The Architecture of the UN Refugee Convention and Protocol

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Publication Information & Recommended Citation


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The heart of international refugee law is the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, with some three-quarters of the world's governments having bound themselves to respect the standards set by these treaties. Contracting States may—and often have—accepted additional refugee protection responsibilities under national or regional law. But, as a matter of international law, these additional duties complement rather than supplant the fundamental commitments made under the Refugee Convention and Protocol.

The architecture of this core normative standard is in many ways unusual. As a formal matter, it derives from two interlocking UN treaties—the Refugee Convention and the Protocol—rather than from a single treaty.1 Perhaps the regime's best-known feature is a definition of refugee status that must be accepted without any qualification or variation by States, and which embraces persons on the basis of the facts of their situation rather than only as a function of legal adjudication or official declaration. Any persons so qualifying must be granted the benefit of an extraordinary array of refugee rights—rights that must be respected in addition to, not instead of, other entitlements including those that have been codified in international human rights law. The duty to respect refugee rights is not, moreover, conditional on the sufficiency of resources and may be derogated from in only relatively limited circumstances.

* The analysis here draws on the more detailed examination of these issues in The Rights of Refugees under International Law (2nd edn, CUP 2021). Jamila Odeh (JD, Michigan, 2019) provided outstanding research assistance for this chapter.

However, and in contrast to most other human rights treaties, refugee rights are not all owed immediately to a refugee coming under a Contracting State's jurisdiction, but rather arise on the basis of a sophisticated structure of levels of attachment. Nor is the nature of refugee rights generally defined in absolute terms; the content of most entitlements is instead contingent on what a particular host State provides to a specified group of non-refugees under its jurisdiction. These two features—the incremental acquisition of rights and the definition of many rights on the basis of contingent standards of compliance—are critical means of taking account of legitimate host State concerns that might otherwise arise from the core obligation to protect all persons coming under their jurisdiction who meet the international refugee definition. The continuing viability of this careful compromise embedded in the architecture of the Convention and Protocol is, however, increasingly threatened by the failure to establish an independent mechanism to supervise compliance with obligations or to ensure the fair distribution of protection burdens and responsibilities arising thereunder.

1. THE REFUGEE CONVENTION AND PROTOCOL AS INTERLOCKING SOURCES OF OBLIGATION

The Refugee Convention was drafted between 1948 and 1951 by a combination of United Nations organs, ad hoc committees, and a conference of plenipotentiaries. Its orientation was decidedly Eurocentric: while most Contracting States opted to apply its provisions to non-European refugees, the mandatory scope of protection was limited to refugees whose flight was prompted by a pre-1951 event within Europe. It was not until the adoption in 1967 of the Protocol that the duty to protect refugees was prospectively made both global and temporally inclusive. In the result, Contracting States to the Refugee Convention that have gone on to adopt the Protocol—as nearly all have done—


3 Two States—Madagascar and Saint Kitts and Nevis—accessed to the Refugee Convention but have not gone on to adopt the Protocol. These two States are therefore not formally bound to protect the rights of modern refugees. While the option under the Convention to protect only European refugees is in most cases denied to States that sign the Protocol, one Contracting State, Madagascar, exercised the 'European refugee only' option when it acceded to the Convention and it has not yet become a party to the Protocol—meaning that it is still formally entitled to refuse to protect non-European refugees. In addition, the Protocol includes a 'grandfathering' provision that allows Contracting States that were parties to the Convention before 1967 to maintain any pre-existing geographical restriction even upon ratifying or acceding to the Protocol. Congo and Turkey fall into this category: having ratified the Convention with a geographical limitation and not having elected to withdraw that limitation (as, for example, Malta did in 2002), these countries are also exempted from obligations towards non-European refugees.
must now grant all Convention rights to all refugees, including those in flight from contemporary phenomena in any part of the world.

Whether the Protocol truly updated and universalized the scope of international refugee protection is, however, debatable. While the explicit temporal and geographical limitations were eliminated, the substantive test for refugee status—a well-founded fear of being persecuted for reason of one of five forms of civil or political status—was not changed by the Protocol. This raises the spectre of persons in flight from natural disasters, war, or broadly based political or economic turmoil—arguably the dominant causes of flight in most of the less-developed world today—being thought to fall outside the scope of internationally protected refugee status.

