

# The Evolving Definition of the Refugee In Contemporary International Law

By  
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## I. INTRODUCTION

The Refugee Convention is one of the cornerstones of the larger human rights system for protecting vulnerable persons and yet it is also a very narrow instrument, protecting a very specific group of persons. This duality is reflected in refugee protection generally where, on the one hand, states appear to believe in a moral, humanitarian imperative to protect individuals seeking refuge, yet, on the other hand, they are reluctant to permit entry to all those persons falling under their responsibility. When we consider the contemporary definition of refugee, and how customary international law may supplement the definition of refugee, we see this same division of interests. If we were motivated strictly by human-centered interests, we would find a broadening of the definition, although perhaps with limited state compliance. If we were motivated strictly by state-centered interests, we might find a narrowing of the definition, although perhaps abandoning desperate individuals truly in need.

This Article will attempt to navigate between these perspectives to look, first, at how the definition may be broadening under customary international law, and second, at how the definition may be narrowing. Section II will address the evolving interpretation of the definition of refugee under the Refugee Convention, especially the evolving means for interpreting the Convention, to determine whether the conventional definition has outgrown its conventional shell. Section III will turn to customary international law proper, analyzing state practice and *opinio juris* on point. In particular, this Section will reflect on the role

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of specially interested or specially affected states in the formation of customary international law and the growth of “subsidiary” protection. Also this Section will consider the contribution of the practice and *opinio juris* of international organizations in the frame of contemporary international law’s understanding of the contribution international organizations can make.

Section IV will turn to look at the opposite side of the coin: the ways in which customary international law may have narrowed the definition beyond the terms of the Refugee Convention. If we are open to considering the broadening role of customary international law, then we must equally be open to the narrowing role. Some of the provisions examined in this Section are perhaps not correctly considered aspects of the definition, for example, safe third country option and diplomatic assurances. These might be better understood as exceptions to the *non-refoulement* obligation. However, they will be considered nonetheless within the broader notion of the definition of those deserving refuge similar to the “exclusion” or public danger clauses in the Refugee Convention, which interact with the application of the definition in important ways, such as in the case of child soldiers. These additional concerns are developing under customary international law to increasingly restrict the availability of refuge. Section V will conclude by summing up the findings of the analysis.

## II.

### INTERPRETATION OF THE DEFINITION IN THE REFUGEE CONVENTION

The beginning for any inquiry into the definition of a refugee is the Refugee Convention and its protocol.<sup>1</sup> The Refugee Convention specifies that a person qualifies as a refugee if (1) the person has already been considered a refugee under prior treaty arrangements<sup>2</sup> or (2) the person is outside the country of his nationality (or not having a nationality) and is unable or unwilling to avail himself of the protection of that country due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.<sup>3</sup> The latter are commonly referred to as the “inclu-

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1. Convention relating to the Status of Refugees [hereinafter Refugee Convention], *adopted* on July 28, 1951 by the U.N. Conf. of Plenipotentiaries on the Status of Refugees & Stateless Persons convened under U.N.G.A. Res. 429 (V) (Dec. 14, 1950), 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees [hereinafter Refugee Protocol], *adopted* by U.N.G.A. Res. 2198 (XXI) (Dec. 16, 1966), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). Note that some authorities cited herein may refer to the Refugee Convention as the “Geneva Convention of 1951” or similar.

2. Refugee Convention, art. 1A(1) (a person who has been considered a refugee under the Arrangements of May 12, 1926 and June 30, 1928, or under the Conventions of October 28, 1933 and February 10, 1938, the Protocol of September 14, 1939, or the Constitution of the International Refugee Organization).

3. Refugee Convention, art. 1A(2). *See also* Min. Immigr. Ethnic Aff’rs v. Guo & Anor. (Matter No. S151 of 1996), [1997] H.C.A. 22 (High Ct., Austl., June 13, 1997); R v. Sec’y St. ex parte Adan, [2001] 2 A.C. 477 (U.K. H. Lords, Apr. 2, 1998) (Slynn, L.). However, that the Geneva

sion” clauses. Failure to qualify under the former does not defeat the possibility of qualification under the latter.<sup>4</sup>

This Article will not address in depth the requirements of persecution or social group membership, other than to note in passing that the classification of social group membership appears to be broadening to consider cultural changes.<sup>5</sup> Also one of the most significant developments in interpretation is that some

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Convention [Refugee Convention] in Article 1A(2), does not confer that status. The first matter to be established under the Article is that the claimant *is* outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the Article that he had such fear when he left his country but no longer has it. *See e.g.*, *A.G. v. Ward*, [1993] 2 S.C.R. 689; (1993) 103 D.L.R. (4th) 1; 20 Imm. L.R. (2d) 85 (Sup. Ct., Can. June 30, 1993); *Wang v. Min. for Immigr. & Multicult. Aff'rs*, [2000] F.C.A. 1599 (High Ct., Austl. Nov. 10, 2000); *Applicant A. & Anor. v. Min. Immigr. & Ethnic Aff'rs & Anor.*, [1997] H.C.A. 4; (1997) 190 C.L.R. 225; 142 A.L.R. 331 (High Ct., Austl. Feb. 24, 1997); *Namitabar v. Can. (Min. of Employ. & Immigr.)*, Case A-1252-92, [1994] 2 Can. F.C. 42 (Fed. Ct. T.D.); *Fathi-Rad, v. Can. (Sec'y of St.)*, Case No. IMM-2438-93, [1994] 77 F.T.R. 41 (Fed. Ct. T.D., Apr. 13, 1994); *Islam (A.P.) v. Sec'y St. Home Dep't, R. v. Immigr. Appl. Trib. & Anor. ex parte Shah (A.P.) (Conjoined Appeals)* (U.K. H. Lords, Mar. 25, 1999); *Mandla v. Dowell Lee*, [1983] 1 Q.B. 1 (Q's Bench, U.K.); U.N.H.C.R. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/Eng/REV.1, ¶¶ 74-6 (rev. ed. 1992) [hereinafter UNHCR Handbook].

4. Refugee Convention, art. 1A(1) (“Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section”).

5. *See e.g.*, *Australia: Applicant A. v. Min. Immigr. & Ethnic Aff'rs*, [1997] H.C.A. 4 (individuals opposing China's “one-child” policy not a social group); *Chen Shi Hai v. Min. Immigr. & Multicult. Aff'rs*, [2000] 170 A.L.R. 553 (children born outside of “one-child” policy may be a social group); *Belgium: Dec. VB/04-1680/E530 (Perm. Appls. Bd. for Refs., Belg., Dec. 2, 2004)* (recognizing Mongolian women who break centuries old taboos as a social group); *Canada: A.G. v. Ward*, [1993] 2 S.C.R. 689 (membership of the Irish National Liberation Army was not a social group); *Finland: Aliens Act (2004)* (recognizing gender as a particular social group according to the Refugee Convention); *France: Case 550032, “MS” (Comm'n des Recours des Réfugiés [hereinafter CRR] [Refugees Appls Bd.], Dec. 20, 2005)* (persecution based on female genital mutilation); *Case 445756, “FS” (CRR, Dec. 1, 2005)* (recognizing persons with albinism as a social group); *Case 534159, “LO” (CRR, Sep. 19, 2005)* (persecution based on gender); *Case 497003 (CRR, Mar. 2, 2005)* (recognition of homosexuals as a social group); *Case 489014, Ayten Tas (CRR, Mar. 4, 2005)* (recognition of persecution based on sexual grounds for subsidiary protection); *Case 496775, “B” (CRR, Feb. 15, 2005)* (recognition of transsexuals as a social group); *Case 513490, “SD” (CRR, Jan. 10, 2005)* (same); *Case 492349 (CRR, Dec. 22, 2004)* (recognition of homosexuals as a social group for subsidiary protection); *Case 444000, Noreen Niaz (CRR, Oct. 15, 2004)* (recognition of persecution based on sexual grounds for subsidiary protection); *Case 473647, “NH” (CRR, July 23, 2004)* (recognition of homosexuals as a social group for subsidiary protection); *Germany: Grundgesetz [Basic Law] § 16a, ¶ 1 (¶ 2 prior to 1993); Ausländergesetz [Foreigner Law], art. 51, ¶ 1; Immigration Act, (2005)* (recognizing gender-related persecution); *Bundesverwaltungsgericht [Fed. Admin. Ct.], Jan. 18, 1994, Case 9 C 48/92 (Ger.); BVerwG, Mar. 15, 1988, Case 9 C 278/86 (Ger.); Verwaltungsgerichtshof [Higher Administrative Court] (13th Sen.), Hessen, Nov. 14, 1988, Case 13 TH 1094/87 (Ger.); VGH (10th Sen.), Hessen, Aug. 21, 1986, Case 10 OE 69/83 (Ger.); Verwaltungsgericht [Admin. Ct.], Dresden, Feb. 1, 2005, Case A 7 K 31131/03 (Ger.)* (recognizing gender persecution); *VG, Frankfurt am Main, Feb. 19, 2005, Case 5 E 7021/03.A(3) (Ger.)* (same); *VG, Frankfurt am Main, Mar. 29, 1999, Case 9 E 30919/97.A(2) (Ger.); VG, Frankfurt am Main, Oct. 23, 1996, Case 5E 33532/94.A (3) (Ger.); VG, Magdeburg, June 20, 1996, Case 1 A 185.95*

states have begun to recognize non-state actors as potential sources of persecution, rather than only states.<sup>6</sup> These two developments suggest that at least the applicable inclusion provisions within the definition of refugee appear to be interpreted dynamically with a focus on the object and purpose of the Refugee Convention, and the contemporary meaning of the treaty text.

However, there are also several provisions that defeat refugee status for otherwise qualified individuals. Individuals who do qualify under (1) or (2) above may fall outside the definition if they have voluntarily re-availed themselves of the protection of their country of nationality;<sup>7</sup> have voluntarily re-acquired the nationality of their state;<sup>8</sup> have acquired a new nationality and protecting state;<sup>9</sup> or voluntarily re-established themselves in the state which they left or remained outside of owing to fear of persecution.<sup>10</sup> In the case of multiple nationals, the individual must qualify as a refugee as per all the states of nationality.<sup>11</sup> This latter possibility has been interpreted so far as to refuse refugee sta-

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(Ger.); VG, Minden, May 17, 2004, Case 9 K 51445/03 (Ger.) (same); VG, Wiesbaden, Nov. 4 2004, Case 7E 2235/03. A(V) (Ger.) (same); *but see* VG, Neustadt a.d.W., Apr. 26, 2004, Case 5 K 2591/03.NW (Ger.) (holding that women may be required to comply with social conditions); VG, Stade, May 26, 2004, Case 6 A 160/04 (Ger.) (same); VG, Trier, Apr. 27, 1999, Case 4 K 1157/98 (Ger.); and Slovakia: case reported but unnamed in European Council on Refugees and Exiles, Country Report 2004, EUROPEAN COUNCIL ON REFUGEES AND EXILES (2005), <http://www.ecre.org/files/CR04.pdf>, [hereinafter *ECRE Country Report 2004*] (recognizing gender persecution). Provisions against discrimination can inform the reading of persecution on one of the protected grounds. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978) [hereinafter ICCP]; *See also* S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), *entered into force* Jan. 3, 1976, Art. 2(2); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, *entered into force* Jan. 4, 1969, Art. 1; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980), *entered into force* Sep. 3, 1981, Art. 2(1); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), *entered into force* Sep. 2, 1990; International Labour Convention No. 111, Discrimination (Employment and Occupation) Convention, June 25, 1958, 362 U.N.T.S. 31, *entered into force* June 15, 1960.

6. *See* Arthur C. Helton & Pamela Birchenough, *Forced Migration in Europe*, 20 FLETCHER F. WORLD AFFAIRS (1996) (reporting on Austria, France, Sweden, and Switzerland; although Switzerland does often permit these individuals to remain on other humanitarian grounds).

7. Refugee Convention, art. 1C(1).

8. *Id.* at art. 1C(2). *See also* Cessation of Refugee Status (No. 2001/01/0499) [2003] VGH (Austl.).

9. Cessation of Refugee Status at art. 1C(3).

10. *Id.* at art. 1C(4).

11. *Id.* at art. 1A(2); *Koe v. Min. for Immigr. & Multicultural Aff's* [1997] FCR 306, 9 (Austl.) (upholding *Koe v. Min. for Immigr. & Ethnic Aff's* [1997] 78 F.C.R. 289 (High Ct., Austl.)). *See also*, *N.A.G.V. & N.A.G.W. v. Min. for Immigr. & Multicultural Aff's* (S187/2004) [2005] CLR 6 (Austl.); *Min. for Immigr. & Multicultural Aff's v. Thiagarajah* (1997) 151 ALR 685 (Austl.) (regarding Sri Lankan with French nationality); *SSRP & Min. for Immigr. & Multicultural Aff's* (No. N2000/399) [2000] AATA 878 (Austl.) (regarding East Timorese); Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.); *A.G. v. Ward*, [1993] 2 S.C.R. 689; (1993) 103

tus to persons who have the potential nationality (perhaps even ethnicity) of another state.<sup>12</sup> However, this dual nationality (or residence) provision is not always strictly applied under municipal law, evidencing a purposive application of the terms of the convention. For example, North Koreans who avail themselves of South Korean nationality are considered firmly resettled in South Korea by the United States,<sup>13</sup> but if they do not move to acquire South Korean nationality, they cannot be returned to the Korean peninsula on the theory that they could be considered South Korean nationals.<sup>14</sup>

Persons will also not qualify if the persecuting circumstances within the

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D.L.R. (4th) 1 (Sup. Ct. Can. June 30, 1993) ("The Board must investigate whether the claimant is unable or unwilling to avail himself or herself of the protection of each and every country of nationality ... Where the second state has not actually been approached by the claimant, that state should be presumed capable of protecting its nationals."); *Dawlaty v. Min. of Citizenship & Immigr.* [1998] F.C. (Can.) (also note that Canada might be considered a specially interested state, *see infra* note 65 and accompanying text); *Case Abstract No. IJRL/0127, G. v. Sec. Just.*, 4 INT'L J. OF REFUGEE L. 551 (1992) (dual Argentine-Uruguayan national had refugee status recognized by the Netherlands because he could prove that he faced a well-founded fear of persecution from both Argentina and Uruguay) (also note that the Netherlands might be considered a specially interested state, although it is less affected than some of the other states considered in this Article, *see infra* note 65); *Case Abstract No. IJRL/0071*, 3 INT'L J. OF REFUGEE L. 129 (1991) (Jewish individual refused refugee status by Switzerland because he could seek refuge in Israel); *Case Abstract No. IJRL/0067, St M. v. Sec. St. Home Dept.*, 3 INT'L J. OF REFUGEE L. 129 (1991) (also note that the United Kingdom could be considered a specially interested state, *see infra* note 65 and accompanying text); UNHCR Handbook, *supra* note 3, at ¶ 106-07. *See generally* Elim Chan & Andreas Schloenhardt, *North Korean Refugees and International Refugee Law*, 19 INT'L J. OF REFUGEE L. 215 (2007) (making an argument regarding North Korean refugees having the possibility of nationality in South Korea and thus not qualifying under the Refugee Convention); Ryszard Piotrowicz, *Refugee Status and Multiple Nationality in the Indonesian Archipelago: Is there a Timor Gap?*, 8 INT'L J. OF REFUGEE L. 319 (1996) (arguing that refugees from East Timor might not qualify under the Refugee Convention due to *de jure* Portuguese nationality).

12. *See e.g.*, Case No. MIG 2007: 33 II, UM837-06 [Supreme Migrations Court] 2007-06-15 (Swed.); Rolleiv Solholm, *Amnesty Accept Expulsions*, NORWAY POST (Sept. 14, 2010), <http://www.norwaypost.no/news/amnesty-accept-expulsions.html> (holding that Serbs from Kosovo may be returned to their "homeland" in Serbia, not Kosovo; also reporting that Amnesty International has accepted the practice). Similarly, individuals do not qualify if they are recognized by the state of residence as having the rights and obligations of nationality of that state, even though not formally holding nationality. *See* U.N.H.C.R. PROTOCOL ON POLICY AND LEGAL ADV. SEC., DEPT. INT'L PROTOCOL, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶ 9, reprinted in 17 INT'L J. OF REFUGEE L. 293 (2003) [hereinafter UNHCR, *Background Note on the Exclusion Clauses*]. Under Article 1E, the 1951 [Refugee] Convention does not "apply to a person who is recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." The object and purpose of this Article can be seen as excluding from refugee status those persons who do not require refugee protection because they already enjoy greater protection than that provided under the 1951 [Refugee] Convention in another country apart from the country of origin where they have regular or permanent residence and where they enjoy a status that is in effect akin to citizenship.

13. *See* Matter of K-R-Y- and K-C-S-, 24 Immigr. & Nat'lty. Decision 133 (Bd. Immigr. Appls 2007).

14. *See* North Korean Human Rights Act of 2004, Pub. L. 108-333, 118 Stat. 1287, *codified in* 22 U.S.C. § 7842 (2004).

relevant state have ceased to exist under the so-called “cessation” clauses<sup>15</sup>. According to the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), the cessation clauses are to be applied sparingly. Further, in order to invoke a cessation clause:

There must have been a change in the refugee’s country of origin, which is fundamental, durable, and effective. Fundamental changes are considered as effective only when they remove the basis of the fear of persecution.<sup>16</sup>

This provision is usually interpreted more broadly than even the UNHCR appears to advise and refugee status usually will not be considered to have ceased as long as the situation remains one of general danger or instability.<sup>17</sup> In

15. Refugee Convention, art. 1C(5) & (6); 98/01/0503 v. Indep. Fed. Asylum Bd. [hereinafter UBAS], (VwGH [Admin. Ct.], Aust., Sept. 8, 1999); S.S. (Czech Rep.) v. Swiss Fed. Office for Refugees (Asylum Appls. Comm’n, Switz., Nov. 3, 1999). However, in order for a state to make a determination that a person does not qualify as a refugee under this provision, the state is obliged to first determine whether the individual qualifies as a refugee under the Convention. *See* R v. Spec. Adj’tor ex parte Hoxha, [2005] 1 W.L.R. 1063; [2005] 4 All E.R. 580, [2005] UKHL 19 (UKHL, Mar. 10, 2005, *aff’g* Hoxha & B., [2002] E.W.C.A. Civ. 1403, [2002] All E.R. (D) 182 (Oct)) (“[Art] 1C(5), a cessation clause, simply has no application ... at any stage unless and until it is invoked by the State against the refugee in order to deprive him of the refugee status previously accorded to him”).

