

Alienage

Only a person outside her own state can qualify as a Convention refugee.¹ The alienage requirement of the definition – limiting status to an at-risk person who is “outside” her own country² – derives from the limited aim of the Refugee Convention to deal “only with the problem of legal protection and status.”³ The treaty was conceived not to relieve the suffering of all forced migrants, but rather to assist a subset comprised of persons who were “outside their own countries [and] who lacked the protection of a Government.”⁴ The intent was to provide this group of enforced expatriates with legal status and protection to offset the disabilities of presence outside their own country until they could acquire new or renewed national protection.⁵ Internally displaced persons, while objects of humanitarian concern, were thought to raise “separate problems of a different character,”⁶ since such persons did not suffer from the legal disabilities of enforced alienage. 5

The drafters’ focus on enfranchising persons forced abroad also reflected a candid appraisal that the broader problem of persons dislocated within their own countries would demand a more sustained commitment of resources than was then available to the international community.⁷ Indeed, there was concern that the inclusion of internally displaced 10 15

¹ Analysis of the rationale for the alienage requirement in J. C. Hathaway, *The Law of Refugee Status* (1991) (“*Refugee Status*”) was cited by the High Court of Australia in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, (2002) 212 CLR 162 (Aus. HC, Nov. 7, 2002), at 174 n. 54, per Gleeson C.J.; and was described by the English High Court of Justice as “plainly very persuasive”: *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWHC 1989 (Eng. HC, Oct. 8, 2002), at [44]. The same passages were approved by the English Court of Appeal, which found the analysis to be “supported also by the authorities, domestic and foreign”: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] QB 811 (Eng. CA, May 20, 2003), at 825 [38], per Simon Brown L.J.

² Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 (“Refugee Convention” or “Convention”), at Art. 1(A)(2). A claimant with a nationality must be outside her country of nationality, while a claimant who is stateless must be outside her country of former habitual residence. The specific country or countries of reference are analyzed in detail *infra*, at Ch. 1.3.

³ Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.161 (Aug. 18, 1950), at 7.

⁴ Statement of Mrs. Roosevelt of the United States, 4 UN GAOR (Dec. 2, 1949), at 473.

⁵ “The proposals of the Economic and Social Council were designed, however, to meet the needs of refugees who were outside their countries of origin for social, religious or political reasons, were unable to return thereto and required protection under international auspices until they acquired a new nationality or reassumed their former nationality”: Statement of Mrs. Roosevelt of the United States, 4 UN GAOR (Nov. 29, 1950), at 363.

⁶ Statement of Mrs. Roosevelt of the United States, 4 UN GAOR (Dec. 2, 1949), at 473.

⁷ “[W]hile he would like to see the Convention drafted to cover as many refugees as possible, he nevertheless appreciated how difficult it would be for governments to provide what the Ad hoc Committee had described as a blank cheque”: Statement of Mr. van Heuven Goedhart, United Nations High Commissioner for Refugees (“UNHCR”), UN Doc. A/CONF.2/SR.21 (Jul. 14, 1951), at 12.

persons in the international protection regime might prompt states to shift responsibility for the well-being of large parts of their own population to the world community.⁸ The obligations of states under the Convention would thereby be increased, inclining fewer states to participate in the treaty regime.⁹

5 There was moreover principled concern that any attempt to respond to the needs of the internally displaced would infringe the sovereignty of the state within which the forced migrant resided.¹⁰ While it was increasingly accepted in the early 1950s that the world community had a legitimate right to set standards and scrutinize national human rights records, it was unthinkable that refugee law would authorize intrusion into the territory of a state to
10 protect citizens from their own government. The best that could be achieved within the context of the then-prevailing rules of international law was the sheltering of such at-risk persons as were able to liberate themselves from the territorial jurisdiction of their own state.¹¹

Many of the drafters' concerns are less salient today than in 1951.¹² States have adopted commitments in principle to aid internally displaced persons,¹³ appointed a UN special
15 representative to coordinate relevant policy and action,¹⁴ and expanded the mandates of the UNHCR and other international organizations to include internally displaced persons.¹⁵

⁸ "While, in principle, it favoured the elimination of all exceptions, the United States Government wanted to maintain that of refugees of German ethnic origin residing in Germany because it considered that group of nearly eight million persons as normally under the jurisdiction of the German Government and it did not want to encourage that government to renounce all responsibility toward them by placing them under international protection": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.5 (Jan. 18, 1950), at 5.

⁹ "He felt that the extension of the Convention to internal refugees, which was implied in the [Belgian, Canadian, and Turkish] draft [UN Doc. A/C.3/L.130,] could only encourage the diplomatic conference to adopt some other definition": Statement of Mr. Rochefort of France, 5 UN GAOR (Dec. 4, 1950), at 391.

¹⁰ "Whatever [definitional] formula might ultimately be chosen, it would not and could not in any event apply to internal refugees who were citizens of a particular country and enjoyed the protection of the government of that country. There was no general definition covering such refugees, since any such definition would involve an infringement of national sovereignty": Statement of Mr. Rochefort of France, UN Doc. E/AC.7/SR.172 (Aug. 12, 1950), at 4.

¹¹ As Shacknove observed, "alienage is an unnecessary condition for establishing refugee status. It . . . is a subset of a broader category: the physical access of the international community to the unprotected person": A. Shacknove, "Who Is a Refugee?" (1985) 95 *Ethics* 274, at 277.

¹² The extent of the change should not, however, be overstated. As Cohen observes, "[t]he main reason no internationally binding instrument on IDPs has been introduced is . . . because states have not been ready to adopt a treaty on anything so sensitive to their own claim to sovereignty as internal displacement": R. Cohen, "Response to Hathaway," (2007) 20 *J. Ref. Stud.* 370, at 373.

¹³ See e.g. "Guiding Principles on Internal Displacement," UN Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

¹⁴ The Special Representative of the Secretary-General on the Human Rights of Internally Displaced Persons is charged with strengthening the international response to the plight of internally displaced persons and to "mainstream" issues of internal displacement within the UN system: UN Human Rights Council, "Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons," UN Doc. A/HRC/RES/14/6 (Jun. 14, 2012), at [14].

¹⁵ International agencies are responsible to assist the internally displaced under a "cluster approach"; the UNHCR is the lead agency for three of the nine humanitarian sectors: Norwegian Refugee Council, "The Definition of an Internally Displaced Person," www.internal-displacement.org (accessed Jul. 1, 2010). The UNHCR Executive Committee conclusion, while supportive of a broadened mandate to encompass the internally displaced, was nonetheless at pains to observe that the UNHCR role should be defined "on the basis of criteria specified by the General Assembly, which include[] not undermining the mandate of the Office for refugees and the institution of asylum": UNHCR Executive Committee Conclusion

Even the Security Council has called for attention to be paid to the predicament of the internally displaced.¹⁶ Still more normative progress may follow from the evolving concepts of “human security” and its companion “responsibility to protect.”¹⁷

Yet important as these developments clearly are, it remains that the African Union’s regional treaty¹⁸ is thus far the only evidence of a preparedness to give clear legal standing to protecting internally displaced populations.¹⁹ Governments have generally been extremely selective in the allocation of protective resources to respond to internal displacement, with evidence of a greater preparedness to assist those displaced persons likely to cross borders and become refugees if not assisted *in situ*.²⁰ There has also been a decidedly negative side to the new-found interest in responding to internal displacement, with would-be refugees encouraged, and at times compelled, to remain inside their own country. Under the banner of the “right to remain” many forced migrants were subjected to what amounted in practice to a *duty* to remain inside their own country with often horrific consequences, including the massacres in Srebrenica and Bihać.²¹

At present, then, it follows that as a matter of positive law the Convention definition of refugee status excludes at-risk persons still within their own country from the scope of the refugee regime.²² This is so even in the extreme case where steps are taken by an asylum

No. 108 (LIX), “General Conclusion on International Protection,” UN Doc. A/AC.96/1063 (Oct. 10, 2008), at 8(r).

¹⁶ See e.g. UN Security Council Res. 1674, UN Doc. S/RES/1674 (Apr. 28, 2006).

¹⁷ See A. Edwards and C. Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (2010).

¹⁸ African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, adopted Oct. 26, 2009, entered into force Dec. 6, 2012, available at www.unhcr.org/refworld/docid/4ae572d82.html (accessed Dec. 17, 2013). Regrettably, the treaty provides little by way of meaningful enforcement of the obligations formally assumed.

¹⁹ Even the much-vaunted “Guiding Principles on Internal Displacement,” *supra* n. 13, represent no advance in binding law since they do little more than explain how existing law applies to the circumstances of internally displaced persons. See also R. Cohen, “The Guiding Principles: How Do They Support IDP Response Strategies?” in Norwegian Refugee Council (ed.), *Response Strategies of the Internally Displaced: Changing the Humanitarian Lens* (2002), at 17. This growing disjuncture between international institutional mandates and law binding on states is criticized in M. Zieck, *UNHCR’s Parallel Universe, Marking the Contours of a Problem* (2010).

²⁰ J. C. Hathaway, “New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection,” (1995) 8 J. Ref. Stud. 288.

²¹ M. Barutciski, “The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94),” (1996) 8 Intl. J. Ref. L. 49.

²² “The first requirement, that the refugee should be an alien, is undisputed”: G. Jaeger, “The Definition of ‘Refugee’: Restrictive versus Expanding Trends,” [1983] *World Refugee Survey* 5, at 5. See e.g. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) (“*Handbook*”), at [88]: “It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule.” Analysis on this point in Hathaway, *Refugee Status* was approved by the English High Court of Justice in *European Roma Rights Centre v. Immigration Officer at Prague Airport* (Eng. HC, Oct. 8, 2002), at [43], affirmed in this regard by the House of Lords: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2005] 2 AC 1 (UKHL, Dec. 9, 2004), at 28–30. See also *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 210 CLR 1 (Aus. HC, Apr. 11, 2002), at 21 [62], per McHugh and Gummow JJ., holding that “[t]he definition of ‘refugee’ is couched in the present tense and the text indicates that the position of the putative refugee is to be considered on the footing that that person is *outside* the country of nationality” (emphasis in original).

state to prevent the departure from their home country of persons seeking protection.²³ In considering the plight of Roma refugee claimants denied boarding of their UK-bound flights by British authorities stationed at Prague airport, it was determined that

[t]he 1951 Convention could have, but chose not to, concern itself also with enabling people to escape from their own country by providing for a right of admission to another country to allow them to do so.

...

In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities . . . I am satisfied, however, that on no view of the 1951 Convention is this within its scope. The distinction between on the one hand a state preventing an aspiring asylum seeker from gaining access from his own country to its territory and on the other hand returning such a person to his own country . . . can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported by both the text of the 1951 Convention and by the authorities dictating its scope.²⁴

Beyond this clear textual constraint, the primary goal of the Refugee Convention's drafters – namely, to provide legal status and protection to persons suffering the disabilities of presence outside their own country²⁵ – remains a compelling basis for the alienage requirement of refugee status. Critics are of course correct that refugee law so defined in no

²³ The situation is different once alienage has been established. As the Austrian Administrative Court determined in the case of a Turkish Kurd sent back to his home country by authorities before a decision on his claim was delivered, the absolute rule that refugee status requires presence outside one's country must be read in tandem with the cessation clauses of the Convention which exhaustively define the circumstances under which refugee status may be lost. Since Art. 1(C)(4) provides that refugee status ceases only upon voluntary re-establishment in one's country of origin (see generally *infra* Ch. 6.1.3), involuntary repatriation does not bring refugee status to an end: 95/20/0101 (Au. VwGH [Austrian Administrative Court], May 9, 1996), affirmed in 95/20/0643 (Au. VwGH, Dec. 18, 1996). It is true, of course, that the rights that follow from refugee status would not in practical terms be susceptible to implementation pending return to the asylum state. The Austrian Administrative Court's decision nonetheless strikes the right balance between clearly recognizing the absolute nature of alienage as a condition precedent to refugee status and the importance of respecting the Convention's rules on when refugee status comes to an end. A decision of the French Refugee Appeals Commission (*Ferdi Aydin*, 573524 (Fr. CRR [French Refugee Appeals Commission], Jun. 1, 2007)) has been fairly criticized for adopting the opposite view: see J.-Y. Carlier, *Droit d'asile et des réfugiés: de la protection aux droits* (2008), at 239–40. The French court's concern to avert the practical difficulties for refugee status adjudication occasioned by the applicant's involuntary return appears to have led it to embrace a decontextualized understanding of the Convention's alienage requirement.

²⁴ *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* (Eng. CA, May 20, 2003), at 825 [37], 827–28 [43], per Simon Brown L.J., affirmed in this regard by the House of Lords: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* (UKHL, Dec. 9, 2004), at 29 [16]: “The requirement that a foreign national applying for refugee status must, to qualify as a refugee, be outside his country of nationality is unambiguously expressed in the Convention definition of refugee.” The House of Lords ultimately struck down the pre-screening system on the basis that it was discriminatory: at 64 [97]. Such practices are moreover inconsistent with Art. 12(2) of the International Covenant on Civil and Political Rights, which guarantees the right of “[e]veryone . . . to leave any country, including his own”: International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 UNTS 171 (“Civil and Political Covenant”). See generally J. C. Hathaway, *The Rights of Refugees under International Law* (2005), at 308–10.

²⁵ See text *supra*, at n. 5.

sense answers all harms that flow from coerced movement,²⁶ much less all forms of human rights abuse.²⁷ But as Geissler has observed, “equal treatment of refugees and internally displaced persons is only feasible if their factual *legal* situation can be compared. As this is not the case, there is no space for analogy to or even synthesis with the legal status of refugees under international law.”²⁸ That is, the refugee label attaches not simply to identify a group of persons who need and deserve international assistance, but rather to identify a sub-group of such persons with specific needs that can only be addressed by the attribution to them of specific rights. The Convention distinguishes refugees from other forced migrants not to signal that refugees are more important or more deserving, but simply in recognition of the distinctiveness of their needs.²⁹

Specifically, the definition of a refugee set by Art. 1 identifies the beneficiary class for the rights set out in Arts. 2–34 of the Convention.³⁰ Perusal of the rights guaranteed to a person who meets the refugee definition shows their irrelevance to persons who remain within their own country.³¹ Refugee status secures access to protection against *refoulement*, the right not to be sent back to the country of origin for the duration of the risk.³² Refugees also receive a catalog of entitlements designed to compensate them for the traditional disadvantages of their alien status. It is thus wrong to characterize refugee rights as entitlements of generic utility arbitrarily denied to the unlucky minority not able to cross a border. To the contrary, because the rights required to be granted to persons who meet the definition of refugee status set out in Art. 1 are directly related to the predicament of *being outside one’s country of origin*,³³

²⁶ See e.g. the arguments advanced by R. Cohen, H. Adelman, S. McGrath, and J. DeWind: Colloquium, “Forced Migration Studies: Could We Agree Just to ‘Date’?” (2007) 20 J. Ref. Stud. 349. It has been suggested that a more inclusive “forced migration” optic “highlights the need for institutional and legal reinforcement of human rights mechanisms required to ensure that the internally displaced and others who do not or cannot flee receive adequate protection. Important as the categorization of refugees might be to assuring their individual protection, it is not necessarily the most helpful concept for research or analysis to understand why they are being persecuted or how to develop strategies to address the origins of their persecution”: J. DeWind, “Response to Hathaway,” (2007) 20 J. Ref. Stud. 381, at 384.

²⁷ See W. Kälin, “Internal Displacement and the Protection of Property,” in H. De Soto and F. Cheneval (eds.), *Swiss Human Rights Book Vol. I: Realizing Property Rights* (2009) 175, at 176; and R. Cohen, “UNHCR: Expanding Its Role with IDPs,” [2005] (Supp., Oct.) *Forced Migration Review* 9, at 10.

²⁸ N. Geissler, “The International Protection of Internally Displaced Persons,” (1999) 11 Intl. J. Ref. L. 451, at 457 (emphasis in original).

²⁹ J. C. Hathaway, “Is Refugee Status Really Elitist? An Answer to the Ethical Challenge,” in J.-Y. Carlier and D. Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997) 79; J. C. Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?” (2007) 20 J. Ref. Stud. 349; J. C. Hathaway, “Rejoinder,” (2007) 20 J. Ref. Stud. 385. This sensible delimitation of the scope of the Refugee Convention does not deny the fact that most persons forced to flee their homes in search of safety remain within the boundaries of their home state, and their plight is often every bit as serious as that of individuals who cross borders.

³⁰ “For the purposes of the present Convention, the term ‘refugee’ shall apply to . . .”: Refugee Convention, at Art. 1(A) (emphasis added).

³¹ The one exception may be protection of private property rights, regulated under the Refugee Convention but not under binding norms of international human rights law: see Kälin, *supra* n. 27.

³² Refugee Convention, at Art. 33(1).

³³ While the internally displaced often need assistance to enforce their rights, they are in this sense indistinguishable from other (non-displaced) internal human rights victims. As observed by the UN’s Assistant High Commissioner for Refugees, “the question being asked is whether it is artificial, in a complex emergency, to make a distinction between persons actually displaced and the broader population of the country, who may be just as vulnerable”: E. Feller, “The Responsibility to Protect: Closing the Gaps in the International Protection Regime and the New EXCOM Conclusion on Complementary Forms of

the alienage requirement ensures a match between the beneficiary class and the remedy provided by the Convention.³⁴

In any event, the contingent nature of the Convention's rights regime simply establishes a legal duty on states to treat refugees on par with their own population.³⁵ Indeed, while some refugee rights are guaranteed on par with those granted to nationals, others are set at the level provided to most-favored foreigners, or even to aliens in general.³⁶ As citizens of that state, legal guarantees of refugee rights – which amount, at best, to legal guarantees of the rights held by citizens – would thus clearly provide internally displaced persons with no net benefit.

A second contemporary function of the alienage requirement is to ensure that refugee status as defined by the Convention is directly linked to the capacity of the international community to guarantee a remedy. The need to be outside one's own country limits refugee status to seriously at-risk persons who, by crossing an international border, are within the unqualified protective competence of other states.³⁷ Despite the often attenuated nature of sovereign power today, it remains the case that a clear guarantee of rights can only be made to persons who are outside their own country.³⁸ The restriction of refugee status to persons who have left their own country is logical because it defines a class of persons to whom foreign states can, as a matter of practicality, undertake to provide an unconditional response of precisely the kind set by the Refugee Convention.³⁹ Being a refugee, in other words, means being a person who needs and deserves a specific form of protection *and* being a person who can, in practical terms, be *guaranteed* the substitute or surrogate protection that the Refugee Convention is designed to deliver.

Protection,” remarks delivered at the “Moving On: Forced Migration and Human Rights” conference, Sydney (Nov. 22, 2005). Indeed, “[u]nlike refugees, who have been deprived of the protection of their state of origin, IDPs remain legally under the protection of national authorities of their country of habitual residence. IDPs should therefore enjoy the same rights as the rest of the population”: Norwegian Refugee Council, *supra* n. 15. In any event, inclusion of IDPs as beneficiaries of the Refugee Convention would not meaningfully advance their access to international remedies since the predominant purpose of the Refugee Convention is to establish a normative regime which state parties are expected to enforce under their domestic laws: Hathaway, *supra* n. 24, at 992–98. The only international mechanisms are UNHCR institutional oversight under Art. 35 and the (thus far not pursued) possibility of submitting a dispute to the International Court of Justice under Art. 38.

³⁴ In our analysis of the internal protection alternative (see *infra* Ch. 4.3.2) we advocate using Convention rights to guide the contextually sensitive interpretation of “protection” for internal protection purposes. We do so because we recognize that Convention rights are sensibly understood to be designed to be indicative of the sort of rights required to facilitate integration and not, of course, because they are in any sense formally binding on a state in relation to its own citizens.

³⁵ See Hathaway, *supra* n. 24, at 228–38. ³⁶ See *ibid.*, at 192–200, 228–38.

³⁷ *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* (Eng. CA, May 20, 2003), at 824–25 [37], 827–28 [43]; affirmed in this regard by the House of Lords: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* (UKHL, Dec. 9, 2004), at 28–30 [13]–[17].

³⁸ This point is conceded even by advocates for the assimilation of refugees and the internally displaced. “While it is true that the international community may not have the same ‘unqualified ability’ to come to their aid as it does in the case of refugees, counter-insurgency or ethnic cleansing campaigns carried out by governments or non-state actors often require an international response”: Cohen, *supra* n. 12, at 371.

³⁹ “[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”: *Lotus (France v. Turkey) (Judgment)*, [1927] PCIJ (Series A, No. 10) (PCIJ, Sept. 7, 1927), at 18–19.

In sum, the alienage requirement of the Convention refugee definition is not only textually unambiguous, but remains a principled constraint. It enfranchises a subset of forced migrants not because they are thought more worthy of assistance than others, but rather because they face the disabilities of *enforced alienage*. The rights that follow from Convention refugee status are thus precisely attuned to countering that predicament. Second and related, the alienage requirement limits the international promise of protection to those to whom that protection can, as a practical matter, always be delivered. 5

The balance of this chapter explores specific issues raised by the alienage requirement. First, when can it be said that an individual is “outside” her country? At what point does the departing individual become the responsibility of an asylum state? What is the implication of entry into an asylum state by fraudulent means or in contravention of applicable immigration laws? Second, what choice does a refugee enjoy about where to seek asylum? Must she claim status in the country nearest her home, or in the first safe state in which she arrives? If she does not do so, may a state party lawfully remove her to some other country rather than process her claim itself? Third, outside of *what* country must an individual be in order to qualify for Convention refugee status? What is the country of reference for the assessment of refugee status and, more specifically, how should the claims of stateless persons, of those with dual or multiple nationality, or who could secure a safe alternative form of citizenship be assessed? And fourth, must an individual *leave* her country as a result of fear of being persecuted, or may she successfully claim Convention refugee status if her fear arises at a time when she is already abroad? Is it relevant whether the fear arises as the result of her own actions, rather than because of a change of circumstances in her country of origin? 10 15 20

1.1 Accessing protection

Given the refugee definition’s commitment to the identification of at-risk persons within the unqualified protective competence of foreign states, and to the provision to them of rights designed to compensate them for the disabilities of enforced alienage,⁴⁰ it is unsurprising that alienage is normally achieved upon physical departure from the home country.⁴¹ Once outside the territory of the state of origin, other governments have full capacity to protect, whatever the inclinations of the refugee’s home country.⁴² And it is also at this point that the departing individual is positioned to benefit from the Convention’s rights regime, which focuses on countering the disabilities of enforced alienage. 25 30

Despite the simplicity of this principle, legally ambiguous circumstances do arise.⁴³ For example, the common assumption that an at-risk person who secures entry to the premises of a foreign embassy or consulate located inside her home state can be said to be “outside” her own country is not sound. While such premises are immune from

⁴⁰ See text *supra*, at n. 5.

⁴¹ This straightforward principle coincides with the primary limit on the home state’s jurisdiction under international law: see *supra*, at n. 39.

⁴² “The principle governing the freedom of states to enforce their laws is . . . that a state cannot enter the territory of another state nor carry out any activities there without the consent of the territorial state. This rule is quite rigid”: M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009), at 53.

⁴³ See G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000).

intrusion,⁴⁴ they are not assimilated to the territory of the state that established the diplomatic mission.⁴⁵ Because a diplomatic post is not a part of the territory of the state whose interests it represents, an individual who shelters inside has not yet left her own country and has therefore not satisfied the alienage requirement.⁴⁶ The same is true of an airport or other pre-clearance zone in which a host state cedes routine administrative authority to a partner country.⁴⁷

Nor does the situation change even once an individual actually boards an aircraft or ship registered in a country other than the state from which departure is pending. While the ship or aircraft is in principle subject to the jurisdiction of its flag state,⁴⁸ this notional authority is functionally trumped by the continuing enforcement jurisdiction of the state of departure.

⁴⁴ Vienna Convention on Diplomatic Relations, adopted Apr. 18, 1961, entered into force Jun. 24, 1964, 500 UNTS 95 (“Diplomatic Relations Convention”), at Art. 22.

⁴⁵ *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266 (ICJ, Nov. 20, 1950). Brownlie, however, suggests that the reference to “special arrangements” in Art. 41 of the Diplomatic Relations Convention “makes room for bilateral recognition of the right to give asylum to political refugees within the mission”: I. Brownlie, *Principles of Public International Law* (7th edn., 2008), at 357. The traditional practice of Latin American states to honor a grant of diplomatic asylum is codified in the Caracas Convention on Diplomatic Asylum, 1438 UNTS 101, adopted Mar. 28, 1954, entered into force Dec. 29, 1954. The English Court of Appeal has moreover suggested that a duty to grant diplomatic asylum may arise for state parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, adopted Nov. 4, 1950, entered into force Sept. 3, 1953 (“European Convention for the Protection of Human Rights”), at least where an issue of removal to face the risk of a crime against humanity is involved: *R (B) v. Secretary of State for Foreign and Commonwealth Affairs*, [2005] QB 643 (Eng. CA, Oct. 18, 2004), at 673–74 [88]–[89].

⁴⁶ In the case of a person seeking protection at a consulate or embassy located outside her own country, in contrast, the alienage requirement has clearly been met and refugee status therefore established assuming the other definitional criteria are also satisfied. As the consulate or embassy has jurisdiction over the refugee (see *R (B)* (Eng. CA, 2004), at 666 [66]) even though the refugee is not on its territory, it is bound to respect those rights that inhere at the first level of attachment, including the duty of *non-refoulement*. Its responsibilities co-exist with those of the territorial state, assuming the latter also to be a state party to the Refugee Convention, and it may freely share protection responsibilities with that country under the usual rules for responsibility sharing (see *infra* Ch.1.2.1). Where, however, the flag state of the consulate or embassy has actual or constructive knowledge that the territorial state will not in fact respect the duty of *non-refoulement* or other acquired rights under the Refugee Convention, the duty not to aid or assist another state party to breach its legal obligations requires that it not transfer custody of the refugee to that state: see text *infra* at n. 173. For this reason, the ejection in July 2002 of an Afghan child refugee claimant from the British consulate in Melbourne to face cruel and inhuman conditions of ongoing detention at the Woomera detention camp, in breach of Australian duties under Art. 31(2) of the Refugee Convention, was unlawful. Regrettably, the reviewing court had jurisdiction to consider this case only under the more limited ambit of UK domestic law, including duties under the European Convention for the Protection of Human Rights, *supra* n. 45, but not under the Refugee Convention as such: *R (B)* (Eng. CA, 2004).

⁴⁷ In such circumstances, the territorial state routinely reserves ultimate enforcement authority for itself. For example, US officials may question and search travelers, and may deny boarding to any person, at the several preclearance facilities established at Canadian airports for travelers bound to the United States. US officials operating within the preclearance zone may even detain any person suspected of violating Canadian law, but must deliver such a person “as soon as possible” to Canadian law enforcement officials. Preclearance procedures must moreover be administered in compliance with the Canadian Charter of Rights and Freedoms and other key human rights guarantees: Preclearance Act, SC 1999, c. 20, at Arts. 6, 24.

⁴⁸ *R (B)* (Eng. CA, 2004), at 663 [55]. “[B]y virtue of article 91 of the 1982 Convention on the Law of the Sea, ships have the nationality of the state whose flag they are entitled to fly. Each state is entitled to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. However, there must be a genuine link between the state and the ship. By article 17 of the Chicago Convention on International Civil Aviation, 1944, aircraft have the nationality of the

A ship will no doubt sail for some period of time within the departure state's territorial sea or contiguous zone,⁴⁹ while an aircraft will likely overfly the departure state's territory and hence remain in its enforcement jurisdiction at least briefly.⁵⁰ Until the ship has exited the territorial sea (and where relevant, its contiguous zone) or until the aircraft ceases to overfly the departure country's territory, the alienage requirement is not satisfied.

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1.1.1 Accessing a state party's jurisdiction

Once the alienage requirement is met, an individual who has a "well-founded fear of being persecuted" for a Convention reason is a refugee with rights under international law. This is so whether or not status has been recognized, or even claimed. Refugee status determination does not make a person a refugee. Rather, positive assessment by a state party simply confirms the status already held by a person who meets the requirements of the refugee definition.⁵¹ As elegantly framed in the UNHCR's *Handbook*:⁵²

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state in which they are registered, although the conditions for registration are a matter of domestic law": M. Shaw, *International Law* (6th edn., 2008), at 664.

⁴⁹ A state's "territory" in most cases extends 12 nautical miles, and its contiguous zone an additional 12 nautical miles, from its baseline, normally the low water mark. The contiguous zone, in contrast to the territorial sea, is not part of the coastal state's territory, but is an area in which specialized jurisdiction, including the enforcement of customs or immigration law, may be exercised. Beyond these areas, a state may claim an exclusive economic zone of up to 200 miles from the baseline of the territorial sea in which it may *inter alia* construct artificial islands and regulate immigration to and from any such artificial islands. To the extent that a state opts to establish a contiguous zone or to declare an exclusive economic zone – and most obviously where the claim to extended jurisdiction of either kind includes the right to regulate the movement of persons therein – refugees within such zones are appropriately understood to be under the jurisdiction of the state. See Convention on the Territorial Sea and Contiguous Zone, adopted Apr. 29, 1958, entered into force Sept. 10, 1964, 516 UNTS 205, at Art. 24; United Nations Convention on the Law of the Sea, adopted Dec. 10, 1982, entered into force Nov. 16, 1994, 1833 UNTS 3, at Arts. 33, 55–75, 60(2).

⁵⁰ State sovereignty extends upward into the airspace above its territory (*usque ad coelum*), subject to the law of outer space and constrained by a right of innocent passage: Shaw, *supra* n. 48, at 542–43. Jennings and Watts sensibly note, however, that "[a] state which in principle has territorial jurisdiction will in practice find it difficult to give any effect to its jurisdiction if the aircraft is merely overflying the state and not landing in it": R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (Vol. 1, 9th edn., 1996), at 479. There is thus force in Brownlie's succinct conclusion that "[a]bstract discussion as to whether ships [and] aircraft . . . are 'territory' lacks reality, since in a legal context the word denotes a particular sphere of legal competence and not a geographical concept": Brownlie, *supra* n. 45, at 113.

⁵¹ "Art. 1 . . . establishes a process by which a person becomes 'recognized' as a refugee. In using the language of 'recognition,' rather than 'rendering,' 'becoming,' or 'constituting,' the article connotes a process whereby a person, who already is a refugee, gains formal 'recognition' as such within the country of refuge. Recognition does not render a person a 'refugee.' It simply recognises the status as one that preceded the recognition. This is why the process is commonly described as merely 'declaratory': *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004*, (2006) 231 CLR 1 (Aus. HC, Nov. 15, 2006), at 34–35 [96], per Kirby J. in dissent. See also Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 (Dec. 20, 2011) ("Qualification Directive"), at Preamble, para. 21: "The recognition of refugee status is a declaratory act." The declaratory nature of refugee status does not, of course, mean that a state is precluded from verifying the facts underlying the assertion of refugee status: *A v. Staatssecretaris van Justitie*, 200707802/1/V2 (Neth. RvS [Dutch Council of State], Sept. 30, 2009).

⁵² UNHCR, *Handbook*, *supra* n. 22.

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁵³

The declaratory nature of refugee status is not simply good policy, but follows inextricably from the way in which rights accrue under the Refugee Convention. The treaty provides that some rights inhere on a provisional basis⁵⁴ as soon as a refugee comes under a state's jurisdiction, in the sense of being under its control or authority;⁵⁵ other rights apply once a refugee is physically present within a state party's territory;⁵⁶ still others are owed when the refugee is "lawfully present," for example while undergoing refugee status assessment;⁵⁷ a fourth group of rights inhere only once the refugee is "lawfully staying" in a state, usually consequent to formal recognition of refugee status;⁵⁸ and a small number of entitlements apply only when a durable residence requirement is met.⁵⁹ The express duty under the Convention to grant rights at the first three levels of attachment makes clear that there was no intention to withhold all refugee rights pending affirmative refugee status assessment. Such a reading would moreover be perverse, in that a state could avoid its responsibility to protect by the simple expedient of refusing ever to assess a claim – a risk made all the more real given that the Convention imposes no duty formally to adjudicate refugee status.⁶⁰

Despite the requirement provisionally to honor basic refugee rights pending status verification, a person who is a refugee – and hence in principle entitled to rights under international refugee law – may not be in a position to claim those rights against any country. Because

⁵³ *Ibid.*, at [28].

