate Select Committee on Ministerial Discretion in Migration Matters *Report* (Commonwealth of Australia March 2004)

<[www.aph.gov.au/senate/committee/minmig\\_ctte/report/index.htm](http://www.aph.gov.au/senate/committee/minmig_ctte/report/index.htm)> (8 January 2005) esp Ch 8. For discussion of how complementary protection might operate in the Australian context, see eg Refugee Council of Australia, National Council of Churches in Australia and Amnesty International Australia ‘Complementary Protection: The Way Ahead’ (April 2004) <[www.refugeecouncil.org.au/docs/current\\_issues/Complementary\\_Protection\\_model\\_files/Complementary%20Protection%20Model-.doc](http://www.refugeecouncil.org.au/docs/current_issues/Complementary_Protection_model_files/Complementary%20Protection%20Model-.doc)> (2 November 2005); UNHCR Australia ‘Discussion Paper: Complementary Protection’ (No 2, 2005) <[www.unhcr.org.au/pdfs/Discussion22005.pdf](http://www.unhcr.org.au/pdfs/Discussion22005.pdf)> (2 November 2005).

<sup>6</sup> 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.

<sup>7</sup> International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>8</sup> See D Perluss and JF Hartman ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia J of Intl L 551; GS Goodwin-Gill ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26 Virginia J of Intl L 897; cf K Hailbronner ‘*Non-Refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 Virginia J of Intl L 857.

thus been precarious; posited as a purely humanitarian gesture dependent on the goodwill of particular States, and the political inclinations of their populace.

The drastic effects of being tolerated but not granted a proper status are well-documented.<sup>9</sup> It is therefore essential to secure a legal status for anyone whom a State recognizes is in need of international protection. Although the last decade has seen increasing resentment towards refugees as governments around the world have stigmatized asylum seekers as economic migrants, using them as scapegoats for unemployment, social unrest and even terrorism, there has simultaneously been a trend to examine the legal foundations on which States' obligation to protect might rest. Accordingly, the once ad hoc systems of complementary protection have started to find their proper foothold in international and regional human rights law.

For example, in 1999, the United States enacted laws implementing its obligations under article 3 of the CAT, granting protection to people who are 'more likely than not' to be tortured if returned to a particular country.<sup>10</sup> In 2001, Canada decided to grant the same protection it gives to refugees, which is permanent residence, to people fleeing torture, as well as to those facing a personal risk to life or a risk of cruel and unusual treatment or punishment in certain defined circumstances. Most recently, the European Union in April 2004 adopted the first binding, supranational instrument on complementary protection, known as the Qualification Directive. This implements the EU States' protection obligations under international law and the European Convention on Human Rights. By contrast, Australia is notable for its lack of any comparable system.

---

<sup>9</sup> *Ahmed v Austria* (1997) 24 EHRR 278.

<sup>10</sup> See US Citizenship and Immigration Services 'History of the United States Asylum Officer Corps' <<http://uscis.gov/graphics/services/asylum/history.htm#torture>> (16 November 2005). Relevant legislation is listed there.

While States have examined their obligations under international law *not to deport* people to certain conditions, they have so far been less diligent in looking to international law to define what legal status those people should be given. Instead, political rather than legal arguments have been used to defend the creation of protection hierarchies. For example, in the EU, the Qualification Directive says that States must not remove people facing a real risk of the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or a serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>11</sup> On these bases, people can claim protection. However, although permitted to stay, these people do not get the same rights as Convention refugees. Instead, they get ‘subsidiary protection’: lesser entitlements with respect to family unity; access to and length of residence permits; eligibility for travel documents; access to employment; social welfare entitlements; health care entitlements; access to integration facilities; and rights of accompanying family members.

Although an EXCOM Conclusion on complementary protection was adopted in October 2005, it does not explicitly address the question of the status of beneficiaries. Instead, it contains important but relatively elusive statements calling upon States to ‘provide for the highest degree stability and certainty by ensuring the human rights and fundamental freedoms of [beneficiaries of complementary protection] without discrimination’,<sup>12</sup> and affirming that complementary protection should be applied ‘in a manner that strengthens, rather than undermines, the existing

---

<sup>11</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

<sup>12</sup> ExCom Conclusion No 103 (LVI) ‘The Provision of International Protection including through Complementary Forms of Protection’ (2005) para (n).

international refugee protection regime'.<sup>13</sup> Similarly, it emphasizes the importance of applying and developing international protection in a manner that avoids the creation or continuation of protection gaps.<sup>14</sup>

This paper seeks to establish the fundamental conceptual connections between international refugee law and human rights law in order to argue that under *international* law, beneficiaries of protection, whether as Convention refugees or otherwise, are entitled to an identical status.