This has led some scholars, including most recently Betts and Collier, to call for a new understanding of refugee status. Yet other voices recognize the continuing value of the definition, in particular as expanded at the regional level and taking into account the adoption of complementary or subsidiary protection regimes. Indeed, even in the absence of such formal initiatives, the creative reinterpretation of the refugee definition by scholars and judges has in many cases succeeded in broadening understandings of a risk of 'being persecuted', so that at-risk minorities in flight from war or other broadly based forms of harm are recognized as refugees entitled to the protection of the Convention and Protocol. As framed by Justice Kirby of the High Court of Australia:

Because the Convention is universal, it does not speak only of the grounds of persecution that have been most familiar to Western countries. . . . [I]n other societies,


5 See Chapters 45 and 46 in this volume.


8 See in particular Marina Sharpe, The Regional Law of Refugee Protection in Africa (OUP 2018); see generally Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para 2' in Zimmermann (n 1) 464.


10 See Chapter 45 in this volume; Matthew Scott, Climate Change, Disasters and the Refugee Convention (CUP 2020).
and in modern times, different cultural norms and social imperatives may give rise to different sources of persecution. The concept is not a static one. Nor is it fixed by historical appreciation.  

2. REFUGEE STATUS AS A NON-RESERVABLE INTERNATIONAL NORM

As in the case of most treaties, States acceding to the Convention and Protocol may generally enter a reservation to avoid particular obligations. The Refugee Convention, however, insulates five core norms from any possibility of reservation or qualification—including the Convention's definition of a refugee entitled to international protection. Because the refugee definition in article 1A(2) may not be altered by Contracting States, it is, for example, not lawful for a country to protect as refugees only those fleeing risk on account of religion but not for reason of their particular social group; to decide that only persons who have already experienced persecution (rather than all who have a 'well-founded fear' of being persecuted) are to be treated as refugees; nor to exclude stateless persons from refugee status. And because the Convention stipulates in great detail both the circumstances under which refugee status comes to an end and the scope of permissible exclusion from refugee status, Contracting States may not, for example, simply end refugee status because of economic or political pressure or summarily bar persons from protection on the basis of vague allegations that they present a 'terrorist' or other threat.

It is of course true, as both Sztucki and Chetail have insisted, that Contracting States enjoy significant latitude to interpret and apply the common refugee definition. Courts have nonetheless recognized the importance of giving a common meaning to the Convention, including to its definition of who is a refugee. As the Supreme Court of the United Kingdom made clear, the refugee definition 'must be interpreted as an international instrument, not a domestic statute. It should not be given a narrow or restricted interpretation.' Because there is a single refugee definition that binds all

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12 Refugee Convention, arts 1A(2) and 42(1). The other non-reservable rights are to protection from discrimination, to enjoy freedom of religion, to have access to the courts, and to be protected from refoulement.
13 See Chapters 39 and 57 in this volume. Sztucki (n 6) 68–75.
Contracting States, each State is required to promote the effectiveness of the Convention as a treaty with a common standard of entitlement to protection:

As in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning... without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty... In practice it is left to national courts, faced with the material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. 17

3. REFUGEE STATUS AS DECLARATORY

While it is common to speak of Contracting States 'granting' refugee status, this framing is not in fact accurate. As detailed below, 18 rights under the Convention and Protocol actually accrue incrementally over time, with two important 'bundles' of rights explicitly owed to persons who are not yet 'lawfully present' (much less 'lawfully staying' or durably residing) in an asylum country. This innovative approach to the attribution of rights to refugees reflects the sensible concern of the Convention's drafters that some basic entitlements had to be provisionally extended to all persons claiming refugee status, or recognizable as refugees even before status adjudication, in order to safeguard the very purpose of the regime. 19 Put simply, if a Contracting State had no refugee protection obligations unless and until an individual is affirmatively found to satisfy the criteria of the refugee definition, a poorly intentioned State might opt to delay that