⁵⁴ Hathaway, *supra* n. 24, at 156–60. Thus, if and when a final decision not to recognize refugee status is reached, the refugee rights provisionally guaranteed no longer apply.

⁵⁵ These include the rights to protection against discrimination (Art. 3), respect for personal status (Art. 12), property rights (Art. 13), access to courts (Art. 16(1)), rationing (Art. 20), primary education (Art. 22), administrative assistance (Art. 25), equality in fiscal charges (Art. 29), protection against *refoulement* (Art. 33), and to be considered for naturalization (Art. 34).

⁵⁶ These include the rights to freedom of religion (Art. 4), identity papers (Art. 27), non-penalization for illegal entry or presence (Art. 31(1)), and to be subject to only justifiable constraints on freedom of movement (Art. 31(2)).

⁵⁷ These include the rights to engage in self-employment (Art. 18), enjoy freedom of movement (Art. 26), and freedom from expulsion (Art. 32).

⁵⁸ These include the rights to protection of artistic and industrial property (Art. 14), freedom of association (Art. 15), wage-earning employment (Art. 17), practice liberal professions (Art. 19), housing (Art. 21), public relief (Art. 23), benefit from labor and social security legislation (Art. 24), and travel documents (Art. 28).

⁵⁹ These include the rights to legal aid and to equality in posting of security for costs (Art. 16(2)), to be exempted from legislative reciprocity requirements (Art. 7(2)), and to be exempted from restrictive measures imposed on the employment of non-citizens (Art. 17(2)).

⁶⁰ While the principle of *pacta sunt servanda* clearly requires a state party to proceed to the assessment of refugee status if it elects to condition access to refugee rights on the results of such verification, governments are otherwise free to dispense with a formal procedure of any kind: they must simply respect the rights of persons who are, in fact, refugees. Indeed, most less developed states – which host the majority of the world's refugees – do not operate formal refugee status determination procedures. See W. Kälin, *Towards a Concept of Temporary Protection: A Study Commissioned by the UNHCR Department of International Protection* (1996), at 32; Hathaway, *supra* n. 24, at 180–81.

even the most basic refugee rights can be claimed only once a refugee comes under the jurisdiction of a state party,⁶¹ the entitlements of refugees will likely remain inchoate during some or all of the process of flight. So long as she is in international waters or airspace, at least if not onboard a vessel flying the flag of a state party,⁶² a refugee will not be able to claim the protections to which she is in principle entitled.⁶³ Similarly, if she ultimately reaches one of the more than forty countries which is a party to neither the Convention nor the Protocol, her *de jure* status as a refugee under international law may be of little real value.⁶⁴ 5

Beyond these protection *lacunae* which are the inevitable result of the limited reach of international law, some states have sought artificially to circumscribe the extent of their jurisdiction as a means of avoiding their duty to honor refugee rights.⁶⁵ The strategies adopted range from the establishment of fictitious “international zones” from which arriving refugees have been unlawfully expelled without consideration of their protected status, to efforts to “excise” parts of territory for migration control purposes.⁶⁶ Yet as the European Court of Human Rights made clear in the *Amuur* decision,⁶⁷ such domestic ploys are of no force in international law. All such places are clearly part of a state’s territory, and hence subject to its jurisdiction. No form of words and no domestic law can change that.⁶⁸ 10 15

⁶¹ See *supra*, at n. 55.

⁶² An individual who is aboard a ship or aircraft, and who is not subject to the territorial jurisdiction of the state of departure or any other country, is under the jurisdiction of the flag state of the ship or aircraft: see *supra*, at n. 48.

⁶³ As a general rule, “[t]erritoriality is the primary basis for jurisdiction”: Jennings and Watts, *supra* n. 50, at 458. See also Brownlie, *supra* n. 45, at 299.

⁶⁴ Such refugees may nonetheless be in a position to benefit from the institutional protection or assistance of the UNHCR. It is also sometimes alleged that there is a customary legal duty of *non-refoulement*: see e.g. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, adopted Dec. 12–13, 2001, UN Doc. HCR/MMSP/2001/09 (Jan. 16, 2002), at Preamble, para. 4; and generally 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* (2003) 87. But see J. C. Hathaway, “Leveraging Asylum,” (2010) 45 *Tex. Intl. L. J.* 503.

⁶⁵ See Noll, *supra* n. 43; T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011), at 114 ff.

⁶⁶ See Hathaway, *supra* n. 24, at 298–99. But Australia was recently found to be subject to a duty of procedural fairness in the assessment of protection claims of “unlawful non-citizens” arriving in “excised” territory. Because such persons were detained, their “rights and interests” were engaged: *Plaintiff M61/2010E v. Commonwealth of Australia*, (2010) 243 CLR 319 (Aus. HC, Nov. 11, 2010). See generally M. Foster and J. Pobjoy, “A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s ‘Excised’ Territory,” (2011) 23 *Intl. J. Ref. L.* 583–631.

⁶⁷ The European Court of Human Rights observed in relation to the international zone established by France at Paris Orly Airport that persons there are “subject to French law. Despite its name, the international zone does not have extraterritorial status”: *Amuur v. France*, [1996] III Eur Court HR 826 (ECtHR, Jun. 25, 1996), at 851 [52]. Thus, the recast Dublin Regulation now provides that “[w]here the application for asylum is made in the international transit area of an airport of a Member State by a third-country national, that Member State shall be responsible for examining the application”: European Council Regulation No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/32 (Jun. 29, 2013) (“Dublin Regulation”), at Art. 15.

⁶⁸ Hathaway, *supra* n. 24, at 321–22.

1.1.2 Unlawful arrival

A more subtle strategy to avoid the engagement of responsibility that follows from arrival in a place under a state party's jurisdiction is to challenge the entitlement to protection of refugees who arrive unlawfully. The risks that follow from such a challenge are real, since most developed countries impose a visa requirement enforced by carrier sanctions on the citizens of refugee-producing states,⁶⁹ and do not grant visas for the purpose of making a claim to Convention refugee status.⁷⁰ The use of false travel documents (or alternatively, lying about one's true intentions in order to secure a technically valid travel document) is thus nearly always a practical necessity to access protection.⁷¹

Keenly aware of the barrier which routine immigration rules pose for refugees in search of protection, the drafters of the Refugee Convention took steps to ensure that refugee status is not compromised by unauthorized or unlawful arrival in the state from which protection is sought. They agreed that the alienage requirement of the refugee definition in no sense requires lawful entry: persons who otherwise meet the requirements of the definition are genuine refugees even if they cross frontiers covertly or disguise their true motive when they seek entrance.⁷²

The eligibility of illegal entrants to qualify as refugees is clear from the internal structure of the Refugee Convention. Most obviously, there is no reference in the Convention to legal admission as a criterion of refugee status. This possibility was raised and rejected at the Conference of Plenipotentiaries by way of an unsuccessful Australian proposal to exclude fraudulent entrants from the scope of protection.⁷³ Not only was the Australian proposal soundly defeated, but the duty to grant refugee status to illegal entrants was made explicit by incorporation in the Convention of Art. 31, entitled "Refugees unlawfully in the country of refuge."⁷⁴ This provision self-evidently presupposes that refugees may arrive

⁶⁹ E. Feller, "Carrier Sanctions and International Law," (1989) 1 Intl. J. Ref. L. 48.

⁷⁰ Noll, *supra* n. 43. Swiss law historically provided a limited exception to this norm, authorizing the issuance of a visa to allow an at-risk person to pursue an asylum claim in Switzerland on the basis of an application submitted at a Swiss embassy or consulate: Asylum Act SR 142.31 (*Loi sur l'asile* (Sw.)), RS 142.31), at Art. 20. This procedure was, however, ended in September 2012: www.parlament.ch/sites/doc/CuriaFolgesseite/2010/20100052/Texte%20pour%20le%20vote%20final%203%20NS%20F.pdf (accessed Jan. 9, 2014).

⁷¹ "[H]e who wishes to obtain asylum in this country, short of a prior contact with the Home Secretary offering him asylum, has the option of: 1. Lying to the United Kingdom authorities in his country in order to obtain a tourist or some other sort of visa. 2. Obtaining a credible forgery of a visa. 3. Obtaining an airline ticket to a third country with a stopover in the United Kingdom": *R v. Secretary of State for the Home Department; Ex parte Yassine*, [1990] Imm AR 354 (Eng. HC, Mar. 6, 1990), at 359–60.

⁷² On the legal irrelevance of using false documents in the context of credibility assessment see Ch. 2 *infra*, at n. 380.

⁷³ "The present Convention shall not apply to a person who has been admitted to the territory of a Contracting State for a specific purpose and who did not at the time of entry apply for permission to reside permanently therein, unless such person can establish to the satisfaction of the contracting State that since the date of his admission circumstances have arisen which justify his claiming the rights and privileges intended to be secured by this Convention for a bona fide refugee": UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention relating to the Status of Refugees*: Australia, "Proposal for a New Article," UN Doc. A/CONF.2/42 (Jul. 6, 1951). This proposal was not incorporated in the final version of the Convention.

⁷⁴ "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves

unlawfully in asylum countries, and makes clear that protection is not to be withheld on that basis.⁷⁵

Indeed, there is appellate authority from Canada suggesting that the claims even of persons not entitled to the benefit of Art. 31 (because they invoked refugee status only after being apprehended while working illegally)⁷⁶ are similarly to be considered without reference to the illegality of their presence:

It does not stand to the applicants' credit that, after entering Canada as visitors, they illegally obtained Canadian social insurance cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations.⁷⁷

This position respects the fundamentally protective purpose of refugee law, and reinforces the primacy in the determination process of the risk faced by the refugee claimant.⁷⁸

In sum, the alienage requirement is met only when the at-risk individual physically departs her country of origin: sheltering in diplomatic premises or in a customs pre-clearance zone, or even being onboard a means of conveyance flying the flag of another country, does not suffice. Once outside the home country's borders, the refugee status of a relevantly at-risk individual is established even though her Convention rights remain inchoate until she reaches the jurisdiction of a state party to the Refugee Convention. While governments are under no duty to facilitate arrival in their territory, neither may they artificially circumscribe their jurisdiction as that notion is generally understood in international law in order to avoid

without delay to the authorities and show good cause for their illegal entry or presence": Refugee Convention, at Art. 31(1).

⁷⁵ Indeed, not even "penalties" may be imposed for unauthorized entry or presence in most cases. Specifically, the drafters recognized that while countries commonly require non-citizens to present a valid passport and visa to be legally admitted, a refugee "is rarely in a position to comply with the requirements for legal entry": *Status of Refugees and Stateless Persons: Memorandum by the Secretary-General*, UN Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 (Jan. 3, 1950), at 46. So long as the refugee's failure to present valid travel documents or to comply with the usual immigration formalities is incidental to her flight from the risk of being persecuted, she may not be penalized for the breach. This protection is owed not just to those coming directly from their country of origin, but equally to refugees in flight from risks in a country of first or subsequent asylum. Arrival is to be deemed "direct" even if the refugee has passed through, or spent time in, one or more non-persecutory states so long as the refugee provides a plausible explanation for not having sought protection in such states. See Hathaway, *supra* n. 24, at 392–402.

⁷⁶ Only persons who "present themselves without delay to the authorities" are entitled to the protection of Art. 31 of the Convention. See generally Hathaway, *supra* n. 24, at 388–92.

⁷⁷ *Surujpal v. Canada (Minister of Employment and Immigration)*, (1985) 60 NR 73 (Can. FCA, Apr. 25, 1985), at 73–74, per MacGuigan J. (in *obiter*). See also *Sharma v. Canada (Minister of Employment and Immigration)*, (1984) 55 NR 71 (Can. FCA, Jan. 27, 1984).

⁷⁸ In a case such as this, Art. 31 would allow a "penalty" to be imposed on the refugee for illegal entry or presence, but nothing in the Convention suggests the propriety of denying or limiting her access to Convention-based protection. As Anker has observed, the duress under which asylum seekers live often leads them to be less than forthright in dealing with or even approaching officials of the asylum state. The fear of encounters with authority figures in their state of origin carries over to the state of reception, prompts many refugees to seek entry by any means, and induces them to go underground in order to avoid the risk of rejection or deportation: D. Anker, "Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980," (1987) 28 Va. J. Intl. L. 1, at 53.

protective responsibilities. Nor may they insist that arrival or presence in their jurisdiction be lawful. Achieving alienage requires a would-be refugee somehow, even if illegally, to get out of her home country and somehow, even if illegally, to reach the jurisdiction of a state which has agreed to honor Convention rights – no more, and no less.

1.2 Choice of the country of asylum

5 Arriving in a state party does not in practice guarantee the refugee's right to have her claim processed and protection needs met in that country. To the contrary, domestic and regional rules that constrain individual choice have emerged in many different forms in recent years. These range from unilaterally declared "direct flight"⁷⁹ and "safe third country"⁸⁰ rules, to sophisticated bilateral and multilateral arrangements that purport to designate the refugee's
10 "first country of arrival" as solely responsible to assess protection needs.⁸¹ The common

⁷⁹ For example, British Home Secretary Waddington opined in 1990 that "[i]t is an internationally accepted concept that a person fleeing persecution, who cannot avail himself of the protection of the authorities of a country of which he is a national, should normally seek refuge in the first safe country reached... Accordingly, an application for asylum from a passenger who has arrived in the United Kingdom from a country other than the country in which he fears persecution, will not normally be considered substantively. The passenger will be returned to the country from which he embarked": Statement of the Home Secretary, *Hansard*, Jul. 25, 1990, at cols. 262–63, cited in *R v. Secretary of State for the Home Department; Ex parte Akyol*, [1990] Imm AR 571 (Eng. HC, Aug. 7, 1990); see also *Thevarajah v. Secretary of State for the Home Department*, [1991] Imm AR 371 (Eng. CA, Mar. 12, 1991). The United Kingdom has adopted a "list approach," classifying EU Member States plus Iceland and Norway to be on the "First List" of safe states of passage, with the Secretary of State entitled to designate other countries on a "Second List" of safe states: Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (UK) c. 19. Lord Bingham observed that such legislative designations mean that arguments regarding the true effectiveness of protection elsewhere are "effectively blocked" in UK courts: *R (Yogathas) v. Secretary of State for the Home Department*, [2003] 1 AC 920 (UKHL, Oct. 17, 2002), at 928 [11]. But the House of Lords has since warned that the Secretary of State must balance the administrative convenience of relying on a list against the prospect of a court making a declaration of incompatibility if an unsafe country remains on the list: *R (Nasseri) v. Secretary of State for the Home Department*, [2010] 1 AC 1 (UKHL, May 6, 2009), at 10 [22].

⁸⁰ See e.g. Australia's Migration Act 1958 (Cth), at s. 36(3)–(5A), discussed *infra*, at n. 141. The main distinction between rules based on this approach and those which rely on "direct flight" is that "safe third country" rules are not predicated on the refugee claimant having actually passed through or spent time in the country to which return is contemplated. The notion of a "safe third country" is also incorporated in the law of the European Union: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13 (Dec. 13, 2005) ("Procedures Directive"), at Arts. 27, 29.

⁸¹ See e.g. Dublin Regulation, *supra* n. 67, the successor to the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, adopted Jun. 15, 1990, entered into force Sept. 1, 1997, 2144 UNTS 435 ("Dublin Convention"); Agreement Between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, adopted Dec. 5, 2002, entered into force Dec. 29, 2004, US State Dept. No. 05-35, 2004 WL 3269854 ("Canada–US Agreement"). In each case, criteria other than "first arrival" take precedence as a matter of principle. Thus, the Dublin Regulation assigns responsibility first on the basis of family membership (Arts. 6, 7, 8), then on the basis of the issuance of a visa to the applicant (Arts. 9, 11): Dublin Regulation, *supra* n. 67. The Canada–US Agreement has comparable provisions based on the presence of family members and visa issuance, as well as an exemption in the case of unaccompanied minors: Canada–US Agreement, *supra* this note, at Art. 4. In each case, however, the primary *de facto* rule for the assignment of responsibility is the determination of the applicant's first country of arrival.

thread among all of these “protection elsewhere”⁸² regimes is the assumption that a refugee may be required to seek protection in some country other than that to which she has traveled.⁸³ Whether by unilateral declaration or under the auspices of a treaty or other arrangement, the refugee who presents a claim in one state is removed and entrusted to some other state. That country, and that country alone, is deemed responsible to evaluate the refugee claim and to provide protection as required. 5

Despite the widespread belief that a refugee should seek protection in whatever safe country she first reaches,⁸⁴ failure to claim protection in one’s region of origin or in the first safe country of arrival is not grounds for refusing to recognize refugee status.⁸⁵ There are often good reasons why a refugee may travel beyond the first safe state she reaches, including outside her own region.⁸⁶ For example, a US appellate court refused to accept the argument that a claimant fleeing the Abkhaz region of Georgia should have sought protection in Russia where the law prohibited refugees from seeking work: 10

⁸² This term originates in the “Michigan Guidelines on Protection Elsewhere (No. 4, 2006),” (2007) 28 Mich. J. Intl. L. 207 (“Michigan Guidelines on Protection Elsewhere”).

⁸³ See generally S. Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection,” (2003) 15 Intl. J. Ref. L. 567; “Michigan Guidelines on Protection Elsewhere,” *supra* n. 82; M. Foster, “Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State,” (2007) 28 Mich. J. Intl. L. 223. In South Africa, for example, administrative authorities have refused refugee status based simply on passage through a safe country en route to South Africa even though the domestic Refugees Act makes no provision for refusal of protection on that basis: L. de la Hunt and W. Kerfoot, “Due Process in Asylum Determination in South Africa from a Practitioner’s Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act,” in J. Handmaker, L. de la Hunt, and J. Klaaren (eds.), *Advancing Refugee Protection in South Africa* (2008) 89, at 97.

⁸⁴ Indeed, Gil-Bazo writes that the “safe third country” notion “has managed to ground itself so firmly in the discourse of governments, academics and even NGOs that the debate does not address the lawfulness of the practice itself, but rather – seemingly accepting it – focuses on the specific requirements that are to be met for a State to be considered a safe third country”: M.-T. Gil-Bazo, “The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited,” (2006) 18 Intl. J. Ref. L. 571, at 595.

⁸⁵ Chief Justice Lutfy of the Canadian Federal Court approved the view expressed in Hathaway, *Refugee Status*, at 46 that “[t]here is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection”: *Gavryushenko v. Canada (Minister of Citizenship and Immigration)*, (2000) 194 FTR 161 (Can. FCTD, Jul. 26, 2000), at 165 [10]. The UNHCR has also criticized the refusal to grant admission or asylum on the basis of a “strict application of the notion of ‘country of first asylum’”: UNHCR, *Report of the High Commissioner for Refugees*, UN Doc. A/46/12 (Jan. 1, 1992), at [16].

⁸⁶ The economic and logistical realities of travel may also preclude direct arrival in the state where the refugee intends to seek protection. “Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee’s aim to reach these shores has in any sense been abandoned”: *Rosenberg v. Woo*, (1971) 402 US 49 (USSC, Apr. 21, 1971), at 57 n. 6, per Black J. See also *Tung v. Canada (Minister of Employment and Immigration)*, (1991) 124 NR 388 (Can. FCA, Mar. 15, 1991). But as the High Court of Ireland has observed, the duty to explain a decision not to take advantage of real protection possibilities is not tantamount to a “direct flight rule”: *C v. Refugee Appeals Tribunal*, [2009] IEHC 491 (Ir. HC, Nov. 12, 2009), at [21]. Rather, “[a]n asylum seeker is expected to establish that he/she acted in a manner consistent with a person fleeing persecution. Spending more than two years travelling and working illegally for long periods before a university educated adult finally applies for asylum requires some reasonable explanation”: at [25].

This Court has previously held that a refugee need not seek asylum in the first place where he arrives. . . . Rather, it is “quite reasonable” for an individual fleeing persecution “to seek a new homeland that is insulated from the instability [of his home country] and that offers more promising economic opportunities” . . . [We have previously held that] “[w]e do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best.”⁸⁷

Indeed, Justice Newman of the English High Court has suggested that the decision of a refugee to seek protection beyond her region of origin should be welcomed as the logical consequence of opportunities for international movement that did not exist at the time of the Refugee Convention’s drafting:

[A]nother current reality and advance . . . is the development of a readily accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea . . . Thus there exists a rational basis for exercising choice where to seek asylum. I am unable to accept that to recognise it is to legitimise forum shopping.⁸⁸

- 5 Whatever one’s views on this broader policy question, the text of the Refugee Convention makes clear that refugee status may only be denied on the basis of the possibility of seeking protection elsewhere in the two situations mentioned in Arts. 1(D) and 1(E) – those being access to UN (other than UNHCR) protection or assistance, and access to protection as a *de facto* national of a country of former residence.⁸⁹ The *expressio unius* principle, providing

⁸⁷ *Melkonian v. Attorney General*, (2003) 320 F.3d 1061 (USCA, 9th Cir., Mar. 4, 2003), at 1071, per Fletcher J. A very different view has, however, been taken by the Canadian Federal Court. In considering the claim of a family that had spent significant time in Europe before seeking asylum in Canada, the court observed that “[c]laiming refugee protection is not a question of choice; if the fear is real, the claim for protection must be made at the first opportunity, not when the claimant finds a better place to live as appears to be the case here”: *Canada (Minister of Citizenship and Immigration) v. Hund*, [2009] FC 121 (Can. FC, Feb. 5, 2009), at [26].

⁸⁸ *R v. Uxbridge Magistrates’ Court; Ex parte Adimi*, [2001] QB 667 (Eng. HC, Jul. 29, 1999), at 688, per Newman J. The UNHCR’s position on this issue is unclear. The agency has opined that the decision about where to seek recognition of refugee status “[i]s not an opportunity for asylum seekers to choose the country of refuge most agreeable to them, although due consideration should be given to such elements as family, educational or language ties. . . . While UNHCR continues to urge States to consider asylum claims put to them taking into account attendant humanitarian considerations, this must not admit to an endorsement for asylum seekers to choose the country of asylum most agreeable to them”: UNHCR, “Report of the UNHCR Working Group on International Protection,” Jul. 6, 1992, at 21.

⁸⁹ These provisions are discussed in detail in Chs. 6.2.1, 6.2.2. See e.g. the case of Mr. B. Conté, reported at [1981] *Recueil des décisions du Conseil d’État* 20–21 (Fr. CE [French Council of State], Jan. 17, 1981), in which the French Conseil d’État considered the case of a Guinean who had resided for four years in Senegal before seeking asylum in France. Looking to the purposes and structure of the 1951 Convention, the court properly held that Mr. Conté could be excluded only if determined to be a *de facto* national of Senegal, in accordance with Art. 1(E). Cited in E. Vierdag, “The Country of ‘First Asylum’: Some European Aspects,” in D. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 73, at 79–80. See also *Al-Rahal v. Minister for Immigration and Multicultural Affairs*, (2001) 110 FCR 73 (Aus. FFC, Aug. 20, 2001), at 81–82 [36], per Lee J. in dissent. It is of course true that if a refugee has already sought and been granted durable protection as a refugee elsewhere, then she has made her election about where to seek protection and cannot simply choose to move on to another asylum country for reasons of personal convenience: UNHCR Executive Committee Conclusion No. 58 (XL), “Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already

that explicit mention of certain exceptions operates so as to exclude others,⁹⁰ forecloses the argument that refugee status is lost because of failure to take up some other (and lesser) opportunity to seek protection. In line with the observation of Justice Kirby of the High Court of Australia, “[w]ithout clear language in the Convention to support such a course, I would not introduce such relief from the Convention ‘protection obligations’ by a process of implication inimical to the Convention’s objectives, terms and practical operation.”⁹¹ 5

1.2.1 *The legal basis for allocating protective responsibility*

Other than in the narrow circumstances set by Arts. 1(D) and 1(E), there is no legal basis to *deny* refugee status on the grounds of a duty to seek protection elsewhere. This rule does not, however, dispose of the distinct question whether state parties are nonetheless 10 free to *share-out protective responsibility* among themselves, including on the basis of a “first country of arrival” rule. Despite their proliferation,⁹² no positive legal authority for these arrangements is ever cited. Rather, “it is commonly argued that authorization for [protection elsewhere] practices is derived from an omission in the Convention text, that is, a negative implication is drawn from the limits of the positive obligations actually imposed on state 15 parties.”⁹³

But in truth, Art. 32 of the Convention – which governs the permissibility of sending a refugee to a non-persecutory state – is directly relevant. Because the consequence of being found amenable to a protection elsewhere rule or regime is the removal of the refugee from the country in which protection has been solicited, the requirements of this provision must 20 be met. Article 32 affords state parties a measure of operational flexibility by prohibiting the expulsion of a refugee only once a refugee is “lawfully present” in a state party.⁹⁴ By implication, the issuance of a removal order to a refugee who has yet to achieve lawful presence – which would ordinarily occur by admission to the state’s status determination procedure⁹⁵ –

Found Protection,” UN Doc. A/44/12/Add.1 (Oct. 13, 1989) (“UNHCR Executive Committee Conclusion No. 58”), at [(e)].

⁹⁰ A. Aust, *Modern Treaty Law and Practice* (2007), at 247; Jennings and Watts, *supra* n. 50, at 1279–80.

⁹¹ *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) 222 CLR 161 (Aus. HC, Mar. 2, 2005), at 190 [93].

⁹² See text *supra*, at n. 79. ⁹³ Foster, *supra* n. 83, at 230–31. ⁹⁴ Refugee Convention, at Art. 32.

⁹⁵ As observed by the French drafter of the Convention, presence is lawful in the case of “a person . . . not yet in possession of a residence permit but who had applied for it and had the receipt for that application. Only those persons who had not applied, or whose application had been refused, were in an irregular position”: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15 (Jan. 27, 1950), at 20 [109]. The US representative agreed that persons arriving without permission but who had been admitted to a status assessment procedure should “be considered, for purposes of the future convention, to have been regularly admitted”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.15 (Jan. 27, 1950), at 20 [108]. Thus, for example, the Full Federal Court of Australia has determined that an individual awaiting a decision on his refugee claim was “lawfully in” Australia and entitled to the protection of Art. 32 of the Convention: *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 86 FCR 526 (Aus. FFC, Sept. 4, 1998). Similarly, the South African Supreme Court of Appeal determined that the child of a person seeking refugee protection in South Africa was “lawfully in this country”: *Minister of Home Affairs v. Watchenuka*, [2003] ZASCA 142 (SA SCA, Nov. 28, 2003), at [36]. See generally Hathaway, *supra* n. 24, at 175–83. But see *R (ST) v. Secretary of State for the Home Department*, [2012] 2 AC 135 (UKSC, Mar. 21, 2012).

is *prima facie* permissible.⁹⁶ But any effort to require a refugee to seek protection elsewhere after lawful presence is established is presumptively unlawful.⁹⁷

5 Second and more generally, the Convention does not afford states any authority to deprive refugees of their acquired rights in pursuit of a protection elsewhere rule. As such, the
 10 assignment to protection elsewhere must not compromise the individual's rights under the Refugee Convention and more generally under international law. Having bound themselves to respect Refugee Convention (and in many cases, other international)⁹⁸ rights, the duty to implement obligations in good faith, coupled with the absence of any provision in international law that authorizes rights-stripping in pursuit of responsibility reallocation, means that such programs must be implemented in a way that respects the rights of those to be removed.⁹⁹ The allocation of protective responsibility, in other words, is not a project that can be pursued as a good in and of itself; it is rather an activity permitted within the limits of Art. 32, and is subject to the caveat that state parties have no license whatever to breach duties owed to refugees.¹⁰⁰

⁹⁶ “States are free to assert their jurisdictional competences to the absolute limit that international law allows. When in doubt, [the *Lotus* (PCIJ, 1927)] presumption counsels, States are able to insist on their jurisdiction over a particular individual, matter, or transaction. In short, international law is a permissive system when it comes to State jurisdiction: everything is permitted, save that which is expressly – and unambiguously – rejected”: D. Bederman, *International Law Frameworks* (2010), at 182. Refugees arriving or present unlawfully and who are not to be regularized in the state of arrival are nonetheless entitled to “a reasonable period and all the necessary facilities to obtain admission into another country”: Refugee Convention, at Art. 31(2).

⁹⁷ The main exception is where a decision on expulsion is grounded on national security or public order concerns and expulsion is ordered with due process of law: Refugee Convention, at Art. 32. See Hathaway, *supra* n. 24, at 669–94.

⁹⁸ While the focus here is on the requirements of refugee law, there is in most cases also a duty to consider respect for generic, internationally guaranteed human rights in the state of destination. See Foster, *supra* n. 83, at 275–78; and generally J. McAdam, *Complementary Protection in International Refugee Law* (2007).

⁹⁹ The closest the Convention comes to an affirmative endorsement of the allocation of refugee protection responsibilities is the acknowledgment in the Preamble of both the importance of ensuring that refugee flows not become “a cause of tension between States” and the value of “international co-operation” to respond to the fact that the granting of asylum may “place unduly heavy burdens on certain countries”: Refugee Convention, at Preamble, paras. 4–5. For this reason, bilateral or multilateral approaches – rather than unilateral rules that force refugees to seek protection elsewhere – are to be preferred. “In [bilateral and multilateral] scenarios there is at least a theoretical possibility that ‘responsibility sharing’ could ensure fair and equitable allocation of protection responsibilities between states. By contrast, in the case of unilateral removals, where there is not necessarily any readmission or other written agreement, nor any meaningful analysis of the situation pertaining in the ‘other country,’ it is more accurate to view these schemes as an attempt to avoid responsibility rather than sharing it fairly as between state parties”: M. Foster, “Responsibility Sharing or Shifting? ‘Safe’ Third Countries and International Law,” (2008) 25(2) *Refugee* 64, at 65.

¹⁰⁰ “To read . . . the Act as providing a power to remove from Australia to *any* country that is willing to receive the person concerned . . . would deny the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia’s compliance with the obligations undertaken in the Refugee[] Convention and the Refugee[] Protocol”: *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, (2011) 244 CLR 144 (Aus. HC, Aug. 31, 2011), at 192 [98], per Gummow, Hayne, Crennan, and Bell JJ. (emphasis in original).

The duty to ensure that acquired rights are respected in a transfer of protective responsibility means that the destination state¹⁰¹ must in most cases¹⁰² also be a state party to the Refugee Convention or Protocol.¹⁰³ This is so for two reasons.

First, the already acquired rights of those to be removed are subject to UNHCR supervision under Art. 35 and to oversight by the International Court of Justice by virtue of Art. 38. The absence of these means of supervising respect for rights consequent to removal to a non-party state would increase the refugee's vulnerability,¹⁰⁴ since a state which is not bound by the Refugee Convention may refuse cooperation with the UNHCR and cannot be compelled to allow the International Court of Justice to adjudicate a dispute about the interpretation or application of Convention rights. As the Committee Against Torture has observed in

¹⁰¹ The entire structure of the Refugee Convention is predicated on protection being provided by a state, and not by a non-state entity which is not subject to the same (if any) level of accountability at international law. As cogently observed by the English Court of Appeal, "[t]he reference in Art. 1(A)(2) is to an asylum-seeker being unable or unwilling to avail himself 'of the protection of that country', a reference to the earlier phrase, 'the country of his nationality'. That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognised internationally": *Gardi v. Secretary of State for the Home Department*, [2002] 1 WLR 2755 (Eng. CA, May 24, 2002), at 2766 [37], per Keene L.J.

¹⁰² There may be a rare circumstance in which responsibility could lawfully be shared with a state that is a full *de facto* participant in the international refugee protection regime, though not formally a party to the Convention or Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267 ("Refugee Protocol"). Specifically, the duty to protect might be shared with a state that accepts and applies in practice the duty to afford all Convention rights to refugees, and is prepared to accept a right of international supervision tantamount to that foreseen by Arts. 35 and 38 of the Convention. As observed in a lucid dissenting opinion in the Full Federal Court of Australia, there may be no duty to protect "a person who [has] been accepted as a refugee by another State and accorded rights by the State as contemplated by the Treaty, such as the issue of travel documents with the right to leave and re-enter that State . . . [U]nder international law, the equivalent protection to that required of a contracting state under the treaty must be secured to an applicant in a third country before it can be said that the person is not a refugee requiring consideration under the Treaty": *Al-Rahal* (Aus. FFC, 2001), at 89 [49]–[50], per Lee J. in dissent. The possibility of true *de facto* equivalence of Convention protection being treated as tantamount to accession to the Refugee Convention should, however, be read in tandem with the insistence of the High Court of Australia that the duty to afford Convention protections in the destination country must be legally binding, not simply a matter of policy or even international agreement: *Plaintiff M70/2011* (Aus. HC, 2011), at 182–83 [66], 193 [103], 195 [116], 201–2 [135]. As observed by Kiefel J., "[i]n terms of ordinary language it is difficult to see how it can be said that a country provides protection, in a concrete sense, if its laws contain no such provisions": at 233 [244].