## **B THE INADEQUACY OF *NON-REFOULEMENT* + HUMAN RIGHTS LAW ALONE**

Why do I think it is necessary to find a way of giving Convention status to beneficiaries of complementary protection? After all, there is a whole body of universal human rights law which applies to everyone, irrespective of their nationality or formal legal status.<sup>15</sup>

While that is true, in practice, characteristics *like* nationality or formal legal status can significantly affect the extent of rights an individual *is* actually accorded. In reality, States *do* differentiate between the rights of citizens and the rights of aliens (and even between different categories of aliens), premising this on their sovereign right to determine who remains in their territories and under what conditions. While the rights set out in the Refugee Convention are not inherently superior to those in the

---

<sup>13</sup> *ibid* para (k).

<sup>14</sup> *ibid* para (s).

<sup>15</sup> Although certain exceptions exist with respect to political rights reserved for citizens (art 25 ICCPR); see also arts 12(3), 13. See Human Rights Committee 'General Comment 15: The Position of Aliens under the Covenant' (11 April 1986), reinforced by Human Rights Committee 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [10]; Committee on the Elimination of Racial Discrimination 'General Recommendation XI on Non-Citizens (Art 1)' (19 March 1993) in UN Doc A/46/18.

universal human rights treaties, being largely based on the latter,<sup>16</sup> they are applied in a different way. Whereas a grant of Convention refugee status entitles the recipient to the full gamut of Convention rights, no comparable status arises from recognition of an individual's protection need under a human rights instrument. The Refugee Convention alone creates a status recognized in domestic law.<sup>17</sup>

Thus, although I would *like* to be able to point to human rights law as offering a complementary and, in part, more generous set of rights than the Refugee Convention, the generality and vagueness of those rights, combined with a lack of implementing mechanisms at the domestic level, make them in practice comparatively weak. Although the universal human rights instruments grant a comprehensive set of rights to all persons within a State's jurisdiction,<sup>18</sup> international human rights law is strong on principle but weak on delivery.<sup>19</sup> There is therefore a gap between the theory of human rights and the ability to enjoy those rights.<sup>20</sup>

It is for this reason that I seek to demonstrate, through historical analysis, why the status set out in the Refugee Convention should attach to all those whom the principle of *non-refoulement* protects. This does not have to be viewed as an attempt

---

<sup>16</sup> Many of the provisions of the Convention were based on the UDHR and the draft ICCPR and ICESCR: see nn 26 and 27 below.

<sup>17</sup> H Lambert 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 International and Comparative Law Quarterly 515, 519; *Ahmed v Austria* (1997) 24 EHRR 278; *BB v France* App No 30930/96 (9 March 1998). It is not surprising that treaties such as the CAT do not articulate a resultant status for those who benefit from human rights-based *non-refoulement*. For example, the purpose of the CAT was not to enumerate the rights of persons protected from *refoulement*, but rather to strengthen the existing prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law through a number of supportive measures. See JH Burgers and H Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers Dordrecht 1988). Hathaway argues that refugee rights consist of 'an amalgam of principles drawn from both refugee law and the [human rights] Covenants', and that refugee 'status' should now be understood as comprising a combination of these: JC Hathaway *The Rights of Refugees under International Law* (CUP Cambridge 2005) 9. Certainly, where this is the case, that more comprehensive status should also be accorded to beneficiaries of complementary protection for the same reasons as advanced above.

<sup>18</sup> With the exception of certain rights granted to citizens only: (n15).

<sup>19</sup> Thanks to Prof Chris McCrudden (Lincoln College, University of Oxford) for this description.

<sup>20</sup> UNHCR 'Note on International Protection' A/AC.96/898 (3 July 1998) [45].

to broaden the scope of article 1A(2), but rather as recognition that the widening of *non-refoulement* under customary international law requires a concomitant consideration of the status which its beneficiaries acquire.