16. UNHCR Exec. Comm. Concl. 69 (XLIII) (1992) – Cessation of Status.

17. *See e.g.*, Denmark: Case unreported and unnamed (Appls. Bd., 2005) *reported at ECRE Country Report 2004*, *supra* note 5, *rev’g* the application of the cessation clause in the case of Afghan refugees since the situation in Afghanistan was not yet sufficiently stable; Germany: Oberverwaltungsgericht [OVG] Saarland [High Admin. Ct.] Sept. 21, 2004, Case 1 R 15/04 (Ger.) (holding that there was no longer a risk of persecution for ethnic Albanians in Kosovo, justifying cessation of refugee status); OVG Schleswig-Holstein, June 16, 2004, Case 2 LB 54/03 (Ger.) (holding that Afghanistan was sufficiently stable after the fall of the Taliban); Verwaltungsgerichtshof [VGH] Hessen, Feb. 10, 2005, Case 8 UE 216/02.A (Ger.) (holding that conditions of stability must be considered and that Afghanistan after the Loya Jirga in June 2002 was sufficiently stable to provide for cessation of refugee status); Verwaltungsgericht [VG] Ansbach, June 29, 2004, Case 19 K 03.31666 (Ger.) (holding that the particularized living conditions were so poor that refugee status could not be withdrawn); Case 6 A 524/04 (VG Braunschweig, Feb. 17, 2005) (same); Case 7 K 2389/01.A (VG Düsseldorf, Feb. 25, 2004) (same); Case 7 K 1517/00.A (VG Frankfurt/Oder, Mar. 2, 2004) (same); Case 9 E 7411/03.A(2) (VG Frankfurt am Main, Jan. 24, 2005) (same); Case 1 E 495/04.A(V) (VG Frankfurt am Main, May 27, 2004) (same); Case 5 E 4425/03.A (VG Frankfurt am Main, Feb. 27, 2004) (same); Case 9 K 4856/03.A (VG Minden, Apr. 26, 2004) (same); Case 7 E 2245/03.A(V) (VG Wiesbaden, Nov. 4, 2004) (same); Case W 7 K 04.30411 (VG Würzburg, Aug. 20, 2004) (same); Romania: Ord. No. 102/2000, Ordinance on the Status and Regime of Refugees in Romania (Nov. 1, 2000), as amended by Ord. 43/2004, Amending and Completing Government Ordinance No. 102/2000 on the Status and Regime of Refugees in Romania (Jan. 29, 2004) (Rom.) (modifying the rules of cessation, withdrawal and cancelling refugee status to reflect the Refugee Convention).

Switzerland: *In re* O.D. und Kinder, Eritrea, Case 2004, No. 26 Asylrekurskommission [ARK] [Asylum Appls. Comm’n] May 26, 2004 (Switz.) (Eritrea-Ethiopian borderland of the Senafe/Dehub region is considered unreasonable due to the humanitarian situation); *In re* A.G.M. et famille, Angola, Case 2004, No. 32 [Comm’n des Recours des Réfugiés] Sept. 17, 2004 (provinces of Cabinda, Uíge, Malanje, Lunda Norte, Lunda Sul, Bié, Moxico and Cuando-Cubango of Angola not to be reasonable, but removal to Luanda and easily accessible cities in the provinces of Cunene, Huila, Namibe, Benguela, Huambo, Cuanza Sul, Cuanza Norte, Bengo and Zaïre is considered to be reasonable under certain circumstances (i.e., single men or couples, without young children, no serious medical

general, however, the application of the Refugee Convention appears to be customarily interpreted dynamically with very heavy reliance on its apparent objective and purpose of protecting individuals in need.

Nevertheless, in several cases, general instability was found insufficient to prevent cessation of status,<sup>18</sup> while in others general instability was not even a factor considered unless it was due to lingering effects of the persecution.<sup>19</sup> Yet in other cases, general instability was considered only in the context of a viable internal flight alternative,<sup>20</sup> a topic addressed later. These cases do not appear to arise widely in different jurisdictions, so their evidence of a customary interpretation of the Refugee Convention is limited.

Further, in another set of cases, even where cessation of refugee status occurred preventing protection under the Refugee Convention, some cases held that general conditions of instability still could be grounds for granting subsidiary protection.<sup>21</sup> Such a decision by a state's court may in fact evidence that the state holds the belief that where the Refugee Convention strictly fails to provide for protection, the state is nonetheless still obliged to grant protection. This consideration will be addressed in more detail in a subsequent section on subsidiary protection, *infra* sec. III.E.2.

The Refugee Convention does contemplate that although the conditions of persecution are no longer continuing, an individual might still qualify as a refugee if there are compelling reasons arising out of previous persecution for refusing to avail oneself of the protection of the country of nationality; this is sometimes referred to as "exemption from cessation."<sup>22</sup> The Refugee Convention limits the application of this exception only to individuals who qualify as refu-

problems, family or social network).

18. See *e.g.*, Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.] July 23, 2004, Case 2 BvR 1056/04 (Ger.) (holding that refugee status may cease and recognition may be withdrawn, as long as the individual received notice of the decision); OVG Schleswig-Holstein, June 16, 2004, Case 2 LB 54/03 (Ger.) (reaching the opposite conclusion in the case of Afghanistan, finding it was sufficiently stable); VG Berlin, Feb. 2, 2004, Case VG 33 X 302.96 (Ger.) (same); VG Dresden, Mar. 16, 2004, Case Case A 7 K 31035/03 (Ger.) (same); VG Gelsenkirchen, Nov. 11, 2004, Case 5a K 8121/95.A (Ger.) (same); VG Neustadt a.d.W., Apr. 26, 2004, Case 5 K 1900/03.NW (Ger.) (same). See also VG Stuttgart, Jan. 7, 2003, Case 5 K 11226/00 (Ger.) (reaching the opposite conclusion that conditions of stability must be considered but reversed on appeal).

19. See *e.g.*, VG Braunschweig, Nov. 12, 2004, Case 6 A 58/04 (Ger.) (holding that cessation did not apply in particularized cases of ethnic Albanians from Kosovo where, *e.g.*, there were lingering effects); VG Göttingen, Apr. 27, 2004, Case 3 A 519/03 (Ger.) (same); VG Saarland, Nov. 24, 2004, Case 10 K 442/02.A (Ger.) (same).

20. See *e.g.*, VG Düsseldorf, July 15, 2004, Case 6 K 4833/03.A (Ger.) (holding that Kabul was sufficiently stable to present a viable internal flight alternative).

21. See *e.g.*, VG Gelsenkirchen, Nov. 11, 2004, Case 5a K 8121/95.A (Ger.) (holding that poor living conditions justified granting subsidiary protection); VG Wiesbaden, Mar. 30, 2004, Case 7 E 572/04. A(V) (Ger.) (same).

22. Refugee Convention, art. 1C(5) and (6). See generally David Milner, *Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention*, 16 INT'L J. REFUGEE L. 91 (2004).

gees under Article 1A(1), not 1A(2), *i.e.*, only to “statutory” refugees whose status was based on conventions prior to the Refugee Convention, not “convention” refugees whose status is based on the particular definition of “refugee” in the Convention. Notwithstanding the explicit terms of the Refugee Convention, there is practice of states extending this “exemption from cessation” protection to convention refugees,<sup>23</sup> even though the UNHCR clearly phrases this interpretation as not legally required by the Refugee Convention.<sup>24</sup> However, given the extent of state practice there may now be a customary norm requiring its application.<sup>25</sup> Again, there is a strongly purposive application of the terms of the Refugee Convention in state practice.

Also not qualifying as refugees under the Refugee Convention are persons

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23. See *e.g.*, Canada: Immigration Act § 2(3) (Can.); *Jiminez v. Can.*, F.C. # IMM-1718-98 (Can.); Finland: Aliens Act, 378 § 36, Feb. 22, 1991 (Fin.) (however, it is unclear whether the standard is the same: only in cases where the person is “evidently no longer stands in need of protection”); Ireland: Refugee Act 1996, No 17/1996 § 21(2) (Ir.) (“compelling reasons”); Netherlands: Aliens Act 2000 § 27(1) (Neth.) (“pressing reasons of a humanitarian nature”); New Zealand: *Re R.S.* (135/92) (N.Z.) (“it can no longer be confidently said that the ‘compelling reasons’ exception is confined only to refugees under Article 1A(1)”); Switzerland: Case No. 16, “F.M.”, Rwanda at 139 [ARK] Mar. 23, 1998 (Switz.); the United Kingdom: *In re Qafaliaj*, 00/HX/01051, [Immigr. Appls. Trib.] (U.K.); and the United States: 8 U.S.C. § 208.13(b)(1)(ii) (exempts from denial of status those who are able to demonstrate “compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution”); *Skalak v. Immigr. & Naturalization Serv.*, 944 F.2d 364 (7th Cir. 1991); *Lal v. Immigr. & Naturalization Serv.*, 255 F.3d 998 (9th Cir. 2001); *Lopez-Galarza v. Immigr. & Nationalization Serv.*, 99 F.3d 954 (9th Cir. 1996); *Matter of Chen*, 20 I. & N. Dec. 16 (Bd. Immigr. Appls., 1989). But see France: *Loi No. 52-893, Loi relative au droit d’asile* (July 25, 1952) (providing for the opposite); Luxembourg: *Loi du 20 mai 1953 portant approbation de la Convention relative au statut des réfugiés, signée Genève, le 29 juillet 1951* [Refugee Convention], Mém. A-37, Jun 16, 1953 § 703 (same); Portugal: *Law No. 15/98 § 36(h)*, Mar. 26, 1998 (Port.) (same); the United Kingdom: *R v. Spec. Adj’t. ex parte Hoxha*, [2005] 1 W.L.R. 1063; [2005] 4 All E.R. 580, [2005] U.K.H.L. 19 (H. Lords, Mar. 10, 2005) (holding that there was no evidence of a clear and widespread state practice); *R v. Sec’y St. ex parte Adan*, [2001] 2 A.C. 477 (H. Lords, Apr. 2, 1998) (Slynn, L.) (“I am satisfied, however, that the Geneva [Refugee] Convention in Article 1A(2), does not confer that status. The first matter to be established under the Article is that the claimant is outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the Article that he had such fear when he left his country but no longer has it.”). The UNHCR has also asserted, going further than the UNHCR Handbook, that it has “generally been accepted ... that the exception should apply where broadly, reflecting, as it does, a humanitarian concern ...” See UNHCR, U.N. Doc. EC/SCP/1992/CRP.1, at ¶ 15.

24. Milner, *supra* note 22, at 95-96.

25. See *id.* at 96 (“according to the Conclusions of the Lisbon Expert Roundtable, “Application of the ‘compelling reasons’ exemption to general cessation contained in Article 1C(5)-(6) is interpreted to extend beyond the actual words of the provision and is recognized to apply to all Article A1(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice.”) (citing Joan Fitzpatrick, *Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article 1.4 of the 1969 OAU Convention*, Excerpt Paper for the Global Consultations on International Protection, U.N.H.C.R., at ¶ 69, (citing in turn the practice of Germany, Ireland, Slovakia, Ghana, Liberia, Malawi, Zimbabwe, Azerbaijan, Lithuania, Canada and the United States) (Apr. 2001)). Also note that Germany, the United States and Canada may be considered specially interested states, see *infra* note 65 and accompanying text.



who are receiving protection or assistance from UN offices other than the UNHCR such as United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), or the United Nations Korean Reconstruction Agency, now defunct.<sup>26</sup> However, if the individual leaves the protection of that agency, and UNRWA is only operating in some portions of the Middle East, then the individual appears to qualify as a refugee under the Refugee Convention (the Helsinki, Finland Administrative Court went so far as to determine that the individual must be granted asylum because he now qualifies under the Refugee Convention).<sup>27</sup>

In addition, other persons may qualify under (1) or (2) but do not benefit from the protection of *non-refoulement*. These provisions have been adopted in municipal legislation on refugee status.<sup>28</sup> There are two classes of persons contemplated. The first class are those falling in the “exclusion” clauses,<sup>29</sup> including individuals with respect to whom there are “serious reasons for considering” that they have committed a crime against peace, a war crime, or a crime against humanity,<sup>30</sup> committed a serious non-political crime outside the country of ref-

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26. Refugee Convention, art. 1D; UNHCR, *Background Note on Exclusion Clauses*, *supra* note 12, at ¶ 8. *See also* UNHCR, *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* (Oct. 2002).

27. *See* Case No. 15.9.2004/04/1240/7 (Helsinki Admin. Ct., Fin. 2004).

28. *See e.g.*, Act No. 480/2002 § 13 (Slovk.) (providing specific categories of people who are excluded from the protection of the Refugee Convention, essentially adopting the Refugee Convention text).

29. The UNHCR has requested that states interpret the exclusion clauses restrictively. *See* UNHCR HANDBOOK, ¶ 116; UNHCR, *Background Note on Exclusion Clauses*, *supra* note 12, at ¶ 4; UNHCR, *Note on Expulsion of Refugees*, U.N.H.C.R. Doc. EC/SCP/3, ¶ 4 (1977). *See also* X & Y v. Refugee Status Appeals, CIV 2006-404-4213, Auth., High Court, Auckland (N.Z.), 23 Apr. 2007, at ¶ 64 (agreeing that the clauses must be interpreted restrictively).

30. Refugee Convention, art. 1F(a). *See also* Mugesera v. Canada (Minister of Citizenship and Immigr.), [2005] 2 S.C.R. 91, 2005 SCC 39; Zazai v. Canada (Minister of Citizenship & Immigr.), [2005] 2 F.C.R. 78, 2004 F.C. 1356, *reprinted at* ILDC 646 (CA 2005); Gonzalez v. Canada (Minister of Employment & Immigr.), [1994] 3 F.C. 646; A v. Minister of Immigr. & Integration, Council of State, Admin. L. Div., 2005 (Neth.), *reprinted at* ILDC 848 (NL 2005) (violations of Common Article 3 of the Geneva Conventions regarding international humanitarian law); Vreemdelingenzaken en Integratie, (Minister of Immigr. & Integration) v. A, Council of State, Admin. L. Div., 2005 (Neth.), *reprinted at* ILDC 546 (NL 2005); Anonymous v. Minister for Immigr. Affrs and Integration, Council of State (Raad Van State), 2004, (Neth.), *reprinted at* ILDC 144 (NL 2004); X & Y v. Refugee Status Appeals, CIV 2006-404-4213, Auth., High Court, Auckland, (N.Z.); Garate v. Refugee Status Appeals Auth. [1998] NZAR 241 (HC); Egbuna v. Taylor, [2005] Suit No.: FHC/ABJ/M/216/2004 (Nigeria), *reprinted at* ILDC 163 (NG 2005); Anyaele v. Taylor, [2005] Suit No.: FHC/ABJ/M/217/2004 (Nigeria), *reprinted at* ILDC 163 (NG 2005). *See also* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998); Charter of the International Military Tribunal, Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/1316 /82 (1950); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess. Supp. No. 51, U.N. Doc. A/39/51 at 197 (Dec. 10, 1984) [hereinafter CAT].

uge prior to admission as a refugee,<sup>31</sup> or have “been guilty of acts contrary to the purposes and principles of the United Nations.”<sup>32</sup> However, there may be an exception to these provisions for cases involving child soldiers, even though the Refugee Convention does not specifically address this exception.<sup>33</sup> Persons falling within the exclusion clauses do not appear to acquire the status of refugee under the Refugee Convention,<sup>34</sup> as opposed to individuals qualifying as refugees who might later lose that status.

A second class of persons who are refused protection includes individuals lawfully present who: (1) pose a compelling threat to national security or public order,<sup>35</sup> (2) present a danger to the security of the country of refuge,<sup>36</sup> or (3) have been convicted by a final judgment of a particularly serious crime and constitute a danger to the community of the country of refuge.<sup>37</sup> This second class applies to an individual who at some time qualified as a refugee, but who subse-

31. Refugee Convention, art. 1F(b). *See e.g.*, *Xie v. Canada* (Minister of Citizenship & Immigr.), [2004] 2 F.C.R. 372, 2003 F.C. 1023; *T v. Secretary of State for the Home Department*, [1996] AC 742, [1996] UKHL 8, [1996] 2 WLR 766, [1996] 2 All ER 865, [1996] Imm. AR 443. Note that the United Kingdom might be considered a specially interested state, *see infra* note 65 and the accompanying text. *See also* *Immigr. & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

32. Refugee Convention, art. 1F(c). *See e.g.*, *Pushpanathan v. Canada* (Minister of Citizenship & Immigr.), [1998] 1 S.C.R. 982, *as amended by* 1 S.C.R. 1222, *reprinted at* ILDC 182 ¶ 65, 68, 70 & 72 (CA 1998) (“In this case there is simply no indication that the drug trafficking comes close to the core, or even forms a part of the corpus of fundamental human rights”); *K.K. v. Secretary of State for the Home Department*, [2005] INLR 124, [2004] UKIAT 00101, [2004] Imm AR 284, [2004] UKIAT 101, ¶¶ 85, 93. Note that the Refugee Convention provides that such persons do not deserve refuge under the Convention, but it does not comment on any additional potential obligation under international law to prosecute or extradite. *See e.g.*, Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 425, 428 (E. Feller, et al., eds., 2003); Elizabeth Santalla Vargas, *Ensuring Protection and Prosecution of Alleged Torturers: Looking for Compatibility of Non-Refoulement Protection and Prosecution of International Crimes*, 8 EUR. J. MIGR. & L. 41 (2006); J. Handmaker, *Seeking Justice, Guaranteeing Protection and Ensuring Due Process: Addressing the Tensions between Exclusion from Refugee Protection and the Principle of Universal Jurisdiction*, 21(4) NETH. Q. HUM. RTS. 677, 681 (2003); Joan Fitzpatrick, *The Post-Exclusion Phase: Extradition, Prosecution and Expulsion*, 12 INT’L J. REFUGEE L. 272, 274 (2000).

33. *See* Case No. AWB 03/26654, Judgement (Dist. Ct. Arnhem, Neth., Oct. 18, 2004) (regarding a former child soldier of UNITA); UNHCR, *Background Note on Exclusion Clauses*, *supra* note 12, at ¶¶ 91-93. *See also, id.* at n.92 (“If the age of criminal responsibility is higher in the country of origin, this should also be taken into account (in the child’s favour).”)

34. UNHCR, *Background Note on Exclusion Clauses*, *supra* note 12 at ¶ 10.

35. Refugee Convention, art. 32(1); Dec. No. Nr. III-27-20/2005, (Vilnius apygardos administracinio teismo sprendimas [Vilnius Dist. Admin. Ct.], Lith., July 15, 2005) (balancing threat to national security and public order against family relations in Lithuania and holding that the need to expel was not necessary in a democratic society).

36. Refugee Convention, art. 33(2). *See e.g.*, Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, (Aug. 2004) (U.K.) (listing offences defined as serious within the context of Article 33(2) of the Refugee Convention, including offences such as “criminal damage” possibly encompassing graffiti or shoplifting).

37. Refugee Convention, art. 33(2).

quently loses that status.<sup>38</sup> The exclusion clause does not appear to be widely used, even if it is potentially applicable.<sup>39</sup>

The infrequent application of the exclusion clauses, coupled with the child soldiers exception, exemplify the Convention's dynamic and human-oriented application. At least one court has held that Article 33(2) of the Refugee Convention has been amended by the more absolute prohibitions on *refoulement* provided in the Convention Against Torture.<sup>40</sup> In *A.G. v Zaoui*, N.Z.S.C. 38, the New Zealand Supreme Court initially noted that the Convention Against Torture was a successive treaty relating to the same subject matter as the Refugee Convention, and not an amendment to the Convention.<sup>41</sup> However, the court also held that "[t]he prohibition on refoulement to torture has the status of a peremptory norm or *jus cogens* with the consequence that article 33.2 [of the Refugee Convention] would now be void to the extent that it allows for [refoulement in such circumstances]."<sup>42</sup> Essentially, the court held that the prohibition of torture was *jus cogens*,<sup>43</sup> so *refoulement* to a situation of torture was prohibited and the Refugee Convention may not contain a provision that would permit *refoulement* to a situation of torture.<sup>44</sup> Although not technically amended, the terms of the Convention have thus been stricken. If the Refugee Convention has not been amended by the practices cited above, then it is worth considering whether the prohibition of *refoulement* in a situation of torture is establishing a customary international legal norm, perhaps even a *jus cogens* norm, alongside the conventional one. In any event, it would appear that the means of interpreting the obligations of the Refugee Convention have been established as overwhelmingly purposive.