¹⁰³ In the European Union, for example, only a state which "has ratified and observes the provisions of the [Refugee] Convention without any geographical limitations" can qualify as a "safe third country": Procedures Directive, *supra* n. 80, at Art. 36(2)(a). The Refugee Protocol incorporates the Refugee Convention's rights scheme in Arts. 2–34 by reference: Refugee Protocol, at Art. I(1). A more difficult question is whether return is lawful if the terms on which the destination country has agreed to be bound by the Convention or Protocol differ from those of the sending country. See e.g. S. Taylor, "The Pacific Solution or a Pacific Nightmare? The Difference Between Burden Shifting and Responsibility Sharing," (2005) 6 Asian-Pac. L. & Pol. J. 1, at 9, questioning whether Papua New Guinea was an acceptable destination for refugees from Australia given its multiple reservations to the Refugee Convention.

¹⁰⁴ "Nauru [was] not a party to the Refugee Convention and Protocol. This fact itself made the removal of the appellant by Australian officials to Nauru a source of potential disadvantage for him": *Ruhani v. Director of Police* (No. 2), (2005) 222 CLR 580 (Aus. HC, Aug. 31, 2005), at 599 [68], per Kirby J. See also *Plaintiff M70/2011* (Aus. HC, 2011), at 182 [64], 183 [67], 233–34 [245]. *Accord* Legomsky, *supra* n. 83, at 660.

refusing to allow at-risk persons to be sent to non-party states, the deprivation of access to a remedy may render a transfer of protective responsibility unlawful.¹⁰⁵

Second, refugees in a state party are already entitled to benefit from additional rights once lawful presence, lawful stay, and durable residence are established.¹⁰⁶ If forcibly removed to a country with no obligation ever to deliver these rights because it is not a party to the Convention, the refugee is completely deprived of her entitlement to access asylum on the terms mandated by the treaty. States enjoy some latitude in defining precisely when these higher levels of attachment are achieved.¹⁰⁷ But there is a default mechanism built into the Refugee Convention that ensures that all refugees present in a state party are ultimately entitled to invoke all of the rights set by Arts. 2–34.¹⁰⁸ Because no such default mechanism exists in a non-party state, removal to other than a state party deprives a refugee of her already established entitlement to secure enhanced protection over time as required by the express terms of the Refugee Convention.¹⁰⁹

Most fundamentally, *protection* elsewhere means precisely that: protection in line with Refugee Convention and other applicable international standards. This means ensuring that removal does not expose the refugee to the risk of being persecuted or subjected to *refoulement*¹¹⁰ and does not compromise the refugee's acquired rights.¹¹¹

1.2.2 *The duty to avoid refoulement*

The foundational jurisprudence has clearly acknowledged what is undoubtedly the most critical constraint on the right of state parties to rely on protection elsewhere policies, that being the duty to avoid *refoulement*, direct or indirect. The lead was taken by the European Court of Human Rights in its seminal decision of *TI*.¹¹² Drawing on the rule set in *Soering* that states are responsible “for all and any foreseeable consequences of extradition suffered

¹⁰⁵ *Mutombo v. Switzerland*, CAT Comm. No. 13/1993, UN Doc. CAT/CX/12/D/13/1993 (Apr. 27, 1994), at [9.6]; *Khan v. Canada*, CAT Comm. No. 15/1994, UN Doc. CAT/C/13/D/15/1994 (Dec. 18, 1994), at [12.5]. See Foster, *supra* n. 83, at 242–43.

¹⁰⁶ The rights that inhere once these more demanding levels of attachment are attained are discussed in Hathaway, *supra* n. 24, at 173–92.

¹⁰⁷ Subject to the requirements of the Refugee Convention and other binding norms of international law, states have the right to define both lawful presence and lawful stay: see *ibid.*, at 177 (lawful presence) and 187 (lawful stay).

¹⁰⁸ State inaction on the adjudication of an asylum seeker's claim, coupled with the effluxion of time, will lead to an entitlement to all of the refugee rights. If a state does not adjudicate the status of a person who claims to be a Convention refugee, it is deemed to have assented to the lawfulness of the asylum seeker's assertion of entitlement to refugee rights, and owes the rights which arise from the first three levels of attachment. The fourth and fifth levels of attachment inhere when there is officially sanctioned, ongoing presence, regardless of whether there has been a formal declaration of refugee status, grant of permanent residence, or establishment of domicile. In short, refugee rights accrue despite delay or failure of a state party to process a claim, assign a status, or issue a confirmation of entitlement: see *ibid.*, at 184–85, 189, 192.

¹⁰⁹ As observed by the High Court of Australia, an inquiry into the existence of protection in the destination state should be “understood as directing attention to matters that include what has happened, is happening or may be expected to happen in that country”: *Plaintiff M70/2011* (Aus. HC, 2011), at 195 [112], per Gummow, Hayne, Crennan, and Bell JJ.

¹¹⁰ See *infra* Ch. 1.2.2. ¹¹¹ See *infra* Ch. 1.2.3.

¹¹² *TI v. United Kingdom*, [2000] INLR 211 (ECtHR, Mar. 7, 2000).

outside their jurisdiction,”¹¹³ the court refused to countenance the automatic return of a Sri Lankan Tamil refugee claimant to Germany under the European Union’s Dublin Convention,¹¹⁴ which set the “first country of arrival” as the sole state presumed responsible to assess status and provide protection to a refugee. The essential concern was that Germany refused at the time to acknowledge that risk of death at the hands of a non-state agent could give rise to refugee status.¹¹⁵ The UK and most other courts took precisely the opposite position.¹¹⁶ The court was unwilling to allow British authorities to turn a blind eye to the protection consequences of reliance on the “first country of arrival” rule: 5

The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to [prohibited] treatment . . . Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention . . . Where states establish international organisations, or . . . international agreements, to pursue co-operation . . . , there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution . . . The Court notes the comments of the United Nations High Commissioner for Refugees that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.¹¹⁷

Just a few months later, the House of Lords addressed essentially the same question, and reached much the same view regarding when a refugee may be removed to another state to pursue her asylum claim: 10

[I]t is a long standing principle . . . that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution . . . it would be equally unlawful to return him to a third country which it is known will return him to his country of origin.¹¹⁸

¹¹³ *Soering v. United Kingdom*, (1989) 11 EHRR 439 (ECtHR, Jul. 7, 1989), at [86].

¹¹⁴ *Supra*, at n. 81.

¹¹⁵ See *infra* Ch. 4.2.2. There is now a common approach in Europe which recognizes non-state agents of persecution: Qualification Directive, *supra* n. 51, at Art. 6(c).

¹¹⁶ See *infra* Ch. 4.2.2.

¹¹⁷ *TI* (ECtHR, 2000), *supra* n. 112, at 456–57. The court was nonetheless satisfied that other remedies provided under German law would in practice provide an effective safeguard against removal from Germany, their technically discretionary nature notwithstanding, and therefore declared the application inadmissible. As Blake and Husain observe, “[t]he European Court was perhaps exceptionally generous to Germany in assuming that de facto protection . . . would be available . . . There was no evidence that such cases had been successfully reopened and status given under the particular provisions of the relevant Code. Theoretical possibilities of protection are not enough”: N. Blake and R. Husain, *Immigration, Asylum and Human Rights* (2003), at 107 [2.122].

¹¹⁸ *R v. Secretary of State for the Home Department; Ex parte Adan*, [2001] 2 AC 477 (UKHL, Dec. 19, 2000). Lord Steyn insisted that this duty to seek and apply the autonomous international meaning of the refugee definition “is part of the very alphabet of customary international law . . . [A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] . . . In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so [they] must search, untrammelled by notions of [their] national legal culture[s], for the

Knowing that the proposed destination states (in this case, France and Germany) would not in fact recognize refugee status despite the requirement under an authentic understanding of international refugee law to do so, the House of Lords determined that the government was not entitled to issue certificates authorizing return to Germany and France under the terms of the Dublin Convention.¹¹⁹

As later adumbrated by the House of Lords, the underlying principle of these cases is that a state party has a duty of “anxious scrutiny” to ensure that Convention rights are not indirectly forfeited:

There is an obvious tension between the need to make use of accelerated procedures to remove those whose claims for asylum ought not to be substantively considered in this country and the protections to which genuine refugees are entitled under . . . the Geneva Convention . . . This places a special responsibility on the court in its examination of the decision making process . . . [T]he basis of the decision must surely call for *the most anxious scrutiny*.¹²⁰

While failure of the destination country properly to apply the refugee definition is perhaps the most obvious instance in which there is a risk of *refoulement* by virtue of reliance on a protection elsewhere rule, courts have recognized that the duty of “anxious scrutiny” applies also where the risk is that the *procedure* in the partner state is suspected of serious inadequacy. For example, the European Court of Human Rights determined that Belgium could not return a refugee claimant to face manifestly inadequate asylum procedures in Greece, since “[w]hen they apply the Dublin Regulation . . . [s]tates must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces.”¹²¹ This is, of course, a sensible proposition. Whether the destination state uses a fair procedure that misapplies the definition, or embraces a sound understanding of the refugee definition but administers its protection system in a slipshod way, is irrelevant to the refugee: in either case, the risk of improper rejection of her claim to protection and subsequent *refoulement* is clear.

true autonomous and international meaning of the treaty. And there can only be one true meaning”: at 515–17.

¹¹⁹ The House of Lords subsequently made clear that where removal is resisted on the basis of the destination country’s failure to respect the requirements of the refugee definition, there must be “significant differences” of interpretation: *R (Yogathas)* (UKHL, 2002), at 927 [9], per Lord Bingham.

¹²⁰ *Ibid.*, at 941 [58], per Lord Hope, adopting the language of Lord Bridge of Harwich in *R v. Secretary of State for the Home Department; Ex parte Bugdaycay*, [1987] AC 514, at 531 (UKHL, Feb. 19, 1987) (emphasis added).

¹²¹ *MSS v. Belgium and Greece*, (2011) 53 EHRR 28 (ECtHR [GC], Jan. 21, 2011), at 342. This approach is in line with the view taken earlier by the English Court of Appeal that “[i]f the Secretary of State knows that in the instant case the procedures of the member state to which it is proposed that the asylum applicant be returned have operated unfairly, with the result that if returned to that state the asylum seeker will then be sent back to his own country of origin without his claim to asylum ever having received proper consideration, then the Secretary of State cannot [rely on the Dublin Convention]”: *R v. Secretary of State for the Home Department; Ex parte Dahmas*, [1999] All ER (D) 1280 (Eng. CA, Nov. 17, 1999), at [4]. See also *Kilic v. Belgium*, 162.040 (Bel. CE [Belgian Council of State], Aug. 28, 2006).

1.2.3 *The duty to ensure respect for acquired rights*

As helpful as these leading cases are, they nonetheless suffer from a narrowness of perspective.¹²² The traditional concern of courts has been whether the sending away of the applicant under a protection elsewhere rule would expose her, directly or indirectly, to the risk of being persecuted in her home country.¹²³ More specifically, the question is framed as whether there is a risk that Art. 33 of the Refugee Convention (or comparably narrow international,¹²⁴ regional,¹²⁵ or national¹²⁶ provisions) would be breached by reason of a failure accurately to identify or protect the refugee. As found by the Federal Court of Canada, “[w]hat is of concern is whether these individuals are protected from risk, not whether they have the full panoply of rights provided for under the 1951 Convention.”¹²⁷

One possible explanation for the focus on Art. 33 compliance is the quite specific language of that obligation. Because Art. 33 proscribes expulsion or return “in any manner whatsoever” to the country in which persecution is feared, there is little question that liability ensues

¹²² Conceptual confusion has been abetted by the UNHCR, which has unhelpfully promoted the view that only “effective protection” needs to be available in the destination country for a transfer of responsibility to be lawful. This notion, which has no basis in the Convention, has been defined to focus on respect for the rights to life, liberty, freedom from torture and cruel, inhuman or degrading treatment, and protection against *refoulement*, though this list is said to be non-exhaustive: UNHCR, “Summary Conclusions on the Concept of ‘Effective Protection’ in the Context of Secondary Movements of Refugees and Asylum-Seekers” (Feb. 2003), at [15]. Indeed, even as she promoted the notion of “effective protection” the Assistant High Commissioner for Refugees herself observed that there are “too many artificial constructs being devised to elude responsibility for supporting and accepting refugees. The end result is to lock people out of the effective protection the Convention’s drafters had in mind”: E. Feller, “Effective Protection in Today’s World,” Statement to the 54th Session of the Executive Committee of UNHCR’s Programme (Geneva, Oct. 1, 2003), at www.unhcr.org/admin/ADMIN/42a0554a2.html (accessed Jan. 9, 2014). See generally Legomsky, *supra* n. 83; C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?” (2005) 7 Eur. J. Migr. & L. 35. For its part, the EU has defined the same notion of “effective protection” as including also “the possibility . . . to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention”: Procedures Directive, *supra* n. 80, at Art. 27(1)(d) (emphasis added). While more precise than the UNHCR standard, the EU formulation’s reference to the duty to afford “protection in accordance with the Refugee Convention” begs the question whether there is really a difference between “effective protection” and Convention protection *simpliciter*.

¹²³ See e.g. *V872/00A v. Minister for Immigration and Multicultural Affairs*, (2002) 122 FCR 57 (Aus. FFC, Jun. 18, 2002), in which the court expressed the view that “there is nothing in Art 33 or any other Article of the Convention (when Art 32 is left out of consideration) that either obliges a contracting party to keep a person who qualifies as a refugee within its own territory or which forbids a contracting state from expelling a refugee to a third country, so long as Art 33 is not infringed”: at 61 [18]. See also 2 *BvR 1938/93*; 2 *BvR 2315/93* (Ger. BverfG [German Federal Constitutional Court], May 14, 1996), reported as Abstract No. IJRL/0269, (1997) 9 Intl. J. Ref. L. 292; *Dahmas* (Eng. CA, 1999), at [4]: “[There is] agreement that the Secretary of State cannot adopt [a] ‘hands-off’ approach. He must always have regard to Article 33 of the Geneva Convention of 1951.”

¹²⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, entered into force Jun. 26, 1987, 1465 UNTS 85 (“Torture Convention”), at Art. 3; Civil and Political Covenant, *supra* n. 24, at Arts. 6–7.

¹²⁵ European Convention for the Protection of Human Rights, *supra* n. 45, at Art. 3.

¹²⁶ See text *infra*, at n. 137.

¹²⁷ *Wangden v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 FCR 46 (Can. FC, Nov. 5, 2008), at 74 [72].

for indirect consequences.¹²⁸ Article 33 is uniquely attuned to the core concern in protection elsewhere cases, that being the avoidance of indirectly inflicted rights deprivation.

While true, this observation nonetheless fails to engage the more basic question of why the sending state was bound to observe Art. 33 in the first place. That is, even if the ambit of the duty of *non-refoulement* is especially broad, on what basis may it be said to bind the sending state at all in relation to the refugee proposed to be removed? As a matter of law, the answer must be that the duty to treat Art. 33 protection as a condition precedent to removal follows from the fact that it is a protection the provisional benefit of which has already accrued to the refugee claimant under the jurisdiction (and normally also within the territory) of the state party considering removal.¹²⁹ It is an acquired right that binds the sending state even as removal under a protection elsewhere rule is being contemplated. As earlier analyzed,¹³⁰ refugee status determination does not make a person a refugee. Rather, positive assessment by a state party simply confirms the status already held by a person who meets the requirements of the refugee definition. Because the text of the Convention expressly guarantees some rights even before refugee status assessment, persons who have claimed refugee status, including those being considered for removal to a third state that will consider their protection needs, are provisional rights-holders. While not yet lawfully present in any country,¹³¹ they are both under a state party's jurisdiction and physically present within its territory.¹³²

This means that pending an assignment of protective responsibility they are already entitled to the interim benefit of Art. 33, but also of Arts. 3 (non-discrimination), 4 (religious freedom), 12 (respect for personal status), 13 (preservation of property rights), 16(1) (access to the courts), 20 (access to rationing systems), 22 (primary education), 25 (access to administrative assistance), 27 (identity papers), 29 (fiscal equity), 31 (non-penalization for illegal entry and freedom from arbitrary detention), and 34 (consideration for naturalization).¹³³ The UNHCR is entitled to supervise the application of these rights in every state party pursuant to Art. 35, with ultimate oversight entrusted to the International Court of Justice under Art. 38.¹³⁴ These basic refugee rights are owed until and unless a final decision is made that refugee status is not warranted on the facts of the case – a decision that, by definition, will occur only after transfer to the country deemed responsible to assess the claim.

There is thus no legal basis to distinguish Art. 33 from Arts. 3, 4, 12, 13, 16(1), 20, 22, 25, 27, 29, 31, and 34¹³⁵ – each of which is also a right held by a refugee on a provisional basis as soon as she either comes under a state party's jurisdiction or is physically present within its territory. As acquired rights, the state that wishes to transfer its protective responsibilities to

¹²⁸ The scope of the duty was said by its sponsors to amount to an undertaking “not to expel or in any way [return] refugees”: UN Ad Hoc Committee on Statelessness and Related Problems, *Ad Hoc Committee on Statelessness and Related Problems*: Belgium and the United States of America, “Proposed Text for Article 24 of the Draft Convention relating to the Status of Refugees,” UN Doc. E/AC.32/L.25 (Feb. 2, 1950), at Art. 24(1) (emphasis added). See generally Hathaway, *supra* n. 24, at 316 ff.

¹²⁹ See text *supra*, at n. 55. ¹³⁰ See text *supra*, at n. 51.

¹³¹ “Lawful presence” is established when a refugee has been admitted for a fixed period of time, is undergoing refugee status assessment where formal assessment is required, or is simply physically present in a state party that does not undertake formal assessment of refugee claims: see Hathaway, *supra* n. 24, at 173–86.

¹³² See *ibid.*, at 160–73. ¹³³ See generally *ibid.*, at Ch. 4. ¹³⁴ See *ibid.*, at 992–98.

¹³⁵ For details of these rights see text *infra*, at nn. 165–68.

another country has a duty of “anxious scrutiny” to ensure that each of these entitlements is honored in the destination country, not just that there is protection against the risk of *refoulement* there.¹³⁶

Why, then, has there so frequently been a failure to recognize that the sending of refugees to a partner state is as much conditional on respect for acquired rights as it is on compliance with the duty of *non-refoulement*? A key reason is that, at least in many common law jurisdictions, the scope for judicial engagement with the full range of relevant questions has in many cases been artificially constrained by domestic legislation. For example, recent British protection elsewhere cases are devoid of reasoning based on the full range of refugee law obligations because that country’s domestic laws afford courts no license to draw directly on Refugee Convention rights in making relevant assessments.¹³⁷ Even more strikingly, Canadian legislation denies eligibility for protection to refugees coming “directly or indirectly to Canada” from a “designated” country, with designation by the cabinet predicated on compliance with “Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.”¹³⁸ In a challenge to the legality of sending refugees to the United States (the first country so designated), the Federal Court determined that the US failed to meet numerous obligations under the Refugee Convention and was therefore not in compliance with international law.¹³⁹ Yet the Federal Court of Appeal allowed the removals to proceed, noting both that Parliament had determined that only failure to abide by the duty of *non-refoulement* was relevant and, most fundamentally, that the only role left to the courts by the

¹³⁶ The duty to respect acquired rights has been most thoroughly adumbrated in the context of a change of sovereignty: see R. Mullerson, “The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia,” (1993) 42 ICLQ 473, at 490; *Human Rights Committee Decision on State Succession to the Obligations of the Former Yugoslavia under the International Covenant on Civil and Political Rights*, (1993) 15 EHRR 233; UN Commission on Human Rights, “Succession of States in respect of International Human Rights Treaties,” UN Doc. E/CN.4/1995/80 (Nov. 28, 1994), at 3. As regards non-citizens, it is suggested “that the successor state faces restrictions on its powers in relation to private rights of aliens additional to the ordinary rules of international law governing treatment of aliens apart from a case of succession”: Brownlie, *supra* n. 45, at 651. More generally, Judge Weeramantry has indicated that there is support for a broader theory mandating respect for acquired rights. “Another possible line of enquiry . . . is the analogy between a treaty vesting human rights, and a dispositive treaty vesting property rights. From the time of Vattel, such a dispositive treaty, as for example a treaty recognizing a servitude, has been looked upon as vesting rights irrevocably in the party to whom they were granted; and those rights, once vested, could not be taken away. Perhaps in comparable fashion, human rights, once granted, become vested in the persons enjoying them in a manner comparable, in their irrevocable character, to vested rights in a dispositive treaty”: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)*, [1996] ICJ Rep 595 (ICJ, Jul. 11, 1996), at 652 (Judge Weeramantry).

¹³⁷ Drawing instead on the reasoning of the European Court of Human Rights in *KRS v. United Kingdom* (2009) 48 EHRR 129 (ECtHR, Dec. 2, 2008), the House of Lords concluded that in a challenge brought in reliance on the European Convention for the Protection of Human Rights the sole question is whether the destination country “would actually infringe . . . article 3 rights”: *R (Nasseri)* (UKHL, 2009), at 35 [20], per Lord Hoffmann. The High Court interpreted these holdings to deny it the right to take account of even severe rights deprivations faced by refugee claimants in Greece, so long as these did not amount to evidence of *refoulement*: *R (Saeedi) v. Secretary of State for the Home Department*, [2010] EWHC 705 (Eng. HC, Mar. 31, 2010), at [40].

¹³⁸ Immigration and Refugee Protection Act, SC 2001, c. 27, at ss. 101(1), 102(1)(a).

¹³⁹ *Canadian Council for Refugees v. Canada*, [2007] FC 1262 (Can. FC, Nov. 29, 2007).

legislation was to ensure that the government had considered the issue of treaty compliance (which it had), not whether there was, in fact, compliance.¹⁴⁰

Australia has also asserted that removals to a third country are constrained only by the duty of *non-refoulement*.¹⁴¹ Yet the High Court of Australia did not accept the government's claim that Australia had no "protection obligations" to refugees so long as they would not be exposed to a risk of *refoulement* in the destination state:

Counsel for the Minister submits that the Minister has no "protection obligation" in the nature of providing asylum to the appellants because the implication of that positive obligation does not flow from Art 33(1) . . .

[However] . . . a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as "protection obligations."¹⁴²

This recognition that international refugee law obligations are in no sense limited to ensuring respect for the duty of *non-refoulement*¹⁴³ has recently been elaborated by the same

¹⁴⁰ The majority decision on appeal reversed the Federal Court's holding that the agreement with the United States was unlawful. It expressed concern about the scope of the inquiry conducted below, finding that the judge below incorrectly considered whether designation by the Governor-in-Council of the United States as a listed country *actually* met the required standard rather than simply whether relevant factors had been *considered* in making the designation: *Canada v. Canadian Council for Refugees*, [2009] 3 FCR 136 (Can. FCA, Jun. 27, 2008). In his concurring opinion, Evans J.A. noted further that the declarations of invalidity sought were problematic because they "do not match the allegations that . . . the policies and practice of the United States concerning refugee protection do not comply with international law . . . [and] they are not tailored to meet the proper concerns of Canadian law, namely that claimants for refugee protection in Canada are not returned to a country to face a real risk of removal in contravention of Article 33 of the [Refugee Convention] and Article 3 of the [Torture Convention]": at 182 [115].

¹⁴¹ As currently framed, Australia's Migration Act purports to deny "protection obligations" to any refugee "who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently . . . any country apart from Australia . . . [unless that country] will return the [refugee] to another country [where he or she] will be persecuted": Migration Act 1958 (Cth), at s. 36(3)–(5). This provision is predicated on the erroneous belief that the duty to protect a refugee under one's jurisdiction can be denied at will based on some unspecified sense of obligation to seek even temporary admission to "any country apart from Australia," presumably including even a state which is not a party to the Convention: see e.g. Department of Immigration and Multicultural and Indigenous Affairs (Cth), *Interpreting the Refugees Convention – An Australian Contribution* (2002), at 129–30: "[T]here is no obligation by the intended State of destination to admit to its territory a refugee seeking to enter illegally. The obligation is limited to ensuring that the refugee is not *refouled*. This does not require entry to the intended State of destination. Through negotiating entry with other countries, it may be met anywhere in the world by those States who honour the *non-refoulement* obligation."

¹⁴² *NAGV* (Aus. HC, 2005), at 172–73 [27]–[31], per Gleeson C.J., McHugh, Gummow, Hayne, Callinan, and Heydon JJ. Unfortunately, the High Court proceeds to identify three "examples" of "protection obligations" in the treaty, thereby giving unwarranted credence to the view that some Convention duties are not to be understood as "protection obligations": *ibid.*, at [31]. But as the Preamble to the Convention itself makes clear, the Convention *as a whole* is a means "to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments": Refugee Convention, Preamble, para. 3. There is moreover no division in the Convention between "protection" and "other" obligations.

¹⁴³ "[T]he protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States": *Khawar* (Aus. HC, 2002), at 15 [42], per McHugh and Gummow JJ. "[N]on-refoulement constitutes part only of the benefits attaching to refugee status and . . . [is] the part presently least important to these applicants who cannot

court in the context of a challenge to legislation authorizing the blanket transfer of refugee claimants to a country deemed safe.¹⁴⁴ Rejecting the Australian government's assertion that refugees could be forcibly transferred to Malaysia by reference only to the fact that they would be immune from *refoulement* there, the court observed that if that construction were adopted, the transferred refugee

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may have none of the other rights which Australia is bound to accord to persons found to be refugees . . . Thus when [the Act] speaks of a country that "provides protection . . ." it refers to provision of protections of all the kinds which parties to the Refugee[] Convention and the Refugee[] Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against *refoulement*.¹⁴⁵

While declining to specify the precise content of requisite protection, the High Court noted in particular that attention must be paid to the existence in the destination country of legally binding protection against discrimination, and of affirmative protection of religious freedom, access to the courts, entitlement to engage in wage-earning employment, access to primary education, and freedom of internal movement.¹⁴⁶

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The Australian High Court's clear insistence that transfers under protection elsewhere rules take account of more than just compliance with the duty of *non-refoulement* is mirrored in recent European jurisprudence. Rejecting a narrow approach,¹⁴⁷ a Grand Chamber of the European Court of Human Rights ruled in 2011 that Belgium was prohibited from returning an Afghan refugee claimant to Greece – his "first country of arrival" in Europe. The court determined *inter alia* that the state of extreme poverty to which refugees were subjected in Greece amounted to inhuman or degrading treatment, thus imposing a bar to protection elsewhere transfers to that country.¹⁴⁸ Later that same year, the Court of Justice of the European Union reached much the same conclusion, finding that evidence of risk in a partner state amounting to torture or inhuman or degrading treatment or punishment

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be removed anyway. Their concern rather is not to remain here in limbo – without benefits, without security, unable to travel, unable to bring in their families – but instead to enjoy the specific advantages to which refugees are entitled under both international and domestic law. They seek, in essence, the protection of this country and a new home here": *Adan v. Secretary of State for the Home Department*, [1997] 1 WLR 1107 (Eng. CA, Feb. 13, 1997), at 1116, per Simon Brown L.J. *Accord* K. Hailbronner, "The Concept of 'Safe Country' and Expedient Asylum Procedures: A Western European Perspective," (1993) 5 Intl. J. Ref. L. 31, at 59: "A casual connection with a country that respects the principle of *non-refoulement* and does not persecute the asylum seeker is not usually considered as adequate protection."

¹⁴⁴ Migration Act 1958 (Cth), s. 198(A), as in force at the relevant time. The relevant provision has since been amended by the Migration Legislation Amendment (Regional Processing and other Measures) Act 2012 (Cth).

¹⁴⁵ *Plaintiff M70/2011* (Aus. HC, 2011), at 197 [119], per Gummow, Hayne, Crennan, and Bell JJ.

¹⁴⁶ *Ibid.*, at 195–96 [117], per Gummow, Hayne, Crennan, and Bell JJ.

¹⁴⁷ For example, responding to evidence that a refugee claimant returned to Italy would face "destitution and homelessness," an English court observed that "there is no general right to accommodation or a minimum standard of living that can be drawn from the [European Convention for the Protection of Human Rights] or the Directives, or from elsewhere in the European or our domestic human rights, social or other legislation. The setting of such a minimum standard – no matter how low – is a matter for social legislation, not the courts. Therefore, given that the claimant's case is based upon the premise that there is a risk that, if returned to Italy, 'he will be destitute and homeless on the street', a cautious approach is required by this court to ensure that it does not inappropriately encroach into areas reserved to the political decision of the executive government": *R (EW) v. Secretary of State for the Home Department*, [2009] EWHC 2957 (Eng. HC, Nov. 18, 2009), at [23], per Hickinbottom J.

¹⁴⁸ *MSS v. Belgium and Greece*, (2011) 53 EHRR 28 (ECtHR [GC], Jan. 21, 2011).

would preclude removal to that state.¹⁴⁹ These judgments signal that the duty to scrutinize the realities of protection in a partner state is not to be narrowly conceived.

Indeed, civil law courts in Europe have explicitly acknowledged that the Refugee Convention itself imposes a duty to consider more than simply the risk of *refoulement*. The French Conseil d'État, for example, invoked the Refugee Convention and Protocol to prevent the return of a refugee family to Greece, their country of first arrival. Noting specifically that evidence of the conditions to which the family was subjected upon arrival in Greece failed to meet "the guarantees required by asylum law," and that return to Greece would therefore pose the risk of "a grave and manifestly unlawful deprivation of the fundamental liberty that comprises the right to asylum," the court refused to sanction the family's removal.¹⁵⁰ The German Administrative Court in Frankfurt am Main similarly overturned a removal order made against an Iranian refugee who had arrived in Germany via Greece. Observing that returns under the Dublin Regulation are contingent on respect by the destination country for the "right to asylum binding on all member states," the court required the government to exercise its discretion to withhold removal in view of the failure of Greece to meet regional standards for processing and reception of refugee claimants,¹⁵¹ which standards are expressly to be interpreted in line with international refugee law requirements.¹⁵²

¹⁴⁹ *NS v. Secretary of State for the Home Department*, C-411/10 and C-493/10 (CJEU, Dec. 21, 2011). While the court determined that there could be a presumption that partner states would honor their legal obligations to refugees sent to them (at [84]), it nonetheless found that awareness of systemic deficiencies that amount to substantial grounds for believing that conditions in the partner state amount to violation of Art. 4 of the European Charter of Fundamental Rights (which prohibits torture or inhuman or degrading treatment or punishment) rebutted that presumption: at [94]. Regrettably, the court did not take the opportunity to determine whether a broader range of legal constraints also governs removal to a partner state. In particular, the right to asylum guaranteed by Art. 18 of the European Charter providing that "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees" provides a clear basis for conditioning removal on compliance with the duties assumed under Arts. 2–34 of the Refugee Convention, not just on risk of torture or inhuman or degrading treatment or punishment: Charter of Fundamental Rights of the European Union, [2000] OJ C 364/01 (Dec. 18, 2000), at Art. 18.

¹⁵⁰ 339478 (Fr. CE [French Council of State], May 20, 2010) (unofficial translation).

¹⁵¹ *Transfer of Asylum Applicants to Greece*, [2009] BeckRS 36287 (Ger. VG Frankfurt am Main [German Administrative Court, Frankfurt am Main], Jul. 8, 2009) (unofficial translation). The English High Court's criticism of this decision – that it "seems to reason from 'a right to asylum binding [on] all Member States...' [that] cannot constitute a basis for reasoning in this type of case since the Dublin Regulation is expressly drafted on the basis of that right" (*R (Saeedi)* (Eng. HC, 2010), at [154], per Cranston J.) – is not sound. The Dublin Regulation is subordinate to international refugee law obligations (*infra* n. 152), but was not intended to implement the whole of those obligations. To the contrary, the Dublin Regulation is directed only to the process by which an allocation of refugee protection responsibilities is to occur, and does not address at all the core questions of qualification for status or the rights of persons who are refugees. The judgment of the German court appropriately recognizes that the Dublin Regulation cannot operate in a way that breaches these binding norms of international refugee law.