### C THE REFUGEE CONVENTION AS A HUMAN RIGHTS TREATY<sup>21</sup>

In 1947, the Commission on Human Rights adopted a resolution that ‘early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation.’<sup>22</sup> The Ad Hoc Committee on Statelessness and Related Problems was asked by ECOSOC to draft a binding legal instrument to implement articles 14 and 15 of the Universal Declaration of Human Rights,<sup>23</sup> firmly cementing the Convention’s foundations in human rights law. Many of its substantive provisions were based on principles of the UDHR<sup>24</sup> and the embryonic ICCPR and ICESCR, known then as the draft Covenant on Human Rights.<sup>25</sup>

The Convention’s Preamble states its aim as assuring ‘refugees the widest possible exercise of ... fundamental rights and freedoms’. The Convention was to

---

<sup>21</sup> IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999); UNHCR ‘Note on International Protection’ UN Doc A/AC.96/975 (2 July 2003) [49]–[52] emphasizes relevance of human rights law to refugee issues.

<sup>22</sup> Commission on Human Rights Report to ECOSOC on the 2<sup>nd</sup> Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 [46], in P Weis ‘Human Rights and Refugees’ (1971) 1 *Israel Yearbook on HR* 35, 37.

<sup>23</sup> Ad Hoc Committee on Statelessness and Related Problems (AHC) First Session ‘Summary Record of the 1<sup>st</sup> Meeting’ (NY 16 January 1950) UN Doc E/AC.32/SR.1 (23 January 1950) [4] (Secretariat).

<sup>24</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ Annex II to AHC ‘Draft Report of the Ad Hoc Committee on Statelessness and Related Problems’ (16 January–February 1950) UN Doc E/AC.32/L.38 (15 February 1950) 36 (art 3 non-discrimination), 46 (art 26 education); AHC ‘Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems’ (Document E/1618) UN Doc E/AC.32/L.40 (10 August 1950) 31 (France on UDHR art 29(1)).

<sup>25</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ (n24) 58; see UN Doc E/1572, 12 (art 32 (then art 27) expulsion).

establish practical but universal standards<sup>26</sup> for the rights of refugees that went beyond the lowest common denominator, ‘since [it was said] a convention would hardly be useful if it contained only the minimum acceptable to everyone.’<sup>27</sup> Early General Assembly resolutions support its underlying human rights basis, with an emphasis on assisting the most needy,<sup>28</sup> affirming basic principles relating to solutions,<sup>29</sup> and recommending increased protection activities.<sup>30</sup>

The resulting Refugee Convention is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR and ICESCR in such provisions as the acquisition of property, the right to work, housing, public education, public relief, labour legislation and social security, and freedom of movement.<sup>31</sup> Moreover, it reinforces States’ protection of refugees as an international legal duty, arising from article 14 of the UDHR and embodied in binding form by the principle of *non-refoulement* in article 33 of the Convention. As one commentator remarks: ‘The framers’ unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles.’<sup>32</sup> Lauterpacht and Bethlehem stress that the law on human rights that has emerged since the Convention’s conclusion is

---

<sup>26</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (CP) ‘Summary Record of the 2<sup>nd</sup> Meeting’ (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 18 (High Commissioner); CP ‘Summary Record of the 3<sup>rd</sup> Meeting’ (3 July 1951) UN Doc A/CONF.2/SR.3 (19 November 1951) 10 (France).

<sup>27</sup> AHC First Session ‘Summary Record of the 25<sup>th</sup> Meeting’ (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68].

<sup>28</sup> UNGA Res 639 (VI) of 20 December 1952; UNGA Res 728 (VIII) of 23 October 1953.

<sup>29</sup> UNGA Res 1166 (XII) of 26 November 1957; ECOSOC Res 686 (XXVI) B of 21 July 1958.

<sup>30</sup> UNGA Res 1284 (XIII) of 5 December 1958 [1], in GS Goodwin-Gill ‘The Language of Protection’ (1989) 1 IJRL 6, 14.

<sup>31</sup> J Patnogie ‘International Protection of Refugees in Armed Conflicts’ (reprinted by UNHCR Protection Division from *Annales de Droit International Médical* (July 1981)) section 4.

<sup>32</sup> MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff The Hague 2002) 314.

‘an essential part of [its] framework ... that must ... be taken into account for purposes of interpretation.’<sup>33</sup> UNHCR has also emphasized that:

The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.<sup>34</sup>

In so far as there is no *legal* justification for distinguishing between the status granted to Convention or extra-Convention refugees,<sup>35</sup> it makes sense that the Convention, as a ‘Magna Carta for the persecuted’,<sup>36</sup> applies to both. I argue that since the Convention is itself a specialist human rights instrument, the protection conceptualization it embodies is necessarily extended by developments in human rights law, rather than via the conventional means of a protocol. It therefore acts as a form of *lex specialis* which applies to persons encompassed by that extended concept of protection, that is, by complementary protection.