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18 See Section 6.
19 For example, '[g]iven that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition... the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared': UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) para 6. 'While [the declaratory nature of refugee status] may sound like a technicality, it is the reason why asylum-seekers should not be returned to their countries of origin until their claims have been examined': Frances Nicholson and Judith Kumin, A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27, 2017 (Inter-Parliamentary Union and UNHCR 2017) 18. See also Abdul Ghafur Hamid and Shaban Phiri, 'Protecting Asylum-Seekers Prior to Determination of Refugee Status: Reinterpreting the Refugee Convention and Assessing Contemporary State Practice on Non-Refoulement' (2017) 25 International Islamic University of Malaysia Law Journal 29, 37–8. Importantly, all rights provisionally respected can be immediately withdrawn in the event an applicant is found not to be a Convention refugee.
inquiry or even to avoid it altogether. If, on the other hand, core rights are provisionally guaranteed to those arriving to seek protection unless and until found not to qualify as refugees, the Contracting State has an incentive to inquire into the need for protection even as the basic interests of the person claiming refugee status are safeguarded in the interim. The UNHCR Handbook thus eloquently observes that:

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.

This understanding that refugee status recognition is declaratory has been recognized by the Inter-American Court of Human Rights, as well as by several senior national courts. European Union law also expressly provides that '[t]he recognition of refugee status is a declaratory act', as do the laws of a number of countries.

This importance of the declaratory nature of refugee status truly cannot be overstated: perhaps most importantly, this principle provides a critical means to

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21 The declaratory nature of refugee status thus sits comfortably with the implied duty to investigate refugee claims. See eg UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/ENG/REV.4 (1979, reissued 2019) paras 24, 189, 194; Chetail (n 15) 51. The innovative attachment system of the Convention (see Section 6) nonetheless ensures that, if a State fails or refuses to assess refugee status, the full catalogue of refugee rights will still accrue over time. James C Hathaway, The Rights of Refugees under International Law (CUP 2005) 183-4, 189-91. See also Hathaway and Foster (n 7) 25-6.

22 UNHCR (n 21) para 28.

23 'Given the declarative nature of the determination of refugee status...the States parties to the 1951 Convention...must recognize this status, based on the respective fair and competent proceedings': Pacheco Tineo Family v Bolivia, Inter-American Court of Human Rights Series C No 272 (25 November 2013) para 147.

24 'True it is...as para 28 of the Handbook neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined': R (Hoxha) v Special Adjudicator [2005] UKHL 19, [2005] 1 WLR 1063 para 60; see also R (ST; Eritrea) (n 16) para 21. 'Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings': Németh v Canada 2010 SCC 56, [2010] 3 SCR 281 para 50; see also Kenya National Commission on Human Rights v Attorney General [2017] eKLR para 17.


26 It is nonetheless fair to observe that, under national law, '[f]or the asylum seeker there is little comfort in this otherwise perfect logic, since unless recognized he or she will be treated, rightly or wrongly, as a non-refugee with all the consequences (perhaps sometimes tragic) of non-recognition': Sztucki (n 6) 70-1; see also Goodwin-Gill and McAdam (n 9) 51. This concern, though, derives less from the declaratory nature of refugee status than from the tragic failure to establish an effective system for oversight of duties under the Convention. See Section 8.
contest the legality of *non-entée* policies under which Contracting States have attempted to avoid even access to their courts or protection from *refoulement* to persons arriving at their jurisdiction to seek protection.\(^{27}\)

### 4. Non-exclusive Catalogue of Rights

A critical attribute of the Convention and Protocol is that they contain a continuing affirmation of the propriety of Contracting States legislating domestically beyond the standards of the Refugee Convention and, particularly, of them continuing to accord refugees all advantages that accrue to them by virtue of other agreements, such as bilateral treaties with the refugee’s country of origin. Most important, article 5 should be read as establishing how duties under refugee law are to be reconciled with the requirements of the array of important accords negotiated since the advent of the Refugee Convention—including expansions and interpretations of international refugee law itself, the advent of regional refugee regimes, and especially the evolution of a dynamic system of international human rights law.\(^{28}\) International human rights law generally grants rights to all persons subject to a State’s jurisdiction, and is therefore a critical source of enhanced protection for refugees. Article 5 of the Refugee Convention ensures that refugee rights are not seen as limited to those set by the refugee treaty itself,\(^{29}\) but rather makes clear that refugees are entitled to the benefit of more general human rights principles. As Chetail explains:

> the Geneva Convention itself provides the means for resolving any potential conflicts of norms [between refugee law and human rights law], for its Article 5 preserves the continuing applicability of more favourable standards granted apart from [the Refugee] Convention without regard to the so-called specialty of the norms.\(^{30}\)

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\(^{27}\) The implications of the duty of *non-refoulement* in the context of extraterritorial deterrence are developed in Thomas Gammeltoft-Hansen and James C Hathaway, *‘Non-Refoulement in a World of Cooperative Deterrence’* (2015) 53 Columbia Journal of Transnational Law 235.