Not only do the various examples above imply flexible application of the Convention, the Council of Europe also has expressly urged flexible application. The Council issued Recommendation 773 in an attempt to address the plight of certain individuals denied recognition as refugees. In this recommendation it is not entirely clear whether the problem is that the individuals do not qualify un-

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38. UNHCR, *Background Note on Exclusion Clauses*, *supra* note 12 at ¶ 10.

39. See e.g., European Council on Refugees and Exiles, *ECRE Country Report 2003: Synthesis (2003)*, <http://www.ecre.org/files/01.%20Synthesis.pdf>. ("[In Denmark, the] exclusion clauses of the 1951 Geneva [Refugee] Convention in the context of national security were still not widely applied ... In Lithuania and the United Kingdom perceived threats to public order were not dealt with via the use of exclusion clauses [...]") [hereinafter *ECRE Country Report 2003*].

40. See CAT, art. 3; ICCPR, arts. 6(1), 7; *A.G. v. Zaoui & Insp.-Gen. of Intell. & Sec.*, (2005) NZSC 38; (2006) 1 NZLR 289; (2005) 7 H.R.N.Z. 860; *reprinted at* ILDC 81 (NZ 2005) (Sup. Ct., N. Zealand June 21, 2005).

41. See *A.G. v Zaoui*, N.Z.S.C. 38 at ¶ 50.

42. See *id.* at ¶ 51.

43. See also, e.g., *Pros. v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 144, 147, 153-4 (Int'l Crim. Trib. Former Yugoslavia Dec. 10, 1998).

44. See *R. v. Bow St. Metro. Stip. Magistr., ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 198, 275, 290 (H.L.); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992).

der the Refugee Convention at all, or whether the states of the Council of Europe are not properly fulfilling their international legal obligation to recognize these individuals as *de jure* refugees under municipal law. The Council recommended that states “apply liberally the definition of ‘refugee’ in the Convention . . . as amended by the Protocol . . .”<sup>45</sup> A similar policy of dynamic interpretation of the Convention was evidenced above for particular provisions of the Convention, but here it is argued that the entire Convention definition of refugee should be liberally applied.

In sum, the conventional definition of refugee is a complex one. It requires that the person, his background, and his situation satisfy both inclusive and exclusive requirements. However, the conventional definition has shown a remarkable flexibility of liberal interpretation, either based on an evolving interpretation of the Convention or perhaps a supplementary understanding from customary international law. In fact, it appears that it is required for the terms of the Refugee Convention to be interpreted primarily with an eye to the Convention’s object and purpose.

### III.

#### EVOLUTION OF A DEFINITION UNDER CUSTOMARY INTERNATIONAL LAW

As mentioned above, the Refugee Convention has not been amended either explicitly or through practice to provide for a revised definition of refugee;<sup>46</sup> however, customarily it is interpreted in an expansive fashion, relying heavily on its object and purpose. In fact, in some instances cited above, the qualification as a refugee may have been supplemented beyond the express terms of the Convention.<sup>47</sup>

It has been argued that the definition of refugee does not exist under customary international law but only under treaty law.<sup>48</sup> Most scholars of international refugee law have concluded as much. In particular, as far as the European Union is concerned, Kay Hailbronner has concluded, “[T]he assumption of an international legal obligation to grant protection to victims of war, civil war and general violence must still be considered as ‘wishful legal thinking.’”<sup>49</sup> Similarly, the American Society of International Law has concluded that there is no

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45. Council Recommendation 773 (1976) on the Situation of de facto Refugee, Parl. Assembly Council Eur., 27 ord. sess. (Jan. 16, 1976), at II(i).

46. See *A.G. v. Zaoui*, N.Z.S.C. 38.

47. See *supra* notes 17, 23, and 33.

48. Memorandum from the U.N. Secretariat on Expulsion of Aliens, U.N. Doc. A/CN.4/565 (July 10, 2006) [hereinafter *U.N. Secretariat Memo*] (citing THE MOVEMENT OF PERSONS ACROSS BORDERS, 23 STUD. TRANSNAT’L L. POL’Y § 13.02, 100 (Louis B. Sohn & T. Buergenthal, eds., 1992)). See also RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393 (rev. 2d ed. 1988)).

49. See SUBSIDIARY PROTECTION OF REFUGEES IN THE EUROPEAN UNION: COMPLEMENTING THE GENEVA CONVENTION? 13 (D. Bouteillet-Paquet ed., 2002); PIRKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED 287 (1997).

customary international law obliging states to provide protection to individuals who fall outside the strict terms of the Refugee Convention.<sup>50</sup> Even as active an advocate as Guy Goodwin-Gill has stated that:

[P]ractice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries . . . nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the 1951 Convention. Whether practice has been sufficiently consistent over time and accompanied by the *opinio juris* essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.<sup>51</sup>

This Article will question the validity of these conclusions.

The conference that adopted the Refugee Convention immediately adopted a recommendation and attached it to the Final Act, urging states to extend refugee benefits to individuals not qualifying under the narrow terms of the Refugee Convention:

The Conference expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>52</sup>

This statement could be interpreted to acknowledge, or possibly even express *opinio juris*, that a complementary definition would develop under customary international law.

Many authors have attempted to argue that just such a definition under customary international law has arisen. Some have argued that the prevailing restrictive reading of the term “refugee” in the Convention is incorrect, disregards usage of the term prior to the Convention and is not supported by the *travaux préparatoires*.<sup>53</sup> Some have even argued that the Refugee Convention is merely

50. See *Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, Thursday, April 18: Morning*, Amer. Soc’y of Int’l L. Proc. Apr. 17-20, 1991, 90 AM. SOC’Y INT’L L. PROC. 545.

51. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 171 (1996). However, Goodwin-Gill has subsequently relaxed this perspective to be much more open to the existence of a definition of refugee under customary international law.

52. See Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, ¶ IV, Recomm. E., reprinted at UNHCR, *Convention and Protocol Relating to the Status of Refugees* (2007) <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>. Also note that the Conference on Territorial Asylum expressed a consensus view that the definition of refugee should be expanded.

53. See T. Spijkerboer, *Subsidiarity in Asylum Law: the Personal Scope of International Protection*, in *SUBSIDIARY PROTECTION OF REFUGEES IN THE EUROPEAN UNION: COMPLEMENTING THE GENEVA CONVENTION?* 28-9 (D. Bouteillet-Paquet, ed., 2002); María-Teresa Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, New Issues in Refugee Research, UNHCR Research Paper No. 136 (Nov. 2006) <http://www.unhcr.org/455993882.html>. See also *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, UNHCR Exec. Comm., U.N. Doc. EC/50/SC/CRP.18 (9 June 2000) (noting that during the drafting of the Refugee Convention, France had proposed that refugee status should

one in a collection of human rights instruments that must be read as a whole so that the protections described by the Refugee Convention apply to any person who enjoys some form of *non-refoulement* from any human rights instrument. Thus, *non-refoulement* is a general principle and the Refugee Convention is merely one kind of situation in which *non-refoulement* arises.<sup>54</sup> For example, Maria-Teresa Gil-Bazo argues that “in addition to refugees within the meaning of the Geneva Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are ‘refugees’ in a broader sense.”<sup>55</sup> However, many of these authors have not cited extensive practice and *opinio juris* to support their argument. This Article will attempt to identify practice and *opinio juris* on point.

#### A. State Practice Expanding the Definition

As the international relations of states evolves, so too does the law, at least customary international law. It has been observed that increasingly “refugee” flows have been more likely due to “civil wars, ethnic and communal conflicts and generalized violence, or natural disasters or famine—usually in combinations—than individually targeted persecution by an oppressive regime.”<sup>56</sup> As states have shifted their behavior to respond to these crises, we must consider whether they have shifted their understanding of the definition of refugee under customary international law.

It is accepted in the international legal system that binding international law can arise through custom.<sup>57</sup> Discussion of sources commonly cites the Statute of

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extend to a person ‘unable to obtain from [his or her] country [of origin] permission to return’) (citing Ad Hoc Committee on Statelessness and Related Problems, *France: Proposal for a Draft Convention Preamble*, U.N. Doc. E/AC.32/L.3 (17 Jan. 1950)). Also note that France may be considered a specially interested state. See *infra* note 65 and accompanying text.

54. See Gil-Bazo, *Refugee status*, *supra* note 53, at 13; J. McAdam, *Humane Rights: The Refugee Convention as a Blueprint for Complementary Protection Status*, paper presented at Moving On: Forced Migr. & Hum Rts. Conf., NSW Parl. House (Nov. 22, 2005).

55. See María-Teresa Gil-Bazo, *La protección internacional del derecho del refugiado a recibir asilo en el Derecho internacional de los derechos humanos*, in F.M. MARIÑO MENÉNDEZ, ED., DERECHO DE EXTRANJERÍA, ASILO Y REFUGIO 691-2 (2d ed., 2003). See also Spijkerboer, *supra* note 53; Gil-Bazo, *Refugee status*, *supra* note 53, at 10 (citing Goodwin-Gill, *Asylum: The Law and Politics of Change*, 7 INT’L J. REF. L. 7 (1995)) (“The refugee in this broader sense includes not only those who have a well founded fear of persecution, but also those who have a substantial risk to be subjected to torture or to a serious harm if they are returned to their country of origin, for reasons that include war, violence, conflict and massive violations of human rights.”). However, among those who argue that the term “refugee” should be read liberally, some concede that there must still be some element of persecution in order to qualify, although collective persecution would suffice.

56. Adrienne Millbank, *The Problem with the 1951 Refugee Convention* (Social Pol’y Group Research Paper No. 5 2000-01, 2000), <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm>.

57. See generally Statute of the International Court of Justice, art. 38, June 16, 1945; Statute of the Permanent Court of Justice, art. 38, Dec. 16, 1920; A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972); Int’l L. Assoc., *Statement of Principles Applicable to the Formation of Gen-*

the International Court of Justice for proof that “evidence of a general practice accepted as law” is law.<sup>58</sup> Building on this definition of customary international law, courts have determined that this source of law has two elements: state practice and *opinio juris sive necessitatis*.<sup>59</sup> State practice is usually defined as a widespread and consistent practice followed by states.<sup>60</sup> *Opinio juris* is usually defined as a subjective belief on the part of the state engaging in the practice that the practice is required, not merely optional.<sup>61</sup>

As for the first element of state practice, there is no set number of states that must engage in the practice before it becomes law. It is accepted that it does not need to be all states, just many of them.<sup>62</sup> However, in the *North Sea Continental Shelf* cases, the International Court of Justice stated that the practice of “specially affected States” is the most significant practice.<sup>63</sup> Which states will be specially affected will vary on a case-by-case basis, depending on the nature

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*eral Customary International Law*, in INT’L L. ASSOC., REPORT OF THE SIXTY-NINTH CONFERENCE, LONDON, 713 (2000).

58. See Statute of the International Court of Justice, *supra* note 57, art. 38(1)(b).

59. See e.g., *Military & Paramilitary Activities In & Against Nicaragua*, Merits (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *N. Sea Cont. Shelf Cases* (F.R.G./Den.) (F.R.G./Neth.), 1969 I.C.J. 43 (Feb. 20); *Case Concerning Right of Passage Over Indian Territory*, Merits (Port. v. Ind.) 1960 I.C.J. Reps. 6 (Apr. 12); *Fisheries Case* (U.K. v. Norw.), 1951 I.C.J. 116 (Dec. 18); *Asylum Case* (Colom./Peru), 1950 I.C.J. 266 (Nov. 20); *Case of the S.S. “Lotus”* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

60. See *Asylum Case*, 1950 I.C.J. 276-7 (“in accordance with a constant and uniform usage practised by the States in question”) (holding that state practices was lacking in the consistency and certainty required to constitute ‘constant and uniform usage’); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (5th ed., 1998).

61. See *Nicaragua v. U.S.*, 1986 I.C.J. 14.; *N. Sea Cont. Shelf Cases*, 1969 I.C.J. 43; *Right of Passage Case*, 1960 I.C.J. 42-3; *Asylum Case*, 190 I.C.J. 277; *Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10, 28 (“only if such abstention were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom”); MALCOLM N. SHAW, *INTERNATIONAL LAW* 75 (6th ed. 2008).

62. See *Fisheries Case*, 1951 I.C.J. 131, 138; CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 149 (P.E. Corbett trans., Princeton Univ. rev. ed. 1968); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 368 (1958). See also, generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005) (surveying a selection of representative states for each point of law, which has been widely accepted as correctly stating the law on the matter) [hereinafter HENCKAERTS & DOSWALD-BECK, *CUSTOMARY IHL*].

63. *N. Sea Cont. Shelf Cases*, 1969 I.C.J. 43, at ¶ 74; SHAW, *supra* note 61 at 80 (citing situations where the practice of only one or two states could be potentially determinative, such as the practice of the United Kingdom regarding the law of the sea; the practice of the United States and USSR regarding space law). We might consider that if regional custom could be found, the usage in such a case would also presumably need to be widespread and consistent albeit only within the region. See e.g., *N. Sea Cont. Shelf Cases*, 1969 I.C.J. 43; *Asylum Case*, 1950 I.C.J. 276-7 (requiring “constant and uniform usage”); HENCKAERTS & DOSWALD-BECK, *CUSTOMARY IHL*, *supra* note 62, at xlviv; M. MENDELSON, ET. AL., *FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GEN. CUSTOMARY INT’L L.* Principle 14, Commentary (e) (2000).

of the practice being examined.<sup>64</sup> On this basis, it is worth noting which states are specially affected by refugee flows and note their practice and *opinio juris* in particular. This Article cannot hope to survey all states in the world to any satisfying degree of depth and certainty, but it can assess many of them, particularly those whose practice is representative of global practice. One of the first steps, then, is to identify those states that might be specially interested in refugee law.

### *B. The Role of Specially Interested States*

There are more than nine million individuals that the United Nations High Commissioner for Refugees has identified as “refugees” deserving protection. Of that number, the states in which the largest numbers of individuals have sought refuge are, beginning with the largest:

**Table 1** <sup>65</sup>

State	Refugees or Persons in Refu- gee-like Situations	Percentage of Total Global Population of Refugees
Syria	1,503,769	15
Iran	963,546	10
Pakistan	887,273	9
Germany	578,879	6
Jordan	500,281	6
Tanzania	435,630	5
China	301,078	3
United Kingdom	299,718	3
Chad	294,017	3
United States	281,219	3
Kenya	265,729	3
Saudi Arabia	240,742	
Uganda	228,959	
Sudan	222,722	
Democratic Republic of Congo	177,390	
Canada	175,741	

64. The International Committee of the Red Cross (“ICRC”) study gives examples of “specially affected” states in certain situations. See HENCKAERTS & DOSWALD-BECK, CUSTOMARY IHL, *supra* note 62, at xlv.

65. These numbers are provided on the UNHCR website for statistics dated at the end of 2007. 2007 UNHCR Statistical Yearbook, <http://www.unhcr.org/statistics/49a2c7ff2.html>. The particular chart containing this data is [http://www.unhcr.org/static/statistical\\_yearbook/2007/annextables.zip](http://www.unhcr.org/static/statistical_yearbook/2007/annextables.zip). The next ten states, in the order of the number of refugees seeking refuge on their territories are: Yemen (117,363 persons); Zambia (112,931); Serbia (97,995); Egypt (97,556); Algeria (94,137); Netherlands (86,587); Ethiopia (85,183); Sweden (75,078); Cameroon (60,137); and Rwanda (53,577). See *id.*



India	161,537
France	151,789
Nepal	128,181
Thailand	125,643

Perhaps states that experience significant numbers of refugees are “special-ly affected” in the *North Sea Continental Shelf* sense and thus more crucial to and representative in establishing the widespread practice and *opinio juris* necessary. Those states actually deal with more cases and experience the effects of their policies more directly (or, conversely, consider that evidence of state practice and *opinio juris* is not necessarily widespread unless it is undertaken by states that are the major recipients of refugees). Stated differently, perhaps the way that the majority of individuals in the world seeking refuge are treated, albeit by less than a majority of states, is more relevant in establishing custom than by the way in which they define “refugee.”

It is not entirely clear under international law whether representative states should also be geographically and culturally diverse in order to establish the existence of generally customary international law. Insofar as diversity may be necessary, the above list of states is already fairly diverse with perhaps South America being the one region that is not represented. Therefore, South American regional practice will also be addressed in the sections below to accommodate for its omission from the list of specially interested states above and ensure geographical diversity in the analysis.

### *C. International Agreements Defining Refugee Status*

#### *1. The Organization of African Unity Convention on Refugees*

The 1969, the Organization of African Unity (OAU) Convention on the Specific Aspects of Refugee Problems in Africa expanded the definition of refugee in the Refugee Convention to include those fleeing “external aggression, occupation, foreign domination or events seriously disturbing public order.”<sup>66</sup> Due to a lack of documentation on the drafting history of the OAU Convention, there has been considerable debate about the intention of the drafters, and speculation has been unhelpful.<sup>67</sup> However, note that this instrument was signed by some of the largest recipients of refugees in the world, specifically: Tanzania, Chad, Kenya, Uganda, Sudan, Democratic Republic of Congo, Zambia, Egypt, Alge-

66. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

67. See George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20(1) REF. STUD. Q. 79; Micah Bond Rankin, *Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on*, Apr. 2005, <http://www.unhcr.org/425f71a42.html>.

ria, Ethiopia, Cameroon, and Rwanda.<sup>68</sup>

In addition to these major recipients of refugees, the OAU Convention was also signed by Burundi, the Central African Republic, Congo, Gabon, Gambia, Ghana, Guinea, Côte d'Ivoire, Mali, Nigeria, Rwanda, and Sierra Leone, which are all in the upper half of states receiving the most numbers of refugees. States such as South Africa,<sup>69</sup> Tanzania,<sup>70</sup> and Uganda<sup>71</sup> for example, have additionally adopted the OAU definition into municipal law. The second of the states incorporating the Convention criteria, Tanzania, is the single highest recipient of refugees in Africa and the sixth highest recipient in the world.

In addition to these refugee numbers, which magnify the impact of the state practice of those states on the formation of customary international law, also note that Mexico has adopted into state law the definition established by the OAU convention.<sup>72</sup> Clearly, Mexico is under no obligation to adopt this definition from another region, but this act demonstrates a growing acceptance outside the region of the norms established by the region. In sum, the OAU Convention, although only binding states in the region under treaty law, has significantly

68. See 2007 UNHCR Statistical Yearbook, *supra* note 65.

69. See Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention* ("Complementary Protection"), ¶ 238, U.N. Doc. PPLA/2005/02 (June 2005) ("In defining refugee status, section 3 of the 1998 Refugees Act incorporates the refugee definitions in Article 1A(2) of the 1951 Convention and Article I(2) of the 1969 OAU Convention (in sub-sections 3(a) and 3(b) respectively)."), <http://www.unhcr.org/protect>.

70. See *id.* at ¶ 242 ("Refugee status is defined in section 4 of the 1998 Refugees Act. Section 4(1)(a) incorporates the language of Article 1A(2) of the 1951 [Refugee] Convention while section 4(1)(b) adopts the text of Article I(2) of the 1969 OAU Convention. Section 4(4) of the Act incorporates the exclusion clause in Article 1F of the 1951 Convention, though some of these grounds are also included in the section 4(3) provision on cessation."). Also note that Tanzania is the sixth highest recipient of refugees and persons in refugee-like situations. Thus, it may be considered specially interested. See *supra* note 69.