¹⁵² "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties": Treaty on the Functioning of the European Union, adopted Feb. 7, 1992, entered into force Nov. 1, 1993, [2010] OJ C 83/47, at Art. 78(1) (emphasis added). The Court of Justice of the European Union has affirmed that the Refugee Convention is the cornerstone of regional refugee protection norms, and that the regional regime must be implemented in line with requirements of the

This robust approach to scrutiny of protection elsewhere transfers accords with the approach recommended by the UNHCR's Executive Committee. In its Conclusion No. 85,¹⁵³ the Executive Committee noted that

as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker . . . in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum seeker . . . with the possibility to seek and enjoy asylum.¹⁵⁴

This view aligns with the Executive Committee's traditional insistence on the importance of ensuring "that persons who are in need of international protection actually receive it."¹⁵⁵ In particular, Conclusion No. 85 makes absolutely clear that the scrutiny of circumstances in the destination country may not be restricted to whether there is a risk of *refoulement* there; it must also evaluate whether that country "will provide the asylum-seeker . . . with the possibility to seek and enjoy *asylum*."¹⁵⁶ Access to "asylum," defined to include "the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments,"¹⁵⁷ is thus as relevant as the basic question of whether there is a risk of removal to persecution.

Both Executive Committee guidance and the emerging national and regional jurisprudence on protection elsewhere rules thus affirm the balance struck in the Convention between permissible expulsion prior to lawful presence (Art. 32) and the treaty's commitment to rights acquisition prior to formal status assessment.¹⁵⁸ Nothing in the Refugee Convention authorizes rights deprivation in pursuit of a protection elsewhere policy. To the contrary, state parties agree to grant clearly framed rights to refugees coming under their jurisdiction and present in their territory. There is no provision authorizing either the cessation of refugee status or termination of refugee rights to pursue the goal of refugee redistribution.¹⁵⁹ The notion that states may expel refugees at will, thereby stripping them of rights already acquired, is manifestly incompatible with the duty to apply the Refugee Convention in a way that ensures its effectiveness.¹⁶⁰ While the Convention does not impose

Refugee Convention: *Abdulla v. Germany*, C-175/08, C-176/08, C-178/08, and C-179/08, [2010] ECR I-01493 (CJEU, Mar. 2, 2010).

¹⁵³ UNHCR Executive Committee Conclusion No. 85 (XLIX), "Conclusion on International Protection" (Oct. 9, 1998) ("UNHCR Executive Committee Conclusion No. 85"). The legal status of these Executive Committee Conclusions is discussed in Hathaway, *supra* n. 24, at 112–18.

¹⁵⁴ UNHCR Executive Committee Conclusion No. 85, *supra* n. 153, at (aa).

¹⁵⁵ UNHCR Executive Committee Conclusion No. 74 (LXV), "General Conclusion on International Protection," UN Doc. A/49/12/Add.1 (Oct. 7, 1994) ("UNHCR Executive Committee Conclusion No. 74"), at (p).

¹⁵⁶ UNHCR Executive Committee Conclusion No. 85, *supra* n. 153, at (aa) (emphasis added).

¹⁵⁷ UNHCR Executive Committee Conclusion No. 82 (XLVIII), "Safeguarding Asylum" (Oct. 17, 1997), at (d)(vi).

¹⁵⁸ See text *supra*, at n. 94.

¹⁵⁹ "Because there is nothing in the Convention, either expressly or by implication, to remove . . . protection obligations with respect to the appellants . . . in circumstances where, although the Convention is engaged in the State to which the applicant has had recourse, the applicant might have obtained protection elsewhere, such obligations continue to exist": *NAGV* (Aus. HC, 2005), at 189 [90], per Kirby J.

¹⁶⁰ The duty to ensure a treaty's effectiveness derives from the more general obligation of good faith treaty interpretation: M. Bos, "Theory and Practice of Treaty Interpretation," (1980) 27 *Neth. Intl. L. Rev.* 135,

obligations on states to deliver rights to refugees in the abstract, state parties have assumed obligations to refugees with whom they have a connection, in some cases based simply on their exercise of jurisdiction. If it were possible to circumvent the considerable range of obligations imposed on state parties by the simple expedient of transferring a refugee to another state, this would defeat the very *raison d'être* of the Convention. As cogently observed by a judge of the Full Federal Court of Australia,

[t]he Convention does not provide that the incurring of obligations to a refugee to whom the Convention applies is at the option or discretion of a Contracting State and nor does it provide that a Contracting State will not incur obligations to a refugee under the Convention if the refugee has had, or has, the opportunity to seek protection from another country or Contracting State.¹⁶¹

It is important to emphasize, however, that the duty to ensure respect for acquired rights is not tantamount to conditioning removal on evidence that the refugee would enjoy the same overall quality of life in the destination country as in the sending state. This distinction has not always been clearly understood by courts.¹⁶² For example, in the decision of *Januzi*¹⁶³ the House of Lords mistakenly assumed that assessment of respect for refugee rights in a destination state entails a comparison of the quality of life in the sending and destination countries.¹⁶⁴

This is not so: the measure of respect for each right set by the Refugee Convention is rather defined by either an absolute or a contingent standard of attainment, which is the

at 150. As observed by Judge Lauterpacht, “[t]he preponderant practice of the Court itself has . . . been based on principles of interpretation which render the treaty effective rather than ineffective. These principles are not easily reconcilable with restrictive interpretation conceived as the governing rule of construction”: H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 305. See generally C. Tomuschat, *Human Rights: Between Idealism and Realism* (2003), at 104.

¹⁶¹ *WAGH v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2003) 131 FCR 269 (Aus. FFC, Aug. 27, 2003), at 276 [25], per Lee J.

¹⁶² As early as 2002, the House of Lords expressed the view that “the Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant’s living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it”: *R (Yogathas)* (UKHL, 2002), at 927 [9], per Lord Bingham. The concern is that the vague reference to “living conditions” inappropriately collapses the legally cognizable duty to implement Arts. 2–34 with other, legally irrelevant, considerations. On the question of the inappropriateness of a comparative analysis, see text *infra*, at n. 168.

¹⁶³ *Januzi v. Secretary of State for the Home Department*, [2006] 2 AC 426 (UKHL, Feb. 15, 2006). This case was concerned with the internal protection alternative, in which context the limits on the scope of permissible return by the United Kingdom were considered.

¹⁶⁴ “Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment”: *ibid.*, at 447–48 [19], per Lord Bingham (this decision was specifically addressed to the internal protection alternative, a concept discussed *infra*, at Ch. 4.3).

sole measure of compliance.¹⁶⁵ The standard varies from right to right. For example, the refugee must receive the same protection as *nationals of the destination country* with regard to religious freedom (Art. 4), access to rationing systems (Art. 20), ability to undertake primary education (Art. 22), and fiscal equity (Art. 29).¹⁶⁶ But she need only be granted the same rights as *aliens generally in the destination country* as regards property rights (Art. 13) and access to post-primary education (Art. 22).¹⁶⁷ The other rights owed by virtue of subjection to jurisdiction or physical presence – non-discrimination as among refugees (Art. 3), respect for personal status (Art. 12), access to the courts (Art. 16), access to administrative assistance (Art. 25), issuance of identity documents (Art. 27), non-penalization for illegal entry or presence and freedom from arbitrary detention (Art. 31), *non-refoulement* (Art. 33), and consideration for assimilation or naturalization (Art. 34) – are defined in absolute terms, either because the drafters deemed them fundamental to the most basic definition of protection, or because a contingent standard of respect is unviable given their refugee-specific nature.¹⁶⁸

As this structure makes clear, the duty to undertake “anxious scrutiny” of the destination state’s record of respect for acquired refugee rights is in no sense benchmarked against the conditions that prevail in the sending state. With the exception of core, refugee-specific rights, the highest standard of respect demanded by the Refugee Convention is instead whatever the destination country guarantees to its own citizens. The pre-removal question is simply whether the requirements of the Refugee Convention are met, with that assessment based on the standards set by the Convention.

The primary focus of the pre-removal inquiry will thus be whether the state party to which removal is contemplated can be relied upon to respect the refugee’s already acquired rights – that is, those that inhere in refugees who are simply under a state’s jurisdiction, or within its territory.¹⁶⁹ Any deprivation of such rights is, for the reasons previously described,¹⁷⁰ attributable to the sending state itself.

In addition, international law will in some cases hold the sending state responsible if it knowingly removes a refugee to a state party that will not respect those refugee rights that remain inchoate¹⁷¹ – that is, those that may be invoked only once the refugee has established

¹⁶⁵ See generally Hathaway, *supra* n. 24, at 192–277.

¹⁶⁶ This contingent standard of compliance is discussed in *ibid.*, at 234–37.

¹⁶⁷ This contingent standard of compliance is discussed in *ibid.*, at 196–200.

¹⁶⁸ The Refugee Convention’s absolute rights are discussed in *ibid.*, at 237–38.

¹⁶⁹ See text *supra*, at nn. 133–36. ¹⁷⁰ See text *supra*, at n. 136.

¹⁷¹ “[R]emoval or transfer of a *person* from the territory or jurisdiction of one state to another does not also transfer *legal obligations* to that other state”: Foster, *supra* n. 83, at 268 (emphasis in original). Accord J. Vedsted-Hansen, “Non-Admission Policies and the Right to Protection: Refugees’ Choice Versus States’ Exclusion?” in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 269, at 279 (emphasis in original): “Taking into account the content and structure of the [Refugee] Convention, as well as the declaratory nature of the determination of refugee status, it must follow that, in order to be considered an adequate country of first asylum, the relevant state has to provide refugee protection of a *quality*, and at a *level*, in conformity with the protection scheme laid down in the Convention.” But Legomsky suggests a somewhat lower duty, that being only to avoid “knowingly” sending the refugee to a place where Convention rights will not be respected, with the degree of certainty required by the term “knowingly” to vary inversely with the importance of the particular right: Legomsky, *supra* n. 83, at 624. While a helpful acknowledgment of the duty to ensure respect for acquired rights, this analysis is problematic since there is no formal hierarchy among refugee

lawful presence, lawful stay, or durable residence.¹⁷² Specifically, the removing state has a duty not to “aid or assist” another state party to breach its legal obligations¹⁷³ – in this case, to ensure all refugee rights at such time as they are owed. International law would deem a removal to be “assistance” if it is “clearly and unequivocally connected to the subsequent wrongful act”¹⁷⁴ and, most important, if it is carried out “with a view to facilitating the commission of the wrongful act.”¹⁷⁵ Thus, removal of a refugee to a state known to deny refugees the right to work or to access public relief and assistance (both owed once “lawful stay” is established)¹⁷⁶ in furtherance of a policy of deterring the arrival of refugees would demonstrate the requisite specific intent, and hence be internationally unlawful.¹⁷⁷

More generally, even absent evidence of such specific intent, a sending state which has actual or constructive knowledge that the destination country will not grant Convention rights on the terms mandated by international law may violate the duty of *pacta sunt*

rights, leading to divergent views among state parties about which rights are thought to be “important.” See generally Foster, *supra* n. 83, at 270–75.

¹⁷² The rights that are owed once these levels of attachment are attained are discussed in Hathaway, *supra* n. 24, at 173–92.

¹⁷³ “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State”: International Law Commission, “Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001),” UN Doc. A/56/10 (2001), at 47 (Art. 16); endorsed by “Responsibility of States for Internationally Wrongful Acts,” UN General Assembly Res. 56/83, UN Doc. A/RES/56/83 (Dec. 12, 2001), at [3]; approved in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)*, [2007] ICJ Rep 43 (ICJ, Feb. 26, 2007), at 217 [420].

¹⁷⁴ International Law Commission, “Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur,” 51st sess., UN Doc. A/CN.4/498/Add.1 (Apr. 1, 1999), at 10 [178].

¹⁷⁵ International Law Commission, “Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001),” *supra* n. 173, at 156 [5]. “A State is not responsible for aid or assistance under article 16 unless the relevant State intended, by the aid or assistance given, to facilitate the occurrence of the internationally wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State”: *ibid.*

¹⁷⁶ Refugee Convention, at Arts. 17, 23. See also Hathaway, *supra* n. 24, at 739–76, 800–13.

¹⁷⁷ Absent evidence of such specific intent, however, the simple fact of removal to a country in which international rights owed at some future point will not be fully honored does not amount to aiding or assisting the destination state to breach its obligations and cannot therefore be deemed a condition precedent to removal under a protection elsewhere rule. These questions are thoughtfully explored in J. Robb, “Returning Asylum Seekers to Third Countries: New Theoretical and Practical Concerns in Determining the Content of ‘Effective Protection’” (forthcoming, copy on file with authors). It would, of course, be possible to argue that the sending state is subject to an implied duty of *non-refoulement* with respect to all refugee rights, that is, that it must never remove anyone to a state where the refugee rights associated with lawful presence and higher levels of attachment are not respected. To this point, however, courts have been prepared to impose liability to avert extraterritorial harms only where the risk abroad reaches a level of acute gravity – as, for example, the risk of torture or cruel and inhuman treatment. Indeed, the House of Lords has determined that while a range of substantive harms may be relevant, only the threat of a harm that amounts to a “flagrant denial or gross violation” will be sufficient to impose responsibility to avert an extraterritorial harm: *R (Ullah) v. Special Adjudicator*, [2004] 2 AC 323 (UKHL, Jun. 17, 2004), at 352 [24], per Lord Bingham. See e.g. *Mamatkulov v. Turkey*, [2005] I Eur Court HR 293 (ECtHR [GC], Feb. 4, 2005). Indeed, this understanding of Strasbourg jurisprudence may go beyond what the European Court of Human Rights has been prepared to acknowledge by way of the breadth of the implied duty of non-return, at least where the destination state is also bound by the European Convention for the Protection of Human Rights, *supra* n. 45: see e.g. *KRS* (ECtHR, 2008).

servanda – the duty to interpret a treaty in good faith.¹⁷⁸ If the manner in which a treaty is interpreted, including through application, leads to a result that is manifestly unreasonable in light of that treaty’s context, object, and purpose, then that interpretation is impermissible as a matter of international law.¹⁷⁹ Given that the Refugee Convention is expressly founded on the conviction that states are committed to “assur[ing] refugees the widest possible exercise of . . . fundamental rights and freedoms,”¹⁸⁰ and that its language and structure are designed to grant a clear catalog of rights to refugees, it would surely be antithetical to the Convention’s very essence to read it as allowing a state party forcibly to expel a refugee to a state known not to deliver those rights. 5

In sum, there is no duty under international refugee law for a refugee to seek protection either in her region of origin, or in the first safe state to which she travels. Neither her refugee status nor consequential entitlements are compromised by the decision to seek protection farther afield. As soon as she comes under the jurisdiction of a state party, that state is bound to respect certain core rights on a provisional basis. The extent of the receiving state’s obligations increases once the refugee is physically present on its territory. 10

Despite these presumptive obligations, the flexibility afforded by Art. 32’s provisions on expulsion allows for a transfer of protective responsibility to another state party, so long as that transfer is effected prior to the establishment of lawful presence (normally at the time of admission to a process of substantive consideration of the asylum request). The refugee need not consent to the transfer of responsibility to another state party. She may, however, be required to relocate to the partner state only once the sending state has engaged in “anxious scrutiny” of the record of the proposed destination country with a view to ensuring that the refugee will have access to a sound process of refugee status assessment there, under which the refugee definition as authentically understood is reliably applied. The same level of scrutiny must be applied also to the destination state’s record of respect for each of the refugee rights acquired in the initiating state, with the standard of reference for compliance being that set by the Refugee Convention itself. There is moreover a duty not to effect a removal in circumstances that would amount to aiding or assisting the destination country to breach its international obligations, including to honor such refugee and other international human rights as are owed once lawful presence, lawful stay, and durable residence are established there. Finally, the general duty to implement treaties in good faith may preclude a protection elsewhere transfer, at least where the sending state has actual or constructive knowledge that the destination country will withhold Convention rights in a way that is manifestly unreasonable given the requirements of international law. 15 20 25 30

If, and only if, each of these constraints is respected, protective responsibility may lawfully be transferred to another state party to the Convention. 35

1.3 Determining the state of reference

The plain language of the Convention requires the substantive evaluation of refugee status to be undertaken by reference to conditions in the refugee claimant’s state of *nationality*.¹⁸¹

¹⁷⁸ Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force Jan. 27, 1980, 1155 UNTS 331 (“Vienna Convention”), at Art. 31(1).

¹⁷⁹ Aust, *supra* n. 90, at 187–88. ¹⁸⁰ Refugee Convention, at Preamble, para. 2.

¹⁸¹ A refugee is a person who “owing to well-founded fear of being persecuted . . . is outside the *country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the *protection of*

Whatever her relationship with other countries, the basic inquiry into the existence of a relevant well-founded fear focuses squarely on the risks faced in the country of which the individual is a citizen.¹⁸²

5 The choice of the state of nationality as the country of reference for risk analysis was driven by the Convention's overarching goal of responding to the need to provide a *new national home* to persons driven from their own country by the risk of persecution. The commitment of international law to individuals having a nationality in the legally recognized form of citizenship, and hence being "allocated" to a state, follows in part from the logic of the interstate system.¹⁸³ The jurisdiction over individuals afforded by nationality is critical to 10 the community of states as a whole since the state of nationality "has a certain responsibility for the acts of its citizens . . . of which its agents know or ought to know and which cause harm to the legal interest of another state."¹⁸⁴ Citizenship is a universally recognized basis for jurisdiction over individuals,¹⁸⁵ who are subject to a duty of allegiance¹⁸⁶ to their country of nationality. Nationality thus provides a default means by which individuals may be brought 15 under the authority of the interstate system.¹⁸⁷

At least as important, and of greater immediate relevance in the context of refugee protection, nationality provides the essential means by which individuals are able to avail themselves of the protection of international law.¹⁸⁸ Under international law, injury to a citizen is treated as an injury to the state of citizenship.¹⁸⁹ It is the state of citizenship¹⁹⁰ that

that country": Refugee Convention, at Art. 1(A)(2) (emphasis added). The provisions of the Convention relevant to refugee claims by stateless persons – requiring analysis of risk in the stateless applicant's "country of former habitual residence" – are discussed *infra*, at Ch. 1.3.3.

¹⁸² "In order to be considered eligible, persons possessing a nationality must fear persecution in the country of their nationality . . . Their nationality may, therefore, have to be determined as a preliminary question in eligibility proceedings": P. Weis, "The Concept of the Refugee in International Law," (1960) 87 J. du droit international 928, at 972. "In this context, nationality means citizenship of a particular country": Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law* (Dec. 31, 2010), at [2.1].

¹⁸³ This is a matter of substantial importance to the working of international law. "Since every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is essential that a link between the two be legally established. That link connecting the state and the people it includes in its territory is provided by the concept of nationality": Shaw, *supra* n. 48, at 659.

¹⁸⁴ Brownlie, *supra* n. 45, at 519.

¹⁸⁵ "Nationality provides a normal (but not exclusive) basis for the exercise of civil and criminal jurisdiction and this even in respect of acts committed abroad": *ibid.*, at 384.

¹⁸⁶ R. Donner, *The Regulation of Nationality in International Law* (2nd edn., 1994), at 120.

¹⁸⁷ "International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person": Shaw, *supra* n. 48, at 487.

¹⁸⁸ "If the answer [to the question why individuals need to be nationals of a state] is to enable the state to exercise protection on our behalf, then the question follows, why do we individuals need states to protect us? The answer appears to be this: without the protection of a state other states would seek to exercise their jurisdiction over us. To live without a nationality and go unmolested by one state or another seems not to be an option. One might therefore think of nationality as a global protection racket run by states": J. Blackman, "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law," (1998) 19 Mich. J. Intl. L. 1141, at 1150–51.

¹⁸⁹ Brownlie, *supra* n. 45, at 519.

¹⁹⁰ "Nationality is a juridical and political link which unites an individual with a State, and it is that link which enables a State to afford protection against all other States; the same link is not created between a

is entitled to exercise diplomatic protection to aid its citizen¹⁹¹ and to seek a remedy for harms suffered.¹⁹² As Blackman concludes,

[i]n a state-centric international legal system, the state is still the primary vehicle by which the individual accesses the rights and protections available under international law . . . [J]ust as domestic citizenship is the prerequisite for acquiring and exercising civil and political rights within a state – the right to have rights – so too nationality in a state is the *sine qua non* for exercising most rights the individual has under international law.¹⁹³

Indeed, the importance of citizenship as a threshold for international protection holds true even in relation to many human rights. While the rights to vote and stand for election¹⁹⁴ are perhaps the most obvious examples of rights restricted to nationals, citizenship is also often essential to recognition of property rights.¹⁹⁵ Perhaps most critically, in developing countries only citizens are unequivocally entitled to benefit from the full range of internationally enshrined economic rights.¹⁹⁶

It is thus clear that citizenship is not only an important means of ensuring state responsibility for individual actions, but is more fundamentally a source of safety and empowerment for individuals.¹⁹⁷ The Refugee Convention recognizes that where the risk of being persecuted prevents someone from living in her state of citizenship, she suffers losses that go beyond the threat of immediate harm. As senior courts have affirmed, the drafters of the Convention were committed not just to offering shelter against harm, but more broadly to providing *surrogate national protection* to at-risk persons denied the ability to live in their country of citizenship.¹⁹⁸

This determination to provide rights of surrogate or substitute *national* protection is confirmed by the fact that the rights owed to refugees are particularly attentive to precisely those entitlements often reserved for citizens,¹⁹⁹ and are generally framed so as to enfranchise

person and a State in which the person is ordinarily resident if the person is not a national of that State”: L. B. Sohn and T. Buergenthal (eds.), *The Movement of Persons Across Borders* (1992), at 39.

¹⁹¹ V. Lowe and C. Staker, “Jurisdiction,” in M. Evans (ed.), *International Law* (2006) 313, at 346.

¹⁹² Shaw, *supra* n. 48, at 258. ¹⁹³ Blackman, *supra* n. 188, at 1150.

¹⁹⁴ See Civil and Political Covenant, *supra* n. 24, at Art. 25(a), (b). ¹⁹⁵ Donner, *supra* n. 186, at 250.

¹⁹⁶ “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”: International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force Jan. 3, 1976, 993 UNTS 3, at Art. 2(3). The scope of this exception to guaranteeing economic rights is considered in more detail *infra*, at Ch. 3.3.5.

¹⁹⁷ Because the losses stemming from enforced alienage from one’s country of citizenship follow whether or not “safety” from immediate risks is available in some other state, such safety is legally irrelevant to the assessment of Convention refugee status. The availability of protection elsewhere is legally pertinent only in the circumstances defined by Arts. 1(D) and 1(E) of the Refugee Convention: see *infra* Chs. 6.2.1, 6.2.2. Indeed, the Federal Court of Australia has advanced the thoughtful view based on the text of the Convention itself that recognition abroad of refugee status that falls short of securing the *de facto* nationality required for exclusion under Art. 1(E) is no basis for refusal to recognize refugee status: *Barzideh v. Minister for Immigration and Ethnic Affairs*, (1996) 69 FCR 417 (Aus. FC, Aug. 21, 1996), at 427.

¹⁹⁸ “International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then only in certain situations”: *Ward v. Canada (Attorney General)*, [1993] 2 SCR 689 (Can. SC, Jun. 30, 1993), at 709. See generally *infra* Ch. 4.

¹⁹⁹ For example, the Refugee Convention gives significant attention both to freedom of internal movement (Arts. 31(2), 26) and to property rights (Arts. 13, 14). More generally, it mandates respect for economic

refugees in the host national community.²⁰⁰ The same commitment to provide not just safety but rather a substitute national home can be seen in the rule that once a well-founded fear of being persecuted in the country of nationality is confirmed,²⁰¹ the refugee is entitled to remain in the asylum state for the duration of the risk²⁰² unless her presence adversely affects that country's national security or public order.²⁰³ This is so even if some other state is willing to admit her, and poses no risk to her.²⁰⁴ Indeed, refugee status comes to an end not just when safety is available, but rather only when protection is available in a country of which the refugee is a citizen.²⁰⁵ The context of the Convention thus confirms the intent of its plain language that refugee status is to be assessed by reference only to risk in the applicant's country of nationality.

This basic principle is not contentious. For example, in considering the claim of a Polish citizen who had resided in what was then West Germany for five years before coming to Canada,²⁰⁶ the Canadian Federal Court of Appeal overturned the initial decision in which risk was analyzed in relation to Germany, insisting that refugee status be assessed instead by reference to conditions in Poland, his country of nationality.²⁰⁷ Much the same approach was adopted by the US Court of Appeals for the Second Circuit. In considering the claim of the son of Tibetan refugee parents, born and raised in a refugee camp in India, not entitled to Indian citizenship but a citizen of China under *jus sanguinis* rules, the court overturned a lower decision which had assessed his protection needs against India:

rights which might otherwise be denied to non-citizens in less developed states, and requires the host government to provide refugees with consular and other forms of assistance typically reserved to citizens. See generally Hathaway, *supra* n. 24.

²⁰⁰ Other than those rights that speak explicitly to the disabilities of refugeehood, rights in the Refugee Convention require treatment on a contingent basis. The highest contingency requires host states to afford refugees the same treatment as that granted to their own nationals: Hathaway, *supra* n. 24, at 228 ff.

²⁰¹ Once an individual's claim to Convention refugee status has been accepted for substantive assessment, she is "lawfully present" in the asylum country and thus entitled to Art. 32's protection against expulsion even to a non-persecutory state until and unless found not to qualify for refugee status: Hathaway, *supra* n. 24, at 175–78.

²⁰² "Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses. This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin": UNHCR, *Handbook*, *supra* n. 22, at [112].

²⁰³ Refugee Convention, at Art. 32. See generally Hathaway, *supra* n. 24, at 659 ff.

²⁰⁴ The only exception is where the individual has a relationship with another country that amounts to *de facto* nationality, which gives rise to exclusion. Specifically, a person with a well-founded fear of being persecuted but who is "recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country" is excluded from refugee status: Refugee Convention, at Art. 1(E). This issue is discussed *infra*, at Ch. 6.2.1.

²⁰⁵ See Refugee Convention, at Art. 1(C)(5–6), discussed *infra*, at Ch. 6.1.4.

²⁰⁶ *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 FC 340 (Can. FCA, Jan. 25, 1978).

²⁰⁷ The court held that the issue of the availability of protection in West Germany, while relevant, was appropriately addressed as a matter of exclusion from refugee status, subsequent to the primary determination. Exclusion requires not simply access to safety, but rather prior residence in a country which will afford the individual "the rights and obligations which are attached to the possession of the nationality of that country": Refugee Convention, at Art. 1(E). See generally *infra* Ch. 6.2.1.

[A]n alien who has a nationality is generally eligible for asylum if she has a well-founded fear of persecution in her country of nationality, regardless of where she was living before coming to the United States, and regardless of whether the government seeks to remove her to some other country.²⁰⁸

Despite the simplicity of the basic rule, difficulties can nonetheless arise. For example, the German Administrative Court in Würzburg elected to treat the (legally unrecognized) entity of the “Serbian Republic of Bosnia and Herzegovina” as a country of reference.²⁰⁹ The Austrian Administrative Court went farther still, holding that the 1998 claim of an ethnic Albanian from Kosovo was not to be assessed in relation to Yugoslavia, his sole country of citizenship, but rather in relation to the subsequently established United Nations Mission in Kosovo.²¹⁰ And the English Court of Appeal effectively substituted the notion of “home area” for the true standard of “country of nationality” in a case involving risks faced by a Kurd from Iraq.²¹¹ While couched as an interpretation of “well-founded fear,” the court determined that the case was to be decided on the basis of an assessment of conditions only in the so-called “Kurdish Autonomous Region” in Northern Iraq – an area found by the court itself to be not only legally unrecognized, but fractured among three different controlling entities.²¹² Yet as the Australian Federal Court has observed, in the refugee definition “the word ‘country’ . . . is used to designate a country capable of granting nationality”²¹³ – a test clearly not met by a would-be but unrecognized state, by a UN agency, or by an ethnic enclave within a fractured state. Not only are such interpretations at odds with the clear language of the refugee definition, but they do not conform to the Convention’s purpose of

²⁰⁸ *Dhoumo v. Board of Immigration Appeals*, (2005) 416 F.3d 172 (USCA, 2nd Cir., Jul. 27, 2005), at 174.

²⁰⁹ *W 9 K 92.30416 446.11* (Ger. VG Würzburg, [German Administrative Court, Würzburg], Mar. 15, 1994).

²¹⁰ *Federal Ministry of the Interior v. Independent Federal Asylum Board (UBAS)*, 2000/01/0402 (Au. VwGH [Austrian Administrative Court], Mar. 6, 2001).

²¹¹ *Gardi* (Eng. CA, 2002).

²¹² “I cannot see why the international community should be expected to provide surrogate protection to someone who is found to have no well-founded fear of persecution in his own home area. Of course, that assumes that he can be safely returned to that area, a matter which I shall turn to when dealing with the second way in which the applicant’s case on the ‘fear test’ is put. But this first argument appears to me to be ill-founded”: *ibid.*, at 2764–65 [29]. The Court of Appeal noted that it felt constrained by the (highly problematic) approach adopted by the UK to the internal protection alternative (see *infra*, at Ch. 4.3.2), noting “[i]f a person is not a refugee because there is a safe part of his country to which he could reasonably be expected to relocate, it would be very remarkable if a person were to acquire the status of a refugee when the safe area is one where he originally lived. I conclude that, so as long as he is not put at risk in the process of getting to his safe home area, he is not a refugee”: at 2765 [31]. It was arguably on less solid ground in indicating also that it felt bound to reach this determination based on precedent: at 2764 [25]. In the case relied on, *Canaj v. Secretary of State for the Home Department*, [2001] INLR 342 (Eng. CA, May 24, 2001), the Court of Appeal did not find it necessary to determine whether the notion of “that country” under Art. 1(A)(2) could comprise no more than an entity within Kosovo, noting that “[i]t was, of course, unnecessary for the judge to choose between the three alternatives: it was sufficient to accept that Art 1A(2) would certainly be satisfied were protection in fact to be provided by an entity which had both the international law obligation and the country of nationality’s consent”: at 345 [9].

²¹³ *Tjhe Kwet Koe v. Minister for Immigration and Ethnic Affairs*, (1997) 78 FCR 289 (Aus. FC, Sept. 8, 1997), at 298, cited with approval in *Dyli v. Secretary of State for the Home Department*, [2000] Imm AR 652 (UKIAT, Aug. 30, 2000).

determining whether a relevant risk deprives the individual of the protection of a state of citizenship.

As these examples make clear, an initial question in the process of refugee status assessment is thus the identification of the applicant's country of nationality, since all other aspects of the refugee definition can only be analyzed once this threshold question has been resolved. The question of nationality is to be treated like any other factual matter,²¹⁴ with the applicant bearing the burden of proof in the context of a shared duty of fact-finding.²¹⁵ In most cases, the refugee applicant's nationality can be discerned from her own testimony, buttressed by documentary evidence such as a passport, visa, or transportation ticket.²¹⁶ Assuming that the applicant establishes a *prima facie* case that she is a national of a given country, and that sufficient evidence has not been adduced to counter her assertion,²¹⁷ that state should be treated as the country of reference for the assessment of refugee status.

If, on the other hand, the applicant is unable to identify her citizenship or if her designation of the country of reference cannot be relied upon, the receiving state should proceed to assess risk in the state which it believes is most likely to be the applicant's true country of citizenship.²¹⁸ Because the ultimate duty of the state is to assess whether or not the individual is a refugee, status may not lawfully be denied simply because the applicant's country of nationality was not properly identified by her.²¹⁹

²¹⁴ This basic principle was held to apply to assessment of the country of nationality: *N (HL) (RE) T90-09221*, [1991] CRDD 754 (Can. IRB, Sept. 5, 1991).

²¹⁵ “[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application”: UNHCR, *Handbook*, *supra* n. 22, at [196]. See generally *infra* Ch. 2.4.2.

²¹⁶ *Damnan v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 578 (Can. FCA, Jun. 14, 1993); UNHCR, *Handbook*, *supra* n. 22, at [93]. See also Immigration and Refugee Board of Canada, *supra* n. 182, at [2.1.2]: “Possession of a national passport as well as birth in a country can create a rebuttable presumption that the claimant is a national of that country. However, the claimant can adduce evidence that the passport is one of convenience or that he or she is not otherwise entitled to that country's nationality.” The latter caution is important, since “[a] State may in its discretion issue its passport in favor of any other person who is not a citizen but is permanently resident within its territory”: Sohn and Buergethal, *supra* n. 190, at 83.