\(^{28}\) Ziegler notes that rights in the Refugee Convention and Protocol were ‘carefully framed to define minimum standards’: Ruvi Ziegler, *Voting Rights of Refugees* (CUP 2017) 41, citing UNHCR, *‘Note on International Protection; UN doc A/AC.96/951 (13 September 2001) paras 4 and 107.*

\(^{29}\) Skordas, in contrast, contends that it is ‘more appropriate to examine the relationship between refugee law and human rights law in Art 7, which establishes a clear obligation of the contracting parties to afford refugees the same treatment as that accorded to aliens generally’: Achilles Skordas, *Article 5: Rights Granted Apart from this Convention* in Zimmermann (n 1) 675; see also at 677, 698. Art 7, which establishes the general standard of treatment for refugees, does indeed reinforce the right of refugees to benefit from general norms of human rights law. But it is art 5 that most clearly resolves the potentially thorny question of how the two bodies of law should be reconciled, requiring that refugees receive the benefit of the cognate rights set by international human rights law.

\(^{30}\) Chetail (n 15) 22 (fn omitted). It does not, however, follow that ‘the terms of the debate should be inversed: human rights law is the primary source of refugee protection, while the [Refugee] Convention is bound to play a complementary and secondary role’. Such an assertion of hierarchy is not only at odds with the complementary and mutually reinforcing nature of refugee and general human rights law, but misstates the relative strength of refugee-specific norms in various contexts. See generally Hathaway (n 21).
Edwards takes much the same position, noting that 'Article 5 of the [Refugee] Convention [may be] read as a “successive clause” or “conflict clause”. Article 5, in other words, ensures that, in the event of any normative dissonance between the Refugee Convention and simultaneously applicable general human rights standards, refugees are entitled to the benefit of the higher standard.

5. EXCEPTIONS AND DEROGATION

Another strength of the Refugee Convention and Protocol—in addition to the non-reservable core definitional norm, the declaratory nature of refugee status, and the non-exclusive catalogue of rights—is that refugee rights are less susceptible to exceptions and derogation than are the rights set by some other core human rights treaties, including, in particular, the two international human rights covenants.

While the rights set by the ICESCR explicitly inhere in 'everyone', they are not framed as obligations of result. States parties agree instead 'to take steps, individually and through international assistance and co-operation... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. Critically, this formulation 'does not mean that States parties may indefinitely postpone taking action': to the contrary, there is a duty to give priority to the realization of economic, social, and cultural rights, and to ensure that their realization is subject to meaningful legal accountability and respect for the rule of law and human rights.

31 Alice Edwards, 'Human Rights, Refugees, and the Right "to Enjoy" Asylum' (2005) 17 IJRL 293, 306. She continues that this understanding leads to a result that is consistent with the more general approach taken under paragraphs 30(3)-(4) of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Edwards writes that those subparagraphs 'provide that where an earlier treaty is not terminated or suspended, the former applies only to the extent that its provisions are compatible with the latter treaty. While there is no refugee-specific replacement for the 1951 Convention, there is an overlap in relation to particular provisions... and application of sub-Articles 30(3) and (4) of the Vienna Convention would mean that all the provisions of the 1951 Convention and/or 1967 Protocol remain on foot apart from those which are incompatible with international human rights law instruments subsequently ratified.'


33 As Saul, Kinley, and Mowbray observe, 'the tone and nature of the demands made of states are quite different from the equivalent Article 2(1) in the ICCPR, being more exhortatory than mandatory, more progressive than immediate': Ben Saul, David Kinley, and Jacqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials (OUP 2014) 134.

34 ICESCR, art 2(1). 'The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time': Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties’ Obligations (Art 2, Para 1, of the Covenant)'; UN doc E/1991/23 (14 December 1999) para 9.

towards other requirements of human rights law, in particular the duty of non-discrimination. But it remains that general economic rights are subject to a more fungible standard of implementation than are cognate rights under the Refugee Convention, which grant Contracting States no discretion whatsoever to delay implementation on the basis of insufficient resources.