71. The Refugee Act 2006 [Uganda], 24 May 2006 (although apparently the status determination procedures are not yet implemented), <http://www.unhcr.org/refworld/docid/4b7baba52.html>. See also United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 – Uganda*, 17 June 2009, <http://www.unhcr.org/refworld/docid/4a40d2b5c.html> [hereinafter *USCRI, Uganda*].

72. See Ley General de Población [General Law of Population], Diario Oficial de la Federación, 7 de Enero de 1974, *as amended* Diario Oficial de la Federación [DO], 8 de Noviembre de 1996 (Mex.); Reglamento de la Ley General de Población [Regulations of the General Law of Population] Diario Oficial de la Federación [DO], 31 de Agosto de 1992 (Mex.); Manual de Trámites Migratorios del Instituto Nacional de Migración [Immigration Procedures Manual], Diario Oficial de la Federación [DO], 21 de Septiembre de 2000 (Mex.) TMN-I-07 REFUGIADO (Fracción VI del artículo 42 de la LGP y 166 del RLGP): El extranjero que huyendo de su país de origen, para proteger su vida, seguridad o libertad, cuando haya sido amenazado por violencia generalizada, agresión extranjera, conflictos internos, violación masiva de derechos humanos u otras circunstancias que hayan perturbado el orden público, y que ingrese a territorio nacional ... [TMN-I-07 REFUGEE ... The foreigner who fleeing from his country of origin, to protect his life, security or freedom, when he has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have disturbed the public order, and who enters national territory ... (author's translation)] See *Open Session: Governing Rules Project: Review and Discussion on the Movement of Persons Across Borders*, Proc. of the 85th Ann. Mtg. of the Amer. Soc'y of Int'l L., 90 AM. SOC'Y INT'L L. PROC. 545 (Apr. 17-20, 1991).

contributed to the formation of a general rule of customary international law due to its highly representative nature of establishing the norms of treatment for a high percentage of the individuals seeking refuge in the world.

## 2. *The Asian-African Legal Consultative Organization Bangkok Principles*

The Asian-African Legal Consultative Organization agreed in June 2001 on a set of principles concerning the treatment of refugees, known as the “Bangkok Principles.”<sup>73</sup> Although they are not binding themselves,<sup>74</sup> they could nonetheless serve as a source of *opinio juris*. The Bangkok Principles define refugee essentially the same way as the Refugee Convention, but they also cover:<sup>75</sup>

[E]very person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>76</sup>

The Bangkok Principles contain other provisions similar to those in the Refugee Convention, such as dual nationality,<sup>77</sup> cessation, and exclusion.<sup>78</sup> It specifically accepts the concept of refugee *sur place*.<sup>79</sup> It also provides that a “refugee” may not be expelled “to a State or Country where his life or liberty would be threatened for reasons of race, colour, nationality, ethnic origin, religion, political opinion, or membership of a particular social group.”<sup>80</sup>

A large number of specially interested states has adhered to the Bangkok Principles. This list includes the following states with large influxes of refugees: Syria, Iran, Pakistan, Jordan, Tanzania (also a party to the OAU Convention), PR China, Kenya, Saudi Arabia, Uganda, Sudan, India, Nepal, Thailand, Yemen, Zambia, Egypt, and Cameroon.<sup>81</sup>

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73. Asian-Afr. Legal Consult. Org., *Principles Concerning Treatment of Refugees*, 40th Sess. (Dec. 31, 1966) [hereinafter Bangkok Principles].

74. UNHCR, Executive Committee, *Note on International Protection*, U.N. Doc. A/AC.96/951 (Sept. 13, 2001).

75. Bangkok Principles, art. I(1).

76. *Id.* at art. I(2).

77. *Id.* at art. I(5).

78. *Id.* at arts. I(6) – (7).

79. *Id.* at art. I(3).

80. *Id.* at art. V(3).

81. See *supra* note 65 and accompanying text. Also note: Tanzania, Kenya, Uganda, Sudan, Egypt, and Cameroon are all members to the OAU Convention. It is important to note that India submitted a communication when adopting the Bangkok Principles where it opposed the expanded definition. See *id.* at art. I, note 5. But see Sec. III.E. *infra*, for a discussion of other aspects of India’s actual practice that may be inconsistent with this apparent statement of *opinio juris*. It may be that India was opposed to expanding the Convention definition in the instrument purely because of the potential for weakening refugee integration into their host states, but is not opposed to engaging in practices supportive of an expanded definition.

The above states are among the top twenty-five state-recipients of refugees.<sup>82</sup> Additional signatories to the Principles that fall within the top half of states receiving refugees are Bangladesh, Gambia, Ghana, Lebanon, Nigeria, Senegal, Sierra Leone, and Turkey. Of these states, Gambia, Ghana, and Nigeria are also parties to the OAU Convention. The Bangkok Principles have thus provided a very strong statement of *opinio juris* by the major recipients of world refugee flows.

### 3. The Cartagena Declaration

The 1984 Cartagena Declaration, regarding forced migrants in Central and South America, expresses the same principles as the foregoing documents, even going so far as to explicitly refer to Article I(2) of the OAU Convention as inspiration for its definition of “refugee,” although the two texts do differ.<sup>83</sup> Of the Central and South American states, Costa Rica participated in drafting the Cartagena Declaration but has only received approximately 12,000 refugees, placing it almost in the top fifty states receiving refugees. Ecuador is in the in top fifty recipient states, but did not participate in the conference. Brazil and Argentina did not participate, but have received approximately 3,000 refugees each.

Although Brazil and Ecuador neither attended the drafting conference nor signed the Cartagena Declaration, the Declaration’s principles have been adopted into municipal law in both countries.<sup>84</sup> The Declaration, although not legally binding in itself, has been endorsed by the Organization of American States, the UNHCR Executive Committee and by states party to the universal refugee treaties.<sup>85</sup> Further, the Declaration has been cited in turn by the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, which was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Pana-

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82. See 2007 UNHCR Statistical Yearbook, *supra* note 65.

83. See Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, in Cartagena, Colombia, 19-22 Nov. 1984, Concl. III, 5, *reprinted in* 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (1995), <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>. See also Eduardo Arboleda, *The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective*, INT’L J. REF. L. 95 (Summer 1995).

84. See Refugee Law No. 9474/97, § I(iii) (Braz.) (persons seeking refuge because of “serious and generalised violations of human rights”) (discussed in Mandal, *supra* note 69 (observing that “[i]n practice, it seems that subsection (iii) is also considered to apply to situations of armed conflict and generalised violence.”); Pres. Decree 3301/92, arts. 1-2 (Ecuad.) (discussed in Mandal, *supra* note 69 (observing that “[s]ince the beginning of 2003, only 36 out of 5772 individuals recognised as refugees were recognised on the basis of Article 2 of the Decree.”)

85. See U.N. High Commissioner for Refugees, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 16 Jan. 2002, HCR/MMSP/2001/09; UNHCR Exec. Comm. Concl. No. 77 (1995); OAS GA Res. 1273 (XXIV–0/94) (June 10, 1994).

ma, Paraguay, Peru, Uruguay, and Venezuela.<sup>86</sup> The Brasilia Declaration “highlighted” the expansive regional definition of refugee,<sup>87</sup> suggesting that the participants at the Brasilia Declaration Conference understood that an expansive legal definition already existed in the region, due to the formally non-binding Cartagena Declaration and supporting instruments. Based on these participants and other factors, and notwithstanding the declaratory nature of the document, the Cartagena Declaration does further crystallize customary international law.

#### 4. *The Mercosur Rio de Janeiro Declaration*

The *Mercado Común del Sur* (Mercosur), along with Bolivia and Chile, has also adopted the Rio de Janeiro Declaration on the Institution of Refuge.<sup>88</sup> This declaration provides that “international protection should be given to individuals persecuted for reasons of race, nationality, religion, membership of a particular social group, political opinion or victims of serious and generalized violation of human rights.”<sup>89</sup> Specifically, the states parties proclaimed that they “will study the possibility of including in the refugee definition the protection of victims of serious and generalized human rights violations,”<sup>90</sup> and that they:

[W]ill not apply refoulement measures to a refugee who has been recognised in another Contracting or associate State, to a country where his life, freedom or physical integrity are threatened by reasons of race, nationality, membership of a particular social group, political opinion or serious and generalised violation of human rights, according to the international norms governing this issue.<sup>91</sup>

The practices of Latin American countries is unlikely to heavily influence the formation of customary international law because these countries do not receive the high numbers of refugees that countries in other regions do. However, the Declaration remains important as it expresses an *opinio juris*. Further, the consideration of geographically diverse practice may be necessary to support a finding of the existence of customary international law. Thus, Latin American practice should be considered regardless of whether states in the region are spe-

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86. See UNHCR, Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, Brasilia, Nov. 11, 2010, <http://www.unhcr.org/4cdd3fac6.html> (Canada and the United States also attended the conference as observers) [hereinafter *UNHCR, Brasilia Declaration*].

87. Highlighting the contribution of the Americas to strengthen the protection of victims of forced displacement and stateless persons through the adoption of multilateral treaties on asylum, statelessness and human rights. *Id.* at 1. However, the fact that the states would resolve to promote accession to the instruments does not necessarily imply that they believe that the definition of refugee in those other instruments was not already binding under customary international law. Given the other statements suggesting that an expansive legal definition already applied, at least in the region, one cannot conclude otherwise.

88. See UNHCR, Americas - Miscellaneous, *Rio de Janeiro Declaration on the Institution of Refuge*, Nov. 10, 2000, <http://www.unhcr.org/refworld/docid/3de4f8982.html> [hereinafter *Rio Declaration*].

89. *Id.*

90. *Id.* at Proclam. 3.

91. *Id.* at Proclam. 4.

cially interested based on refugee flows.

### *5. Conclusion on the Role of International Agreements by Specially Interested States*

All of the foregoing conventions are expressly regional law or soft law, not universal, conventional international law. However, each expresses the practice and/or *opinio juris* of some of the most important refugee-receiving states in regards to dealing with refugee flows. The Declaration of States Parties to the 1951 Convention, and/or its 1967 Protocol relating to the Status of Refugees in Geneva in 2001, affirmed “the importance of other human rights and regional refugee protection instruments.”<sup>92</sup> It might be that obligations undertaken by states that are in a position to suffer the most burden will signal a stronger existence of *opinio juris* than states that will not suffer as much from assuming such obligations.

This Section has only examined international agreements, but aside from participation in these agreements, the practice of specially interested states is important as well. Now that specially interested states have been identified, this Article will highlight those states where they appear in subsequent sections of this analysis. Based on the practice and *opinio juris* evidenced in these documents further defining “refugee” in their regions, and the fact that the relevant states are also specially interested ones in regards to refugee flows, the instruments above potentially show that customary international law has supplemented and broadened the definition of “refugee.” Specifically, it appears that the general customary international law definition of refugee includes persons fleeing serious disturbances of public order. Bearing in mind this tentative conclusion, the next issue is the influence of subsidiary protection.

### *D. The Influence of “Subsidiary Protection” in International Agreements*

Whereas the preceding section examined the customary international legal definition of “refugee”, this Section considers whether subsidiary protection, or the protection available for persons under alternative international legal obligations who clearly fall outside the conventional definition of “refugee” governing in the relevant state, has expanded the customary international legal definition of refugee.

It is admitted that even when the Refugee Convention is applied dynamically, many individuals do not qualify under its definition of “refugee” because of the absence of the element of persecution (or no qualifying form of persecution). However, these individuals may have other justifiable reasons for refusing to avail themselves of the protection of their state of nationality. This group of

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92. UNHCR, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, Dec. 13, 2001, [www.unhcr.org/419c74d64.pdf](http://www.unhcr.org/419c74d64.pdf).

persons is often referred to “*de facto*” refugees: their refuge needs are seen as legitimate but they do not qualify under the Convention. Their needs are often addressed through other agreements or legislation granting them a “subsidiary” status. The question for this Section is whether the extension of subsidiary protection status to these individuals has created a wider notion under customary international law of “refugees” that includes those who are deserving of the *non-refoulement* and other protections substantively the same as those afforded by the Refugee Convention.

The Conference that negotiated the Refugee Convention specifically encouraged states to grant subsidiary protection to individuals not qualifying under the Refugee Convention.<sup>93</sup> On this basis, the intent of the Convention’s drafters can be interpreted to express a desire to cover this expanded group of persons.<sup>94</sup> When the European Union was considering the minimum standards directive, the EU Presidency stated that the exclusion provision from subsidiary protection should be modeled on Article 1(F) of the Refugee Convention, but there was no legal obligation to follow the Convention’s terms for subsidiary protection.<sup>95</sup> In addition, state courts have held that the definition of refugee remains that given in the Refugee Convention and has not been supplemented by humanitarian assistance to persons in need.<sup>96</sup> However, consider whether the practice of subsidiary protection, as a separate institution itself, has expanded the definition of refugee under customary international law.

Certain treaties call for subsidiary protection. Most notably, the International Covenant on Civil and Political Rights (ICCPR)<sup>97</sup> and the 1984 Conven-

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93. See Sohn & Buergenthal, eds., *supra* note 48, at 102 (“The 1951 Geneva Conference which adopted that [Refugee] Convention expressed at the same time the hope that ‘all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the [Refugee] Convention, the treatment for which it provides.’”).

94. See Final Act of the U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 U.N.T.S. 37 *excerpt reprinted in* UNHCR HANDBOOK, Ann. I(E).

95. See Presidency Note to SCIFA, EU Doc. 13623/02 Asile 59 (30 Oct. 2002). *But see* Gil-Bazo, *Refugee status*, *supra* note 53 (observing that Sweden disagreed with the interpretation and sent its own competing proposal to SCIFA). Also note that Sweden might be a specially interested state, although it is less affected than some other states under consideration.

96. See Applicant A. & Anor. v. Min. Immigr. & Ethnic Aff’rs & Anor., [1997] H.C.A. 4 (High Ct., Austl., Feb. 24, 1997).

97. See International Covenant on Civil and Political Rights, arts. 6-7 [hereinafter ICCPR]; U.N. Commission on Human Rights (ICCPR), Gen. Comm. No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12 (Mar. 29, 2004); U.N. Commission on Human Rights, (ICCPR), Gen. Comm. No. 20: *Prohibition of Torture and Cruel Treatment or Punishment*, ¶ 9 (Mar. 10, 1992); U.N. Commission on Human Rights (ICCPR), *Concluding Observations on the Netherlands*, U.N. Doc. CCPR/CO/72/NET, ¶ 11 (Aug. 27, 2001) (women should not be sent back to states where they are likely to be subjected to forced female genital mutilation); *Judge v. Can.*, U.N. Doc. CCPR/C/78/D/1086/2002 (Hum. Rts. Comm., Aug. 4, 2003) (expelling or extraditing a person to another State where he or she would face the death penalty); *C. v. Austl.*, U.N. Doc. CCPR/C/76/D/990/1999 (Hum. Rts. Comm., Oct. 28, 2002) (person should not be returned to a country where his illness, which was in whole or in part caused by the State party’s violation of his rights, cannot be treated); *Kindler v. Can.*, U.N. Doc. CCPR/C/48/D/470/1991, ¶ 13.2

tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>98</sup> which prohibits *refoulement* of a person “where there are substantial grounds for believing that he would be in danger of being subject to torture (Art. 3).” There are no exceptions for national security to the CAT or ICCPR obligations of *non-refoulement* to situations of torture.<sup>99</sup> The European Court of Human Rights (ECHR) establishes a similar protection requirement where there is a “real risk” that the person in question will be subject to inhuman or degrading treatment and punishment.<sup>100</sup> The American and African Charters make similar provisions for torture.<sup>101</sup>

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(Hum. Rts. Comm., Nov. 5, 1993) (the removal of a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person’s rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant). Note that Pakistan, a specially interested state, is a party to the ICCPR.

98. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 [hereinafter CAT]; *Dadar v. Can.*, Comm. No. 258/2004 (Comm. Ag. Torture, Dec. 5, 2005); *T.A. v. Swed.*, Comm. No. 226/2003 (Comm. Ag. Torture, May 27, 2005); *Rios v. Mex.*, Comm. No. 133/1999 (Comm. Ag. Torture, Dec. 17, 2004); *Karoui v. Swed.*, Comm. No. 185/2001 (Comm. Ag. Torture, May 8, 2002); *A.S. v. Swed.*, Comm. No. 149/1999 (Comm. Ag. Torture, Nov. 6, 1999); *Elmi v. Austl.*, Comm. No. 120/1998 (Comm. Ag. Torture, May 14, 1999); *Haydin v. Swed.*, Comm. No. 101/1997 (Comm. Ag. Torture, Nov. 20, 1998); *Korban v. Swed.*, Comm. No. 88/1997 (Comm. Ag. Torture, Nov. 16, 1998); *Ayas v. Swed.*, Comm. No. 97/1997 (Comm. Ag. Torture, Nov. 12, 1998); *A.F. v. Swed.*, Comm. No. 89/1997 (Comm. Ag. Torture, Sept. 3, 1997); *Aemei v. Switz.*, Comm. No. 34/1995 (Comm. Ag. Torture, May 9, 1997); *Paez v. Swed.*, Comm. No. 39/1996 (Comm. Ag. Torture, Apr. 28, 1997); *Tala v. Swed.*, Comm. No. 43/1996 (Comm. Ag. Torture, Nov. 15, 1996); *Kisoki v. Swed.*, Comm. No. 41/1996 (Comm. Ag. Torture, May 8, 1996); *Khan v. Can.*, Comm. No. 15/1994 (Comm. Ag. Torture, Nov. 15, 1994); *Mutombo v. Switz.*, Comm. No. 13/1993 (Comm. Ag. Torture, Apr. 27, 1994).

99. See *Suresh v. Can.* (MCI), [2002] S.C.C. 1, ¶ 78 (Can. Sup. Ct., Jan. 11, 2002) (reaching the opposite conclusion: “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified”); *but see* U.N. Commission against Torture, *Conclusions and Recommendations of the Committee Against Torture: Canada*, 34th sess., U.N. Doc. CAT/C/CO/34/CAN, ¶ 4(a) (May 2004) (criticizing the *Suresh* decision); U.N. Commission on Human Rights, 85th sess., U.N. Doc. CCPR/C/CAN/CO/5 at 15 (Oct.-Nov. 2005) (“The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from.”). Note that Syria and Pakistan, specially interested states, *see supra* note 65, are parties to the CAT.

100. See Eur. Conv. Hum. Rts. & Fund. Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (absolute prohibition against torture or inhuman or degrading treatment or punishment) [hereinafter ECHR]; *H.L.R. v. Fr.*, 27 Eur. Ct. H.R. 29 (1998); *Chahal v. U.K.*, Appl. No. 22414/93, 23 Eur. Ct. H.R. 413 (1996); *Vilvarajah v. U.K.*, 14 Eur. Ct. H.R. 248 (1991); *Cruz Varas v. Swed.*, Appl. No. 15576/89, 14 Eur. Ct. H.R. 1 (1991); *Soering v. U.K.*, Appl. No. 14038/88, 11 Eur. Ct. H.R. 439 (1989). See also *Agbonlahor v. Min. Just., Equality & L. Reform, Jud. Rev.*, [2007] I.E.H.C. 166 (High Ct., Ir., Apr. 18, 2007), *reprinted at* ILDC 820 (Ir. 2007) (no violation of Article 8 of the ECHR based on argument for a right to remain in a state to continue to benefit from medical, social, or other forms of assistance); *R. v. Spec. Adj’tor ex parte Ullah*; *Do v. Sec’y St. Home Dep’t*, [2004] U.K.H.L. 26, *reprinted at* ILDC 103 (U.K. 2004) (claim for protection against removal based on a provision in the ECHR other than art 3 (torture) which only requires a real risk of violation, such as art. 9 (right to freedom of religion) must be flagrant denial or gross violation of those rights such that the right was completely denied or nullified in the destination country). See also Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R.