²¹⁷ For example, it might be shown that the putative state of citizenship denies that the applicant is its national, ordinarily a fatal finding since international law allows each state to decide for itself who is entitled to its citizenship: P. Weis, *Nationality and Statelessness in International Law* (2nd edn., 1979), at 92. “International law allows each State to determine who are its nationals, and this determination is usually recognized by other States, except when it departs from the international law principles on the subject”: Sohn and Buergethal, *supra* n. 190, at 41. *Accord Tji v. Minister for Immigration and Ethnic Affairs*, (1998) 158 ALR 681 (Aus. FC, Oct. 30, 1998). See *Chahoud v. Canada (Minister of Employment and Immigration)*, (1992) 140 NR 324 (Can. FCA, Feb. 12, 1992); *Zidarevic v. Canada (Minister of Citizenship and Immigration)*, (1995) 90 FTR 205 (Can. FCTD, Jan. 16, 1995); *Buchung v. Canada (Minister of Citizenship and Immigration)*, [2009] FC 381 (Can. FC, Apr. 15, 2009), at [28].

²¹⁸ *S v. Independent Federal Asylum Board (UBAS)*, 2001/20/0410 (Au. VwGH [Austrian Administrative Court], Sept. 30, 2004). The view that the decision-maker “is not obliged to make any positive finding as to the appellant's nationality or country of origin” (*Hussaini v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 104 (Aus. FFC, Feb. 14, 2002), at [12]; see also *Raza v. Minister of Immigration and Multicultural Affairs*, [2002] FCA 350 (Aus. FFC, Mar. 28, 2002)) cannot be reconciled to the shared duty of fact-finding in refugee law: see *infra* Ch. 2.4.2.

²¹⁹ *Ward* (Can. SC, 1993). See generally *infra* Ch. 2.4.2.

1.3.1 *Dual or multiple nationality*

It is an underlying assumption of refugee law that, wherever available, national protection takes precedence over surrogate international protection.²²⁰ In the drafting of the Convention, delegates clearly expressed their view that no person should be recognized as a refugee unless she is either unable or legitimately unwilling to avail herself of the protection of *all* countries of which she is a national.²²¹ Even if an individual has a genuine fear of being persecuted in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is both prepared and able to afford her protection.²²² This is clear from the plain language of the refugee definition itself:

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.²²³

The duty to consider risk in *each* country of which the applicant is a national and to recognize status only if a relevant risk is found in *each* of them is thus mandatory.²²⁴ As observed by the Supreme Court of Canada, “[t]he exercise of assessing the claimant’s fear in each country of citizenship . . . accords with the principles underlying international refugee protection. Otherwise, the claimant would benefit from rights granted by a foreign state while home state protection had still been available.”²²⁵

²²⁰ UNHCR, *Handbook*, *supra* n. 22, at [106]. “When available, home state protection is a claimant’s sole option”: *Ward* (Can. SC, 1993), at 752. “The Refugee[] Convention provides an exception to that general rule [of sovereign authority over the entry of non-citizens]; but it is an exception which provides for ‘international protection’ only where ‘national protection’ is not available”: *Jong Kim Koe v. Minister for Immigration and Multicultural Affairs*, (1997) 74 FCR 508 (Aus. FFC, May 2, 1997), at 516. *Accord Minister for Immigration and Multicultural Affairs v. A.*, (1998) 156 ALR 489 (Aus. FC, Apr. 9, 1998), at 495; *Tji* (Aus. FC, 1998), at 683.

²²¹ “[P]ersons with dual or even plural nationality would be considered as refugees only after it had been ascertained that they were either unable or unwilling to avail themselves of the protection of the governments of any of their nationalities”: Statement of Mr. Fearnley of the United Kingdom, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 6. See *NBKE v. Minister for Immigration and Citizenship*, [2007] FCA 126 (Aus. FC, Feb. 15, 2007), at [15].

²²² “[S]o long as a person had one nationality and no reasons not to avail himself of the protection of the government concerned, he could not be considered as a refugee”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 7.

²²³ Refugee Convention, at Art. 1(A)(2).

²²⁴ *Canada (Minister of Employment and Immigration) v. Akl*, (1990) 140 NR 323 (Can. FCA, Mar. 6, 1990); *ELLM, Refugee Appeal No. 70074/96*, [1998] NZAR 252 (NZ RSAA, Sept. 17, 1996). Australian legislation that denies dual or multiple citizens even the right to lodge an application for a protection visa without the permission of the Minister (Migration Act 1958 (Cth), ss. 91M–Q) raises the possibility of non-compliance with the Convention. While a dual or multiple national must accept that her claim will be assessed in relation to each country of citizenship, under no circumstance may she be denied access to a refugee status procedure altogether given the clear language of the second paragraph of Art. 1(A)(2).

²²⁵ *Ward* (Can. SC, 1993), at 753.

So long as the second citizenship has been lawfully bestowed,²²⁶ the duty to assess claims in relation to each state of citizenship applies even when the dual citizen has never set foot in her second country of nationality, and even if she would prefer not to do so. For example, in *Jong*²²⁷ the Full Federal Court of Australia was called upon to consider the claim of an individual born in East Timor in 1973, at which time Portugal exercised sovereignty over the territory. The reviewing court agreed with the government's position that despite solid evidence of risk in relation to Indonesia – the then-governing power in East Timor, which had bestowed its citizenship on the East Timorese²²⁸ – Mr. Jong was required to avail himself of the benefit of the Portuguese citizenship he had acquired at birth.²²⁹ He could not therefore qualify as a refugee despite the clear personal challenges presented by the need to live in Portugal:

Although the material indicates that there is an East Timorese community in Portugal, there is no suggestion that Mr Jong has any personal or family connections there. On the other hand, it is evident from the material that Mr Jong has substantial family connections with Australia and he has, of course, now lived here for several years. It must be said, however, that this does not assist his application for recognition as a refugee. For that purpose his connections here must be treated as irrelevant. What he seeks is international protection; and that is not to be given, under the Refugee[] Convention, where national protection is available.²³⁰

The major caveat to the principle of deferring to protection by a second state of citizenship is the need to ensure *effective*, rather than merely formal, nationality.²³¹ The notion of

²²⁶ The International Court of Justice has found that citizenship may be lawfully bestowed by a state only where there is a “genuine link” between the granting state and the recipient of its citizenship. Specifically, the court determined that, as a matter of international law, nationality should be understood as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”: *Nottebohm (Liechtenstein v. Guatemala) (Second Phase)*, [1955] ICJ Rep 4 (ICJ, Nov. 18, 1953), at 23.

²²⁷ *Jong Kim Koe* (Aus. FFC, 1997).

²²⁸ The lawfulness of citizenship bestowed by a colonial power in view of the commitments in the UN Charter to the self-determination of peoples may be questioned, though the Federal Court of Australia identified “no treaty or practice which requires a former colonial power to withdraw its nationality, already conferred on inhabitants of its former colony, in circumstances where a right of self-determination has not yet been exercised”: *ibid.*, at 518.

²²⁹ In the subsequent decision of *Tji* (Aus. FC, 1998) the court reached a different decision on access to Portuguese citizenship by East Timorese, and therefore a different conclusion on access to refugee status in Australia.

²³⁰ *Jong Kim Koe* (Aus. FFC, 1997), at 519.

²³¹ Commenting on this analysis, the Canadian Federal Court of Appeal observed that “implicit in this proposition is the notion that . . . we are concerned with people who possess real rights”: *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21 (Can. FCA, May 11, 1998), at 36; see also *Martinez v. Canada (Minister of Citizenship and Immigration)*, (1996) 114 FTR 113 (Can. FCTD, Jun. 6, 1996), at 117–18 [13]. Some reluctance to vet a putative second citizenship on grounds of effectiveness has, however, been expressed in the United Kingdom, based in part on an overly broad reading of the notion of “effectiveness”: see e.g. *KA (Statelessness: Meaning and Relevance) Stateless v. Secretary of State for the Home Department*, [2008] UKAIT 00042 (UKAIT, Sept. 13, 2007), at [7]. The alternative proposed by the UK tribunal – namely, to inquire whether “it is reasonably likely that the authorities of the state concerned will accept the person if returned as one of its own nationals” – does little to change the focus of the effectiveness inquiry: see *MA (Disputed Nationality) Ethiopia v. Secretary of State for the Home Department*, [2008] UKAIT 00032 (UKAIT, Sept. 10, 2007), at [110].

effective nationality does not mean that the putative country of second citizenship is to be treated as a country of reference only if it provides protection against persecution and would ensure respect for human rights. While such issues are clearly relevant to the assessment of risk, they do not inform the threshold question of whether putative nationality is effective such as to require consideration of risks in that country. Rather, the issue of effectiveness focuses squarely on “a range of practical questions.”²³² In *Tji*,²³³ for example, it was determined that nationality is not effective if the putative state of citizenship “does not accept that [its nationality] laws apply in the way [assumed]. That is to say, one essential element in the concept of an ‘effective nationality’ is the recognition of the existence of nationality by the State of nationality.”²³⁴ Similar concerns of ineffectiveness would arise where the benefits of nationality, while theoretically available, cannot in practice be accessed by the applicant. This would be the case, for example, where the applicant is unable to travel to or enter the territory in which the rights associated with nationality are in principle available.²³⁵ As affirmed by the Supreme Court of Canada, “[a]n underlying premise . . . is that citizenship carries with it certain basic consequences, such as the right to gain entry to the country at any time.”²³⁶ Where practical impediments of this kind preclude availment of a *de jure* second or other citizenship, the putative second nationality is not effective on the terms of Art. 1(A)(2) itself.

As suggested by the Full Federal Court of Australia, the correct approach is therefore to refuse to treat a country whose nationality is purely formal rather than pragmatically effective as a country of reference:

To interpret “nationality” for the purposes of Article 1A(2) as something of a “merely formal” character . . . instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugee[] Convention. Nor would such a construction advance, in any practical way, another object of the Refugee[] Convention, namely the precedence of national protection over international protection. That precedence has no obvious relevance where national protection is not effective . . .

Given the objects of the Convention, it can hardly have been intended that a person who seeks international protection to which, but for a second nationality[,], he or she would clearly be entitled, would, as a consequence of a formal but relevantly ineffective nationality, be denied international protection and, not being a “refugee,” could be sent back to the country in which he or she feared, and had a real chance of, being persecuted.²³⁷

1.3.2 Inchoate nationality

The plain language of the refugee definition defines the country of reference as the state of which the applicant “is” a national.²³⁸ Germov and Motta thus understandably take the view

²³² *Jong Kim Koe* (Aus. FFC, 1997), at 521. ²³³ *Tji* (Aus. FC, 1998). ²³⁴ *Ibid.*, at 696.

²³⁵ *Jong Kim Koe* (Aus. FFC, 1997). This is a real concern in the post-colonial context since “[a]fter colonial territories achieved independence, most of their inhabitants lost the right to enter the metropolitan territory as its nationals, unless they had some special links with that territory”: Sohn and Buerghenthal, *supra* n. 190, at 43.

²³⁶ *Ward* (Can. SC, 1993), at 694. ²³⁷ *Jong Kim Koe* (Aus. FFC, 1997), at 520–21.

²³⁸ Refugee Convention, at Art. 1(A)(2).

that “[w]here nationality remains ‘prospective’ (that is, according to the law of that country the applicant does not, at the time of determination of the refugee claim, possess ‘in fact’ that nationality) then the Convention does not require assessment of the applicant’s claims against that state as a country of nationality.”²³⁹ As a matter of strict literal construction, this is undoubtedly correct. An asylum state could still avail itself of the flexibility to defer its duty of protection to the state offering its citizenship to the applicant.²⁴⁰ Assuming that it is a country with which the applicant “already has a connection or close links,”²⁴¹ that country could be asked to consider the asylum request. If it chose instead to grant the applicant its citizenship and to extend protection on that basis, her refugee status would automatically come to an end.²⁴²

Rather than pursuing this option, courts have increasingly observed that a strict construction of the country of reference rule is difficult to reconcile to the Convention’s overarching objective of providing surrogate national protection only to those who do not have a state of nationality able and willing to protect them. At least when a country’s nationality is available for the asking and could be acquired by means of a non-discretionary formality, there is indeed a strong substantive logic to treating that state as a country of reference. Taking account of the object and purpose of the treaty, it can reasonably be said that a country with which an applicant has a “genuine link”²⁴³ and that has made its citizenship available to an applicant is, in substance, a country of nationality for refugee law purposes.

For example, the Federal Court of Canada in *Bouianova*²⁴⁴ considered the case of a woman of Russian ethnicity who alleged a risk of ethnic persecution in Latvia, where she had lived for some fourteen years before coming to Canada. But evidence was adduced that because Bouianova had been born near Moscow, she was automatically entitled to Russian citizenship. Specifically, Russian authorities had confirmed that she need only request Russian citizenship, send them her USSR passport, “and we shall put the necessary stamp in [her]

²³⁹ R. Germov and F. Motta, *Refugee Law in Australia* (2003), at 147.

²⁴⁰ “Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State”: UNHCR Executive Committee Conclusion No. 15 (XXX), “Refugees without an Asylum Country,” UN Doc. A/34/12/Add.1 (Oct. 16, 1979) (“UNHCR Executive Committee Conclusion No. 15”), at (h)(iv). Thus, for example, in *R v. Immigration Appeal Tribunal; Ex parte Miller*, [1988] Imm AR 1 (Eng. HC, Jul. 2, 1987), affirmed in *Miller v. Immigration Appeal Tribunal*, [1988] Imm AR 358 (Eng. CA, Feb. 24, 1988), the English High Court was guided by Conclusion No. 15 to reach the view that a Jewish South African who had resided in Israel for nearly four years before coming to the United Kingdom, and who appeared to be entitled to immigrant status in Israel pursuant to the Law of Return, ought reasonably to seek protection from Israel before claiming status elsewhere. Such a decision is suspensive only, since Conclusion No. 15 requires that status determination proceed in the event that the state with which the claimant has close links ultimately declines protection: *Minister for Immigration and Multicultural Affairs v. Amani*, [1999] FCA 1040 (Aus. FC, Aug. 2, 1999), at [35], per Lee J., citing to relevant analysis in Hathaway, *Refugee Status*, at 46.

²⁴¹ UNHCR Executive Committee Conclusion No. 15, *supra* n. 240, at (h)(iv).

²⁴² Refugee Convention, at Art. 1(C)(3). See *infra* Ch. 6.1.5.

²⁴³ The genuine link test derives from the finding of the International Court of Justice in *Nottebohm*: see *supra*, at n. 226.

²⁴⁴ *Bouianova v. Canada (Minister of Employment and Immigration)*, (1993) 67 FTR 74 (Can. FCTD, Jun. 11, 1993).

passport.”²⁴⁵ On the basis of this evidence, the Federal Court sensibly elected to treat Russia as a country of nationality:

In my view, the applicant, by simply making a request and submitting her passport to be stamped, becomes a citizen of Russia. On the evidence before me, there is no discretion by the Russian officials to refuse her Russian citizenship. I do not think the necessity of making an application, which in these circumstances is nothing more than a mere formality, means that a person does not have a country of nationality just because they choose not to make such an application.²⁴⁶

As this case makes clear, the critical points are that access to citizenship involves “a mere formality,” and most importantly that “there is no discretion” to refuse citizenship.²⁴⁷ These facts bespeak what is perhaps best described as *inchoate* nationality, signaling that the citizenship actually exists in embryonic form and needs simply to be activated by means of a request that will clearly be acceded to. Where an individual possesses inchoate nationality, there is no principled basis to distinguish her circumstances from those of a person born with dual or multiple nationality, whose claim would of necessity be assessed by reference to each of her countries of citizenship.²⁴⁸ Assuming of course that there is a genuine link between the individual and the country of inchoate citizenship,²⁴⁹ and that the citizenship once activated will indeed be effective citizenship,²⁵⁰ a country of inchoate nationality is a country of reference for the assessment of refugee status.

Three key problems have, however, arisen in the application of an otherwise sound interpretation of the refugee definition.

First, judicial reasoning has at times elided non-discretionary access with contingent access to nationality. The slippery slope can be seen in the holding of the Federal Court of Canada that it is enough if it is “relatively simple” to secure a country’s citizenship.²⁵¹ This less demanding formula led to a subsequent ruling that all Jews should avail themselves of Israeli citizenship under that country’s Law of Return rather than seeking protection as refugees in an asylum country.²⁵² Finding that the Azerbaijani victim of anti-Semitic attacks had “ready and automatic” access to Israeli citizenship, the court upheld the decision of the tribunal below to deny refugee status.²⁵³ While this understanding of the Law of Return was later rejected (on the basis that access to Israeli citizenship was far from assured

²⁴⁵ *Ibid.*, at 76 [6]. ²⁴⁶ *Ibid.*, at 76 [8].

²⁴⁷ As such, where there is evidence that embassy officials of a putative country of citizenship are reluctant to acknowledge the claim to nationality, it would be wrong to assess refugee status in relation to that country: *Secretary of State for the Home Department v. SP (North Korea)*, [2012] EWCA Civ 114 (Eng. CA, Feb. 16, 2012).

²⁴⁸ See *supra* Ch. 1.3.1.

²⁴⁹ *Katkova v. Canada (Minister of Citizenship and Immigration)*, (1997) 130 FTR 192 (Can. FCTD, May 2, 1997). See generally text *supra*, at n. 226.

²⁵⁰ See text *supra*, at n. 231.

²⁵¹ *Chavarria v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ 17 (Can. FCTD, Jan. 3, 1995), at [60].

²⁵² The Law of Return (Israel), Statute 5710-1950 (Jul. 5, 1950) (Israel Ministry of Foreign Affairs trans.), declares the right of Jews to immigrate to Israel, providing *inter alia* that “[e]very Jew has the right to come to this country as an *oleh*”: s. 1. There are, however, exceptions where a Jew is deemed to have taken actions against the Jewish people, is a public health or security risk, or is a criminal who may endanger public welfare: s. 2(b)(1)–(3).

²⁵³ *Grygorian v. Canada (Minister of Citizenship and Immigration)*, (1995) 111 FTR 316 (Can. FCTD, Nov. 23, 1995), at 320; application for judicial review denied Dec. 15, 1995.

given the existence of ministerial discretion to deny citizenship on such grounds as risk to public health or security),²⁵⁴ the belief that the applicant must exert reasonable efforts to acquire a second safe citizenship has attracted support, both in Canada²⁵⁵ and elsewhere.²⁵⁶ Indeed, the relevant provision of the European Union's Qualification Directive is framed in extraordinarily general terms, providing only that an applicant may "reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship."²⁵⁷ There is, however, no basis in the text of the Convention for such a vague rule. While inchoate nationality – meaning automatic, non-discretionary access to citizenship – may, for the reasons described above, be deemed the equivalent of extant citizenship ("of which he is a national"),²⁵⁸ the ability simply to be considered for a second citizenship is in no sense the same as possession of that citizenship.

A second worrisome trend shows just how far some courts have diverged from the inchoate nationality standard in defining an applicant's country of reference. In the case of *Williams*,²⁵⁹ the Canadian Federal Court of Appeal considered the claim of a Rwandan citizen, born in that country and who had lived there all but eight years of his life. Under *jus sanguinis* rules, he had also acquired Ugandan citizenship at birth, but lost that nationality by operation of law at age eighteen. Ugandan law would, however, allow him to re-acquire its citizenship if he were to renounce his Rwandan nationality. The key question was therefore whether the inchoate nationality principle developed in *Bouianova* could be relied on to deem Uganda a country of nationality despite the inability to secure Ugandan citizenship without renunciation of Rwandan citizenship.

The court insisted that the only relevant question was whether "it is within the control of the applicant to acquire the [second] citizenship,"²⁶⁰ explaining that

[w]hile words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection . . . and it is not restricted . . . to mere technicalities such as filing appropriate documents.²⁶¹

Applying this "control" principle, the court showed not the slightest concern that its holding impliedly required the applicant to forfeit the citizenship of the country of his birth, and where he had lived nearly all of his life:

²⁵⁴ *Katkova* (Can. FCTD, 1997).

²⁵⁵ *Williams v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 FCR 429 (Can. FCA, Apr. 12, 2005).

²⁵⁶ See e.g. *Kuhai v. Immigration and Naturalization Service*, (1999) 199 F.3d 909 (USCA, 7th Cir., Dec. 9, 1999); *NAEN v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2004) 135 FCR 410 (Aus. FFC, Feb. 13, 2004); *Teclé v. Secretary of State for the Home Department*, [2002] EWCA Civ 1358 (Eng. CA, Sept. 6, 2002).

²⁵⁷ Qualification Directive, *supra* n. 51, at Art. 4(3)(e). In line with this overstated view of relevant international law, France denied protection to a claimant of Armenian origin, formerly a citizen of the Soviet Union, on the simple basis that he had not yet sought the citizenship of Armenia: *A*, 553160 (Fr. CRR [French Refugee Appeals Commission], Feb. 27, 2007).

²⁵⁸ Refugee Convention, at Art. 1(A)(2). ²⁵⁹ *Williams* (Can. FCA, 2005).

²⁶⁰ *Ibid.*, at 439 [22], citing *Bouianova* (Can. FCTD, 1993), at 77 [12].

²⁶¹ *Williams* (Can. FCA, 2005), at 439 [22].

[W]e are not dealing here with forcing an individual to renounce his citizenship. The respondent is free and remains free, in Canada, not to renounce his Rwandan citizenship and not to seek Ugandan citizenship. If he chooses not to renounce and not to seek Ugandan citizenship, he will have to live with the consequences of his choice.

...

[P]recisely because citizenship is a fundamental right, when faced with a choice between becoming a refugee in one country and a citizen in another, a person would gain by opting for citizenship status rather than for refugee status.

... [A] person cannot be said to be deprived of the right of citizenship when he is given the possibility of renouncing the citizenship of a country where he is at risk of persecution in exchange [for] acquiring as a matter of course the citizenship of a country where he is not at risk. One's loss is one's gain.²⁶²

This reasoning is cause for concern. The first point amounts to saying that Williams was free to be persecuted if he did not apply for Ugandan citizenship, since absent Ugandan citizenship the only country with a duty to receive him back was Rwanda,²⁶³ where a genuine risk was assumed to exist. And while the appeal to enlightened self-interest in the latter part of the court's reasons may be compelling, there is no basis in law to insist that an individual give up her citizenship in order to be safe. To the contrary, it has always been understood that the most desirable outcome is for a refugee ultimately to be able to repatriate in safety to her country of origin²⁶⁴ – a result that may well have been foreclosed by the court's insistence in this case on renunciation of Rwandan nationality. More generally, this case exemplifies a critical limitation on the notion of inchoate nationality, namely that inchoate nationality is not to be equated with the ability to secure a second citizenship at any cost. In view of the underlying purposes of the Refugee Convention, a state should not be deemed a country

²⁶² *Ibid.*, at 441–42 [29]–[32]. The court also indicated that its reasoning was supported by the fact that requiring the applicant to accept Ugandan citizenship would not render him stateless. But this argument does not aid the court's analysis since allowing him to retain his original Rwandan citizenship would have the same effect.

²⁶³ “[I]f no other state will accept the alien, deportation will be to the state of his nationality”: Jennings and Watts, *supra* n. 50, at 946.

²⁶⁴ See e.g. UNHCR Executive Committee Conclusion No. 18 (XXXI), “Voluntary Repatriation,” UN Doc. A/35/12/Add.1 (Oct. 16, 1980); UNHCR Executive Committee Conclusion No. 41 (XXXVII), “General Conclusion on International Protection,” UN Doc. A/41/12/Add.1 (Oct. 13, 1986); UNHCR Executive Committee Conclusion No. 46 (XXXVIII), “General Conclusion on International Protection,” UN Doc. A/42/12/Add.1 (Oct. 12, 1987); UNHCR Executive Committee Conclusion No. 55 (XL), “General Conclusion on International Protection,” UN Doc. A/44/12/Add.1 (Oct. 13, 1989); UNHCR Executive Committee Conclusion No. 62 (XLI), “Note on International Protection” (Oct. 5, 1990); UNHCR Executive Committee Conclusion No. 68 (XLIII), “General Conclusion on International Protection,” UN Doc. A/47/12/Add.1 (Oct. 9, 1992); UNHCR Executive Committee Conclusion No. 74, *supra* n. 155; UNHCR Executive Committee Conclusion No. 79 (XLVII), “General Conclusion on International Protection,” UN Doc. A/51/12/Add.1 (Oct. 11, 1996); UNHCR Executive Committee Conclusion No. 81 (XLVIII), “General Conclusion on International Protection,” UN Doc. A/52/12/Add.1 (Oct. 17, 1997); UNHCR Executive Committee Conclusion No. 85 (XLIX), “Conclusion on International Protection,” UN Doc. A/53/12/Add. 1 (Oct. 30, 1998); UNHCR Executive Committee Conclusion No. 89 (LI), “Conclusion on International Protection,” UN Doc. A/55/12/Add.1 (Oct. 13, 2000); UNHCR Executive Committee Conclusion No. 101 (LV), “Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees,” UN Doc. A/AC.96/1003 (Oct. 8, 2004).

of reference if its citizenship can only be acquired at significant human rights cost to the applicant.²⁶⁵

A third development is, however, the most problematic. Rather than treating a true country of inchoate nationality as a “country of nationality” for refugee assessment purposes, there is a disturbing trend simply to *dismiss* the asylum claims of applicants who fail to apply for that second citizenship. In *Williams*, for example, the court concluded that “where citizenship in another country is available, an applicant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his power to acquire that other citizenship.”²⁶⁶ Much the same approach was approved by the English Court of Appeal in *Teclé*, which upheld a refusal of protection where the applicant was adjudged to have made insufficient efforts to acquire Eritrean citizenship.²⁶⁷ This approach is patently at odds with the requirements of the Refugee Convention, which includes no provision for the exclusion from refugee status of persons deemed insufficiently activist in the pursuit of a second nationality.²⁶⁸ There is no difficulty with a decision-maker treating a true state of inchoate nationality as a country of reference, but the Convention affords no basis for a claim to be dismissed because efforts to secure a second citizenship are deemed inadequate.

In contrast to these three trends which inappropriately restrict access to recognition of refugee status, there is one interpretive approach that arguably results in an under-inclusive application of the inchoate nationality principle. In *Tji*,²⁶⁹ the Federal Court of Australia declined to treat Portugal as a country of nationality for an East Timorean in reliance on the Portuguese government’s statement that the applicant “has never applied for Portuguese citizenship, therefore there is no basis for him to enjoy protection from the Portuguese authorities. Portugal has consistently stated that the attribution of Portuguese citizenship to East Timorese born persons presupposes an individual and voluntary application that reveals the wish to become a Portuguese national. It means that East Timorese are not automatically Portuguese nationals.”²⁷⁰

The refusal to treat a country as a state of inchoate nationality on the grounds that a volition requirement of its domestic citizenship law has not been satisfied by the applicant could be argued to be no more than a reasonable deferral to the rule that it is for each state

²⁶⁵ Not only is the approach adopted in *Williams* a dramatic extension beyond the notion of inchoate nationality, but the actions of the asylum country may even breach the Civil and Political Covenant’s guarantee that “[n]o one shall be arbitrarily deprived of the right to enter his own country”: Civil and Political Covenant, *supra* n. 24, at Art. 12(4). At least where the asylum state requiring the applicant to forfeit her home citizenship knows (as on the facts of *Williams*) that the country of origin does not countenance dual citizenship, its actions presumptively preclude the individual’s right to return home, assuming a clear right of entry to be limited to citizens.

²⁶⁶ *Williams* (Can. FCA, 2005), at 441 [27]. ²⁶⁷ *Teclé* (Eng. CA, 2002), at [18], [23].

²⁶⁸ “The exclusion clauses in the 1951 Convention are exhaustively enumerated. No other exclusion provisions can therefore be incorporated into national legislation”: Expert Roundtable, Lisbon, May 2001, “Summary Conclusions: Exclusion from Refugee Status,” in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 479, at 485 [33]. Accord UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UN Doc. HCR/GIP/03/05 (Sept. 4, 2003), at 2 [3]: “The exclusion clauses in the 1951 Convention are exhaustive.” See generally *infra* Ch. 7.

²⁶⁹ *Tji* (Aus. FC, 1998).

²⁷⁰ Embassy of Portugal, Press Communiqué, June 1998, cited *ibid.*, at 697. This led the court to observe that “East Timoreans are not automatically regarded as Portuguese nationals . . . [F]or an East Timorese to become a national he or she must make an application to become a national.”

to decide who its citizens are.²⁷¹ But this would be misplaced deference, since the impact of treating the state as a country of reference is in no sense to compel that government to grant its citizenship; it is rather to assess the true need for protection of the applicant in line with the requirements of the refugee definition. Implicit in the *Bouianova* holding is the duty of an applicant to activate inchoate citizenship, in that case by the act of submitting her passport to Russian officials. So long as the effective citizenship of a state with which the individual has a genuine link is truly available for the asking and can be acquired by means of a non-discretionary formality, it is difficult to imagine a good reason to decline to treat that state as a country of reference simply because the applicant has yet to make the necessary request.

In procedural terms, application of the inchoate nationality principle, like the country of reference inquiry as a whole, raises questions of fact which are subject to the usual shared duty of fact-finding.²⁷² The possible existence of a country of inchoate nationality should therefore be indicated by the authorities of the assessing state, with evidence provided to substantiate the view that the applicant has non-discretionary access to effective nationality in some country other than that identified by the applicant as her country of reference. At that point, the applicant is sensibly understood to have a duty to rebut the evidence of inchoate nationality, failing which the state may be deemed a country of reference.²⁷³

In contrast, there is reason to be concerned by the failure of the English Court of Appeal in *Teclé*²⁷⁴ to impugn the tribunal's view that the daughter of an Eritrean who fought for the losing side in that country's war of independence had failed to satisfy "the onus of proof . . . to show that she was . . . not entitled, or not likely, to receive appropriate documentation to evidence her Eritrean nationality."²⁷⁵ Not only does the Convention require a shared approach to such fact-finding, but the court was aware that access to Eritrean citizenship was contingent on proof of eligibility based on the testimony of "three witnesses of appropriate standing,"²⁷⁶ and that the Eritrean citizenship process had traditionally been tainted by politics and made subject to payment of a "voluntary" tax by expatriates absent from Eritrea during the independence struggle²⁷⁷ – surely strong evidence that there was less than automatic access to the second citizenship. The applicant had moreover testified that when she went to the embassy, she was advised "that she would not get Eritrean nationality."²⁷⁸ In such circumstances, there was no good reason to deem Eritrea a country of inchoate nationality, much less to dismiss the protection claim on the basis of the applicant's failure to seek Eritrean citizenship.

In sum, true inchoate nationality – meaning non-discretionary citizenship available for the asking and which can be acquired by means of a non-discretionary formality – is reasonably understood to be nationality for purposes of defining the country of reference for assessment of refugee status. The citizenship on offer must of course be effective, and it must be on offer from a country with which the individual has a genuine link of the kind

²⁷¹ Jennings and Watts, *supra* n. 50, at 852. See also Brownlie, *supra* n. 45, at 383.

²⁷² See *infra* Ch. 2.4.2.

²⁷³ See e.g. *Tit v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 556 (Can. FCTD, Jun. 1, 1993).

²⁷⁴ *Teclé* (Eng. CA, 2002).

²⁷⁵ *Ibid.*, at [17]. "In my judgment . . . the Tribunal was entitled . . . to take an adverse view of the fact that the appellant, on whom the burden of proof lay, had not contacted the Eritrean Embassy in London and made an application, supported by the appropriate witnesses, for citizenship": at [23].

²⁷⁶ *Ibid.*, at [21]. ²⁷⁷ *Ibid.*, at [11]. ²⁷⁸ *Ibid.*, at [19].

recognized by international law as the basis for a grant of nationality.²⁷⁹ Inchoate nationality is not, however, the same thing as the ability to seek another country's citizenship, a matter of no relevance to refugee status determination. Neither does it include even ready access to a citizenship which could be acquired only by the forfeiture of the applicant's extant citizenship or other serious risk to human rights. An inquiry into the existence of inchoate nationality is subject to the usual duty of shared fact-finding and, most fundamentally, is never grounds for rejection of a claim but rather simply the basis for identification of the country or countries of reference for the assessment of a relevant risk and consequent entitlement to surrogate national protection.