Similarly, article 2(3) of the ICESCR authorizes '[d]eveloping countries, with due regard to human rights and their national economy, [to] determine to what extent they [will] guarantee the economic rights recognized in the present Covenant to non-nationals'. As Saul, Kinley, and Mowbray note, this provision contemplates not just the maintenance of existing restrictions, but also 'the introduction of new measures designed to limit the rights which non-nationals had previously enjoyed'—a potentially fatal concern for the overwhelming majority of refugees who live in the less-developed world. The Refugee Convention, in contrast, requires that a wide range of critical economic rights be granted to refugees by all Contracting States.

While general civil and political rights must be immediately implemented, including by less developed countries, most rights under the ICCPR are nonetheless subject to relatively broad derogation authority in the context of a 'public emergency which threatens the life of the nation'. In contrast, article 9 of the Refugee Convention does not allow Contracting States to derogate from their obligations on an ongoing basis, even in time of war or other serious national emergency. As Grahl-Madsen concluded, 'the Convention is to be applied not only in normal time, but also in time of war or national emergency, and... States may only derogate from the provisions within the limits of [article 9]'.

Specifically, article 9 allows for derogation only as a provisional measure 'pending a determination by the Contracting State that that person is in fact a refugee'. A Contracting State that wishes to avail itself of the provisional measures authority must therefore proceed to verify the claims to refugee status of all persons whose rights are

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36 Saul, Kinley, and Mowbray (n 33) 215. Invoking the drafting history, the authors nonetheless constrain the implications of this understanding somewhat, arguing that 'Article 2(3) was... intended to allow developing countries to address structural inequalities in their economies which resulted from colonialism' and that 'Article 2(3) would therefore seem to refer to countries which are economically weak and which were formerly subject to colonial rule': 215-16 (emphasis added).

37 ICCPR, art 4(1).

38 Atle Grahl-Madsen, Commentary on the Refugee Convention 1951 (UNHCR 1963) 42.

39 Refugee Convention, art 9. Despite the clear language of this provision, it has been suggested that a 'determination... that that person is in fact a refugee' does not mean what it says. Rather, '[t]he ultimate aim of the determination under Art 9 is not to clarify refugee status according to the criteria in Art 1, but to find out whether the individuals concerned—bound via their nationality to a country engaged in severe hostilities against their host country—are (still) loyal to their country of nationality and, hence, a security risk for their host country': Ulrike Davy, 'Article 9' in Zimmermann (n 1) 800. This approach is not only contrary to the plain language and drafting history of the article, but would allow a State effectively to suspend its obligations in perpetuity. Yet even the Australian representative—who argued perhaps most strenuously for a wide-ranging power of derogation—made clear 'that it was never his delegation's intention to open the way to an indefinite extension of the circumstances in which states could take exceptional measures': Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixth Meeting (4 July 1951), UN doc A/CONF.2/SR.6, 14 (statement by Mr Shaw, Australia).
thereby suspended.40 If a particular person41 is found not to be a Convention refugee, including on the basis of criminal or other exclusion provisions, no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.42 If, on the other hand, an individual is found to satisfy the Convention refugee definition, article 9 establishes a presumption that the provisional measures must come to an end.43

6. RIGHTS ACQUISITION BY ATTACHMENT

To this point, the architecture of the Refugee Convention and Protocol may seem skewed in a way that is unrelentingly attuned to the needs of the refugee: refugee status (a) must be based on the international definition of a refugee interpreted in a geographically and temporally inclusive way; (b) accrues by virtue of facts on the ground rather than simply as a function of formal status assessment; (c) is non-exclusive; and (d) is less amenable to exceptions or derogation than are cognate norms under general international human rights law. But these pro-refugee attributes are neatly balanced by two important features that safeguard the legitimate concerns of the Contracting States to which the protection request is addressed.