101. See Am. Conv. Hum. Rts. (“Pact of San José, Costa Rica”), Nov. 22, 1969, Org. Am.



EU law also makes provision for an expanded class of persons in need. The EU Minimum Standards Directive orders EU member states to receive an asylum application if filed.<sup>102</sup> The EU Council Directive of April 29, 2004, also orders subsidiary protection for any person who cannot return to the country of origin because of serious harm, which consists of: (1) death penalty or execution; (2) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (3) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>103</sup> Of course, these directives override EU member state law if not already in conformity with it.<sup>104</sup>

Also important is the Charter of Fundamental Rights of the European Union, which has recently become legally binding.<sup>105</sup> The Charter provides for certain rights to subsidiary protection insofar as those rights arise from the constitu-

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States, arts. 13, 22, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *reprinted at* 9 INT'L L. MATS. 99; African Charter on Human and Peoples' Rights, June 27, 1981, Org. Afr. Unity, art. 5, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 363, *reprinted at* 21 INT'L L. MATS. 58; *Modise v. Botswana*, Comm. No. 97/93 (Afr. Comm'n Hum. & People's Rts., 2000).

102. *See E.U. Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member states in receiving such persons and bearing the consequences thereof*, Council Directive 2001/55/EC, 2001 O.J. (L 212/12) art. 17 (EC). *See also* Austria: Asylum Act 2005, Bundesgesetzblatt ("BGBl") [Legal Gazette] Pt. I, No. 100/2005 (July 7, 2005) (providing for subsidiary protection); Belgium: *see generally* ECRE, *ECRE Country Report 2005* (2006), <http://www.ecre.org/files/ECRE%20Country%20Report%202005rev.pdf> [hereinafter *ECRE Country Report 2005*] ("In July 2006 the Belgium Parliament approved a proposed reform of the asylum procedure, which also included the introduction of a new subsidiary status into Belgium legislation."); Czech Rep.: Amendment 57/2005, Coll. of 4.2.2005 (implementing E.U. Council Directive 2003/9/EC, regarding minimum standards for the reception of asylum seekers); Ireland, *see generally* *ECRE Country Report 2005*, *supra* note 102 ("In April 2005 the Department of Justice, Equality and Law Reform in Ireland published a discussion document outlining the proposals for the upcoming Immigration and Residency Bill. Also included is a proposal for a single protection procedure to be implemented in Ireland with a view to transposing the Qualification Directive. If implemented this will be the first time Ireland will consider complementary/subsidiary protection issues outside of the current Ministerial discretionary process at deportation stage. "); Luxembourg: *see generally* *ECRE Country Report 2005*, *supra* note 102 ("In Luxembourg, the new law on asylum and complementary protection passed in May 2006 introduced subsidiary protection, tolerated status and temporary protection"); Slovakia: *see generally* *ECRE Country Report 2005*, *supra* note 102 ("There is no real form of subsidiary protection in the Slovak Republic as yet. It shall however be introduced by the transposition of the qualification directive into Slovak law by October 2006."); and Spain: Regulation implementing the Asylum Law, art. 31.3.

103. *See E.U. Council Directive 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* (Apr. 29, 2004), Council Directive, 2004/83/EC, 2004 O.J. (L 304/12) (EC) [hereinafter *Qualif. Dir.*].

104. *See* Case C-6/64, *Costa v. Enel*, 1964 E.C.R. 585 (establishing the primacy of European Community law over the law of the member states).

105. 2000 O.J. (C/364/1), *incorporated into* Treaty Establishing a Constitution for Europe, 2004 O.J. (C/314) 1.

tional traditions and international obligations common to the member states.<sup>106</sup> How this will be specifically interpreted remains to be seen; however, an expression of *opinio juris* that those Charter protections should be binding is already evident.

Also noteworthy is the European Social Charter, which provides that migrant workers lawfully residing within the territories of the state parties shall not be expelled unless they endanger national security or offend public interest or morality.<sup>107</sup> Refugees might conceivably fall in this category if they initially came to the state party as a migrant worker and subsequently become a refugee *sur place*.

In sum, additional sources of international law such as the ICCPR, CAT, ECHR and EU law have mandated specific treatment of certain individuals that is broader than the narrow terms of the Refugee Convention. These sources have not expressly sought to supplement the definition of “refugee,” in contrast to the OAU and Cartagena instruments, but have effectively required refugee-like treatment. The fact that they expressly create subsidiary bases for protection rather than amend the Refugee Convention could, however, suggest that their drafters intended to preserve the Convention definition of refugee as a separate institution, thus holding an *opinio juris* that the definition was not to be expanded. At a minimum, these instruments contribute to a supplementary protection regime under customary international law that would provide *non-refoulement* for individuals who would suffer torture, inhuman or degrading treatment, and punishment. Possible additional grounds might be the imposition of the death penalty and indiscriminate violence, although those grounds are less widespread.

#### *E. The Influence of Municipal Law*

Moving from international legal obligations to provide subsidiary protection to municipal legal provisions for other forms of subsidiary protection, states tend to, at a minimum, adopt provisions for refuge in their municipal law that track the 1951 Convention definition.<sup>108</sup> However, states have also adopted regional definitions, such as the OAU or Cartagena definitions, into state law.<sup>109</sup> This may evidence an *opinio juris* of the binding nature of the regional definition. For example, the Cartagena Declaration principles have been adopted into municipal law in Brazil<sup>110</sup> and Ecuador,<sup>111</sup> and the OAU definition has been

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106. See *id.* at prmb.

107. See European Social Charter, Oct. 18, 1961, Council of Eur., art. 19, C.E.T.S. 035.

108. See e.g., 8 U.S.C. § 1101(a)(42)(A) (1993); 8 C.F.R. § 1208.13(a); *Tesfamchiael v. Gonzalez*, No. 04-61180 (5th Cir. Oct. 24, 2006) (stating that to qualify for asylum, an alien must be a “refugee”); Migration Act, 1958 (Cth) (Australia).

109. See Sohn & Buergenthal, eds., *supra* note 48, at 103-04.

110. See Refugee Law No. 9474/97 § 1(iii) (adopting language from the Cartagena Declaration: “serious and generalised violations of human rights”); Mandal, *supra* note 69 (“In practice, it seems that subsection (iii) is also considered to apply to situations of armed conflict and generalised vio-

adopted into municipal law in South Africa,<sup>112</sup> Tanzania,<sup>113</sup> Uganda,<sup>114</sup> and, strangely, Mexico.<sup>115</sup>

### 1. Municipal Law and Practice Concerning Refugee Status

This Article examines the municipal law specifically of those states that have been identified as specially interested. Syria, as discussed above<sup>116</sup>, is perhaps the most specially interested. It is signatory to the Bangkok Principles<sup>117</sup> and its constitution provides for protection for political refugees.<sup>118</sup> However, Syria informally permits the UNHCR to perform refugee status determinations on its behalf, resulting in *prima facie* recognition of refugee status of Iraqi applicants hailing from the central or southern regions of Iraq and the issuance of asylum-seeker documentation to applicants from the Kurdish-controlled northern region.<sup>119</sup> Syria appears to still be in the midst of reforming its refugee policies, but is doing so under the guidance of the Swiss Government and the UNHCR.<sup>120</sup> These actions could suggest state practice and *opinio juris* that UNHCR definitions of refugee are obligatory.

Iran is also a specially interested state.<sup>121</sup> It is a party to the Refugee Convention, and has adopted the Convention definition into its municipal law.<sup>122</sup> Iran has not, however, clearly complied with the requirements of the Convention based on its lack of transparency in refugee status determination and expulsion

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lence.”).

111. See Pres. Decree 3301/92, arts. 1-2.

112. See Mandal, *supra* note 69, at ¶ 238 (“In defining refugee status, section 3 of the 1998 Refugees Act incorporates the refugee definitions in Article 1A(2) of the 1951 [Refugee] Convention and Article I(2) of the 1969 OAU Convention (in sub-sections 3(a) and 3(b) respectively).”).

113. See *id.* at ¶ 242 (“Refugee status is defined in section 4 of the 1998 Refugees Act. Section 4(1)(a) incorporates the language of Article 1A(2) of the 1951 [Refugee] Convention while section 4(1)(b) adopts the text of Article I(2) of the 1969 OAU Convention. Section 4(4) of the Act incorporates the exclusion clause in Article 1F of the 1951 [Refugee] Convention, though some of these grounds are also included in the section 4(3) provision on cessation.”) (internal citations omitted). Also note that Tanzania is the sixth highest recipient in the world of refugees and persons in refugee-like situations. Thus, it may certainly be considered specially interested. See *supra* note 65,

114. Refugees Act 2006, 24 May 2006, XCVIX Ug. Gaz. No. 47 (Aug. 4, 2006). Although apparently the status determination procedures are not yet implemented, see USCRI, Uganda, *supra* note 71.

115. See *supra* note 71.

116. See *supra* note 65.

117. See *supra* note 75, at sec. III.3.C.ii.

118. SYRIA CONST. art. 34 (adopted Mar. 13, 1973).

119. See USCRI, *World Refugee Survey 2009 – Syria*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b3a.html> [hereinafter USCRI, Syria].

120. See *id.*

121. See *supra* note 65.

122. See IRAN CONST. (as amended July 28, 1989); Regulations relating to Refugees (1963).

of refugees for violating technical requirements of area of registration.<sup>123</sup> However, it is a signatory of the Bangkok Principles<sup>124</sup> and it permits the UNHCR to conduct refugee status determinations on its territory.<sup>125</sup>

Pakistan,<sup>126</sup> although not a party to the Refugee Convention and having no municipal legislation on point, has delegated the refugee status determination procedure to the UNHCR, at least for Afghans seeking refuge<sup>127</sup>—although individuals with Afghani nationality constitute the single largest group of refugees in Pakistan. Pakistan thus may be considered to have expressed a positive *opinio juris* regarding the expansive practice of the UNHCR. Additionally, Pakistan is a party to the ICCPR and CAT, as noted above, and signatory to the Bangkok Principles.<sup>128</sup>

Germany, the United Kingdom, and France are all specially interested states.<sup>129</sup> Together with the European Union's other member states, they are bound to comply with European legislation on refugees, so the policies of the European Union are clearly supported by the practice of specially interested states. Further, European states widely comply with UNHCR recommendations, so in their cases UNHCR recommendations supported by state compliance may be strong evidence of *opinio juris* as well as state practice.<sup>130</sup>

Jordan is not a party to the Refugee Convention.<sup>131</sup> However, it does have

123. USCRI, *World Refugee Survey 2009 – Iran* (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a84a.html> [hereinafter *USCRI, Iran*].

124. See *supra* note 75, at sec. III.3.C.ii.

125. Reports on Iran's working relationship with UNHCR are mixed with some reports documenting active hindering of the efforts of UNHCR, but there appears to be a trend towards increasing cooperation and a wider degree of freedom of action for UNHCR to operate than in the relatively recent past. Exceptions seem to arise with respect to Afghan refugees, although the situation has also considerably improved in recent years in terms of permitting UNHCR to act on its mandate within Iran without significant obstacles. Cf. *USCRI, Iran, supra* note 123 (reporting on the situation in 2009); see also USCRI, *World Refugee Survey 2007 – Iran*, (July 2007), <http://www.refugees.org/countryreports.aspx?id=2001> (reporting on the situation two years earlier). Comparing the situation in Iran based on the 2007 report and the text from the 2009 report two years later, the situation appears to be improving.

126. See *supra* note 65 for analysis of status as a specially interested state.

127. A Tripartite Agreement between the Governments of Pakistan and Afghanistan and UNHCR regulates the management of registered Afghans. See Reliefweb, *Pakistan: New refugee agreement honours principle of voluntary repatriation*, (Mar. 17, 2003), <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/8b0dbd25bd463d4485256cec007efa20>; UNHCR, *UNHCR and Pakistan sign new agreement on stay of Afghan refugees*, (Mar. 13, 2009), <http://www.unhcr.org/49ba5db92.html>; USCRI, *World Refugee Survey 2009 – Pakistan*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2af1cc.html> [hereinafter *USCRI, Pakistan*].

128. See *supra* note 75, at sec. III.3.C.ii.

129. See *supra* note 65 for analysis of status as a specially interested states.

130. USCRI, *World Refugee Survey 2009 – Europe*, (June, 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a6c.html> [hereinafter *USCRI, Europe*].

131. See *supra* note 65 for analysis of status as a specially interested state.

a definition in its Constitution covering political refugees<sup>132</sup> and has signed the Bangkok Principles.<sup>133</sup> In addition, Jordan has signed a Memorandum of Understanding (MOU) providing that refugees recognized as such by the UNHCR will be permitted to enjoy that status in Jordan for six months, during which time the UNHCR will locate countries for resettlement.<sup>134</sup> Even if those persons are not resettled in that time frame, Jordan appears to continue to respect the UNHCR determination and permits the refugees to remain on its territory.<sup>135</sup> This practice suggests recognition and acceptance—possibly constituting state practice and/or *opinio juris*—that the UNHCR’s definition is correct, and is all the more significant as evidence of customary international law in that Jordan is not a party to the Refugee Convention and yet is a specially interested state.

Tanzania is a party to the Refugee Convention and the OAU Convention, in addition to being a signatory of the Bangkok Principles.<sup>136</sup> Although, its commitment to living up to those standards has been questioned, there does not appear to be any effort by Tanzania to articulate any failure as contributing to the formation of a new norm of customary international law.<sup>137</sup> The practice of Tanzania is to permit the UNHCR to observe its screening procedures for applicants for refugee status, and to intervene in the procedures with legal arguments.<sup>138</sup> When Tanzania proposed repatriating massive numbers of Rwandan refugees, it did so with UNHCR approval.<sup>139</sup> As with the other states noted above, this practice suggests that Tanzania may hold an *opinio juris* that involvement and standards applied by the UNHCR are obligatory.

China is a party to the Refugee Convention and its municipal law provides asylum for political reasons, although it is unclear whether this practice is actually carried out.<sup>140</sup> China is also a signatory of the Bangkok Principles.<sup>141</sup> Although China does permit UNHCR to conduct status determinations on its be-

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132. See JORDAN CONST. art. 21 (adopted Jan. 1, 1952).

133. See *supra* note 75, at sec. III.3.C.ii.

134. See Memorandum of Understanding, Jord. – UNHCR, 1998.

135. USCRI, *World Refugee Survey 2009 – Jordan*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2aac.html> [hereinafter *USCRI, Jordan*].

136. See *supra* note 65 for analysis of status as a specially interested state; see also *supra* note 75, at sec. III.3.C.

137. See Amnesty International, *Great Lakes Region Still in Need of Protection: Repatriation, Refoulement and the Safety of Refugees and the Internally Displaced*, A.I. Index AFR 02/07/97, 2 (Jan. 1997) [hereinafter Amnesty Int’l, Great Lakes Region].

138. See USCRI, *World Refugee Survey 2009 – Tanzania*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b383.html> [hereinafter *USCRI, Tanzania*].

139. See e.g., Amnesty Int’l, *Great Lakes Region*, *supra* note 137, at 2; Amnesty International, *Rwanda: Human rights overlooked in mass repatriation*, A.I. Index AFR 47/02/97 (Jan. 1997).

140. See *supra* note 65 for analysis of status as a specially interested state; P.R.C. CONST. art. 32 (amended Dec. 4, 1982); See USCRI, *World Refugee Survey 2009 – China*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a3c.html> [hereinafter *USCRI, China*].

141. See *supra* note 75, at sec. III.3.C.ii.

half, it prohibits UNHCR from doing so near the border with North Korea.<sup>142</sup> The practice and *opinio juris* drawn from this policy is more ambiguous, although it could be seen as supportive of the UNHCR definition of refugee generally, similar to the analysis of other states above.

Chad<sup>143</sup> is a party to the Refugee Convention and the OAU Convention, and its municipal law provides for asylum and protection of political refugees.<sup>144</sup> Chad has also agreed to an MOU with the UNHCR specifically providing for *non-refoulement*.<sup>145</sup> In 2007, the UNHCR and Chadian Government jointly proposed a draft law on asylum for Chad, but the draft was not approved, so the country still lacks legislation on point.<sup>146</sup> Chad is, however, recognizing individuals fleeing from the violence in Darfur and the Central African Republic as *prima facie* refugees, with the condition that they remain in the refugee camps.<sup>147</sup> Those leaving camps may have individualized refugee status determinations, apparently applying the definition in the Refugee Convention and OAU Convention.<sup>148</sup> This practice suggests that Chad considers individuals fleeing generalized violence and instability as refugees.

The United States is also a specially interested state.<sup>149</sup> It is not a party to the Refugee Convention, although it is somewhat incongruously a party to the Refugee Protocol and the CAT. Nonetheless, the United States applies the definition provided in the Refugee Convention in its municipal law, though merging the recognition of status and benefit of *non-refoulement* with the application for asylum.<sup>150</sup> It exempts terrorists and those providing “material support” to terrorists from eligibility for refuge or asylum, although some exceptions have been introduced. The United States also exempts individuals that commit “aggravated felonies” from *non-refoulement* or a grant of asylum.<sup>151</sup> Based on these policies, the United States appears to have the policy and *opinio juris* that the Convention definition of refugee applies possibly alternatively through customary international law.

Kenya<sup>152</sup> is a party to the Refugee Convention and the OAU Convention,

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142. See USCRI, *China*, *supra* note 140.

143. See *supra* note 65 for analysis of status as a specially interested state.

144. See *supra* note 75, at sec. III.3.C. See also CHAD CONST. art 46. (amended Mar. 31, 1996).

145. See Memorandum of Understanding, Chad – UNHCR, reported in USCRI, *World Refugee Survey 2009 – Chad*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a271.html> [hereinafter USCRI, *Chad*].

146. See *id.*

147. See *id.*

148. See *id.*

149. See *supra* note 65 for analysis of status as a specially interested state.

150. See Immigration and Nationality Act, 8 U.S.C. § 1158, 208(b) (1986).

151. See *id.*

152. See *supra* note 65 for analysis of status as a specially interested state.

as well as having signed the Bangkok Principles.<sup>153</sup> It has also adopted a refugee statute,<sup>154</sup> but it is unclear whether that law has or needs to have implementing regulations in order to be internally binding.<sup>155</sup> However, the UNHCR has received the delegated authority to administer refugee status determinations and operate refugee camps.<sup>156</sup> Based on these practices, Kenya appears to adhere to the practice and *opinio juris* that the broader notion of refugee in the OAU Convention is the legal definition of the term.

Saudi Arabia<sup>157</sup> is not a party to the Refugee Convention and reserves the right to grant political asylum only where its public interest is served.<sup>158</sup> There does not appear to be any implementing legislation codifying this policy and, in the interim, the policy is very restrictively applied.<sup>159</sup> However, Saudi Arabia has signed the Bangkok Principles,<sup>160</sup> and has further agreed to an MOU with the UNHCR,<sup>161</sup> providing UNHCR with the authority to conduct refugee status determinations on its behalf. Although the practice and *opinio juris* of Saudi Arabia are mixed, there is some acknowledgement that the practice and *opinio juris* of the UNHCR embody the appropriate standard.