1.3.3 Stateless persons

The essential goal of the Refugee Convention – to provide surrogate national protection to persons whose own country is unable or unwilling to protect them from the risk of being persecuted there²⁸⁰ – sits uneasily with the situation of stateless persons.²⁸¹ Are all stateless persons refugees because by definition they do not benefit from national protection? Or conversely are stateless persons excluded from refugee status altogether because the source of their dilemma is less the failure of a national government to protect them than the absence of a state that can be said to owe them a duty of protection?

This conceptual confusion is historically explicable. During the first phase of international refugee law, formal statelessness was the basis for recognition as a refugee.²⁸² The expanded focus of refugee law in the years leading up to the Second World War recognized *de facto* lack of protection as an equally compelling basis for international protection, but continued to protect stateless persons adrift in the international system as refugees.²⁸³

The divorce of *de jure* statelessness and refugee status came only during the drafting of the 1951 Convention. The background study prepared by the Secretary-General in 1949²⁸⁴ proposed a revised and consolidated convention relating to the status of all persons without national protection. The Economic and Social Council approved the drafting of a convention that would extend comprehensive humanitarian protection to both persons who lacked formal or *de jure* protection (“stateless persons”) and persons who lacked *de facto* protection, notwithstanding their retention of a particular nationality (“refugees”).²⁸⁵ The Conference of Plenipotentiaries, however, was of the view that refugees presented a more serious humanitarian problem.²⁸⁶ It viewed the dilemma of stateless persons as

²⁷⁹ See *supra*, at n. 226, and text *supra*, at nn. 231–37. ²⁸⁰ See text *supra* at n. 183; and *infra* Ch. 4.

²⁸¹ The question of whether an individual is or is not stateless must, of course, take account of relevant national law: *Darji v. Secretary of State for the Home Department*, [2004] EWCA Civ 1419 (Eng. CA, Oct. 28, 2004).

²⁸² J. C. Hathaway, “The Evolution of Refugee Status in International Law, 1920–1950,” (1984) 33 ICLQ 348, at 359–60.

²⁸³ *Ibid.*, at 361.

²⁸⁴ UN Ad Hoc Committee on Refugees and Stateless Persons, “A Study of Statelessness,” UN Doc. E/1112 (Aug. 1, 1949).

²⁸⁵ *Ibid.*

²⁸⁶ “The applicability of the draft convention should . . . be limited to refugees. It should not be based upon a confusion between the humanitarian problem of the refugees and the primarily legal problem of stateless persons, which should be dealt with by a body of legal experts, but should not be included in the proposed convention”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.2 (Jan. 17, 1950), at 6 [19].

distinct²⁸⁷ and less urgent than the needs of refugees.²⁸⁸ The Conference therefore agreed to restrict the scope of the new convention to refugees, that is, to persons at risk of being persecuted and who could in consequence no longer enjoy the benefits of citizenship in their own state.

The disabilities that follow from statelessness – that is, from having citizenship in no country²⁸⁹ – were instead addressed by the 1954 Convention relating to the Status of Stateless Persons,²⁹⁰ now supplemented by the 1961 Convention on the Reduction of Statelessness.²⁹¹ The 1954 Stateless Persons Convention mirrors the substantive structure of the Refugee Convention in most respects,²⁹² but suffers from a serious lack of state participation²⁹³ – a regrettable, but nonetheless clear, contemporary affirmation of the drafters’ assessment that governments are less committed to protecting stateless persons than refugees.²⁹⁴ While advocates have at times sought to invoke failure to accede to the statelessness regime as a reason to assimilate stateless persons to refugees, courts have appropriately resisted this appeal.²⁹⁵

²⁸⁷ “Like the French Government, the Government of the United States considered that the problem of refugees differed from that of stateless persons and ought to be considered separately”: *ibid.*, at 5 [15].

²⁸⁸ “It was . . . indisputable that refugees and *de facto* stateless persons were more unfortunately placed than *de jure* stateless persons, and it was therefore more urgent to remedy their situation”: Statement of Mr. Guerreiro of Brazil, UN Doc. E/AC.32/SR.3 (Jan. 17, 1950), at 4 [13]. Several other delegates, including the representatives of both Denmark and Turkey, agreed: *ibid.*, at 5–6 [19]–[23] (Statements of Mr. Larsen of Denmark and Mr. Kural of Turkey). Thus “including in the convention provisions to cover stateless persons who were not refugees . . . was secondary in the sense that the situation of stateless persons who were not refugees did not raise any urgent social or humanitarian problems”: *ibid.*, at 4 [11] (Statement of Mr. Rain of France).

²⁸⁹ Perhaps most critically, “[t]he right to return, without any doubt, applies to citizens; it may also be argued that it applies to permanent residents. As long as a person is a citizen, he or she cannot be barred from returning to his or her country[;] however, if a person is deprived of his or her citizenship, then the person can be barred”: Sohn and Buergenthal, *supra* n. 190, at 7.

²⁹⁰ Adopted Sept. 28, 1954, entered into force Jun. 6, 1960, 360 UNTS 117 (“Stateless Persons Convention”).

²⁹¹ Adopted Aug. 30, 1961, entered into force Dec. 13, 1975, 989 UNTS 175 (“Reduction of Statelessness Convention”).

²⁹² While the structure of the two conventions is quite similar, “[t]he draft Convention on the Status of Refugees, however, gave somewhat greater benefits, it being assumed that States would be willing to go further in respect of refugees than in respect of stateless persons generally, in view of the greater humanitarian factors involved”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.158 (Aug. 15, 1950), at 13.

²⁹³ “For the non-refugee stateless, there is both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness . . . [But] there is not sufficiently widespread adherence to, or implementation of, these instruments”: UNHCR, “Report of the Working Group on Solutions and Protection to the Forty-Second Session of the Executive Committee of the High Commissioner’s Programme,” UN Doc. EC/SCP/64 (Aug. 12, 1991), at [52]. As of June 2013, there were only seventy-seven state parties to the 1954 Convention and fifty-one state parties to the 1961 Convention: see United Nations, “United Nations Treaty Collection: Refugees and Stateless Persons,” status as at June 13, 2013, available at: www.refworld.org/statelessness.html (accessed June 14, 2013).

²⁹⁴ The UNHCR has appropriately resisted amendment of refugee law to assist stateless persons, calling instead for the more efficient and effective implementation of the conventions on statelessness: UNHCR, “Report of the Working Group on Solutions and Protection,” *supra* n. 293, at [52].

²⁹⁵ “That Canada may not be a signatory to the two [statelessness] Conventions cited is of no aid to the applicant”: *Arafa v. Canada (Minister of Employment and Immigration)*, (1993) 70 FTR 178 (Can. FCTD, Nov. 3, 1993), at 180; “As Canada has not ratified the Convention relating to the Status of Stateless

This is not to say, however, that a stateless person can never be a refugee. Despite their clear rejection of the proposal to deem *all* stateless persons to be refugees,²⁹⁶ the drafters of the Convention were equally emphatic that stateless persons could, in some situations, qualify as refugees.²⁹⁷ Specifically, where a stateless person satisfies the requirements of the refugee definition,²⁹⁸ she is both a stateless person and a refugee, entitled to invoke the protections of both regimes.

What prompted the drafters to treat a subset of stateless persons as refugees? Under international law stateless persons who have resided in a country for a significant period of time may be said to “have acquired prima facie the effective nationality of the host state,”²⁹⁹ including in particular a right to be protected against expulsion.³⁰⁰ This understanding that some stateless persons – despite their absence of formal citizenship – can have a country appropriately defined to be “theirs” has been relied on by the UN Human Rights Committee to determine that the obligation to ensure that “[n]o one [is] arbitrarily deprived of the right to enter his own country”³⁰¹ may be invoked not only by citizens, but “might embrace other categories of long-term residents, including but not limited to stateless persons.”³⁰² Similarly, in the context of state succession, the General Assembly has recognized that all persons “habitually resident” in a given territory are presumed to have a right to acquire the

Persons . . . , a stateless claimant who falls outside the refugee definition is apparently without recourse in Canada”: *Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 723 (Can. FCTD, Dec. 13, 1993), at 736.

²⁹⁶ “The problem of stateless persons who were not refugees should, however, be kept separate from the question of refugees, especially since there were doubtless stateless persons who were in no need of protection by the United Nations”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.2 (Jan. 17, 1950), at 9 [28].

²⁹⁷ “[T]here were two categories of stateless persons: those who were also refugees, who would, of course, benefit from the draft convention, and those who were not refugees. Almost all refugees were in need, a fact which gave the problem its special urgency. The same could not be said of stateless persons who were not also refugees”: *ibid.*, at 7–8 [22] (Statement of Mr. Rain of France).

²⁹⁸ Refugee Convention, at Art. 1(A)(2): “or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

²⁹⁹ Brownlie, *supra* n. 45, at 521. ³⁰⁰ *Ibid.*

³⁰¹ Civil and Political Covenant, *supra* n. 24, at Art. 12(4).

³⁰² Human Rights Committee, General Comment No. 27: Freedom of Movement, UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999), at [20]. In its foundational decision on this issue, the UN Human Rights Committee invoked the Art. 13 limits on expulsion of aliens to those not “lawfully in” the state party’s territory to determine that there are “certain categories of individual who, while not nationals in a formal sense, are also not ‘aliens’ within the meaning of article 13”: *Stewart v. Canada, Communication No. 538/1993*, UN Doc. CCPR/C/58/D/538/1993 (Nov. 1, 1996), at [12.3]. Such persons may claim the state in question as their “own country” for purposes of Art. 12(4), and include “at the very least, an individual who, because of his special ties to or claims in relation to a given [country] cannot there be considered to be a mere alien . . . [which] might embrace . . . long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”: at [12.4]. Applying this principle, the Human Rights Committee determined more recently that an individual born in Sweden but who moved to Australia as an infant and had spent the whole of his life there “ha[d] established that Australia was his own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden”: *Nystrom v. Australia, Communication No. 1557/2007*, UN Doc. CCPR/C/102/D/1557/2007 (Jul. 18, 2011), at [7.5].

citizenship of a successor state with sovereignty over that territory.³⁰³ And the International Law Commission has determined that a country is entitled to undertake the diplomatic protection of a person who is both lawfully and habitually resident in its territory.³⁰⁴ In all of these ways, the fact of *habitual residence* is understood to give rise to a bond between the stateless individual and a state that approximates in critical respects the relationship between a citizen and her state. 5

Committed to providing surrogate national protection to persons denied their primary protective relationship with a state³⁰⁵ due to the risk of being persecuted there,³⁰⁶ the drafters sensibly assimilated stateless persons who had a habitual residence – and hence whose enforced departure from their home denied them benefits akin to those enjoyed by citizens – to the more usual category of refugees. The Refugee Convention thus provides that whereas a person with a citizenship qualifies by reference to risk in the country of citizenship, the stateless person’s case is to be established in relation to her “country of . . . former habitual residence.”³⁰⁷ Where a stateless person had a national home (despite her *de jure* statelessness) which she was forced to abandon on pain of persecution, both the nature of her predicament and the remedy for same make refugee status the appropriate international response. 10

“Habitual residence” is an international legal term which dates back to at least the 1896 Hague Convention on Civil Procedure.³⁰⁸ It identifies an individual’s “home” on a basis that is less demanding than traditional common law notions of domicile,³⁰⁹ but more than simple residence.³¹⁰ It is the state where the individual has been based for a reasonably 15 20

³⁰³ “Subject to the provisions of the present articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession”: “Nationality of Natural Persons in relation to the Succession of States,” UN Doc. A/RES/55/153 (Jan. 30, 2001), at Annex, Art. 5.

³⁰⁴ International Law Commission, “Report of the International Law Commission on the Work of Its Fifty-Fourth Session (29 April–7 June and 22 July–16 August 2002),” UN Doc. A/57/10 (2002), at 168.

³⁰⁵ See text *supra*, at n. 183; and *infra* Ch. 4. There is Australian authority for the view that a “country” of former habitual residence need not, in fact, be a legally recognized state, so long as the attributes of statehood are in fact present (based on an election to treat Hong Kong prior to reversion to Chinese sovereignty as a stateless person’s country of residence). “Hong Kong at the relevant date had a distinct area with identifiable borders. It had its own immigration laws, and was inhabited by a permanent identifiable community, and therefore in my opinion it was appropriate to treat it as a ‘country’ in accordance with the meaning and purpose of that expression as used in Art 1A of the Convention. In 1965 Hong Kong enjoyed a degree of autonomy in relation to its administration. This lends further support to the submission that it is a ‘country.’ In addition, as a matter of everyday usage of language, it is not inappropriate to refer to a person as coming from, belonging to, or returning to Hong Kong. The Territory was not simply a place or area but possessed the foregoing additional elements which make it appropriate to be treated as a country for Convention purposes”: *Tjhe Kwet Koe* (Aus. FC, 1997), at 299.

³⁰⁶ See *infra* Ch. 3.1. ³⁰⁷ Refugee Convention, at Art. 1(A)(2).

³⁰⁸ Adopted Nov. 14, 1896, entered into force Apr. 27, 1899, 88 British & Foreign State Papers 555. The concept is thought first to have emerged in bilateral treaties of the 1880s: P. R. Beaumont and P. E. McLeavy, *The Hague Convention on International Child Abduction* (1999), at 88.

³⁰⁹ The common law notion of domicile requires both a factual inquiry and evidence of an intention to reside in the putative place of domicile on an ongoing basis. In contrast, the notion of habitual residence insists only on the former (factual) inquiry, leaving open the question of whether an intention to remain indefinitely is also relevant. See e.g. *Whicker v. Hume*, (1858) 7 H.L. Cas. 124, at 160.

³¹⁰ “There is . . . no need to prove any *animus manendi* [intention to remain], because ‘habitual residence’ does not mean domicile [place of permanent residence], but merely residence of some standing or duration”: A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), at 160; “The notion of habitual residence appears to be emerging as a concept acceptable to lawyers from both

significant period of time, and to which she “has ‘the most real connexion.’”³¹¹ It is in this sense a reasonable functional equivalent of the notion of “country of nationality” which defines the country of reference for the refugee claim of a person who has a citizenship,³¹² as it identifies the country with which the stateless applicant enjoyed her most important relationship.³¹³

5 While courts interpreting the refugee definition have not usually looked to cognate branches of international law to construe the notion of a “country of former habitual residence,”³¹⁴ their interpretations have largely conformed to the flexible and purposive character of this term of art. For example, Austrian courts have appropriately insisted
10 on evidence of authorized residence in the putative country of former habitual residence, deeming illegal presence to be insufficient³¹⁵ in view of the need for the nature of residence to have been of a quality roughly equivalent to that enjoyed by a citizen.³¹⁶ There is agreement that more than simply transient presence is required:³¹⁷ the Canadian Federal Court has limited the notion to “a situation where a stateless person was admitted to a given country
15 with a view to a continuing residence of some duration,”³¹⁸ and has taken account of such

common law and civil law traditions, as representing a compromise between domicile and nationality, or at least a more acceptable connecting factor than domicile to be used as an alternative to nationality”: L. Collins, *Dacey and Morris on the Conflict of Laws* (2000), at 154.

³¹¹ Law Reform Commission of Ireland, “Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws” (1981), at 12 [21]. “‘Habitual residence’ clearly imports something greater than casual or fleeting presence in a country, and it may be argued that, if a person’s residence is sufficiently strong to be described as habitual, the present realities should determine his situation rather than an ‘intention’ that is clouded, perhaps by a degree of self-delusion as regards long-term plans”: at 12–13 [21]. The term is not meant to have “an overly technical or idiosyncratic” meaning: S. I. Winter, “Home is Where the Heart is: Determining ‘Habitual Residence’ under the Hague Convention on the Civil Aspects of International Child Abduction,” (2010) 33 Wash. U. J. L. & Pol’y. 351, at 355. Indeed, “[t]o preserve this versatility the Hague Conference has continually declined to countenance the incorporation of a definition”: Beaumont and McEleavy, *supra* n. 308, at 89.

³¹² The notion of a “country of . . . former habitual residence” as an appropriate state of reference is applicable only to stateless persons: see Refugee Convention, at Art. 1(A)(2)[1]. This structure was intended to meet concern expressed by the Director of the International Refugee Organization during the drafting process. “The notion ‘former habitual residence’ has been interpreted by the IRO to apply only to stateless persons . . . It is, therefore, suggested to reconsider the wording of paragraph A(2)(i). In case the words ‘former habitual residence’ should be retained, they might at least be qualified by the terms ‘in the case of stateless persons’”: UN Ad Hoc Committee on Statelessness and Related Problems, *Ad Hoc Committee on Statelessness and Related Problems, Memorandum From the Secretariat of the International Refugee Organization*, UN Doc. E/AC.32/L.16 (Jan. 30, 1950), at 3 [4].

³¹³ A state can be a “country of former habitual residence” even if it is the successor state to a larger country from which the individual departed: *Lenyk v. Canada (Minister of Citizenship and Immigration)*, (1994) 30 Imm. L. R. (2d) 151 (Can. FCTD, Oct. 14, 1994).

³¹⁴ Interpretation in good faith requires attention to “the terms of the treaty *in their context* and in the light of its object and purpose”: Vienna Convention, *supra* n. 178, at Art. 31(1) (emphasis added).

³¹⁵ *SW v. Federal Asylum Authority*, 201.440/0-II/04/98 (Au. UBAS [Austrian Independent Federal Asylum Board], Mar. 20, 1998). But a German court has taken the view that illegal presence which authorities elect not to terminate is also to be deemed “habitual residence”: *10 C 50.07* (Ger. BverwG [German Federal Administrative Court], Feb. 26, 2009).

³¹⁶ *AMM v. Federal Asylum Authority*, 204.398/0-VIII/23/98 (Au. UBAS [Austrian Independent Federal Asylum Board], Aug. 24, 1998).

³¹⁷ *Tarakhani v. Canada (Minister of Citizenship and Immigration)*, (1995) 105 FTR 128 (Can. FCTD, Nov. 10, 1995), at 132 [7]; *El Assadi v. Holder*, (2011) 418 Fed. Appx. 484 (USCA, 6th Cir., Apr. 25, 2011).

³¹⁸ *Maarouf* (Can. FCTD, 1993), at 739, approved in *10 C 50.07* (Ger. BverwG [German Federal Administrative Court], 2009). The Canadian court approved the analysis in Hathaway, *Refugee Status*, at 63, that

factors as whether the country was the applicant's place of birth, whether the applicant has family ties there, and if the country is prepared to issue the applicant travel documents.³¹⁹ As a helpful general rule, the New Zealand refugee tribunal suggested that "the question whether habitual residence [has] been established is a question of fact to be determined on all the circumstances of each case, but the individual should be able to show that he or she has made it his or her abode or the centre of his or her interests."³²⁰

5

The most controversial issue has been whether a country of former habitual residence must be one to which the applicant is legally entitled to return. The view that a right of legal return is required³²¹ has not found favor with most courts³²² and commentators³²³ that

"one year appears to be accepted as a reasonable threshold standard": *Maarouf*, at 729; see also *Kadoura v. Canada (Minister of Citizenship and Immigration)*, [2003] FCR 1057 (Can. FC, Sept. 10, 2003), at [14]. A US court determined that residence for a period of two years was sufficient: *Al Najjar v. Ashcroft*, (2001) 257 F.3d 1262 (USCA, 11th Cir., Jul. 18, 2001). Interpreting the notion of "habitually resident" in the context of an income support claim, the House of Lords opined that "[t]he requisite period is not a fixed period"; one must be able to "show residence in fact for a period which shows that the residence has become 'habitual' . . . Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country . . . and many other factors have to be taken into account": *Nessa v. Chief Adjudication Officer*, [1999] 1 WLR 1937 (UKHL, Oct. 21, 1999), at 1942–43. Relying on the House of Lords' reasoning, the New Zealand tribunal has opined that "'habitual residence' does not mean domicile, but merely residence of some standing or duration. That is, the individual must show that he or she has in fact taken up residence and lived in the country for a period which showed that the residence had become, and was likely to continue to be, habitual": *Refugee Appeal No. 72635/01* (NZ RSAA, Sept. 6, 2002), at [116]. Doubt has been expressed, however, whether residence in a state during childhood without subsequent physical presence or legal connections is sufficient to deem the state to be a country of former habitual residence: *Marchoud v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 1471 (Can. FC, Oct. 22, 2004).

³¹⁹ *Maarouf* (Can. FCTD, 1993).

³²⁰ *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [116].

³²¹ In *Hathaway, Refugee Status*, it was argued at 61–62 that "[a] purposive interpretation of 'former habitual residence' focuses on the nature of the ties between the claimant and the countries in which she has resided, with a particular view to the identification of one or more countries to which she is readmissible . . . [W]here the stateless refugee claimant has no right to return to her country of first persecution or to any other state, she cannot qualify as a refugee because she is not at risk of return to persecution. Assessment of the claimant's fear of returning to the country of first persecution is a nonsensical exercise, as she could not be sent back there in any event." This is not correct. As observed by the New Zealand tribunal, "because it may also be possible in practice to remove persons to a state which they are not legally entitled to enter, legal returnability cannot be considered a *sine qua non* for the recognition of the refugee status of a stateless person": *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [133]. Moreover, one can only agree with the view that "[d]espite the arguable efficiency of Professor Hathaway's determination to define a 'country of former habitual residence' in a way that allows for the peremptory rejection of claims that could not, in any event, succeed on the merits . . . his formulation cannot be justified on the basis of the ordinary meaning of the Convention's text": at [128].

³²² *Thabet* (Can. FCA, 1998), at 37 [24]; *Rishmawi v. Minister for Immigration and Multicultural Affairs*, (1997) 77 FCR 421 (Aus. FC, Aug. 15, 1997), at 431; *Diatlov v. Minister for Immigration and Multicultural Affairs*, (1999) 167 ALR 313 (Aus. FC, Oct. 25, 1999), at 320 [23]. But the Canadian Federal Court noted in 1999 that a "panel [of the Immigration and Refugee Board] considered itself bound by . . . *Thabet*, despite voicing a strong preference for the approach proposed by Professor James C. Hathaway in his oft-cited text . . . where he suggests that a legal right to return is a *sine qua non* for a country to be considered a country of former habitual residence": *Elastal v. Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 328 (Can. FCTD, Mar. 10, 1999), at [8].

³²³ See e.g. L. Waldman, *Immigration Law and Practice* (2nd edn., 2011), at [8.23]. Yet the academic commentary is not always cogently framed. For example, even as two scholars opine that "[t]here is no historical, textual or commonsensical basis" for insisting on a legal right to return to a country of former habitual residence, they themselves argue that a legal right of return is a *sine qua non* of former habitual

have considered it.³²⁴ Because the ability to return to a state is clearly probative of the sort of “real or continuing connection”³²⁵ and “continuity of the legal situation”³²⁶ understood to be central to the notion of habitual residence as a legal term of art it is usually appropriate to include as a relevant factor the question of a legal right to return in assessing whether a stateless person was habitually resident in the proposed country of reference.³²⁷ But because habitual residence is an intentionally flexible term,³²⁸ no one factor should be treated as essential. Courts have therefore sensibly eschewed a focus on any one factor – including the legal right to return – in favor of a wide-ranging factual inquiry into whether the country to which a stateless person was admitted for ongoing residence can truly be said to be the applicant’s “abode or the centre of his or her interests.”³²⁹ It should be noted too that the term of art as transposed to the Refugee Convention is “former” habitual residence – which clearly does not require a subsisting relationship. In such circumstances, while consideration should always be given to evidence of a subsisting or historical legal right to return as one aspect of a flexible inquiry, this criterion should be understood to be relevant to, rather than determinative of, the existence of a country of former habitual residence.

Assuming identification of the country of former habitual residence, courts have made clear that refugee status must be assessed on the basis of the usual criteria, that is by demonstrating a well-founded fear of being persecuted there for a Convention reason.³³⁰

residence, arguing that “[h]abitual residence for a stateless person would *necessarily* seem to imply some degree of security, of status, of entitlement to remain and to return, which were in part the objectives of inter-government arrangements of the inter-war period”: G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn., 2007), at 68 n. 89, 526 (emphasis added).

³²⁴ The requirement has at times been rejected because it is said to afford the state of origin an opportunity to exacerbate the misery of a stateless applicant by stripping him or her of the right to return, thereby denying access to refugee protection: *Maarouf* (Can. FCTD, 1993), at 738–39; see also *Zdanov v. Canada (Minister of Employment and Immigration)*, (1994) 81 FTR 246 (Can. FCTD, Jul. 18, 1994), at 248 [9]. The second basis on which the criterion has been successfully challenged is that it is said to run counter to the protection rationale of the Convention. “Several of the judges have commented that this requirement creates a substantial hurdle and is contrary to the shelter rationale underlying international refugee protection. A Convention refugee does not need to establish a right of return . . . since the final persecutory act of a given State may in fact be to bar that person from ever returning”: *Desai v. Canada (Minister of Citizenship and Immigration)*, (1994) 88 FTR 161 (Can. FCTD, Sept. 15, 1994), at 165 [15]; see also *Thabet* (Can. FCA, 1998), at 37.

³²⁵ Law Reform Commission of Ireland, *supra* n. 311, at 11 [20(1)].

³²⁶ See L. I. de Winter, “Nationality or Domicile? The Present State of Affairs,” (1969) 128 Coll. Courses of the Hague Acad. of Intl. Law 346, at 424.

³²⁷ “[T]he real difference between a refugee and a stateless person was that whereas the former might have some sort of travel document, and a particular country might claim his allegiance, the stateless person [who is not also a refugee] would have neither a travel document nor a country of allegiance”: Statement of Mr. Robinson of Israel, UN Doc. A/CONE.2/SR.31 (Jul. 20, 1951), at 19. As previously observed, the legal right to enter a state inheres not just in citizens, but in all persons who can as a matter of international law claim a state to be their “own country,” including a subset of stateless persons. See text *supra*, at n. 309. When assessing whether a state is a country of former habitual residence, it would thus be wrong to give weight to a stateless person’s inability to return to her home country where the fear is of persecution in the form of a denial of the right to enter her own country: see Ch. 3.4.3.

³²⁸ Beaumont and McElevay, *supra* n. 308, at 89.

³²⁹ *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [116].

³³⁰ “[I]t seems to me difficult to construe the Refugee[] Convention, as amended by the 1967 Protocol, as protecting a stateless person who is outside the country of his or her former habitual residence and unable to return, regardless of whether the person’s inability to return is associated with a fear of persecution for a Refugee[] Convention reason. To do so would be to render superfluous much of the Stateless Persons

In *Revenko*,³³¹ the English Court of Appeal carefully considered the contrary argument that the first clause of Art. 1(A)(2) – requiring a demonstration of a well-founded fear of being persecuted – applies only to persons with a nationality, whereas stateless persons are entitled to refugee status if they are, for any reason, unable to return to the country of former habitual residence.³³² The court determined, however, that such a decontextualized reading could not stand:

5

The paragraph in article 1A(2) should be read as a whole and does, in my judgment, set out a single test for refugee status. When the words in the first part of the paragraph “is unable or, owing to such fear, is unwilling” were repeated in the second part of the paragraph, it was intended that the entire paragraph should be governed by the need to establish a well-founded fear of persecution on a Convention ground. The existence of a well-founded fear was intended to be a pre-requirement of refugee status. It is significant that both categories, nationals and stateless persons, were dealt with in the same paragraph and indeed in the same sentence. I cannot conclude that, by the order of words in the last part of the paragraph, the need for the fear was intended to be excluded in the case of what could be a large category of persons.³³³

Moreover, as noted by Lord Justice Bennett, “if the appellant’s construction of the article [were] correct, then greater protection is given to the stateless than to those with a nationality”³³⁴ – a result clearly at odds with the goals of the Convention.³³⁵

Convention”: *Diatlov v. Minister for Immigration and Multicultural Affairs*, (1999) 167 ALR 313 (Aus. FC, Oct. 25, 1999), at 321 [29]. See also *Houdek v. Attorney General*, (2003) 60 Fed. Appx. 536 (USCA, 6th Cir., Feb. 20, 2003), at 538: “Statelessness alone does not entitle an applicant to asylum; a showing of persecution must be made.” Other cases have addressed the question whether the deprivation of legal status held by a stateless person amounts to a sufficiently serious harm to amount to a risk of “being persecuted”: see *infra* Ch. 3.4.3.

³³¹ *Revenko v. Secretary of State for the Home Department*, [2001] QB 601 (Eng. CA, Jul. 31, 2000).

³³² The applicant relied on the presence of a semi-colon dividing the general portion of the definition applicable to persons with a citizenship, and the subsidiary section providing that the refugee status of a stateless person “who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” to argue for recognition of the refugee status of a stateless person from the former USSR who faced no risk of being persecuted there. Yet as was observed in the Full Federal Court of Australia, “[i]f inability to return is sufficient for a stateless person (that is, a fear of persecution is not necessary) the words ‘such fear’ are inappropriately included after the semicolon. The presence of that phrase indicates to me that the fear of being persecuted for a Convention reason is the talisman of the definition, and applies to both categories of persons to whom the definition is directed”: *Minister for Immigration and Multicultural Affairs v. Savvin*, (2000) 98 FCR 168 (Aus. FFC, Apr. 12, 2000), at 169 [7], per Spender J. Moreover, “[t]he travaux to the Convention to which I have referred show that this was the intention of those involved in the drafting of what became the 1951 Convention. Hathaway propounds the same view of the entitlement of stateless persons to claim refugee status under the Convention . . . These considerations are sufficient to displace the considerations which I have referred to above that favour a reading of the definition of ‘refugee’ in the Convention that would extend its reach to stateless persons unable to return to their country of habitual residence even though they never faced possible persecution there”: at 173 [23], per Drummond J.

³³³ *Revenko* (Eng. CA, 2000), at 623, per Pill L.J.

³³⁴ *Ibid.*, at 635, per Bennett L.J. “Whilst I see the force of that [literalist] argument it is by no means determinative even if the language alone is construed. There are, in my opinion, countervailing arguments of equal and greater force”: at 642.

³³⁵ This point was clearly made by Clarke L.J., who wrote that the goal of the Refugee Convention “was not to afford general protection to stateless persons . . . The problem was subsequently met by the 1954

In some cases, the refugee claimant may have more than one country of former habitual residence. Because the Convention fails expressly to stipulate how such cases are to be handled (in contrast to the case of dual or multiple nationality),³³⁶ different approaches have been adopted. In Germany³³⁷ and the United States,³³⁸ for example, only the “last”
 5 country of former habitual residence is treated as a country of reference. Conversely, Grahl-Madsen argued that the focus should usually be on the state in which the stateless claimant first experienced persecution.³³⁹ The UNHCR’s view is that all countries of former habitual residence are countries of reference, but that risk need only be shown in one of them to qualify as a refugee.³⁴⁰ Which approach is correct?

10 The first option – restricting the scope of analysis to risk only in the *last* country of former habitual residence – will result in unjustified grants of asylum, since an earlier country of former habitual residence may well be able and willing to afford protection. Failing even to consider this possibility would require an asylum state to recognize the refugee status of a person not truly in need of surrogate international protection, contrary to the fundamental
 15 purpose of the refugee regime. It would also privilege the claims of the stateless in relation to those of persons with a citizenship, since the latter receive refugee status only if able to show risk in each and every country of citizenship. The suggestion in German jurisprudence that limiting scrutiny to the country of last habitual residence actually ensures fairness between the two groups³⁴¹ is thus not sound, since it fails to recognize the possibility that an earlier
 20 country of habitual residence may remain a viable, present site of protection. As much is clear

Convention . . . It is true that the 1951 Convention made some provisions with regard to stateless persons, but it would, in my view, be surprising if it intended to put stateless persons in a better position than nationals, which is, I think, the effect of the construction urged on behalf of the applicant”: *ibid.*, at 628–29. Indeed, in the words of the Canadian Federal Court of Appeal, “[t]he Convention is meant to apply to . . . people who are without protection . . . There is no reason why stateless persons should be any more or less accommodated in their claims to refugee status . . . [P]eople are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention”: *Thabet* (Can. FCA, 1998).

³³⁶ See text *supra*, at n. 223.

³³⁷ “If during his life a stateless person has lived more than just transiently in more than one country, then in assessing the danger of persecution one must fundamentally focus on the country of his last habitual residence”: *10 C 50.07* (Ger. BverwG [German Federal Administrative Court], 2009), at [36] (unofficial translation).