First, and in contrast to the usual approach in international human rights law, it is not the case that all of the rights set out in the Convention are immediately owed to every presumptive refugee arriving at a State's territory. Refugees are instead entitled to an expanding array of rights as their relationship with the asylum State deepens.44 At the

40 'The purpose of Art 9 is to permit the wholesale provisional internment of refugees in time of war, followed by a screening process': Nehemiah Robinson, Convention relating to the Status of Refugees: Its History, Contents and Interpretation (Institute of Jewish Affairs 1953) 95.
41 'The words "in his case" indicate that such measures may not be taken against all or certain categories of refugees but may only be taken on the merits of the individual case'. Paul Weis, The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis (CUP 1995) 75.
42 Countervailing domestic or international legal obligations, for example duties to avoid removal under the CAT, may operate independently to prevent removal from the asylum country.
43 Contrary to both the express language and drafting history of art 9, Davy argues that provisional measures may be applied not only to refugees who have not yet been recognized, but also to 'individuals who have—on the basis of a formal determination or just informally—been admitted as refugees. They might all be subjected to provisional measures': Davy (n 39) 801.
44 As observed by the Supreme Court of the United Kingdom, '[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought....An examination of the Convention shows that it contemplates five levels of attachment to the contracting states': R (ST, Eritrea) (n 16) para 21. The first level of attachment (being simply subject to a State's jurisdiction) is not included in the attachment typology proposed in Goodwin-Gill and McAdam, though the writers acknowledge that '[s]ome benefits extend to refugees by virtue of their status alone as refugees': Goodwin-Gill and McAdam (n 9) 524. Another writer omits the notion of durable residence. See Rosa da Costa, 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations', UNHCR Legal and Protection Policy Research Series, POLAS/2006/02 (2006) 17—19.
lowest level of attachment, some refugees are simply subject to a State's jurisdiction, in the sense of being under its control or authority. A greater attachment is manifest when the refugee is physically present within a State's territory. A still more significant attachment is inherent when the refugee is deemed to be lawfully or habitually present within the State. The attachment is greater still when the refugee is lawfully staying in the country. Finally, a small number of rights are reserved for refugees who can demonstrate durable residence in the asylum State.\(^45\) As the refugee's relationship to the asylum State is solidified over the course of this five-part assimilative path,\(^46\) the Convention requires that a more inclusive range of needs and aspirations be met.

The drafters' decision to grant refugee rights on an incremental basis reflected the experience of States confronted with the unplanned arrival of refugees at their frontiers. While States outside Europe continued mainly to receive refugees preselected for resettlement, several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and domestically unauthorized arrival of refugees at a State's borders.\(^47\) The drafters of the Convention explicitly considered how best to align the refugee rights regime with this transition from an essentially managed system of refugee migration to a mixed system in which at least some refugees would move independently:

the initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As the definition of refugee made no distinction between those who had been properly admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.\(^48\)

The compromise reached was that any unauthorized refugee, whether already inside or seeking entry into a Contracting State's territory, would benefit from the protections of the Refugee Convention.\(^49\) Such refugees would not, however, immediately acquire all the rights of 'regularly admitted' refugees, that is, those pre-authorized to enter and to

\(^{45}\) See generally Hathaway (n 21) 156-91.

\(^{46}\) 'The Convention is characterized by a gradual improvement of standards over time, reflecting the refugee's assimilation into the host State': McAdam 2007 (n 9) 214.

\(^{47}\) Art 31 of the Refugee Convention prohibits the penalization of most refugees for unlawful entry or presence: see Hathaway (n 21) 370-412.

\(^{48}\) Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Seventh Meeting Held at Lake Success, New York (23 January 1950), UN doc E/AC.32/SR.7, 12 (statement by Mr Cuvelier, Belgium).

\(^{49}\) 'It did not, however, follow that the Convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties... whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened': Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Twentieth Meeting Held at Lake Success, New York (1 February 1950), UN doc E/AC.32/SR.20, 11-12 (emphasis added) (statement by Mr Henkin, United States).
reside in an asylum State. Instead, as under then-prevailing French law, basic rights
would be granted to all refugees, with additional rights following as the legal status of
the refugee was consolidated.50

This staggered approach to the attribution of refugee rights is a critical answer to the
concern that it would be unreasonable simply to demand that all of the Convention's
rights—which provide an unusually strong arsenal of, in particular, rights of economic
participation—be instantly provided to each and every refugee arriving, whatever the
numbers concerned or the circumstances of the receiving State. Yes, some critical
refugee rights must be guaranteed immediately and to all under a Contracting State's
jurisdiction51—to do otherwise would be fundamentally unjust to refugees. But the
Convention's more sophisticated rights may be lawfully delayed, ideally allowing time
for burden- and responsibility-sharing mechanisms to attenuate the hardship for
overtaxed receiving countries, even as the refugee's assimilation demands deeper
enfranchisement over time.