---

<sup>33</sup> E Lauterpacht and D Bethlehem ‘The Scope and Content of the Principle of *Non-Refoulement: Opinion*’ in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP Cambridge 2003) [75].

<sup>34</sup> UNHCR ‘Note on International Protection’ UN Doc A/AC.96/951 (13 September 2001) [4].

<sup>35</sup> UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ 14109/01 ASILE 54 (16 November 2001) [46]; UNHCR ‘Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive’ (March 2004) 2.

<sup>36</sup> CP ‘Summary Record of the 19<sup>th</sup> Meeting’ (Geneva 13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 27 (International Association of Penal Law).

I now turn to two elements of the Convention regime that support the application of Convention refugee status to other groups of protected persons: article 1A(1) and Recommendation E of the Final Act.

## **1 ‘Humanitarian Refugees’: Article 1A(1)**

Analysis of the Convention’s conceptualization of ‘protection’ invariably focuses on the refugee definition in article 1A(2), since an individual must satisfy its requirements to trigger Convention status. Article 1A(1) extended the benefits of the 1951 Convention to any person covered by pre-1951 refugee instruments—predominantly victims of armed conflict or communal violence. This provision is generally overlooked as an historical remnant. However, though eligibility under this provision is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant. First, the incorporation of these definitions necessarily broadens the Convention’s conceptual basis of protection, making it difficult to sustain the argument that, conceptually, the Convention does not support the grant of its international legal status to persons fleeing situations of armed conflict or communal violence. This has particular significance for persons seeking complementary protection on the basis of civil war, and challenges the EU’s current approach of creating a new and separate protection status for such persons.

Secondly, even though an applicant today cannot invoke an article 1A(1) instrument as the basis of an asylum claim, the fact that Convention status flows from the definitions contained in those instruments, which embody what Melander has

termed the ‘humanitarian refugee’ concept,<sup>37</sup> makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds. Not only has State practice continued to recognize both ‘humanitarian’ and Convention refugees, but that the dominant legal refugee instrument implicitly retains the humanitarian concept of protection within its definitional provision.

Thus, while the text of article 1A(1) does not support an argument that the provision itself gives rise to additional grounds for claiming protection under the Convention, its implicit incorporation of earlier legal definitions of ‘refugee’ (and the concepts of protection which those definitions embody) supports the view that the Convention tolerates a broader protection concept than article 1A(2) might suggest, and that Convention status is the appropriate status for persons in need of international protection for humanitarian reasons.

## **2 Recommendation E of the Final Act**

Recommendation E of the Final Act of the Conference of Plenipotentiaries, which is appended to the Refugee Convention, expresses ‘the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees, and who would not be covered by the terms of the Convention, the treatment for which it provides.’ This was proposed by the UK delegation because it felt that a general recommendation was required to cover those

---

<sup>37</sup> G Melander ‘Refugee Policy Options—Protection or Assistance’ in G Rystad (ed) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund University Press Lund 1990) 146–47.

classes of refugees who were altogether outside the scope of article 1A(2) of the Convention.<sup>38</sup>

Recommendation E reveals that the drafters of the 1951 Convention to some extent ‘envisaged a complementary protection system’,<sup>39</sup> but one which *extended* the operative provisions of the Convention to additional classes of protected persons. It does not suggest that a separate system of protection would be necessary. Read in this way, the Recommendation is a most useful guiding principle in the complementary protection debate. Though aspirational rather than asserting a firm legal duty, the Recommendation helps to counter claims that the Convention is too restrictive to absorb the additional groups of refugees covered by complementary protection sources, or that the Convention was not intended to apply to additional groups.

Recommendation E is important in two respects. First, with respect to eligibility, it encourages the extension of protection to individuals not encompassed by the Convention definition of a refugee. Secondly, with respect to substantive rights, it envisages the application of the Convention framework to persons covered by extended eligibility, tacitly recognizing that the source of the harm causing flight is irrelevant for the purposes of status. This is in fact the position adopted in the 1969 OAU Convention (Organization of African Unity Refugee Convention), which, as a regional complement to the 1951 Convention, applies Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country of origin.<sup>40</sup> This is very

---

<sup>38</sup> CP ‘Summary Record of the 35<sup>th</sup> Meeting’ (Geneva 25 July 1951) UN Doc A/CONF.2/SR.35 (3 December 1951) 44.