³³⁸ US law effectively re-writes the text of the Refugee Convention, providing that “[a]n applicant has a well-founded fear of persecution if . . . [t]he applicant has a fear of persecution in his or her country of nationality or, if stateless, *in his or her country of last habitual residence*”: 8 CFR § 1208.13(b)(2)(i)(A) (2011) (emphasis added).

³³⁹ “[T]he country from which a stateless person had to flee in the first instance remains the ‘country of his former habitual residence’ throughout his life as a refugee, irrespective of any subsequent changes of factual residence”: Grahl-Madsen, *supra* n. 310, at 162.

³⁴⁰ “A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them”: UNHCR, *Handbook*, *supra* n. 22, at [104].

³⁴¹ “The aim . . . is to place both stateless persons and persons possessing a nationality on an equal footing, so far as possible, in obtaining refugee status. Persons with a nationality enjoy protection against persecution in regard to the country of their present nationality, but not also in regard to countries where they formerly had nationality. For stateless persons, the state of nationality is replaced by the state of their last habitual residence. They would be positioned more advantageously than those with a nationality if they could claim a danger of persecution not only with reference to the country of their last habitual residence, but also with reference to countries where they had their habitual residence before that”: *10 C 50.07* (Ger. BverwG [German Federal Administrative Court], 2009) (unofficial translation),

from a US decision applying the same approach, in which the claim of a stateless Palestinian was assessed in relation to his last country of former habitual residence (the United Arab Emirates) where he had lived for just two years. Constrained by the aberrational US statutory language establishing the last country of habitual residence as the country of reference for stateless claimants, the court was prevented from even considering protection possibilities in Saudi Arabia (where he had lived for thirteen years) despite accepting that the applicant was both admissible to Saudi Arabia and faced no risk of harm there.³⁴² 5

The second alternative – that the only country of reference for a stateless applicant is the place in which the first risk of being persecuted arose – is also problematic, as the individual may have as strong or stronger formal ties to some subsequent country or countries of habitual residence.³⁴³ Limiting scrutiny to the applicant's initial home fails to respect the importance of symmetrical treatment of persons with and without nationality, since in the case of the former group the Convention requires proof of lack of protection in all states of nationality.³⁴⁴ 10

The third position, preferred by the UNHCR – that all countries of former habitual residence are countries of reference for a stateless person, and that status should be recognized so long as a relevant risk exists in any one of them – helpfully rejects the two forms of privileging described above. The problem with this approach, however, is that it is difficult to discern the logic of treating as a refugee a stateless person who, despite being at risk in one country of former habitual residence, has the ability to secure protection in another country of former habitual residence. Since the overarching objective of the Convention is to ensure the protection of persons denied the benefits of (*de facto*) citizenship by reason of a risk of being persecuted,³⁴⁵ it makes no sense to compel states to admit as a refugee a person still able to benefit from the protection of one of the countries with which she has a relationship that conforms to the qualitative benchmarks of a country of former habitual residence.³⁴⁶ 15 20 25

Each of these approaches to resolving the dilemma of how to assess the claim of a stateless person with more than one country of former habitual residence was considered and rejected by the Canadian Federal Court of Appeal in its comprehensive decision in *Thabet*.³⁴⁷ Insisting

at [36]. This view misunderstands the role of a country of former habitual residence, since the effect of having more than one country of reference is not to give additional opportunities to show a well-founded fear of being persecuted but rather to create additional requirements for access to protection.

³⁴² *Al Najjar* (USCA, 11th Cir., 2001).

³⁴³ Grahl-Madsen's view that habitual residence refers only to the country of initial persecution appears unnecessarily restrictive: see *Maarouf* (Can. FCTD, 1993), at 738.

³⁴⁴ This analysis in Hathaway, *Refugee Status* was noted with approval by the Federal Court of Canada in *Pidasheva v. Canada (Minister of Citizenship and Immigration)*, (1995) 96 FTR 53 (Can. FCTD, May 17, 1995), at 58–59 [13], [15]. In *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 FC 685 (Can. FCTD, Dec. 20, 1995), at 697, the same court observed that “[i]f the ties which bind the refugee claimant to a subsequent country of habitual residence are as strong or stronger than those which bind him or her to the first, then the claim should be assessed by reference to that country as well.”

³⁴⁵ See text *supra*, at n. 198.

³⁴⁶ “The position of the UNHCR and of [the trial court below] pays insufficient attention to the latter part of the test. Just as a person with more than one nationality cannot be found to be a Convention refugee unless he or she establishes that he or she is unwilling or unable to avail themselves of the protection of those countries, a stateless person must also pass a similar test. If the claimant has available a place of former habitual residence which will offer safety from persecution, then he or she must return to that country. For this reason I find that this option is also not entirely satisfactory”: *Thabet* (Can. FCA, 1998), at 38 [26].

³⁴⁷ *Ibid.*

that “[s]tateless people should be treated as analogously as possible with those who have more than one nationality,” and that “there is no obligation to a person if an alternate and viable haven is available elsewhere,” the court determined that “[s]o long as the claimant does not face persecution in a country of former habitual residence that will take him or her back, he or she cannot be determined to be a refugee.”³⁴⁸ This key precedent is now understood to require “that if a stateless person has multiple countries of former habitual residence, the claim may be established by reference to any such country. However, if the claimant is able to return to any other country of former habitual residence, the claimant must, in order to establish the claim, also demonstrate a well-founded fear of persecution there.”³⁴⁹

So conceived, this test is a helpful means of avoiding the conceptual weakness of the UNHCR position, even as it embraces its core content.³⁵⁰ The *Thabet* test ensures that refugee status is recognized in the case of a stateless person denied the ability to continue to live in “her own” country owing to a risk of being persecuted there, yet respects the equally critical principle that surrogate protection is not owed when the applicant has a country fairly understood to be “her own” that is both able and willing to afford national protection.³⁵¹

³⁴⁸ *Ibid.*, at 39–40 [28]–[29].

³⁴⁹ Immigration and Refugee Board of Canada, *supra* n. 182, at [2.2.2]. The actual holding of the court was that “the best answer to this riddle is really a variation of the ‘any country’ solution. When Professor Hathaway talks about refugee determination by reference to ‘any and all’ countries of former habitual residence, this is really relevant to the latter part of the Convention refugee definition. Where a claimant has two nationalities he or she does not have to show two separate instances of persecution. It will suffice to show that one state is guilty of persecution, but that both states are unable to protect the claimant. Likewise, where a claimant has been resident in more than one country it is not necessary to prove that there was persecution at the hands of all those countries. But it is necessary to demonstrate that one country was guilty of persecution, and that the claimant is unable or unwilling to return to any of the states where he or she formerly habitually resided”: *ibid.*, at 38–39 [27]. As observed by the New Zealand tribunal, “[w]hether there is any real difference between the Federal Court of Appeal [test in *Thabet*] and the Hathaway ‘any country of former habitual residence’ approach is a moot point. We see no material difference. . . as both approaches require a stateless claimant to establish a well-founded fear of being persecuted in a country of former habitual residence and both approaches would deny refugee status where safety from persecution is available in some other country of former habitual residence”: *Refugee Appeal No. 72635/01* (NZ RSAA, 2002), at [120].

³⁵⁰ An Australian case, however, rejected this approach on the basis of an appeal to equality of treatment between stateless applicants and those with a citizenship. “A person who has a nationality, who has left the country of nationality owing to persecution . . . remains a refugee no matter in how many intermediate countries he or she may have resided and however many of them may correctly be described as countries of former habitual residence. It would be surprising if a stateless person . . . ceased to be a refugee merely because of subsequent habitual residence in another country in which he or she had no fear of persecution”: *Al-Anezi v. Minister for Immigration and Multicultural Affairs*, (1999) 92 FCR 283 (Aus. FC, Apr. 1, 1999), at 291 [22]. This analysis fails to take account of Art. 1(E) of the Refugee Convention which would, in fact, require the denial of protection to a refugee with a citizenship based on criteria comparable to those that define habitual residence for a stateless refugee: see *infra* Ch. 6.2.1.

³⁵¹ Much the same result could be achieved by reliance on Art. 1(E) of the Convention, which excludes from refugee status “a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.” See *infra* Ch. 6.2.1. This norm, applicable to all persons otherwise qualifying for refugee status (including stateless persons), requires the denial of protection on the basis of criteria that would in most cases be met in the case of a person with a second, safe country of former habitual

Statelessness, then, is not per se the basis for recognition of Convention refugee status. However where a stateless person had a national home to which she cannot return owing to a risk of being persecuted there, refugee status is the appropriate international response. To ensure that such persons can secure refugee protection, the drafters of the Convention incorporated a provision allowing a stateless person to establish a claim to refugee status in relation to her “country of former habitual residence.” This notion is an international legal term of art, assessed on the basis of a wide-ranging inquiry that would ordinarily include consideration of such factors as whether the applicant was lawfully admitted to, and entitled to leave and return to, the country; lived there for a significant period of time; and made it the center of her interests. Assuming such a country to exist, the stateless person is entitled to recognition as a refugee if able to satisfy the usual standard of showing a well-founded fear of being persecuted there for a Convention reason. Insofar as a stateless person has more than one country of former habitual residence, it suffices for her to meet the well-founded fear test in relation to one of those states, and to show that she is not able to return to, and receive protection in, any other country of former habitual residence.

1.4 Refugees *sur place*

In most cases a refugee will leave her home country because of a fear of being persecuted. Yet the Convention refugee definition does not distinguish between persons who flee their country in order to avoid the prospect of being persecuted and those who, while already abroad, find that they cannot safely return because of risk in their own state.³⁵²

[I]t can happen that a person who has not fled and is abroad for quite unrelated reasons finds that he cannot now go back for a convention reason. That reason must, however, have *become* the reason (or at least *a* reason) why he is outside the country of his nationality. If it has not – if he is here solely for other reasons – his case falls outside the convention and he is not a refugee *sur place*.³⁵³

By virtue of its requirement that the claimant “*is outside the country of his nationality*,”³⁵⁴ the Convention protects refugees *sur place* on an equal footing with those who cross a border after the risk of being persecuted is already apparent.³⁵⁵ The Convention’s present tense language ensures that all persons compelled to remain outside their own country –

residence. This approach would perhaps meet the concern that the *Thabet* test is a “somewhat convoluted result”: M. Jones and S. Baglay, *Refugee Law* (2007), at 107.

³⁵² “A person who has left his country for whatever reason but subsequently owing to well-founded fear of being persecuted refuses or becomes unable to avail himself of the protection of that country or, in the case of a stateless person owing to well-founded fear of being persecuted refuses or becomes unable to return to the country of his former habitual residence, is equally a refugee. These persons have become known as ‘*refugiés sur place*’”: Weis, *supra* n. 217, at 972. *Accord* UNHCR, *Handbook*, *supra* n. 22, at [94].

³⁵³ *Shirazi v. Secretary of State for the Home Department*, [2004] 2 All ER 602 (Eng. CA, Nov. 6, 2003), at 608 [19], per Sedley L.J. (emphasis in original).

³⁵⁴ Refugee Convention, at Art. 1(A)(2) (emphasis added).

³⁵⁵ This analysis in Hathaway, *Refugee Status*, at 33, was approved by the High Court of Australia in *Minister for Immigration and Citizenship v. SZJGV*, (2009) 238 CLR 642 (Aus. HC, Sept. 30, 2009), at 661 [40], per Crennan and Kiefel JJ.; by the New Zealand Court of Appeal in *S v. Chief Executive of the Department of Labour*, [2007] NZCA 182 (NZCA, May 8, 2007), at [23]; and by the Federal Court of Canada in *Win v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 398 (Can. FC, Mar. 28, 2008), at [27].

whether already present in, or forced to flee to, a foreign state – are equally entitled to benefit from the surrogate international protection of refugee law.³⁵⁶

The classic *sur place* refugee claim derives from a significant change of circumstances in the country of origin at a time when the claimant is abroad for reasons wholly unrelated to a need for protection.³⁵⁷ At the time of departure from her state, she may have intended only to vacation, study, or do business abroad, and then return home.³⁵⁸ If, however, events subsequent to her departure put her at risk of serious harm upon return home, she may claim protection as a Convention refugee. For example, refugee status was appropriately recognized in the case of a member of the then-ruling Pakistan People’s Party who was in Canada when the leaders of a military coup issued an arrest warrant against him. The Federal Court of Appeal held that the applicant was a refugee *sur place* since his fear of being persecuted, while not extant at the time of his departure from Pakistan, was nonetheless well-founded on the basis of subsequent events.³⁵⁹

A variant of the classic *sur place* situation involves the intensification of pre-existing factors since departure from one’s home country. While distinguishable from the first category by the fact that the claimant may have been aware of, or even motivated to depart by, disturbing events in her home country, these cases are characterized by an escalation of events post-departure which is sufficient to give rise to a real chance of being persecuted upon return. What may once have been merely a speculative risk has, with time, matured into a threat that is sufficiently real to meet the usual “well-founded fear” standard and hence justify the recognition of refugee status.³⁶⁰

In addition to *sur place* claims based on either new circumstances or the intensification of pre-existing conditions in the country of origin, it is also recognized that *sur place* refugee status may be grounded in an individual’s actions while abroad.³⁶¹ Such claims are

³⁵⁶ See text *supra*, at n. 206.

³⁵⁷ This type of claim was clearly contemplated by the drafters of the Convention. Mr. Rain of France, for example, stated that the definition extended to “not only those who had actually left their country owing to persecution, but also those who had already been outside their country before the persecution began and were unable to return for fear of persecution”: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.17 (Jan. 31, 1950), at 3 [6]. Similarly, Mr. Robinson of Israel cited as an example of a refugee *sur place* a person who “went abroad on a diplomatic mission or to study and, while still abroad, [was] overtaken by a revolution which made it impossible for them to return”: Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 9. *Accord* Mr. Petren of Sweden: *ibid.*, at 10. There is therefore no basis for the concern of a judge of the Federal Court of Canada that “this idea of a refugee ‘sur place’ . . . is an artificial extension of the basic idea of a refugee”: *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 FC 398 (Can. FCA, Feb. 25, 1991), at 411–12, per Marceau J. See e.g. *Canada (Minister of Employment and Immigration) v. Paszkowska*, [1991] FCJ 337 (Can. FCA, Apr. 16, 1991).

³⁵⁸ It may also be the case that an individual leaves by reason of a fear of being persecuted which dissipates even as a new risk emerges. Thus, for example, the Austrian Independent Federal Asylum Board sensibly recognized the claim of a Christian woman from Afghanistan who departed her country because of risk at the hands of the Mujahideen which had been displaced by a new risk that arose when the Taliban took power in her region after her departure: *DA v. Federal Asylum Authority*, 203.029/0-II/28/98 (Au. UBAS, Nov. 10, 1999).

³⁵⁹ *Chaudri v. Canada (Minister of Employment and Immigration)*, (1986) 69 NR 114 (Can. FCA, Jun. 5, 1986).

³⁶⁰ The requisite standard of proof is discussed *infra*, at Ch. 2.4.

³⁶¹ “A person may become a refugee ‘sur place’ as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence”: UNHCR, *Handbook*,

commonly based on risk if returned to an authoritarian state of origin after having engaged in political activism in a foreign country.³⁶² But a claim may also arise indirectly from the actions of third parties. For example, the British tribunal considered the claim of an Algerian convicted of fraud in the United Kingdom, and sentenced to two years' imprisonment there. Among his co-accused were a number of men known by police to have engaged in terrorist activities, leading to suspicion, widely reported in the media, that the fraud was intended to fund terrorism. While the suspicion was never confirmed and no terror-related charges were ever filed, the applicant – facing deportation at the conclusion of his prison term – argued that authorities in Algeria would treat him as a terrorist, and subject him to interrogations involving torture. Noting the high profile of the claimant and the human rights data indicating a strong risk of torture in such circumstances, the tribunal recognized his refugee status on the grounds that “any mistreatment would arise from [his] actual or perceived political beliefs.”³⁶³

This notion that the attribution by the home state of an adverse political opinion based on personal actions abroad can make one a refugee *sur place* parallels the traditional view that refugee status may be based on the risk of being persecuted for unauthorized departure or stay abroad (*Republikflucht*).³⁶⁴ Under this long-standing doctrine, if the sanction for illicit travel abroad is so severe that it effectively undermines the fundamental human right to leave and to return to one's country,³⁶⁵ and the country of origin treats departure or stay abroad as an implied political opinion of disloyalty or defiance,³⁶⁶ the criteria of the refugee definition are satisfied.³⁶⁷ The same analysis holds where an individual's home state

supra n. 22, at [96]. See e.g. *Somaghi v. Minister for Immigration, Local Government and Ethnic Affairs*, (1991) 31 FCR 100 (Aus. FFC, Aug. 21, 1991), at 116; *Chen v. Canada (Solicitor General)*, (1993) 68 FTR 9 (Can. FCTD, Aug. 6, 1993).

³⁶² A German court has regrettably opined that “at the time when the Convention was signed, the treaty states did not wish to forgo the ability to regulate the political activities of foreigners, and to expel foreigners if such activity nevertheless took place; yet Art. 33 of the [Convention] would have deprived them of this option if even post-flight reasons created by the individual himself could provide grounds for refugee status”: *10 C 27.07* (Ger. BverwG [German Federal Administrative Court], Dec. 18, 2008) (unofficial translation), at [18]. To the contrary, the drafters evinced no intention to depart from the historical precedent of recognizing refugee claims *sur place*; nor did they incorporate any exclusion or cessation clause to deny protection to politically active refugees. Their concerns regarding the risks of political activism were rather addressed by providing for only a very limited right of refugees to freedom of association in Art. 15 of the Convention. See Hathaway, *supra* n. 24, at 874–91.

³⁶³ *HS v. Secretary of State for the Home Department*, [2008] UKAIT 00048 (UKAIT, Nov. 20, 2007), at [126].

³⁶⁴ “Some States have made it a crime to try to withdraw from society by leaving without permission (*Republikflucht*), and anyone who manages to escape may face stiff penalties if he ever returns”: A. Grahl-Madsen, “International Refugee Law Today and Tomorrow,” (1982) 20 *Archiv des Völkerrechts* 411, at 421.

³⁶⁵ Civil and Political Covenant, *supra* n. 24, at Art. 12. See generally *infra* Ch. 3.4.3.

³⁶⁶ See *infra* Ch. 5.8.2.

³⁶⁷ “The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad[,] is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention (see paragraph 66 below)”: UNHCR, *Handbook*, *supra* n. 22, at [61]. At [66], it is noted that “[o]ften the applicant himself may not be aware of the reasons for the persecution feared”; at [81], it is further elaborated that persecution for reasons of political opinion may “take the form of sanctions for alleged criminal acts against the ruling power.”

attributes a negative political opinion to a person who has made an unsuccessful claim to asylum abroad. As states have agreed that individuals are entitled “to seek and to enjoy in other countries asylum from persecution,”³⁶⁸ the decision to do so – even if one’s claim ultimately does not succeed – cannot justify exposing the individual concerned to the risk of being persecuted.³⁶⁹ The Belgian refugee tribunal recently affirmed both these principles, finding that refugee status should be recognized in the case of an at-risk stateless person from Uzbekistan to whom a negative political opinion would be attributed based on his unauthorized departure from Uzbekistan, and in consequence of his failed claim for asylum in Belgium.³⁷⁰

Not all courts, however, agree with this approach. The UK tribunal, while conceding that it was bound by precedent to consider the *sur place* claim of a Zimbabwean at risk of being persecuted for having unsuccessfully sought asylum, nonetheless made clear that it viewed that result as “distinctly unattractive.”³⁷¹ A more direct assault has issued from the Federal Court of Canada, which refused to recognize the claim of citizens of Czechoslovakia (as it then was) who faced imprisonment for having remained abroad longer than their exit visas allowed. In a decision still given precedential weight,³⁷² the court determined that “[n]either the international Convention nor our Act, which is based on it . . . had in mind the protection

³⁶⁸ Universal Declaration of Human Rights, UNGA Res. 217A (III), UN GAOR, 3rd sess., 183rd plen. mtg., UN Doc. A/810 (Dec. 10, 1948), at Art. 14(1).

³⁶⁹ “It cannot be seen that there is any valid reason for distinguishing between such actions as active resistance at home and political activities in exile, on the one hand; and . . . unauthorized departure and absence, application for asylum or refugeehood, etc., on the other hand”: Grahl-Madsen, *supra* n. 310, at 249.

³⁷⁰ *X c. Commissaire général aux réfugiés et aux apatrides*, 22144 (Bel. CCE [Belgian Council for Alien Law Litigation], Jan. 28, 2009). Similarly, the Full Federal Court of Australia determined that the risk of being persecuted faced by an Iraqi Kurd consequent to illegal departure and for reasons of having made a failed asylum claim in Australia were grounds for the recognition of refugee status: *SBAB v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 161 (Aus. FFC, May 31, 2002). The same court also determined that an applicant’s “failed application for asylum in Australia and his lack of travel documentation” could be components of a claim to *sur place* refugee status based on cumulative grounds: *W396/01 v. Minister for Immigration and Multicultural Affairs*, (2002) 68 ALD 69 (Aus. FFC, Apr. 19, 2002), at 78 [31]. The High Court of Ireland has also determined “that where a clear Convention nexus is shown, a person’s fear of persecution by virtue of his or her status as a failed asylum seeker might be capable of bringing him or her within the . . . definition”: *FV v. Refugee Appeals Tribunal (Ricardo Dourado)*, [2009] IEHC 268 (Ir. HC, May 28, 2009), at [33].

³⁷¹ “His claim is that the risk of his persecution arises solely from his being a person who is returned from the United Kingdom after having unsuccessfully claimed asylum here. He does not rely on any merit in his asylum claim: as we have pointed out, there is none. He relies instead solely on the consequences arising from the fact that the claim has been made and rejected. It will be seen at once that his argument is distinctly unattractive. This country, like any other signatory to the Refugee Convention, takes a pride in giving proper shelter to those who seek its protection having fled from persecution, or fear of persecution, elsewhere. The Appellant is not such a person. If his argument is successful, there is a risk that any Zimbabwean can obtain the protection of the Refugee Convention simply by coming to the United Kingdom and claiming asylum, even though there is no merit at all in his claim”: *AA v. Secretary of State for the Home Department*, [2005] UKAIT 00144 CG (UKAIT, Oct. 7, 2005), at [35]–[36], in which the tribunal noted its concern with the approach taken in *M v. Secretary of State for the Home Department*, [1996] 1 WLR 507 (Eng. CA, Oct. 24, 1995). The Court of Appeal has nonetheless affirmed that a well-founded fear of being persecuted may arise in such circumstances: *RM (Zimbabwe) v. Secretary of State for the Home Department*, [2011] EWCA Civ 428 (Eng. CA, Apr. 13, 2011).

³⁷² See e.g. *Hernandez v. Canada (Minister of Citizenship and Immigration)*, [2009] FC 229 (Can. FC, Mar. 4, 2009).

of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application.”³⁷³

Such positions are in our view mistaken. Where an individual takes action in line with international human rights norms – including choosing to remain abroad or to seek asylum – her conduct should not be stigmatized as amounting to no more than an inappropriate and self-induced risk of being persecuted.³⁷⁴ The fact that such conduct is treated as criminal by the country of origin or that the decisions made by the individual were less than sound affords no license to expose her to the risk of being persecuted.³⁷⁵ There is, as such, no basis to characterize such claims as unattractive, much less as inappropriate under the terms of the Convention.³⁷⁶ In evaluating *sur place* claims based on the applicant’s activities abroad the focus of attention should therefore be simply on whether the activities abroad³⁷⁷ may plausibly come to the attention of the authorities in the claimant’s country of origin,³⁷⁸ and, if so, whether the risk thereby engendered is both sufficiently serious to amount to a risk of

³⁷³ *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390 (Can. FCA, Jun. 21, 1991), at 395–96. While the court recognized that this form of harm might form part of a cumulative claim to be persecuted, it did not find a nexus to a Convention ground. The court was equally clear that any risk arising in such circumstances was not related to an imputed political opinion of defiance or disloyalty: *ibid.*, at 394.

³⁷⁴ There is as such reason to question the logic of the “voluntary–involuntary” dichotomy invoked by the English Court of Appeal to dismiss the protection claim of a Zimbabwean determined to be at risk upon forcible repatriation, but not if he consented to return home voluntarily: *AA v. Secretary of State for the Home Department*, [2007] 1 WLR 3134 (Eng. CA, Apr. 12, 2006), at 3160–61 [98]–[99]. Since the only duty of the individual facing lawful deportation is to submit to removal, the failure voluntarily to leave is within the bounds of international (and domestic) legality and should not therefore have been relied upon as the basis to distinguish this application from the precedent in *Danian v. Secretary of State for the Home Department*, [2000] Imm AR 96 (Eng. CA, Oct. 28, 1999) (discussed *infra*, text at n. 410 ff).

³⁷⁵ To the contrary, where the home state is prepared to punish such lawful activity, that punishment reflects either an express or an implied rejection of the validity of the claim to lawfulness – a notion easily encompassed by the Convention ground of political opinion. See *infra* Ch. 5.8.2. The imposition of a prison term or worse for having engaged in such lawful activity can moreover clearly amount to a form of serious harm tantamount to persecution. See *infra* Chs. 3.5.1, 3.5.2.

³⁷⁶ Swiss law nonetheless distinguishes between persons who become refugees *sur place* as a result of their own actions, and other refugees. While it grants full Convention rights to this subset of *sur place* refugees, it withholds other rights commonly provided to refugees: Asylum Act SR 142.31 (*Loi sur l’asile* (Sw.)), RS 142.31, at Arts. 54, 58–59, 60–61. This distinct form of status is referred to by one commentator as a “petit statut de réfugié”: F. Maiani, “La définition de réfugié entre Genève, Bruxelles et Berne – tensions, divergences et convergences,” in UNHCR and OSAR (eds.), *L’harmonisation du droit d’asile européen et le droit d’asile suisse, compte tenu du droit international des réfugiés et des droits humains* (2009) 19, at 44.

³⁷⁷ A *sur place* claim may be based on a “combination of factors . . . even if no [single] factor was sufficient to support a claim on its own”: *W396/01* (Aus. FFC, 2002), at 78 [31].

³⁷⁸ “There must be a limit as to how far an applicant for asylum is entitled to rely upon publicity about his activities in the UK against the government of the country to which he is liable to be returned. It seems to me that it is not enough for such an applicant simply to establish, as here, that he was involved in activities which were relatively limited in duration and importance, without producing any evidence that the authorities would be concerned about them, or even that they were or would be aware of them”: *SS (Iran) v. Secretary of State for the Home Department*, [2008] EWCA Civ 310 (Eng. CA, Apr. 10, 2008), at [24]. See also *K v. Minister of Justice, 2005/39560* (Seoul Admin. Ct., Aug. 17, 2006); *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] FCT 1237 (Can. FCTD, Nov. 14, 2001); *NM v. Independent Federal Asylum Board (UBAS), 2000/01/0076* (Au. VwGH [Austrian Administrative Court], May 22, 2001).

being persecuted and based on an actual or imputed Convention ground.³⁷⁹ Circumstantial evidence showing a real chance of awareness is sufficient³⁸⁰ since “[i]t is not necessary, and indeed would usually be impossible, for the claimant to provide direct evidence that the authorities have such knowledge.”³⁸¹

5 There is, however, one narrow subset of cases grounded in risk arising from the applicant’s actions abroad that has proved highly controversial. There is, of course, no sound basis to refuse refugee status to persons at risk for having taken actions consonant with international human rights norms simply because such actions either are not sanctioned by their home country or were arguably unwise or misguided. But a more troubling question arises when
10 actions abroad are undertaken without any sincere motivation, simply in order to generate a risk justifying recognition of refugee status. In a leading case, the New Zealand authority considered the claim of an Iranian who – after being ordered to be deported from New Zealand – falsely claimed to have taken a copy of Salman Rushdie’s *The Satanic Verses* into Iran on an earlier trip, an assertion he made repeatedly in print and on television with
15 knowledge that such publicity would attract the attention and ire of Iranian authorities. The tribunal fairly observed that the situation generated a “tension . . . between the impulse to focus only on the risk of persecution in the country of origin as opposed . . . to the need to assess whether the refugee protection system is being manipulated and abused. For it could be said that the debasing and discrediting of the refugee regime will inevitably jeopardize
20 the *bona fide* asylum seeker for whose protection the regime was intended.”³⁸²

But it is important to recognize that the response to the risk of manipulation must not itself give rise to the very discrediting of the refugee regime that is rightly of concern. As observed by Justice French in the Full Federal Court of Australia, “[t]he solution to the difficulties generated by abuse of the system by applicants [does] not lie . . . in propounding
25 some broad principle of abuse of the system or attempt to pervert the course of justice in order to justify a breach of the requesting country’s international obligations.”³⁸³ Analysis of recent

³⁷⁹ *Girmaeyesu v. Canada (Minister of Citizenship and Immigration)*, [2010] FC 53 (Can. FC, Jan. 20, 2010), at [28].

³⁸⁰ Thus, for example, the Canadian Federal Court of Appeal appropriately reversed the refugee tribunal’s refusal to receive photographic evidence of the claimant’s participation in a demonstration in Ottawa in front of the embassy of his country of origin, noting that “[t]his refusal by the Board was manifestly wrong. An alien in Canada may be a refugee as a consequence of facts which have occurred since his arrival”: *Urur v. Canada (Minister of Employment and Immigration)*, (1988) 91 NR 146 (Can. FCA, Jan. 15, 1988), at 147 [2]. The Canadian Federal Court held more recently that “[i]n a refugee *sur-place* claim, credible evidence of a claimant’s activities while in Canada that are likely to substantiate any potential harm upon return must be expressly considered by the [decision-maker] even if the motivation behind the activities is non-genuine”: *Ejtehadian v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 158 (Can. FC, Feb. 12, 2007), at [11].

³⁸¹ *TM (Zimbabwe) v. Secretary of State for the Home Department*, [2010] EWCA Civ 916 (Eng. CA, Jul. 30, 2010), at [27]. So, for example, the test “does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups”: *YB (Eritrea) v. Secretary of State for the Home Department*, [2008] EWCA Civ 360 (Eng. CA, Apr. 15, 2008), at [18].

³⁸² *Re HB, Refugee Appeal No. 2254/94*, (1995) 7 Intl. J. Ref. L. 332 (NZ RSAA, Sept. 21, 1994), at 337 [124].

³⁸³ *Minister for Immigration and Multicultural Affairs v. Mohammed*, (2000) 98 FCR 405 (Aus. FFC, May 5, 2000), at 417 [34], per French J., adopting in this regard the views of Millett L.J. in *M* (Eng. CA, 1995), at 513.

jurisprudence suggests, however, that an over-reaction to the risk of cynical manipulation of the asylum system has, in fact, occurred.³⁸⁴

One approach is to refuse self-serving claims based on the view that fear in such cases is not “well”-founded, but rather nefariously founded.³⁸⁵

The expression “well-founded” has been taken to describe the objective circumstances giving rise to a real chance of persecution. But, in my view, there is no reason why the expression “well-founded” should be confined only to such a meaning. It can have another meaning as well. In the present circumstances the respondent’s fear of persecution is probably “well-founded” in the objective sense, that is, objectively he is likely to be persecuted on his return to Sudan. However, it is not “well-founded” in the sense of being properly founded within the meaning of the Convention. A claim having fraud as its foundation is not, in my view, “well-founded.”³⁸⁶

Yet this interpretation is clearly at odds with the general jurisprudence requiring simply objective evidence of forward-looking risk for a fear to be “well”-founded:³⁸⁷ 5

[A] fear may be no less genuine despite the artifice by which the circumstances which gave rise to it have been engineered. The epithet attached by the Convention to the requisite fear of being persecuted is “well-founded.” As a matter of ordinary English usage, that connotes only that the fear have a sound or credible basis in fact. I am unable, without some process of implication, to accord the expression a secondary, moral, connotation to the effect that the fear have a basis in facts not tainted by fraud or bad faith on the

³⁸⁴ In addition to the approaches described below which have each garnered some significant support, there is at least one case in which the court elected simply to treat such claims as a subset of cases involving voluntary acts, and to assert that volition per se disqualifies an applicant from protection. The Canadian Federal Court was called upon to consider the claim of a Kenyan student who, after his initial refugee claim was refused, participated in anti-Kenyan government protests while in Canada. There was evidence that the Kenyan ambassador had a team of people taking photographs of the protesters, and Amnesty International confirmed that those identified as protesters would face serious consequences if returned to Kenya. The response of the court was blunt, finding that “[i]f individuals continue to demonstrate knowing full well that there is a possibility that continuing to do so may bring nothing but harm to themselves and then continue to do so then, one makes one’s bed; one must lie in it”: *Said v. Canada (Minister of Employment and Immigration)*, [1990] FCJ 475 (Can. FCTD, May 1, 1990), at [21]. This is a clear outlier case which ignores the fact that at least three of the five protected grounds – religion, political opinion, and some forms of membership of a particular social group – are subject to voluntary choice, yet have always been protected under both refugee law and the non-discrimination norms on which the Refugee Convention grounds are based.