Uganda<sup>162</sup> is a party to the Refugee Convention and the OAU Convention, as well as being a signatory of the Bangkok Principles.<sup>163</sup> It adopted the more liberal definition of refugee provided therein within its municipal legislation.<sup>164</sup>

Sudan<sup>165</sup> is a party to the Refugee Convention and the OAU Convention,

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153. See *supra* note 75, at sec. III.3.C.

154. See Refugees Act, 2006, Keny. Gaz. Suppl. No. 97, Spec. Iss. (Acts No. 13) 437 (Jan. 2, 2007).

155. See USCRI, *World Refugee Survey 2009 – Kenya*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2aa76.html> [hereinafter *USCRI, Kenya*] (reporting that there was no Minister for Immigration and Registration of Persons and no regulations in force, although there was a Commissioner for Refugee Affairs who was legally vested with the authority to make refugee status determinations).

156. See *id.*

157. See *supra* note 65 for analysis of status as a specially interested state.

158. See Basic Law, Royal Decree No. A/90, art. 42 (27/8/1412 AH) (Jan. 31, 1992).

159. USCRI, *World Refugee Survey 2009 - Saudi Arabia*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b071.html> [hereinafter *USCRI, Saudi Arabia*] (reporting that recognition of refugee status and/or grants of asylum are only accepted from individuals legally admitted and in possession of a durable residence permit).

160. See *supra* note 75, at sec. III.3.C.ii.

161. See Memorandum of Understanding, Saudi Arabia – UNHCR (June 22, 1993), [untreaty.un.org/unts/120001\\_144071/9/8/00007426.pdf](http://untreaty.un.org/unts/120001_144071/9/8/00007426.pdf).

162. See *supra* note 65 for analysis of status as a specially interested state.

163. See *supra* note 75, at sec. III.3.C.

164. Refugees Act 2006, 24 May 2006, XCVIX Ug. Gaz. No. 47 (Aug. 4, 2006) (although apparently the status determination procedures are not yet implemented). See *USCRI, Uganda*, *supra* note 71.

165. See *supra* note 65 for analysis of status as a specially interested state.

and signatory to the Bangkok Principles.<sup>166</sup> It adopted the broader definition in the OAU Convention and Bangkok Principles into its municipal law.<sup>167</sup> The express terms of the municipal legislation do not provide for *non-refoulement*, although it appears to be granted in practice.<sup>168</sup> Although, Sudan permits the UNHCR to monitor its refugee status determinations, it does not allow for intervention.<sup>169</sup> Therefore, the practice and *opinio juris* are not clearly in favor of one or another legal standard. However, there appears to be a general practice and *opinio juris* in favor of the OAU definition, which is not as broad as the UNHCR mandate of protection.

In the Democratic Republic of the Congo (DRC),<sup>170</sup> practices around *refoulement* suggest an *opinio juris* that the OAU Convention definition of refugee is the applicable standard. The DRC is a party to both the Refugee Convention and the OAU Convention. It has adopted these definitions into municipal law.<sup>171</sup> Reports by NGOs from the country confirm that individuals qualifying under the OAU Convention are not generally being expelled. However, Amnesty International has reported on a massive, forced return of Rwandan refugees. Amnesty's characterization of the return as a violation of international law does not appear to have been contested, perhaps buttressing the OAU Convention as the applicable standard. However, Amnesty's argument is focused on the forcible means of the return, not the general legal right to expel.<sup>172</sup>

Canada<sup>173</sup> is a party to the Refugee Convention and CAT, and has implemented those obligations into municipal law.<sup>174</sup> Canada also suspended all deportations, not involving individuals who are a security or criminal threat, to Afghanistan, Burundi, DRC, Haiti, Iraq, Liberia, Rwanda, and Zimbabwe.<sup>175</sup> This suspension suggests an *opinio juris* that return to situations of instability is impermissible. Further, Canada accepts refugees for resettlement based to some degree on UNHCR classification.<sup>176</sup> Thus, Canada appears to support the practice and *opinio juris* of UNHCR.

166. See *supra* note 75, at sec. III.3.C.

167. See Regulation of Asylum Act 1974, § 2, May 21, 1974, SDN-115, Dem. Rep. Sudan Gaz. No. 1162 at 183-6 (June 15, 1974).

168. See USCRI, *World Refugee Survey 2009 – Sudan*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b285.html>.

169. See *id.*

170. See *supra* note 65 for analysis of status as a specially interested state.

171. See Refugee Law of 2002, reported in USCRI, *U.S. Committee for Refugees and Immigrants World Refugee Survey 2006 – Congo-Kinshasa*, (June 17, 2006), <http://www.unhcr.org/refworld/docid/4496ad0912.html>.

172. See Amnesty Int'l, *Great Lakes Region*, *supra* note 137, at 3.

173. See *supra* note 65 for analysis of status as a specially interested state.

174. See Immigration and Refugee Protection Act, S.C. 2001, c. 27.

175. See USCRI, *World Refugee Survey 2009 – Canada*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a2c.html>.

176. See *id.*



India<sup>177</sup> is supportive of UNHCR practices although it is not a party to the Refugee Convention and does not appear to have a law on refugees. However, indirectly, India provides for refugee status based on its constitutional principles.<sup>178</sup> India has served on the UNHCR's Executive Committee and has signed the Bangkok Principles.<sup>179</sup> Notwithstanding the formal denial of refugee status, India practices a policy of *non-refoulement* (especially for Tibetans and Sri Lankans, and to some degree also for Bhutanese and Nepalese).<sup>180</sup> India formally denies the UNHCR a binding legal role in refugee status determinations. Nevertheless, it does permit the UNHCR to operate within the country—indicating a level of support for UNHCR practices. Therefore, India could be considered to hold an *opinio juris* in favor of an expanded definition of refugee.

Nepal<sup>181</sup> similarly is not a party to the Refugee Convention and has no laws on refugees, although it does grant *de facto*<sup>182</sup> refugee status and is a signatory of the Bangkok Principles.<sup>183</sup> Nepal practices *non-refoulement* of individuals recognized to be refugees, especially Bhutanese and Tibetans. Nepal also has permitted the UNHCR (albeit somewhat inconsistently) to conduct refugee status determinations, recognized such determinations, and cooperated with the UNHCR operations assisting refugees in resettlement.<sup>184</sup>

Finally, Thailand is also not a party to the Refugee Convention and has no refugee laws. However, similarly to India, Thailand's practice shows support for the Refugee Convention principles. Thailand has signed the Bangkok Principles<sup>185</sup> and, perhaps more significantly, has permitted the UNHCR to conduct status determinations in the past, although that practice was recently suspended. The UNHCR operations were suspended when Thailand adopted its own *de facto* status determination procedure, in which it screens individuals in refugee

177. See *supra* note 65 for analysis of status as a specially interested state.

178. See Nat'l Hum. Rts. Comm'n v. State of Arunachal Pradesh & Anr., 1996 A.I.R. 1234; 1996 S.C.C. (1) 742 (Sup. Ct., Ind. Jan. 1, 1996) (holding that the constitutional principles of life and personal liberty protect refugees from *refoulement*).

179. See *supra* note 75, at sec. III.3.C.ii. But see the discussion of the possible impact of India's reservation, *supra* note 81.

180. See USCRI, *World Refugee Survey 2009 – India*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a75d.html>.

181. See *supra* note 65 for analysis of status as a specially interested state.

182. See Immigration and Refugee Board of Canada, *Nepal: Situation of Tibetan refugees and those not recognized as refugees; including legal rights and living conditions (1995-1999)*, Doc. NPL33157.EX, (Dec. 22, 1999); U.S. Department of State, *Tibetan Refugees in Nepal*, (Aug. 1998), <http://www.unhcr.org/refworld/docid/3ae6ad8066.html>.

183. See *supra* note 75, at sec. III.3.C.ii.

184. See USCRI, *World Refugee Survey 2009 – Nepal*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2aec.html> [hereinafter *USCRI, Nepal*]. However, Nepal refused to permit status determinations in 2007 and refused to recognize status determinations made after 2007, although in 2008, Nepal once again permitted UNHCR to perform status determinations. See *id.*

185. See *supra* note 75, at sec. III.3.C.ii.

camps and admits a certain qualifying quota.<sup>186</sup> This practice essentially amounts to a national adoption of UNHCR practice, where Thailand is under no conventional legal obligation to do so.

In conclusion, the practice and *opinio juris* of the specially interested states above demonstrates the application of an expanded definition of refugee. This expanded definition is based both on the direct practices of the states, and on the practice of the UNHCR in setting and applying refugee status determination standards on behalf of those states. Moreover, state practices refusing to apply an expanded definition or attempting to curtail the work of the UNHCR have been considered violations of the rules on refugees. Where states act in ways that are successfully characterized as violations of the law, an alternative customary norm does not develop—instead the rule being violated is reaffirmed.<sup>187</sup> The legal characterization of restrictive refugee definition practices as violations of international law indicate that the expanded definition of refugee is well accepted in the international community.

## 2. Municipal Law and Practice Concerning Subsidiary Protection

Many states provide for some form of subsidiary protection under their national law and this provision could be evidence of practice and *opinio juris* of an expanded definition of refugee. This protection is only sometimes mandated by the states' international legal obligations. For example, the specially interested states of France,<sup>188</sup> Germany,<sup>189</sup> the United Kingdom,<sup>190</sup> and the United

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186. See USCRI, *World Refugee Survey 2009 – Thailand*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b4c.html>. Thailand has also expressed the intention to create a formal procedure that would replace the informal one, although it is unclear whether formal means *de jure*. See *id.*

187. *Military & Paramilitary Activities In & Against Nicaragua, Merits (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 186 (June 27).

188. See FR. 5<sup>TH</sup> REP. CONST. art. 53-1 (adopted Oct. 4, 1958) (“the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds”); FR. 4<sup>TH</sup> REP. CONST. (adopted Oct. 27, 1946); ECRE, *Complementary/Subsidiary Forms of Protection in the EU Member States: An Overview: France*, <http://www.ecre.org/files/survcompro.pdf> (noting that the refugee authority and appeals board has discretion to grant Constitutional asylum to persons “fighting for freedom” who do not qualify as Convention refugees); Loi no. 52/893 relative au droit d’asile (the “Asylum Law”), art. 2 (II) (July 25, 1952) (risk of the death penalty; torture or inhuman or degrading punishment or treatment; serious, direct and individualised threat to his life or person because of generalised violence resulting from internal or international armed conflict); Loi no. 99/586 (July 12, 1999) (“Loi Chevènement”), § 13 (rejected asylum seeker who, if returned, would face a threat to his life or freedom or would be at risk of treatment contrary to Article 3 of the ECHR). Also note that France may be considered a specially interested state based on the receipt of high numbers of refugees and persons in refugee-like situations. See *supra* note 65.

189. See Grundgesetz (“GG”), art. 16(a) (May 23, 1949) (right to asylum for those who fear political persecution); Residence Act (June 30, 2004), 2004 Federal Law Gazette, Pt. I, No. 41 (Aug. 5, 2004), sec. 60(1), as amended by Act Amending the Residence Act and Other Acts (Mar. 14, 2005), 2005 Federal Law Gazette, Pt. I, 721 (Torture, death penalty, substantial concrete danger to

States,<sup>191</sup> all provide in their domestic legislation for subsidiary protection for a class of persons wider than the conventional definition of refugee. Additionally, many states other than those in the top twenty-five in terms of refugee recipients have also adopted similar subsidiary protection regimes, including Australia,<sup>192</sup> Austria,<sup>193</sup> Belgium,<sup>194</sup> Canada,<sup>195</sup> Denmark,<sup>196</sup> Ecuador,<sup>197</sup> Finland,<sup>198</sup>

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his or her life and limb or liberty, or ECHR); Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet [Aliens Act] (July 9, 1990), 1990 Federal Law Gazette Pt. I, 1354, sec. 30, *as amended by* Act of 23 July 1999, 1999 Federal Law Gazette Pt. I, 1620, art. 2 “Humanitarian Reasons” [Aufenthaltsbefugnis]; sec. 54 “Temporary Suspension of Deportation”; §§ 53, 55 “Tolerated Residence” [“Duldung”]; § 53, ¶ 1-4 (risk of torture, capital punishment, inhuman or degrading treatment), § 53, ¶ 6 (immediate threat to life or freedom or persons who are forced to flee starvation or deprivation of natural resources), § 55, (temporarily if expulsion is impossible). Also note that Germany is the fourth highest recipient of refugees (or other displaced persons in refugee-like situations) in the world. *See supra* note 65. Therefore, Germany can be considered specially interested in refugee and refugee-like flows of persons.

190. *See* U.K. Immigration Act, Immigration Rules, Rule 334, 339C (1971) (if asylum applications is refused, “humanitarian protection” can still be granted to those who would face serious risk to life or person upon return to country of origin from imposition of the death penalty or other unlawful killing, including in a war/conflict situation, by the State or agents of the State or non-State agents where there is no sufficiency of protection, or torture, inhuman or degrading treatment or punishment), <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/>; United Kingdom Home Office - Immigration and Nationality Directorate, *Asylum Policy Instructions October 2006 (re-branded December 2008)* (allowing for “Humanitarian Protection and Discretionary Leave if refusal of an asylum application and removal would result in a direct breach of ECHR, art. 3 or 8, such as serious medical condition or such poor conditions upon return, such as absence of water, food or basic shelter, or unaccompanied asylum seeking children without inadequate reception arrangements available in their own country or other humanitarian considerations), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>. Also note that the United Kingdom maybe considered to be a specially interested state due to the high level of receipt of refugees and persons in refugee-like situations. *See supra* note 65.

191. *See* INA § 101(a)(42) (definition of refugee to include victims of forced sterilization or abortion programs), § 244 (allowing for grant of “temporary protected status” to eligible nationals of designated countries. The Secretary of Homeland Security may ‘designate’ a country where there is an ongoing armed conflict, natural disaster, the foreign state is unable, temporarily, to handle adequately the return). *See also* Susan Martin, Andrew I. Schoenholtz & Deborah Waller Meyers, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543 (1998). Also note that the United States might be considered a specially interested state based on the high level of receipt of refugees and persons in refugee-like situations. *See supra* note 65 and accompanying text.

192. *See* Migration Act, § 417 (1958) (allowing for the Minister of the Department of Immigration and Multicultural and Indigenous Affairs to review Protection Visa decisions and grant of a more favorable outcome when the action would be with the public interest), [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/); *see also* Department of Immigration and Multicultural and Indigenous Affairs, *Guidelines on Ministerial Power Under Sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958*, ¶ 4.1 (explaining that the public interest may be served where an individual’s situation involves unique or exceptional circumstances, which may arise if return would subject applicant to significant threat to personal security, violations of human rights or human dignity, or subjection to a systematic program of harassment or denial of basic rights), [www.ag.gov.au/www/agd/rwpattach.nsf/.../18Marannex1torture.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/.../18Marannex1torture.pdf).

193. *See* Asylum Act, art. 10 § 5(2) (2005) (implementing complementary protection as provided in the Qualification Directive, *supra* note 102 and ECHR); Asylum Act, 1997, arts. 8, 15; Aliens

Greece,<sup>199</sup> Ireland,<sup>200</sup> Israel,<sup>201</sup> Italy,<sup>202</sup> Luxembourg,<sup>203</sup> the Netherlands,<sup>204</sup>

Act, 1997, art. 57 (granting limited right of residence to persons refused asylum if their forced return has been declared inadmissible because it would violate Article 2 of the ECHR (right to life), Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment or punishment), Protocol 6 to the ECHR (abolition of the death penalty), and to persons fearing persecution for gender-related reasons), <http://legislationline.org/documents/action/popup/id/6542>; Aliens Act, 1997, arts. 56 - 57 “Abschiebungsaufschub” [“Deportation Deferment”] (stating that persons cannot be deported if it would violate arts. 2 or 3 or Protocol 6 to the ECHR or is practically impossible); Aliens Act, 1997, art. 10(4) “Humanitarian Residence Permit” (humanitarian grounds, violation of Article 2, Article 3 or Protocol 6, or human trafficking cases).

194. See Aliens Act, art. 9(3) (1980) (allowing residence permits to be issued under exceptional circumstances when displaced persons possess strong ties to Belgium, return is impossible, situations of civil war or generalised violence, grave illnesses, risk of human rights violations, torture or cruel, inhuman and degrading treatment, special relationship with Belgians or foreigners who permanently stay in Belgium); Dirk Vanheule, *The Qualification Directive: A Milestone in Belgium Asylum Law*, in *THE QUALIFICATION DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED STATES* 75 (Karin Zwaan, ed., 2007) (reporting that Belgium has also created a medical asylum assessment process); “Suspension of Deportation” reported at *Complementary/Subsidiary Forms of Protection in the EU Member States: An Overview: Belgium*, <http://www.ecre.org/files/survcompro.pdf> (reporting that the authority merely rests with administrative discretion).

195. See Immigration and Refugee Protection Act, §§ 95-98 (2002) (defining “refugee” as well as “person in need of protection” in Canada; the latter including those whose removal subjects them to risk to their life or risk of cruel and unusual treatment or punishment); § 25 (‘humanitarian and compassionate’ grounds). Also note that Canada might be considered a specially interested state based on the high level of receipt of refugees and persons in refugee-like situations. See *supra* note 65 and accompanying text.

196. See Aliens (Consolidation) Act, § 7(2) (2002) (granting residence permit to aliens risking the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to country of origin); § 9(b) (granting humanitarian status upon essential considerations of a humanitarian nature); § 9(c) (outlining exceptional reasons, close family ties, not possible to return the person for at least 18 months).

197. See Pres. Decree 3301/92, arts. 1-2 (has been interpreted to include individuals who refuse to provide financial/material assistance to paramilitary or guerrilla forces, relatives and companions of people participating in the conflict (including rape victims targeted on this basis) and individuals who resist forced recruitment or are deserters from paramilitary or guerrilla forces; individuals who have been directly affected in a serious or even life threatening way by the conflict in Colombia; and some other vulnerable non-nationals (e.g., single pregnant women, disabled persons, women victims of domestic violence)).

198. See FIN. CONST., § 9; Aliens Act 301/2004, §§ 51, 52, and 89 (2004) (providing grounds for protection including health, social ties and practical impossibility of return); Aliens Act, 1991, § 31, as amended through 2001 (extending grounds for protection to danger of a death sentence, torture or other treatment violating human dignity, also armed conflict, indiscriminate violence or environmental disaster, gender-related or sexual persecution, persecution for refusal to perform military service).

199. See Immigration (Aliens) Law, Law No. 1975/1991, amended by Law No. 2452/1996, § 25.4; Pres. Decree 61/1999 § 8 (stating that if refugee status application has been finally rejected but aliens cannot return to their countries of origin for reasons of a *force majeure* or return would violate ECHR, art. 3, or CAT, art. 3, or similar humanitarian reasons); Immigration Law No. 2910/2001, art. 37.4 (a), (b); Immigration Law No. 3146/2003, art. 8, ¶ 1 (granting temporary residence permits to illegal immigrants unable to return to their country of origin, especially on humanitarian grounds or due to *force majeure*); Immigration Law No. 2910/2001, art. 44.6 “Suspension of Administrative Deportation” (humanitarian reasons, *force majeure*, or public interest); Inter-min. Dec. No. 137954

Portugal,<sup>205</sup> Russia,<sup>206</sup> Spain,<sup>207</sup> Sweden,<sup>208</sup> and Switzerland.<sup>209</sup> There is, of

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(Oct. 12, 2000), art. 3 (granting suspension of judicial deportation when deportation is not possible, especially when alien's life is in danger.).