<sup>39</sup> H Storey and others ‘Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?’ (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author) 4.

<sup>40</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art 1(2).

significant in light of EU developments, where subsidiary protection status instead results in a lower form of rights than Convention status. Recommendation E supports the argument that there is no legal justification for creating two levels of rights simply by distinguishing between the source of harm (or the legal basis for protection).

The Hungarian refugee crisis of 1956 provided the first real challenge to the Convention's definition of a 'refugee' in article 1A(2), and reflects the first instance of widespread Convention-related complementary protection. An internal UNHCR memo in 1957 revealed that:

On the whole ... no Government has, as far as we know, raised any objection to the application of the Convention to Hungarian refugees who otherwise fulfill the conditions of Article 1 of the Convention.<sup>41</sup>

#### **D 'COMPLEMENTARY' VERSUS 'SUBSIDIARY': A FINAL WORD**

In December 2001, the parties to the Refugee Convention adopted a Declaration '[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope'.<sup>42</sup> UNHCR has repeatedly called for States to respect the primacy of the Convention,<sup>43</sup> as have successive General Assembly resolutions.<sup>44</sup>

---

<sup>41</sup> Memo from P Weis to Mr J Mersch, UNHCR Branch Office in Luxembourg 'Application of 1951 Convention to Hungarian Refugees' (28 May 1957) Ref.G.XV.7/1/8, 6/1/HUN [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

<sup>42</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) <[www.unhcr.ch/cgi-bin/texis/vtx/protect](http://www.unhcr.ch/cgi-bin/texis/vtx/protect)> (18 February 2003) Preamble [2], [4].

<sup>43</sup> eg EXCOM 'Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee: Report of the First Meeting in the Third Track (8–9 March 2001) UN Doc A/AC.96/961 (27 June 2002) [14].

<sup>44</sup> UNGA Res 49/169 of 23 December 1994 [5]; UNGA Res 50/152 of 21 December 1995 [5] (emphasis added).

Creating a protection hierarchy, as the EU has done in the Qualification Directive, reflects a very literal interpretation of respecting the Convention's primacy. Simply entrenching the Convention as the pinnacle of protection does not engage with the underlying protection principles it reflects, and may in fact undermine its primacy by siphoning refugees into complementary categories. Conceptually, the affirmation of the Convention's primacy is, in effect, a commitment to respect its protection principles and refrain from diluting its scope by developing the law *outside* its boundaries. The Convention's primacy would be better observed if it were recognized as the source of international protection status for all persons protected by *non-refoulement*.

To provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the international obligations to which States have agreed. In effect, therefore, this paper argues for a reconsideration of international law as a holistic and integrated system. Compartmentalizing international law into parallel but autonomous and non-intersecting branches leads not only to stultification, but to ineffectual implementation of the interlocking duties which States have undertaken to respect.

As one commentator has poignantly observed:

In the past forty years the rich first world countries have received so many *de facto* refugees that it would not have made any difference if they had agreed to an expanded international definition ... . In fact, it would here have helped clarify and identify those circumstances which were insufficiently clear-cut to merit recognition as refugee-like situations.<sup>45</sup>

---

<sup>45</sup> P Nobel 'Blurred Vision in the Rich World and Violations of Human Rights—A Critical Assessment of the Human Rights and Refugee Linkage' (1992) 91 Bulletin of HR 74, 80.

By retaining the political discretion to determine to whom, and when, protection will be granted, States have in fact complicated the protection regime. Diverging statuses, different eligibility thresholds and variations from State-to-State have created incentives for asylum-seekers to forum-shop and appeal decisions granting subsidiary status. It is arguably in States' own interests to grant a single legal status based on the Refugee Convention to all people who benefit from the principle of *non-refoulement*. In this way, States can acknowledge complementary protection as the natural 'extraterritorial' response to their commitment to uphold and promote respect for human rights. A creative use of human rights law can thus enhance the legal status of refugees and asylum-seekers,<sup>46</sup> basing international protection on the individual's *need*, rather than on which treaty provides the legal source of the obligation.

---

<sup>46</sup> GS Goodwin-Gill 'The Language of Protection' (1989) 1 IJRL 6, 16.