³⁸⁵ *Somaghi* (Aus. FFC, 1991).

³⁸⁶ *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at [92], per Carr J. in dissent.

³⁸⁷ The inability lawfully to refuse such a claim was impliedly recognized by the effort made to salvage this moral interpretation of “well”-founded fear by carving out an exception to the exclusionary rule where “fraudulent activity by an applicant . . . may, in itself, attract malevolent attention from authorities in the country of nationality”: *O v. Minister for Immigration and Multicultural Affairs*, [2000] FCA 265 (Aus. FFC, Mar. 13, 2000), at [12], quoting the reasoning of Lee J. in *Mohammed v. Minister for Immigration and Multicultural Affairs*, (1999) 56 ALD 210 (Aus. FC, Jun. 28, 1999), at 215 [28]. The Full Federal Court’s decision further muddied the waters by asserting that the exception to the exclusion principle would not apply if the purpose of the activity was “to make more plausible, or colourable, a pretended claim to a well-founded fear of persecution.” Since the attraction of sufficient attention would in any event always be required to meet the well-founded fear requirement, this is surely a case of the exception swallowing the rule.

part of the applicant. Nor, as I understand it, do the corresponding words “avec raison d’être” in the equally authoritative French version of the Convention support a secondary connotation of that kind.³⁸⁸

A second tack is to deny protection on the grounds that a cynical manipulator cannot demonstrate the so-called “subjective element” of well-founded fear. It has been suggested in Australian decisions that “actions undertaken for the sole purpose of creating a pretext for claiming fear of persecution would not render a person a refugee ‘sur place.’ A pretext is something that is not real or genuine. It would follow that, subjectively, an applicant invoking a pretext would not have a genuine fear of persecution.”³⁸⁹ Put simply, “[e]vidence that an applicant for protection as a refugee sur place has deliberately set out to create a risk of persecution by conduct outside the country of origin may be a powerful indicator that the claimed subjective fear does not exist.”³⁹⁰ Some Canadian decisions have also taken this approach. For example, a decision of the Federal Court has observed “that the cases will be rare where there is an objective fear but not a subjective fear, but, such cases may exist. In my view, it is certainly relevant to examine the motives underlying a claimant’s participation in demonstrations such as this one in order to determine whether or not that claimant does have a subjective fear.”³⁹¹

For reasons described in the next chapter, we believe that the assessment of well-founded fear is a purely objective exercise, and that no subjective element exists.³⁹² But even if the contrary view is taken, and assuming that there is in fact an objective risk of the manipulator being persecuted in her home country, on what possible basis can it be said that she could not be fearful of such a consequence? If the purpose of the so-called subjective element is to ensure that refugee status is conditioned on demonstration of “a subjective condition, an

³⁸⁸ *Minister for Immigration and Multicultural Affairs v. Farahanipour*, (2001) 105 FCR 277 (Aus. FFC, Feb. 16, 2001) (“*Farahanipour*”), at 286 [20], per Ryan J. Similarly, the New Zealand authority opined that “[i]f a bad faith claim is to be held not to support an application for refugee status, the justification for this view must be founded on the interpretation of the Refugee Convention and not on a fiction, namely that the fear of persecution is not well-founded”: *Re HB* (NZ RSAA, 1994), at 348 [153]. On the meaning of “well-founded” fear, see *infra* Ch. 2.

³⁸⁹ *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at 407 [6], per Spender J., explaining a possible interpretation (which he rejects) of the court’s earlier holding in *Somaghi* (Aus. FFC, 1991).

³⁹⁰ *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at 420 [42], per French J.

³⁹¹ *Asfaw v. Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 1157 (Can. FCTD, Jul. 17, 2000), at [5]. The same judge subsequently cautioned, however, that “[t]he matter of motive goes to the genuineness or otherwise of the applicant’s expressed subjective fear of persecution. That said, however, there is and must always be an intimate interplay between the subjective and objective elements of the fear of persecution which is central to the definition of convention refugee[,] and[] I have previously expressed the view that it would be an error for a Board to rely exclusively on its view that a claimant did not have a subjective fear of persecution without also examining the objective basis for that fear”: *Zewedu v. Canada (Minister of Citizenship and Immigration)*, (2000) 193 FTR 152 (Can. FCTD, Jul. 26, 2000), at 154 [5]. But see *Herrera v. Canada (Minister of Employment and Immigration)*, (1993) 70 FTR 253 (Can. FCTD, Oct. 19, 1993), in which the Federal Court approved the rejection of refugee status for an individual facing politically inspired imprisonment in Cuba on the grounds *inter alia* that there was no evidence of subjective fear due to the lack of good faith in speaking out against his home state only once having made an asylum claim in Canada.

³⁹² See *infra* Ch. 2.3.

emotion characterized by the anticipation or awareness of danger,³⁹³ why is that standard not satisfied simply because the risk arose from manipulation?

A third approach has been to insist that a *sur place* claim can be established only where the conduct engaged in is consistent with past activity in the home country.³⁹⁴ As agreed in the European Union's 1996 Joint Position, for example,

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[r]efugee status may be granted if the activities which gave rise to the asylum-seeker's fear of persecution constitute the expression and continuation of convictions which he had held in his country of origin or can objectively be regarded as the consequence of the asylum-related characteristics of the individual . . . On the other hand, if it is clear that he expresses his convictions mainly for the purpose of creating the necessary conditions for being admitted as a refugee, his activities cannot in principle furnish grounds for admission as a refugee.³⁹⁵

While exceptions have been made to accommodate the special circumstances of those who left their home country as a child,³⁹⁶ as well as those of persons who may have temporarily discontinued their in-country activism just before their departure,³⁹⁷ it remains that this approach sacrifices principle in pursuit of legal certainty.³⁹⁸ As pointed out in a trenchant critique by an advisory committee to the Dutch government, a focus on continuity fails

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³⁹³ *Re Acosta*, (1985) 19 I & N Dec. 211 (USBIA, Mar. 1, 1985), at 221, approved in *Immigration and Naturalization Service v. Cardoza-Fonseca*, (1987) 480 US 421 (USSC, Mar. 9, 1987), at 431 n. 11.

³⁹⁴ Carlier describes the principle as “not absolute . . . but [rather one that] can create a presumption”: J.-Y. Carlier, “General Report,” in J.-Y. Carlier *et al.* (eds.), *Who is a Refugee? A Comparative Case Law Study* (1997) 683, at 699.

³⁹⁵ Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of July 28, 1951 relating to the status of refugees (96/196/JHA), [1996] OJ L 63/2 (Joint Position), at Art. 9.2. The more recent formulation in the Qualification Directive seems to retreat from insistence upon a central role for continuity, providing that “[a] well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, *in particular where* it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin (emphasis added): Qualification Directive, *supra* note 51, at Art. 5(2). Yet German courts seem to have interpreted Art. 5(2) to suggest that even evidence of continuity of actions does not ensure recognition of a *sur place* claim, holding that “although continuity of political convictions acted upon externally, in terms of both content and time, is an important indicator, nevertheless it is not sufficient in itself to refute the statutory presumption that the norm [to exclude self-interested *sur place* claims] applies. Rather, the applicant for asylum must adduce good reasons why he became politically active in exile, or intensified his former activities, only after the asylum proceedings were unsuccessful”: 10 C 27.07 (Ger. BverwG [German Federal Administrative Court], Dec. 18, 2008) (unofficial translation), at [13].

³⁹⁶ 2 BvR 749/89 (Ger. BverfG [German Federal Constitutional Court], Dec. 20, 1989), reported as Abstract No. IJRL/0087, (1991) 3 Intl. J. Ref. L. 739; see also *ibid.*: “However, such continuity must not be a requirement where the person concerned was not yet able to establish convictions because of age.”

³⁹⁷ 2 BvR 1587/90 (Ger. BverfG [German Federal Constitutional Court], Feb. 17, 1992), reported as Abstract No. IJRL/0138, (1993) 5 Intl. J. Ref. L. 118.

³⁹⁸ The “continuity approach” has been formally rejected in the Netherlands: *Staatssecretaris van Justie v. A*, 200904515/1/V1, [2010] LjN BL0267 (Neth. RvS [Dutch Council of State], Jan. 13, 2010), noting amendment of Dutch law in this regard on Nov. 10, 2008. Yet there is evidence of a continuing bureaucratic attachment to the notion: see e.g. Immigration and Naturalization Service, Ministry of Home Affairs of the Netherlands, *Vreemdelingencirculaire 2000*, ed. 2011-01, at [2.6], suggesting that a well-founded fear

to recognize that activities abroad may be the result of changes in the country of origin since departure; that they may result from new awareness; or that they may have been stimulated by post-departure circumstances.³⁹⁹ Not only does the continuity approach fail to take account of real constraints that may have impeded pre-departure activism, but more fundamentally it is simply arbitrary: if there is a genuine risk of being persecuted due to an imputed political opinion or other protected status, this fact is in no sense affected by the lack of continuity with conduct in the home country.⁴⁰⁰

A fourth approach, now codified as a minimum standard for European Union states, is that *sur place* risk stemming from “circumstances which the applicant has created by his own decision since leaving the country of origin” may be ignored in the assessment of refugee status, but only in the context of a “subsequent application.”⁴⁰¹ This is, as the English Court of Appeal put it, an “odd” provision since it fails to distinguish between *sur place* activity thought to be abusive and that which results from a genuine political conviction or other protected status.⁴⁰² Moreover, like the continuity approach, the position is also unprincipled, as the Refugee Convention affords no license whatever to distinguish between needs arising on an original and subsequent application.

In contrast to these four approaches, there is a fifth, more direct, response to *sur place* claims based on purely self-serving conduct. In a seminal 1994 decision, the New Zealand Refugee Status Appeals Authority took the straightforward step of imposing a “good faith” requirement to deny refugee status to persons whose risk follows from activities abroad calculated to justify a grant of asylum.⁴⁰³ Despite recognizing “that the primary focus of the Convention definition is on the risk faced by the individual in the country of origin and that the enquiry is not so much into the asylum seeker’s true beliefs, but on the views of the

based on post-departure activities can be established “in particular” when they are the expression and continuation of convictions or opinions held prior to departure.

³⁹⁹ Adviescommissie Mensenrechten Buitenlands Beleid [Advisory Committee on Human Rights and Foreign Policy of the Netherlands], *Harmonisation of Asylum Law in Western Europe* (1990), at 35 ff. Such considerations may well have led to the decision to reduce (though not to eliminate) the importance of continuity when the Qualification Directive was adopted: see *supra*, at n. 395.

⁴⁰⁰ Nor is the approach – particularly as developed in Germany and Switzerland – saved by the understanding that *sur place* claimants denied refugee status for lack of continuity are nonetheless entitled to the benefit of protection against *refoulement* under Art. 33. To the contrary, this approach exacerbates the disjuncture between the continuity doctrine and the requirements of refugee law since there is no difference between the category of persons entitled to claim refugee status and that of persons entitled to claim the benefit of Art. 33: P. Weis, *The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (1995), at 303, 341; A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1997), at 175; Hathaway, *supra* n. 24, at 304–5. The European Union Qualification Directive continues to give some credence to the continuity theory, but not as a mandatory consideration: Qualification Directive, *supra* n. 51, at Art. 5(2).

⁴⁰¹ Qualification Directive, *supra* n. 51, at Art. 5(3).

⁴⁰² “The difficulty [in assessing claims based on opportunistic activity *sur place*] is knowing when the bar [to granting asylum] can eventually come down . . . The Directive does not confront this problem by, for example, simply shutting out purely opportunistic claims . . . But, by art 5(3), perhaps oddly, it does allow ‘subsequent’ – that is, presumably, repeat – applications to be excluded if these are based on activity *sur place*, whether opportunistic or not. For the rest, it is evident from the way art 5(2) is formulated that activities other than bona fide political protest can create refugee status *sur place*”: *YB (Eritrea)* (Eng. CA, 2008), at [13]–[15].

⁴⁰³ *Re HB (NZ RSAA, 1994)*, at 349 [154], 352 [163].

persecutor,”⁴⁰⁴ the authority nonetheless asserted that the Refugee Convention should be interpreted

as requiring, implicitly, good faith on the part of the asylum seeker . . . [because] the Refugee Convention was intended to protect only those in genuine need of surrogate international protection and . . . the system must be protected from those who would seek, in a *sur place* situation, to deliberately manipulate circumstances merely to achieve the advantages which recognition as a refugee confers.⁴⁰⁵

While allowing the exclusionary rule to be trumped by a “balancing exercise . . . [that weighs up] the degree of bad faith, the nature of the harm feared and the degree of risk,”⁴⁰⁶ the manipulative *sur place* claimant would ordinarily be denied refugee status for lack of good faith. New Zealand⁴⁰⁷ and Australia⁴⁰⁸ have since codified a statutory “good faith” exclusion for *sur place* claims in their domestic laws.⁴⁰⁹ 5

This candidly instrumentalist response was firmly rejected by the English Court of Appeal in the key case of *Danian*,⁴¹⁰ which observed that the Convention refugee definition “mentions the cases in which the Convention is not to apply at all (articles 1D–F), for example in the case of a person who has committed a crime against humanity (article 1F(a)). There is no reference in article 1 to a person who has acted in bad faith in relation to his asylum claim.”⁴¹¹ 10
In response to the argument that the drafters would most certainly have intended to exclude *sur place* claims made in bad faith, the court replied that it had been “shown nothing in the *travaux préparatoires* to indicate that the case had been assumed to be excluded; and in terms 15

⁴⁰⁴ *Ibid.*, at 351 [159].

⁴⁰⁵ *Ibid.*, at 352 [164]. It has been determined that this exclusion is not applicable where the risk of being persecuted is not simply the result of the claimant’s actions taken in bad faith, but also in part the result of the actions of third parties: *Refugee Appeal No. 76204* (NZ RSAA, Feb. 16, 2009), at [134].

⁴⁰⁶ *Re HB* (NZ RSAA, 1994), at 352 [165].

⁴⁰⁷ “A refugee and protection officer must decline to accept for consideration a claim for recognition as a refugee if the officer is satisfied that 1 or more of the circumstances relating to the claim were brought about by the claimant – (a) acting otherwise than in good faith; and (b) for a purpose of creating grounds for recognition [as a refugee]”: Immigration Act 2009 (NZ), at s. 134(3).

⁴⁰⁸ Since 2001, Australian law has required refugee decision-makers to “disregard any conduct engaged in by the person in Australia unless . . . the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee”: Migration Act 1958, at s. 91R(3). This provision has been determined by the High Court to require the exclusion only of evidence that would assist an applicant’s claim, not evidence that would impugn refugee status: *SZJGV* (Aus. HC, 2009). Mathew rightly notes that as an “evidentiary exclusion,” the Australian approach “could be viewed as a narrower approach than that adopted in *Re HB*”: P. Mathew, “Limiting Good Faith: ‘Bootstrapping’ Asylum Seekers and Exclusion from Refugee Protection,” (2010) 29 Aust. Y. B. I. L. 135, at 147. Yet the result is the same, namely the denial of refugee status (though by virtue of a duty to ignore substantively relevant evidence excluded on good faith grounds). A not insignificant safeguard has nonetheless been provided by the determination of the Federal Court that s. 91R(3) applies only when the “dominant purpose” of the impugned actions is to strengthen his or her claim to be a refugee: *SZJZN v. Minister for Immigration and Citizenship*, (2008) 169 FCR 1 (Aus. FC, Apr. 18, 2008), at 10 [35].

⁴⁰⁹ The Australian legislative response was specifically intended to reverse the contrary position adopted by the Full Federal Court in *Mohammed*, discussed in text *supra*, at n. 383. “Both the Second Reading Speech and Revised Explanatory Memorandum to the Bill that introduced s.91R(3) make it clear that the provision was introduced to overcome the effect of Federal Court decisions that had recognised the claims of applicants who deliberately set out to contrive claims for refugee status after they had arrived in Australia”: Refugee Review Tribunal of Australia, *Guide to Refugees Law in Australia* (2012), at 3–13.

⁴¹⁰ *Danian* (Eng. CA, 1999). ⁴¹¹ *Ibid.*, at 111, per Brooke L.J.

of article 32 of the Vienna Convention it does not seem . . . necessarily manifestly absurd or unreasonable that the bare wording of the Convention should extend protection . . . provided that [the applicant] does indeed have a well-founded fear of persecution.”⁴¹² Indeed, in a case decided before the passage of domestic legislation at odds with international obligations,⁴¹³ the Australian Full Federal Court similarly declined to endorse the New Zealand “good faith” approach, finding in *Mohammed*⁴¹⁴ that

the question of whether a person is a refugee is to be determined by consideration of Art 1 of the Convention . . . and Australia’s obligations concerning refoulement specified in Art 33 of the Convention. There is in neither article any requirement of good faith . . . [T]here is no “bad faith” exemption to the definition of [a] refugee.⁴¹⁵

Nor have most scholars embraced the “good faith” limitation.⁴¹⁶ Most fundamentally, Mathew correctly observes that

⁴¹² *Ibid.*, at 127, per Buxton L.J. A judgment of the Federal Court of Canada found this reasoning to be “quite persuasive”: *Ghasemian v. Canada (Minister of Citizenship and Immigration)*, [2003] FC 1266 (Can. FC, Oct. 30, 2003), at [31].

⁴¹³ See *supra*, at nn. 408–9.

⁴¹⁴ *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000). In the subsequent case of *Farahanipour* (Aus. FFC, 2001) the court was essentially deadlocked on whether to follow the *Mohammed* precedent or to adopt the “good faith” principle, arguably implicit in the court’s earlier reasoning in *Somaghi* (Aus. FFC, 1991). The controversy is now moot in Australian law given legislative intervention, discussed in text *supra*, at nn. 408–9, which was intended to reverse the decision in *Mohammed: SZJGV* (Aus. HC, 2009), at 665 [50], per Crennan and Kiefel JJ.

⁴¹⁵ *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at 407, per Spender J. Writing in dissent, Carr J. nonetheless concurred on this issue, noting “I do not see the need . . . to lay down a principle of good faith, that is to imply a condition of good faith into the Convention or to put a gloss to that effect on the Convention”: at 432 [88]. That decision further observed that a good faith requirement would run up against accepted doctrine that risk based on imputed political opinion falls squarely within the Convention definition. “Were Convention protection in respect of persecution on account of political opinion limited to those who truly hold the relevant opinions, a good faith requirement might be seen as no more than a requirement that the political opinions expressed abroad are genuinely held. But Convention protection extends to those with a well-founded fear of persecution on account of political opinions attributed to them by the country of origin . . . Somebody who does not truly hold a political opinion may have such an opinion attributed to him or her upon the basis of statements or actions calculated to attract that consequence”: *ibid.*, at 413–14 [29], per French J.

⁴¹⁶ Grahl-Madsen’s writing provides some support. “[W]e may have to draw a distinction . . . between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not. The principle of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a *bona fide* refugee”: Grahl-Madsen, *supra* n. 310, at 252. While it is true that a contracting state is not bound to grant refugee status to a person who is not a genuine refugee, this fact does not support the insertion of a good faith exclusion into the definition of who is a refugee at international law. Nor does Grahl-Madsen accurately state the principle of good faith in international law: see text *infra*, at n. 428. In contrast, Goodwin-Gill and McAdam conclude that implying such a condition “seems to ignore both the criteria set out in article 1A(2) and the particular responsibility of decision-makers in the determination of refugee status, which requires them to assess the personal experiences and credibility of the individual claimant in context, and to assess the likely behaviour of the State of origin or other putative persecutor if the claimant were to be returned”: Goodwin-Gill and McAdam, *supra* n. 323, at 66.

international law generally binds states rather than non-state actors, the principle of good faith usually does not apply to individuals, even when international law recognises individual rights. It would be worrying if “inalienable” human rights were dependent on the absence of wrong-doing. Individuals may be punished under the criminal law and deprived of certain rights in order to protect others – indeed, international law still tolerates the death penalty. However, human rights do not depend on a person having clean hands.⁴¹⁷

In line with this reasoning, the English Court of Appeal in *Danian* rejected the notion of a “good faith bar” to *sur place* refugee claims based on self-serving actions.⁴¹⁸ Drawing on a sixth approach to such cases recommended by the UNHCR – namely, that courts engage in “a more stringent evaluation of the well-foundedness of a person’s fear of persecution in cases involving opportunistic claims” – the English Court of Appeal subsequently determined that

[t]here is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable. It does not even matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies – cases sometimes characterised as involving bad faith. When I say that none of this matters, what I mean is that none of it forfeits the applicant’s right to refugee status, provided only and always that he establishes a well-founded fear of persecution abroad. Any such conduct is, of course, highly relevant when it comes to evaluating the claim on its merits, ie to determining whether in truth the applicant is at risk of persecution abroad. An applicant who has behaved in this way may not readily be believed as to his future fears.⁴¹⁹

This approach has since been adopted by the High Court of Ireland,⁴²⁰ and was confirmed still to be applicable in the United Kingdom despite the advent of the relevant rule in the European Union’s Qualification Directive.⁴²¹

Yet this sixth “more stringent evaluation” approach as adopted in the United Kingdom is not without conceptual flaws of its own. As pointed out by Lord Justice Sedley in the English Court of Appeal,

[t]o postulate, as in *Danian*, that the consequence of a finding that the claimant’s activity in the UK has been entirely opportunistic is that “his credibility is likely to be low” is, with respect, to beg the question: credibility about what? He has *ex hypothesi* already been believed about his activity and (probably) disbelieved about his motive. Whether

⁴¹⁷ Mathew, *supra* n. 408, at 135.

⁴¹⁸ “I do not accept the Tribunal’s conclusion that a refugee *sur place* who has acted in bad faith falls outwith the Geneva Convention . . . Although his . . . claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound”: *Danian* (Eng. CA, 1999), at 122, per Brooke L.J.

⁴¹⁹ *Ahmed v. Secretary of State for the Home Department*, [2000] INLR 1 (Eng. CA, Nov. 5, 1999), at 7–8.

⁴²⁰ *FV* (Ir. HC, 2009), at [33], [37], per Irvine J. While bound by a distinct statutory regime (see *supra*, at n. 414), the High Court of Australia has also opined that “[n]either [the domestic law] nor Australia’s protection obligations under the Refugee[] Convention require that such conduct be disregarded where it is adverse to an applicant’s credibility. Such a result would be irrational”: *SZJGV* (Aus. HC, 2009), at 651 [9], per French C.J. and Bell J.

⁴²¹ *YB (Eritrea)* (Eng. CA, 2008); *TM (Zimbabwe)* (Eng. CA, 2010).

his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it is well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse.⁴²²

Indeed, in approving the UNHCR advice in *Danian*, Lord Justice Brooke opined that because the credibility of the manipulative claimant “is likely to be low,”⁴²³ the “more stringent evaluation” approach would mean that “the vast majority of cases . . . will be peremptorily dismissed without any real difficulty. It is only in . . . an extraordinary case that a genuine entitlement to protection from *refoulement* may arise.”⁴²⁴

If these assumptions are valid, is the UNHCR’s preferred approach not in effect an invitation to decision-makers to treat some amorphous notion of “lack of credibility” as ordinarily dispositive of the claim of the at-risk but manipulative *sur place* claimant? And if that is so, is the “more stringent evaluation” approach not really just a “good faith” bar in disguise? Yet as the US Court of Appeals for the Ninth Circuit has insisted, an adverse credibility assessment is no bar to the recognition of a *sur place* claim – even one involving lack of “good faith” – so long as there is other credible evidence of a risk of being persecuted for an actual or imputed Convention ground.⁴²⁵ This view is, of course, consonant with the general understanding that the applicant’s credible testimony is but one way in which a well-founded fear may be established.⁴²⁶ More generally, there is no basis in law to justify treating this one category of claim as warranting more stringent evaluation than any other. There is also clear evidence that courts encouraged to treat this subset of *sur place* claims as somehow *sui generis* not infrequently find themselves in legal error.⁴²⁷

How, then, should a state respond to the risk of manipulation by self-serving actions *sur place*?

In our view, the best approach to *sur place* claims grounded in disingenuous and self-serving actions abroad is also the most simple: they should be assessed on the basis of the usual criteria, in the usual way, with no special substantive limitation or procedural posture.⁴²⁸

⁴²² *YB (Eritrea)* (Eng. CA, 2008), at [13].

⁴²³ *Danian* (Eng. CA, 1999), at 122, per Brooke L.J. ⁴²⁴ *Ibid.*

⁴²⁵ Despite finding the Iraqi *sur place* applicant not to be credible, the court nonetheless recognized refugee status on the grounds that “the Iraqi government would have good reason to impute to the evacuees a dissident political opinion and a connection with the United States,” and “that Iraq may well regard all the evacuees as traitors, and persecute them”: *Al-Harbi v. Immigration and Naturalization Service*, (2001) 242 F.3d 882 (USCA, 9th Cir., Mar. 9, 2001), at 892–93.

⁴²⁶ See *infra* Chs. 2.4.3, 2.6.4.

⁴²⁷ There is, in particular, a proclivity to misapply the nexus (“for reasons of”) requirement in such cases. See e.g. the statement that “[a] persecutory reaction, by the country of origin, to the applicant’s pretext because of the embarrassment it creates or domestic difficulties it generates in that country will not thereby be on account of an attributed political opinion, but rather the action itself which will not therefore attract Convention protection”: *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at 420 [43], per French J.; the unsubstantiated position that “an attempt to rely on an imputed political opinion generated by conduct designed solely to attract attention and refugee status is not within the Convention”: *Farahanipour* (Aus. FFC, 2001), at 293 [48], per Tamberlin J.; and the bald assertion that self-serving political conduct can satisfy the nexus requirement only if it is not the dominant cause of risk: *Federal Ministry of the Interior v. Independent Federal Asylum Board (UBAS)*, 99/20/0565 (Au. VwGH [Austrian Administrative Court], May 22, 2003).

⁴²⁸ This analysis in Hathaway, *Refugee Status*, was relied upon by the Federal Court of Australia in *Mohammed v. Minister for Immigration and Multicultural Affairs* (Aus. FC, Jun. 28, 1999), at 215 [28]. The arguments made were, however, later misinterpreted to suggest that refugee status should be recognized in such cases only where the serious harm feared is particularly acute (“It is difficult to escape the conclusion

In *Bahadori*,⁴²⁹ for example, the US Court of Appeals for the Ninth Circuit was confronted with the claim of an Iranian who after conviction of a series of drug and other offences claimed refugee status in order to avoid deportation. The Board of Immigration Appeals initially denied the claim, determining that the basis for his fear – an alleged conversion to Christianity – was fraudulent, having been contrived simply to secure asylum. This result was overturned on appeal. Relying on solid evidence that even an insincere conversion would be seen as apostasy by Iranian officials, leading to a real chance of being persecuted upon return, the court simply applied the usual rules to find that protection was warranted on the basis on an imputed religious identity.⁴³⁰ As has been observed, “there is no . . . basis for distinguishing . . . between the innocent bystander to whom political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned.”⁴³¹

This is the nub of the issue. Worries that respect for the usual rules of refugee law in the context of *sur place* claims will allow any individual simply to turn herself into a refugee are not sound. Because it is the reaction of the home country (in terms either of inflicting harm, or withholding protection) that is critical,⁴³² the only persons whose contrived actions can give rise to a duty to provide protection are those from a state in which the basic duty to protect the security of its citizenry without discrimination is not respected. And because this is so, it really is not correct to see the assessment of *sur place* claims grounded in activities abroad as an invitation to abuse. To the contrary, but for the unlawful response of the home country to the contrived taunt, there would be no possibility of refugee status being recognized. Forcibly to return a person to such a state in order to show our disapproval of “bad faith” is a gross and unprincipled over-reaction to the cynical manipulator.

Adoption of the approach recommended here does not deprive an asylum state of the ability to signal its displeasure. A state may, if it wishes, deny the manipulative refugee any rights or benefits not mandated by the Refugee Convention or other international

that Hathaway’s argument involves recognising that there is some level of persecution against which Convention protection will not be available where the claimant’s conduct was calculated to form the basis for that apprehended persecution”: *Minister for Immigration and Multicultural Affairs v. Mohammed* (Aus. FFC, May 5, 2000), at 414 [29], per Spender J.). To the contrary, the only question is whether the gravity of the harm threatened meets the general test of a risk of being persecuted, not some super-added standard of harm.

⁴²⁹ *Bahadori v. Immigration and Naturalization Service*, (1991) 947 F.2d 949 (USCA, 9th Cir., Oct. 30, 1991).

⁴³⁰ “We have held that an alien may establish a threat of persecution based upon ideas imputed to the alien by others . . . It appears that upon a proper exercise of discretion *Bahadori*’s case could be remanded to the immigration judge because the affidavits and other evidence presented on appeal to the BIA tend to establish a prima facie case that *Bahadori* faces a clear probability of persecution in Iran”: *ibid.*, at [10]–[11].

⁴³¹ G. S. Goodwin-Gill, “*Danian v. Secretary of State for the Home Department*, Comment: Refugee Status and ‘Good Faith,’” (2000) 12 Intl. J. Ref. L. 663, at 670.

⁴³² This analysis in Hathaway, *Refugee Status* was adopted in *Danian* (Eng. CA, 1999) and adopted by the Federal Court of Canada (“I share that view. The only relevant question is whether activities abroad might give rise to a negative reaction on the part of the authorities and thus a reasonable chance of persecution in the event of return”: *Ngongo v. Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1627 (FCTD, Oct. 25, 1999), at [23]). Such an approach would conform to the basic principle enunciated by Grahl-Madsen that “the behaviour of the persecutors is decisive with respect to which persons shall be considered refugees”: Grahl-Madsen, *supra* n. 310, at 251–52.

law – for example, the ability to access permanent residency or citizenship.⁴³³ This approach was encouraged by the original version of the European Union’s Qualification Directive:

Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.⁴³⁴

There is, however, no basis in international law to punish the misfeasance with return to the risk of being persecuted, however sought to be justified.⁴³⁵

5 In sum, the Convention does not distinguish between persons who leave their country to avoid persecution, and those who, while already abroad, find that they cannot safely return home. A relevant risk may arise from a significant change in circumstances in the country of origin or result from actions taken by, or impacting, the applicant while already abroad. In such cases, the relevant questions are whether the actions abroad may reasonably come
10 to the attention of the putative persecutor and, if so, whether the risk thereby engendered is both serious enough to amount to a risk of being persecuted and is based on an actual or imputed Convention ground.

Importantly, it does not follow that all persons whose activities abroad are not genuinely demonstrative of an oppositional political opinion or other protected characteristic are
15 for that reason outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in the sense that it was prompted primarily by an intention to secure asylum, consequential imputation to the claimant of a negative political opinion or other protected status by authorities in her home state may nonetheless bring her within the scope of the Convention definition.⁴³⁶ Following the usual rules, an assessment
20 must be made of the gravity of any potential harm to be faced upon return that derives from that imputed civil or political status. This approach ensures that the focus remains on the provision of protection to persons who face the risk of an unconscionable form of harm, without the distraction of any special rule or procedure.

⁴³³ The Refugee Convention requires only that a state give good faith consideration to the possibility of naturalization, not that it ever grant such status: Refugee Convention, at Art. 34. See generally Hathaway, *supra* n. 24, at 977 ff.

⁴³⁴ 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 L 304/12 (Sept. 30, 2004) (“2004 Qualification Directive”), at Art. 20(6). This provision is not included in the current Qualification Directive, *supra* n. 51.

⁴³⁵ See generally Hathaway, *supra* n. 24, at 342 ff.

⁴³⁶ This analysis in Hathaway, *Refugee Status*, at 39, was endorsed in *Xi Cai Hou v. Canada (Minister of Citizenship and Immigration)*, [2012] FC 993 (Can. FC, Aug. 14, 2012); and *Shi Jie Li v. Canada (Minister of Citizenship and Immigration)*, [2012] FC 998 (Can. FC, Aug. 15, 2012).