7. RIGHTS DEFINED BY A MIX OF ABSOLUTE
AND CONTINGENT STANDARDS

In addition to the fact that refugee rights are owed only incrementally rather than
immediately, the Convention normally calibrates the nature of a Contracting State's
duties with what it provides to other persons under its jurisdiction.52 While a few rights
are guaranteed absolutely to refugees, the standard for compliance normally varies as a
function of the relevant treatment afforded another group under the laws and practices
of the receiving country. The general idea is that most refugee rights are framed as
contingent standards, with the exception of a core group of rights that are owed in

50 '[T]he problem would be seen more clearly if it were divided into three different aspects: the first
concerned the treatment of refugees before they had reached an understanding with the authorities of
the recipient countries; the second referred to their right to have their situation regularized and the con-
ditions in which that was to be done; the third dealt with their rights after they had been lawfully author-
ized to reside in the country, which meant, in the case of France, after they were in possession of a
residence card and a work card': Ad Hoc Committee on Statelessness and Related Problems, First
Session, Summary Record of the Fifteenth Meeting Held at Lake Success, New York (27 January 1950),
UN doc E/AC.32/SR.15, 15 (statement by Mr Rain, France).

51 The relevant substantive rights are arts 3 (non-discrimination), 13 (movable and immovable prop-
erty), 16(1) (access to the courts), 20 (rationing), 22 (education), 29 (tax liability), 33 (prohibition of
refoulement), and 34 (good faith consideration for naturalization). In addition, certain contextual rights
also apply at this stage, including arts 5 (respect for other rights), 6 (exemption from insurmountable
requirements), 7(1) ('aliens generally' default), 8 (exemption from exceptional measures), and 12 (respect
for personal status). Additional rights accruing with mere physical presence include arts 4 (religious
freedom), 27 (identity documents), 31(1) (non-penalization for illegal entry or presence), and 31(2) (only
necessary and justifiable constraints on freedom of movement).

52 See Goodwin-Gill and McAdam (n 9) 512 for an examination of the historical foundations of the
contingent rights structure.
absolute terms because they are either refugee-specific (such as the duty of non-refoulement and the right not to be penalized for illegal entry or presence) or deemed of consummate importance (such as the rights to non-discrimination and to freedom of religion). Under these contingent rights standards, refugees are assimilated to citizens of the asylum country, to nationals of a most-favoured State, or non-citizens generally in the asylum State. But, in any case, refugees must be exempted from any criteria which a refugee is inherently unable to fulfil, and may not be subjected to any exceptional measures applied against the citizens of their State of origin.

The frequent reliance of the Convention and Protocol on contingent standards of treatment helps to ensure that asylum countries are not asked to do more than is demonstrably within their capacity. It also guards against the prospect of refugees being said to be 'privileged' vis-à-vis citizens and others living in the asylum State, since normally refugees are entitled to no more than what others already receive. Like the notion of incremental acquisition of rights, the Convention's reliance on a mix of absolute and contingent rights thus attenuates the otherwise seemingly absolute duty of protection arising from the simple fact of a refugee arriving at a Contracting State's jurisdiction.

8. State-by-State Implementation

The Refugee Convention and Protocol can thus be seen to embody a sensible compromise. On the one hand, their architecture is hugely attentive to the needs of refugees—including by the attribution of rights on the basis of a non-reservable and flexible definition, a commitment to declaratory rather than constitutive status assessment, non-exclusivity of rights accrual, and no more than constrained exceptions and derogation authority. On the other hand, the real needs of host countries are catered for by the structure of incremental rights acquisition through attachment and by the conceptualization of most rights on a contingent basis.