200. See Immigrant Act of 1999, § 3(6) (1999) (allowing leave to remain for humanitarian or other reasons, such as illness, family connections and personal considerations); Refugee Act of 1996 § 17(6) (1996) (allowing for a discretionary right to remain under protective status if asylum application was withdrawn, denied or revoked; this protection status has never been used); Refugee Act of 1996 § 5(2), Criminal Justice (United Nations Convention Against Torture) Act, § 4 (2000) (prohibiting refoulement if life or freedom (including sexual assault) would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion, danger of being subject to torture).

201. See *Belcha v. Min. of Int. Aff's & Trib. for Jud. Rev.*, AdmAp 2028/05 (Tel Aviv Dist. Ct., Isr. Feb. 8, 2006), reprinted at ILDC 290 (IL 2006) (expressing willingness to expand the *non-refoulement* protection beyond the narrow class of Convention refugees with sufficient proof of a well-founded fear of persecution to those not formally qualifying as "refugees" but deserving protection from a risk of persecution, but only as a temporary measure).

202. See ITALY CONST. art. 10, ¶ 3 (granting political asylum to those not allowed to exercise in his own home country the democratic liberties guaranteed by the Italian Constitution). Note that this was traditionally considered a hortatory statement but was later interpreted to have binding legal effect. See Dec. No. 4674 (Ct. Cass. May 26, 1997); In re Abdullah Ocalan (Trib. Rome Oct. 1, 1999) discussed in ECRE, *Residence Permits on Humanitarian Grounds; Complementary/Subsidiary Forms of Protection in the EU Member States: An Overview: Italy*, <http://www.ecre.org/files/survcompro.pdf>; Law No. 189/02 (providing for asylum explicitly as a consequence of ECHR, art. 3); Legis. Decree No. 286/98 "Testico Unico," art. 5(6) (applying to those that do not qualify as Convention refugees but cannot be returned due to serious humanitarian reasons or constitutional or international obligations of the Italian State).

203. See Act of 18 Mar. 2000, art. 13 (applying to persons denied refugee status but who cannot be returned for practical reasons such as refusal to re-admit or health problems).

204. See Aliens Act 2000 §§ 26, 27, 29 (granting "residence status for humanitarian reasons" to those at risk of being subject to torture or inhuman or degrading treatment or punishment, pressing humanitarian reasons, for whom return would constitute an exceptional hardship due to violence in the country of origin, human rights violations, or if a spouse or parent has the same nationality and was granted a residence permit within three months of the applicant's application for admission); Aliens Act 2000 § 43 (if decision on the asylum application is extended beyond the typical six-month period because of insecurity in the country of origin, situation justifying the grant of a residence permit is expected to be of a short duration, number of applications lodged by persons from a particular country or region is so large the Minister cannot reasonably decide them within the six-month time limit); Aliens Act 2000 § 45(4) (asylum applications were rejected but return is temporarily impossible); Aliens Act 2000, art. 14, Aliens Decree, art. 3.6 (granting residence permits to those unable to leave the Netherlands through no fault of his or her own, such as stateless persons and unaccompanied minors). Also note that the Netherlands might be considered a specially interested state, although it is not so highly affected by refugee flows as some other states examined. See *supra* note 65.

205. See 1998 Asylum Act, art. 8 (granting residence permit to those not qualifying for Convention refugee status for humanitarian reasons, e.g., serious lack of security resulting from armed conflicts or systematic violation of human rights); Aliens Act of 2003 (Decree Law No. 34/2003), art. 87, *revoking* Aliens Act of 2001 (Decree Law No. 4/2001), art. 55 (granting residence permit in case of irregular stay to those: gravely ill, with relative who has a humanitarian residence permit, are married to or live with Portuguese nationals or aliens with residence permits, or have minor children living in Portugal; artistic, scientific, economic or social activity of high interest for the country; diplomats who have worked in Portugal for more than three years), art. 88 (granting exceptional residence permit for reasons of national interest).

206. See 1997 Law on Refugees, arts. 1(1), 2, 12(2) (granting temporary refuge to those not

course, no bright line dividing the top twenty-five recipient states from others in terms of which are considered specially interested or not. Some of the states that are not within the top twenty-five might also be considered “specially interested,” or at least highly influential, due to their rates of receipt of individuals in need of protection, especially, for example, in relation to their population levels, resources, etc. Common bases for subsidiary protection by these states include: (1) the risk of torture or degrading punishment,<sup>210</sup> (2) the imposition of capital punishment,<sup>211</sup> (3) impossibility or futility of return,<sup>212</sup> (4) existence of a state of armed conflict,<sup>213</sup> (5) environmental disaster or deprivation of resources,<sup>214</sup> (6) strong ties to the state or family ties,<sup>215</sup> (7) grave illnesses,<sup>216</sup> (8) gender or

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qualifying as permanent refugees for humanitarian reasons, armed conflicts, serious health problems, instability in the country of origin, family unity).

207. See Law 5/1984, Reglamento de Aplicación de la Ley de Asilo [Regulating Refugee Status and the Right of Asylum], arts. 17(2), (3), *approved by* Royal Decree 203/1995 (10 Feb. 1995), *modified by* Royal Decree 864/2001 (20 Jul. 2001) and Royal Decree 1325/2003 (25 Oct. 2003), art. 31.3 (granting residence permits to persons not qualifying for refugee status but who are displaced persons under a serious risk of exposure to systematic or generalised human rights violations), art. 31.4 (granting leave to remain to those refused asylum for humanitarian reasons or reasons of the public interest, such as people fleeing conflict and other serious disturbances; prohibiting refoulement for humanitarian reasons); Regulation on Temporary Protection, Royal Decree 1325/2003 (25 Oct. 2003), art. 2.

208. See Aliens Act, 2005, ch. 12 §§ 1, 2 (prohibiting refoulement to in a situation where there is a risk of a resulting situation of danger), ch. 3, § 3 (granting protection to those who do not qualify as Convention refugees but have a well-founded fear of being sentenced to death or corporal punishment or torture or other inhuman or degrading treatment or punishment, external or internal armed conflict, environmental disaster preventing return, or a well-founded fear of persecution because of his/her sex or sexual orientation), ch. 8, §§ 1-4 (prohibiting refoulement of those not granted refugee status or subsidiary protection, if reasonable grounds exist for believing that they will face capital or corporal punishment or torture or other inhuman or degrading punishment or treatment, or persecution), ch. 2, § 5b (providing for reconsideration of a decision of expulsion for those otherwise in need of international protection or if decision is contrary to humanity), ch. 2, §§ 4(5), 5 (humanitarian reasons, such as certain physical or mental handicaps or diseases or home country is in a state of war). Also note that Sweden might be a specially interested state, although it is less affected than some other states, *see supra* note 65.

209. See *In re O.D. und Kinder, Eritrea*, Case 2004, No. 26 (ARK May 26, 2004); *In re A.G.M. et famille, Angola*, Case 2004, No. 32 (ARK Sept. 17, 2004).

210. Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Netherlands, Sweden, and the United Kingdom. Note that Germany might be considered a specially interested state. *See supra* note 65. Also note that the Netherlands might be considered a specially interested state, although it is not so highly affected as some other states examined. *See supra* note 65.

211. Austria, Denmark, Finland, Germany, Sweden, and the United Kingdom. Also note that Germany and the United Kingdom might be specially interested states, *see supra* note 65; and that Sweden might also be so considered, although it is less affected than some other states, *see supra* note 65.

212. Austria, Belgium, Denmark, Germany, Greece, Luxembourg, and the Netherlands.

213. Belgium, Denmark, Finland, Germany, Greece, the Netherlands, Spain, Sweden, and the United Kingdom.

214. Denmark, Finland, Greece, Portugal, and the United Kingdom.

215. Belgium, Denmark, Ireland, Netherlands, and the United Kingdom.

216. Belgium, Greece, Ireland, Luxembourg, Portugal, and Sweden.

sexual orientation persecution,<sup>217</sup> and (9) other violations of human rights.<sup>218</sup> In addition, many of these aforementioned states conflate terms of “refuge” and “asylum.” For example, they grant “refuge” to individuals qualifying on grounds not mandated by the Refugee Convention, suggesting that the customary international legal definition of “refugee” may encompass more than Convention “refugees.” As an example of the convergence between refuge and asylum, consider that from 2000 to 2002, European states granted protection to approximately 70,000 applicants each year,<sup>219</sup> of which approximately 57,000 subsequently received asylum.<sup>220</sup>

In addition to protections for risk of torture or other subsidiary grounds, some states also apply a general proportionality test to the expulsion of any person for any reason, including individuals whose refugee status was either not recognized or terminated.<sup>221</sup> This test usually weighs the need for expulsion against the dangers facing the person on return. Just as subsidiary rules have effectively expanded the definition of “refugee” beyond the narrow meaning in the Refugee Convention, general proportionality concerns may have done so as well. In applying Article 33(2) of the Refugee Convention, though, the New Zealand Supreme Court found that the Refugee Convention did not require this proportionality test.<sup>222</sup> Accordingly, with only two reported states applying such a test and one rejecting it, there is insufficient practice on point on which to comfortably base a rule of customary international law.

Many states also apply the same or similar standards in determining subsidiary protection as they do in determining refugee status, although they maintain a formal distinction between the two statuses and can apply slightly differing standards on certain aspects.<sup>223</sup> This practice might suggest an *opinio juris* to

217. Austria, Denmark, Finland, and Sweden.

218. The Netherlands and the United Kingdom.

219. See UNHCR, Population Data Unit, *Asylum applications and refugee status determination in selected European countries, 2000-2002*, Tbl. 2 (Feb. 20, 2004), [www.unhcr.org/4039dccc4.pdf](http://www.unhcr.org/4039dccc4.pdf).

220. See *id.* See also Walter Kalin, *Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism*, 44 F.R.G. YB INTL L. 202, 220 (2001).

221. See e.g., Israel: *Belcha v. Min. Int. Aff's*, AdmAp 2028/05, reprinted at ILDC 290 (although petitioners did not qualify for refugee status, the life-threatening situation they would face upon return was disproportionate to the problems with their continued stay, justifying a temporary stay of deportation pending designation of a safe third country); Switzerland: *In re M.C.C.*, Somalie, Case 2006, No. 2 (ARK Dec. 13, 2005) (finding that the chaotic situation and the permanent state of violence in Somalia rendered removal unreasonable because it would be disproportionate).

222. See AG v. Zaoui, (2005) N.Z.S.C. 38, ¶ 42 (Sup. Ct., N. Zealand June 21 2005), reprinted at ILDC 81 (NZ 2005). Article 33(2) [of the Refugee Convention] did not, however, invite a ‘proportionality’ or ‘sliding scale’ approach. It stated a single standard and was to be applied in its own terms by reference to the danger to the security of New Zealand without any individualized balancing or weighing of the particular risk of deportation to the individual. *Id.*

223. See ECRE Country Report 2004, *supra* note 5 (“Changes were brought about after the introduction of subsidiary protection into French legislation. Grounds for the use of exclusion clauses are the same for subsidiary protection as for Convention Status, except for the concept of ‘non-political crime’ which is wider for subsidiary protection than for Geneva Convention Status because

maintain the separate categories of refugee and subsidiary protection, and deny that there is any international legal basis for an expanded definition beyond the Refugee Convention. Consider, for example, the language of the United States' Ninth Circuit Court of Appeals:

“[The] customary international law of safe haven and nonreturn is not a separate basis for jurisdiction before immigration court [a defense against removal by a municipal court].”<sup>224</sup>

However, given the position of specially interested states regarding the UNHCR definition and the widespread and consistent practice of providing and granting subsidiary protection with comparable content, there may be customary international law requiring states to provide, at least, subsidiary protection in some of these situations, though not necessarily a customary expansion of the definition of refugee. In any event, that may be a difference without significance if it results in an expanded class of persons deriving a right of *non-refoulement*.

#### *F. Practice and Opinio Juris of Entities Other Than States*

It is highly contentious whether the acts of entities other than states can contribute to the formation of customary international law. Where the acts of international organizations have been so considered, they are often explained as relevant because they are the collective expression of the practice of states. However, this analysis suffers from the weakness of characterizing some acts as those of the states within the international organization and those of the international organization proper, i.e., exercising a “will of its own.”<sup>225</sup>

It is unconvincing that international law accepts the practice of international organizations themselves, as opposed to the practice of states within and through international organizations, as contributing to customary international law. However, given that this argument is on-going and that the trend appears increasingly in favor of accepting the practice of international organizations as contributory, this Article next examines the practice of organizations. In particular, it will be noted where the practice of organizations is more indicative of the practice and *opinio juris* of states, such as instances where states have made their *opinio juris* known through the organization or where they have potentially

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it includes host countries.”).

224. See *Galo-Garcia v. Immigr. & Naturalization Serv.*, 86 F.3d 916 (9th Cir. 1996).

225. See e.g., *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 113-15 (Oct. 2, 1995) (not clearly distinguishing between the acts of the states within the organization or the acts of the organization proper when relying on the practice of international organizations for establishing customary international law); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 102, Rep’s n.2 (1987) (“The practice of states that builds customary law takes many forms and includes what states do in or through international organizations”). See also HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* § 33, 44-44A (4th rev. ed., 2003) (discussing the notion of a “will of its own”). Of course, that the characterization of some acts as either being attributable to the organization or the member states is difficult to make.



adopted the practice and *opinio juris* of the organization.

*1. United Nations High Commissioner for Refugees Practice and Opinio Juris*

Kay Hailbronner has argued that the practice of the UNHCR is not state practice and therefore does not contribute to the formation of customary international law.<sup>226</sup> It is most likely that it is the practice of states that contributes to the formation of customary international law, not the practice of institutions, and that Hailbronner is therefore correct insofar as her precise argument stands. However, there is a distinction that acts of international organizations are capable of embodying practice and *opinio juris* of states where the act in question is not an act of the organization *per se*, but the act of states within and through the organization.<sup>227</sup> A good example of this type of act is the voting records of states in the UN General Assembly. Acknowledging that a resolution of the General Assembly is an act of the organization with its prescribed legal effects, the voting behavior of a member state remains the practice of the state with its own legal effects in the form of the potential contribution to the formation of customary international law.<sup>228</sup> In addition, the acts of the organization might also be said to embody the practice of the state where the state delegates its state functions to the international organization,<sup>229</sup> or where states cite the mandate of

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226. See e.g., Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees*, 26(4) VA. J. INT'L L. 857, 869 (1986) ("Although the UNHCR fulfills its functions with the agreement of states, it remains a special body entrusted with humanitarian tasks ... the fact that the UNHCR continues to care for the interests of *de facto* refugees cannot be considered evidence of an *opinio juris* by states.").

227. See *supra* note 225.

228. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8). The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

229. See e.g., *Matthews v. U.K.*, Appl. No. 24833/94, 28 Eur. Ct. H.R. 361, ¶¶ 31-35 (1999) (obligation on state to monitor the exercise of delegated powers to ensure compliance with international law). See also *A.G. v. Nissan*, [1969] 1 All. E.L. Reps. 639, 646 (UKHL Feb. 11, 1969), reprinted at 44 INT'L L. REPS. 359 (the United Kingdom remained responsible for the violations of international law by its troops even when participating in UNFICYP because the United Kingdom retained command and control over the troops' acts); *Jennings v. Markley*, 186 F. Supp. 611 (S.D. Ind. Sept. 19, 1960), *aff'd* 290 F. 2d 892 (7th Cir. June 7, 1961) (holding that US troops remained subject to the jurisdiction of the United States when serving on a UN mission). See also Giorgio Gaja, International Law Commission Special Rapporteur, *Second Report on Responsibility of International Organizations*, ¶ 50, U.N. Doc. A/CN.4/541 (Apr. 2, 2004) (suggesting the following language for the Draft Articles on the Responsibility of International Organizations as the codification of customary international law).

the UNHCR as generally supervisory.<sup>230</sup> It is not a stretch to understand that where a state so delegates its functions, it is, at least, expressing an *opinio juris* that the legal standards applied by the organization are the correct ones, and, at most, that the *opinio juris* of the organization could be attributed to that state. An example appropriate here is the delegation by states to the UNHCR of the refugee status determination function, studied extensively above under the practice of specially interested states. Therefore, the practice of the UNHCR cannot easily be dismissed, and, in fact, it might be representative of the *opinio juris* and practice of states.

The Codification Division of the UN Secretariat suggested that the practice of the UNHCR and states, and *opinio juris*, might even be seen through a particular lens: that they may wish to refrain from designating certain individuals as refugees even when they qualify as such, because the recognition of status would have political effects on the state now recognized to be a persecuting state.<sup>231</sup> If this is correct, then it is worth being more aggressive in identifying instances where states and/or the UNHCR might consider the relevant persons to be refugees because it is known that those actors will avoid communicating that fact, even if they regard themselves under an obligation to protect.

The UNHCR was established to address the needs of refugees, but its competence and mission have been extensively expanded by the UN General Assembly, without necessarily expanding the core definition of its mission.<sup>232</sup> This practice arguably expands the international community's understanding of refugee.<sup>233</sup> It is interesting to note that the UNHCR's mandate has been expanded to cover those who have a "serious threat to their life, liberty or security of person in their country of origin as a result of armed conflict or serious public disorder."

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230. See *UNHCR – Brasilia Declaration*, supra note 86. It is interesting to note that the Brasilia Declaration discusses the work of the UNHCR as covering refugees, stateless persons, and internally displaced persons. Since the UNHCR mandate also covers persons in "refugee-like" situations of flight out of the state from situations of external aggression, occupation, foreign domination or events seriously disturbing public order, and such individuals cannot be classified as stateless or *internally* displaced, the logical conclusion is that the parties to the Brasilia Declaration understand those individuals covered by the expanded UNHCR mandate to be refugees *per se*. See *id.*

231. See *U.N. Secretariat Memo*, supra note 48, at ¶ 158.

232. See Sohn & Buergerthal, eds., supra note 48, at 102.

233. In particular, it expands the understanding of specially interested states, such as China, Jordan, Kenya, Pakistan, Saudi Arabia, Syria and Tanzania, that appear to have adopted the practice and *opinio juris* of the UNHCR based on the fact that they have, albeit sometimes formally and sometimes informally, delegated the refugee status determination procedure to the organization. See *USCRI, China*, supra note 140; *USCRI, Jordan*, supra note 135; *USCRI, Kenya*, supra note 155; *USCRI, Pakistan*, supra note 127; *USCRI, Saudi Arabia*, supra note 159; *USCRI, Syria*, supra note 119; *USCRI, Tanzania*, supra note 138. Germany, the United Kingdom, and France might be considered to be highly influenced by the UNHCR definition of individuals falling under its mandate, though not having delegated status determination to the organization. See *USCRI, Europe*, supra note 130. The practice and *opinio juris* of Nepal as per the UNHCR is more ambiguous. See *USCRI, Nepal*, supra note 184.

der.”<sup>234</sup> This mandate should include:

[A]ll persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of their country of origin or nationality are compelling to leave their place of habitual residence in order to seek refuge in another place outside the country of origin or nationality.<sup>235</sup>

Interestingly, this expansion of the mandate of the UNHCR closely tracks the expanded definition of refugee that has developed through regional agreements discussed above. It is important to note that the Refugee Convention itself was not amended to expand the refugee definition. The only expansion was in the UNHCR organizational mandate. However, the expansion of the mandate of the agency charged with ensuring the protections of the Refugee Convention might suggest an *opinio juris* of states that some supplementary “refugee” definition exists.<sup>236</sup>

It could be that war and aggression are seen as falling within the broad notion of persecution. The European Council on Refugees and Exiles has noted that “it is hard to conceive of a recent war or civil war situation which has not resulted in or been motivated by persecution for one of the grounds in Article 1A(2) of the Refugee Convention.”<sup>237</sup> This statement suggests that war or other comparable disruptions might alone qualify as persecution. However, the ECRE does not reach this conclusion specifically, subsequently noting that the UNHCR Executive Committee at its 49th Session observed only that “the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion.”<sup>238</sup> While war could be a means of persecution, it was not persecution *per se* and the individuals who fled did not qualify as refugees. However, this interpretation makes it difficult to understand why the UNHCR’s mandate would be expanded if the individuals it was now charged with protecting were not being persecuted and falling under the Refugee Convention on that basis. It could suggest that the expansion of the

234. U.N.G.A. Res. 428(V), Statute of the Office of the UNHCR (Dec. 14, 1950), 5 U.N.G.A.O.R. Supp. (No. 20), U.N. Doc. A/1775 (1950), reprinted at UNHCR, *Collection of International Instruments Concerning Refugees*, U.N. Doc. HCR/IP/I/Eng. (1979) [hereinafter *UNHCR Statute*] at 3; Eberhard Jahn, *Refugees*, in RUDOLF BERNHARDT, DIR., 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 72, 73 (2001); Sohn & Buergenthal, eds., *supra* note 48, at 100; U.N. *Secretariat Memo*, *supra* note 48 (“In some cases, the General Assembly of the United Nations has extended the mandate of UNHCR to cover ‘displaced persons.’”).