Despite the wisdom of this balance, the Refugee Convention and Protocol are today less influential on the ground than they should be, due in no small measure to the fact that they are implemented on an ad hoc, State-by-State basis rather than in a coordinated manner. In part, this concern mirrors the critique noted above that both the refugee

53 Even the baseline standard of compliance must, of course, meet the requirements of international human rights law, in particular the overarching duty of non-discrimination: Marina Sharpe, 'The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?' (2014) 30(2) Refuge 5; Skordas (n 29) 719-20.
54 Refugee Convention, art 6. See generally Hathaway (n 21) 205-8; Reinhard Marx and Felix Machts, 'Article 6' in Zimmermann (n 1).
55 Refugee Convention, art 8. See generally Hathaway (n 21) 270-7; Davy (n 39).
56 'The [Refugee] Convention draws a clear cut distinction between the international norms enshrined therein and their national implementation entrusted to each individual state party': Chetail (n 15) 51.
definition and refugee rights are interpreted in varying ways by Contracting States in a manner that erodes the intended commonality of protection standards. With no more than a never-used right of Contracting States to challenge another Contracting State's interpretation before the International Court of Justice, the refugee regime is today the only widely subscribed UN human rights regime that lacks an independent supervisory mechanism capable of defining its terms in an authoritative way. While this is both historically explicable (the Convention came into force before independent supervision was routine) and mitigated both by UNHCR's role under article 35 of the Convention (though the agency cannot enforce compliance), lacks autonomy from the Contracting States that fund it and takes on roles that arguably suggest that it should itself be supervised and the existence of a vibrant transnational conversation amongst refugee law judges (who often draw on international and comparative norms when enforcing law at the domestic level), the ability to sustain the Convention's vitality without truly independent and authoritative oversight is increasingly doubtful.

Yet, as real as the threat from interpretive inconsistency is, the most profound challenge to the longevity of the Convention and Protocol comes from the fundamentally uncoordinated way in which they are implemented. Simply put, neither refugee rights

57 See Section 2.
58 See Karin Oellers-Frahm, 'Article 38 of the 1951 Convention/Article IV of the 1967 Protocol' in Zimmermann (n 1) 1551, noting that '[i]t has been argued that the mere existence of a compromissory clause can have a positive effect on the attitude of State parties to a particular convention.'
59 The contemporaneously drafted Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 189 UNTS 117, and the Convention on the Reduction of Statelessness (adopted 4 December 1954, entered into force 30 August 1961) 989 UNTS 175, also lack independent enforcement mechanisms. Neither treaty has, however, thus far been acceded to by the majority of States (94 and 75 ratifications respectively).
61 '[T]here is no proper procedure implementing the UNHCR's supervisory responsibility. Nor has an international enforcement mechanism as such been established in this area.' Volker Türk, 'UNHCR's Supervisory Responsibility', UNHCR New Issues in Refugee Research, Working Paper No 67 (2002) 2-3.
62 Chetail (n 15) 65.
63 'Supervision ceases to be the natural and exclusive preserve of the UNHCR when it assumes responsibilities that are properly those of states and require supervision themselves': Marjoleine Zieck, 'Article 35 of the 1951 Convention/Article II of the 1967 Protocol' in Zimmermann (n 1) 1507-8.
nor the protection of legitimate host State interests can be guaranteed under the current ‘accidents of geography’ mechanism for the allocation of protection burdens and responsibilities.

Despite the recognition in the preamble of the Convention that ‘the grant of asylum may place heavy burdens on certain countries, and that a satisfactory resolution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,’ the Convention and Protocol are today implemented on a State-by-State basis, the default position being that refugees are the sole legal responsibility of whatever country they arrive at. This is not only grotesquely unfair to States—with only 10, mostly poor, countries hosting roughly half of the global refugee population—but at least as important is a huge threat to the vindication of refugee rights, with more than three-quarters of the world’s refugees consigned to long-term indeterminate status in protracted refugee situations. The most recent response of the United Nations to this predicament has been to offer only general principles and a multiplicity of fora in which to discuss voluntary coordination of protection efforts, with no hard commitments to share burdens and responsibilities, much less to establish a true oversight mechanism that would ensure a fair and dependable global implementation of the Convention and Protocol.

We thus stand at a precipice. The thoughtful compromises built into the architecture of the Refugee Convention and Protocol are important, but clearly insufficient to withstand the pressures of continuous large-scale refugee flows in the absence of significantly enhanced oversight and coordination. This poses the very real risk that, despite the smart compromises at the heart of this normative regime, the Refugee Convention and Protocol will founder—leaving both refugees, and the poorer countries that receive most of them, in the lurch.

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66 Refugee Convention, preamble, para 4.
68 ibid 22 (noting that 15.9 million refugees, some 78 per cent of the total refugee population, were living in protracted refugee situations).
70 See the Global Compact on Refugees, which is analysed in depth in a collection of articles found in (2018) 30 IJRL 571.