235. See *Conclusions of a Symposium on the Promotion, Dissemination and Teaching of Fundamental Human Rights of Refugees*, U.N. Doc. HCR/PRO/7 (1982), at 17.

236. UNHCR, *Note on International Protection*, U.N. Doc. A/AC.96/830, ¶ 32 (Sept. 7, 1994); UNHCR, *Complementary Forms of Protection*, *supra* note 53, at ¶ 10; Mandal, *supra* note 69.

237. See European Council on Refugees and Exiles, *Position on the Interpretation of Article 1 of the Refugee Convention*, ¶ 30 (Sept. 2000) [hereinafter *ECRE, Position on Art. 1*] (citing UNHCR Executive Committee, Conclusion No. 85 (XLIX) on *International Protection*).

238. See *id.* at ¶ 30.

mandate was not an effort to expand the meaning of persecution, thus keeping the Convention largely intact, but rather the development of a supplementary definition of refugee.

Arguing against the UNHCR's mandate as supplementing the Refugee Convention definition of refugee, the UNHCR's mandate is still limited to "those in refugee-like situations," and the terms of its statute under which it acts appear to permit it to offer assistance to individuals who are not formally refugees.<sup>239</sup> Thus, the mandate of the UNHCR appears to consider these individuals under the expanded mandate as not literally qualifying as "refugees." Therefore, the mandate alone does not appear to expand the conventional definition of "refugee", even if the practice of that office could potentially do so. Additionally, states often refuse to accept individuals for settlement by the UNHCR if the protected individual does not qualify as a refugee under the Refugee Convention.<sup>240</sup> The foregoing forces the conclusion that the expansion of the UNHCR mandate most likely does not, in itself, expand the conventional definition of refugee. However, even if it is not expanding the conventional definition, it may contribute to the formation of customary international law on the provision of refuge to a broader scope of protected individuals.

## 2. Council of Europe Practice and *Opinio Juris*

The Council of Europe's practice is also relevant. Recommendation (2001) 18 of the Committee of Ministers of the Council of Europe proposes that Europe take a common approach to refugee qualifications, suggesting that the risk of torture or inhuman or degrading treatment or punishment; a threat to life, security or liberty because of indiscriminate violence arising out of situations such as armed conflict; or other reasons recognized by legislation or practice in a member state, all establish a person as a "refugee."<sup>241</sup> We can consider this the *opinio juris* of the states of the Council of Europe, especially since it was adopted by the Committee of Ministers, and more likely to be expressions of *opinio juris* by states through the organization, rather than an expression by the organization itself.

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239. *UNHCR Statute*, *supra* note 234, at art. 9 (providing that the High Commissioner may "engage in such activities ... as the General Assembly may determine, within the limits of the resources placed at his disposal"); U.N. Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement* (1998), [http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html).

240. See Mandal, *supra* note 69, at ¶ 265 (discussing US policy).

241. See Council of Europe Parliamentary Assembly Recommendation 773 (1976) *on the Situation of De Facto Refugees*; Council of Europe Parliamentary Assembly Recommendation 817 (1977) *on Certain Aspects of the Right to Asylum*; Council of Europe Parliamentary Assembly Recommendation 1327 (1997) *on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe*; Council of Europe Parliamentary Assembly Recommendation 1525 (2001) *on the United Nations High Commissioner for Refugees and the Fiftieth Anniversary of the Geneva Convention*.

### 3. EU Practice and *Opinio Juris*

Turning to EU law, the Qualification Directive clearly applies to refugees as defined in the Refugee Convention, but it establishes a separate category for other non-refugee persons who deserve protection.<sup>242</sup> At least three of the member states of the European Union are specially interested states, and all member states, including the specially interested ones, are bound to comply with EU law. Accordingly, EU practice and *opinio juris* must carry significant weight, even if we refuse to accord it formal significance as contributing to the formation of customary international law. It reflects the practice of a considerable number of states in the world, including at least three specially interested ones.

In the Qualification Directive, refugees are defined according to the Refugee Convention,<sup>243</sup> with the difference that EU nationals are exempt from the definition.<sup>244</sup> Insofar as its treatment of armed conflict, the Directive, and especially Article 15(c), draws on the language in the OAU Convention, the Cartagena Declaration and the UNHCR's widened mandate to establish categories of persons deserving protection. However, it implicitly considers these to be situations outside the definition of "refugee" since it classifies them as falling under the definition of "subsidiary protection." In *Elgafaji v. Staatssecretaris van Justitie*, Case C-465/07, 2009 E.C.R., the European Court of Justice clarified the qualification for subsidiary protection as not needing to be "specifically targeted" for harsh treatment, but rather only to have suffered a "serious and individual threat" due to indiscriminate violence—meaning that there was an inverse relationship between the level of violence and the specificity of the threat.<sup>245</sup> However, the Court did not attempt to broaden the definition of refugee, keeping clearly within the terms of subsidiary protection. This language is evidence that the European Union does not have the *opinio juris* that the definition of refugee is broader than the Refugee Convention, although it does express an *opinio juris* that there may be a norm of supplementary subsidiary protection.

### 4. Other Instances of International Organization Practice and *Opinio Juris*

Arguably, there is *opinio juris* for an expanded definition of refugee based on UN Declarations dealing with enforced disappearances and extra-legal executions,<sup>246</sup> extradition treaties, and international humanitarian law.<sup>247</sup> However,

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242. See *Qualif. Dir.*, *supra* note 103; see Gil-Bazo, *Refugee status*, *supra* note 53. Also note that Denmark is the only EU state to have expressly opted out of the Directive's regime.

243. See Directive, art. 2(c).

244. See Treaty of Amsterdam Amending Treaty on European Union, Protocol 29 on asylum for nationals of Member States of the European Union, Dec. 29, 2006, 2006 O.J. (C 321) (however, note that the Protocol strangely allows for an exception for EU nationals where the receiving Member State unilaterally chooses to examine the application, see ¶(d)).

245. See Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R.

246. See U.N. Declaration on the Protection of All Persons from Enforced Disappearance, art. 8

by their own terms these declarations do not appear to strive for an expanded definition of refugee but only expand or narrow prohibitions on expulsion.<sup>248</sup>

Some have suggested that the 1992 Rio Declaration, the UN Framework Convention on Climate Change, the Convention on Biological Diversity, and Agenda 21 contain obligations to adopt a program of common responsibility for sustainable development and prevention of environmental refugees.<sup>249</sup> Could this obligation include an obligation to receive “environmental refugees,” thus expanding the definition of refugee in customary international law? Lacking explicit treaty law or clear evidence of customary international law, this appears to be a weak argument.<sup>250</sup> The UN Codification Division concluded that “international law has yet to confer refugee status on victims of environmental conditions,”<sup>251</sup> which appears to be the correct assessment.

### 5. Conclusion on International Organization Practice and *Opinio Juris*

Based on the foregoing, the practice of international organizations is rather inconsistent. In general, it suggests a practice and *opinio juris* to expand the scope of protection to deserving individuals, but it also shows a reluctance to use the term “refugee” explicitly to expand the conventional definition in customary international law. Instead, the approach seems to be to provide for supplementary categories of subsidiary protection. It may very well be that customary international law now provides for a norm of subsidiary protection.

However, this limited contribution by international organizations, combined with the contribution of specially interested states, the primary makers of customary international law, might result in expansion of the definition under customary international law to cover a wider scope of deserving individuals. In particular, it appears that there is a definition of refugee under customary inter-

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(1992; U.N. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Principle 5 (1989)).

247. See Fourth Geneva Convention, (Convention Relative to the Protection of Civilian Persons in Time of War), arts. 3, 5, 45, 49 (1949); Additional Protocol II to the 1949 Geneva Conventions, art. 17. *But see* Bradvica v. Immigr. & Naturalization Serv., 128 F. 3d 1009, 1014 (7th Cir. 1997); Matter of Medina, 19 I. & N. Dec. 734 (Bd. Immigr. Appls. 1988) (holding that the Geneva Conventions relating to POWs “do not create individual remedy for relief from deportation”).

248. See generally Sibylle Kapferer, External Consultant, UNHCR, Dep’t of Int’l Protection, Protection Policy & Legal Advice Sec., *The Interface between Extradition and Asylum*, LEGAL & PROT. POL’Y RESEARCH SER. (Nov. 2003) (discussing the relationship between extradition and asylum).

249. See Arthur C. Helton, *The Legal Dimensions of Preventing Forced Migration*, 90 PROC. AM. SOC’Y INT’L L. 546 (1996); *but see* L.F. (Ukr.) v. Min. Int., Case No. 5 Azs 38/2003-58 (Sup. Admin. Ct., Cz. Rep. Feb. 25, 2004) (holding that environmental conditions, such as the damage to the region surrounding the Chernobyl nuclear reactor, could not serve as the basis for a claim to refugee status).

250. See Kate Romer, “Environmental” Refugees?, 25 FORCED MIGR. REV. 61 (May 2006).

251. See U.N. Secretariat Memo, *supra* note 48 (citing David Adam, *50m environmental refugees by end of decade, U.N. warns*, THE GUARDIAN, 12 Oct. 2005).

national law that covers, in addition to conventional refugees: (1) individuals who would suffer torture, inhuman or degrading treatment and/or punishment upon return; and (2) individuals who are fleeing a threat to life, security or liberty due to external aggression, armed conflict, occupation, foreign domination or events seriously disturbing public order, including widespread indiscriminate violence. Individuals that might suffer imposition of the death penalty may in the future be added specifically to that list, but they do not fall under the current international law definition. The only exceptions would be cases where the imposition of the death penalty in that state would result in situations of torture or inhumane punishment.

#### IV.

##### CUSTOMARY INTERNATIONAL LAW NARROWING THE DEFINITION

The above discussion has focused on the expanding definition of refugee and concluded that the definition has most likely been expanded to cover more individuals than just those facing a risk of persecution. This finding, in turn, means that more individuals can qualify for refugee protection. However, refugee qualification has also been contracting in some important ways that may be relevant. If it is accepted that customary international law may have supplemented the Convention in a “positive” sense (i.e., expanding the definition to offer protection to a wider range of persons), then it must be considered whether customary international law may be operating in a “negative” fashion (i.e., restricting the persons and situations covered). This narrowing of the definition might go further than the terms of the Refugee Convention. The sources of international law, principally treaty and custom, are generally perceived to be equal, so that a custom can, in theory, operate to restrict obligations incurred under a treaty, although the evidentiary demands for such a change may be rather high.<sup>252</sup>

##### *A. Territorial Application*

One method that states have been adopting to narrow the application of refugee law is to interpret the territorial application of the Refugee Convention restrictively. Although this is not formally an aspect of the definition of refugee under customary international law, it does impact the determination of when an individual is outside his country of nationality. The US Supreme Court has found that the Refugee Convention does not apply outside of the territory of the United States,<sup>253</sup> and the Immigration and Nationality Act (which includes the refugee and asylum provisions) does not apply on Midway Island because it is

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252. See e.g., *Delimitations of the Continental Shelf (U.K./Fr.)*, Award, ¶ 47, 18 R.I.A.A. 3 (June 30, 1977).

253. See e.g., *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993).

not formally a part of the United States.<sup>254</sup> Russia has adopted a similar interpretation in following domestic legal definitions of its territory.<sup>255</sup> These interpretations appear to leave a vacuum between the fact that the individual in question is clearly outside his country of nationality and the territorial application of treaty obligations. It does not appear to attempt to modify the definition of refugee. In addition, aside from certain unusual territorial situations such as Midway Island, states do not appear to claim non-application in their metropolitan territory, so this exception is rare and not widespread.

### *B. Internal Flight or Relocation Alternative*

Internal flight or relocation within the state of nationality has become an alternative to refugee status developed in case law. Courts have found that relocation within the state of nationality can allow for the individual not to face the danger needed for refugee qualification. The language of the Refugee Convention does not explicitly provide for internal flight as a discrete basis defeating refugee status, and the notion has been criticized.<sup>256</sup> However, the courts of many states have found, on a widespread and fairly consistent basis, that the exception is inherent in the definition.

Although not entirely clear on what provisions of the Refugee Convention this interpretation rests, it appears to be a combination of the inclusion clauses, the cessation clause (making a refugee capable to re-avail himself of the protection of the state of nationality) and the *non-refoulement* obligation against returning the individual to the state where he would face persecution.<sup>257</sup> Additionally, the internal flight rule has been argued to be inherent in the concept of the need for international protection.<sup>258</sup> Because of this unclear basis, it is also hard to determine whether the existence of an internal flight alternative means that the individual does not qualify (even *de facto*) as a refugee under the Refugee Convention or whether the individual may qualify (because he was persecuted or faces a real risk of persecution), but falls into an exception of the rule of *non-*

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254. See *In re Li*, 71 F. Supp. 2d 1052 (D. Hawaii 1999). But see *Rasul v. Bush*, 542 U.S. 466 (2004) (finding that for *habeas corpus*, the application of US law required that the US exercise effective, as opposed to merely formal, sovereignty, such as over Guantanamo Bay).

255. See International Law Commission, *Comments and Information Received from Governments*, U.N. Doc. A/CN.4/604 (26 Aug. 2008) (including the statement by Russia in response to a question by the Special Rapporteur on expulsion of aliens).

256. See ECRE, *Position on Art. 1, supra* note 237, at ¶¶ 34-7; University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, adopted at the 1st Colloq. on Challenges in International Refugees Law, Ann Arbor, Mich., Apr. 9-11, 1999, <http://www.unhcr.org/refworld/docid/3dca73274.html>.

257. See UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/04 (July 23, 2003).

258. See e.g., *Thirunavukkarasu v. Can. (Min. Employ. & Immigr.)*, [1994] 1 F.C. 589 (CA) (Can. Fed. Ct. Appl. Nov. 10, 1993).



*refoulement*. This Article will address the internal flight alternative as an exception to the rules on qualification.

Although the internal flight requirement is applied by a number of states, there are several different ways that this exception might be applied.<sup>259</sup> The UK House of Lords considered two approaches to the interpretation of internal flight.<sup>260</sup> The first is that the internal flight alternative should be restrictively applied to situations where: (1) there is genuine access to the area of domestic protection (existence of financial, logistical, or other barriers); (2) the protection is meaningful (meets basic norms of civil, political, and socio-economic human

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259. See e.g., Australia: S.Z.J.N.Y. v. Min. Immigr. & Citiz., [2008] F.C.A. 624 (Fed. Ct. May 8, 2008); S.B.T.D. v. Min. Immigr. & Citiz., [2007] F.C.A. 2050 (Fed. Ct. Dec. 20, 2007); Al-Amidi v. Min. Immigr. & Multicult. Aff'rs, [2000] F.C.A. 1081; (2000) 177 A.L.R. 506 (Fed. Ct.); Abdi v. Min. Immigr. & Multicult. Aff'rs, BC200000863 [2000] F.C.A. 242 (Fed. Ct. Mar. 10, 2000); Perampalam v. Min. Immir. & Multicult. Aff'rs, [1999] F.C.A. 165; (1999) 84 F.C.R. 274 (Fed. Ct.); Randhawa v. Min. Immigr. Local Gov't & Ethnic Aff'rs, (1994) 52 F.C.R. 437 (Fed. Ct.); S.Z.A.T.V. v. Min. Immigr. & Citiz., S62/2007, BC200707277, [2007] H.C.A. 40 (High Ct. Aug. 30, 2007); S.Z.F.D.V. v. Min. Immigr. & Citiz., S61/2007, BC200707278, [2007] H.C.A. 41 (High Ct. Aug. 30, 2007); Austria: Asylum Act 2005, Bundesgesetzblatt ("BGBl") [Legal Gazette] Pt. I, No. 100/2005 (providing for the internal flight alternative concept in law, although it had already been developed in practice); Canada: Rasaratnam v. Can. (Min. Employ. & Immigr.), [1992] 1 F.C. 706 (Ct. Appl.); Okoli v. Min. Citiz. & Immigr., Case No. IMM-2787-08, 209 F.C. 332 (Fed. Ct. Mar. 31, 2009); Sanjivkumar Ram Tripathi, Case No. IMM-2909-08, 2009 F.C. 174 (Fed. Ct. Feb. 19, 2009); *Thirunavukkarasu v. Can.*, [1994] 1 F.C. 589. Also note that Canada might be considered a specially interested state based on the receipt of high numbers of refugees and persons in refugee-like situations, see *supra* note 65 and accompanying text; France: *ECRE Country Report 2004*, *supra* note 5. Also note that France might be a specially interested state, see *supra* note 65 and accompanying text; Germany: Case No. 9 B 1032/98 (BVerwG, 9 Senat May 19, 1999); Case No. 1 LA 79/04 (OVG Schleswig-Holstein Oct. 7, 2004); Case No. 2 LB 54/03 (OVG Schleswig-Holstein June 16, 2004); Case No. 8 UE 216/02.A (VGH Hessen Feb. 10, 2005); Case No. 1 K 3266/01 (VG Arnsberg Mar. 17, 2004); Case No. VG 33 X 302.96 (VG Berlin Feb. 2, 2004); Case No. A 7 K 31035/03 (VG Dresden Mar. 16, 2004); Case No. 25 K 3188/03.A (VG Düsseldorf Dec. 16, 2004); Case No. 6 K 4833/03.A (VG Düsseldorf July 15, 2004); Case No. 7 K 1517/00.A (VG Frankfurt/Oder Mar. 2, 2004); Case No. 5a K 8121/95.A (VG Gelsenkirchen Nov. 11, 2004); Case No. A 11 K 10417/02 (VG Karlsruhe Mar. 10, 2004); Case No. A 11 K 12230/03 (VG Karlsruhe Mar. 10, 2004); Case No. 2 E 1598/02.A (VG Kassel June 2, 2004); Case No. 2 A 94/01 (VG Lüneburg Feb. 26, 2004); Case No. 9 K 4856/03.A (VG Minden Apr. 26, 2004); Case No. 5 K 1900/03.NW (VG Neustadt a.d.W. Apr. 26, 2004); Case No. 1 A 2944/01 (VG Oldenburg May 17, 2004); Case No. 7 E 2245/03.A(V) (VG Wiesbaden Nov. 4, 2004). Also note that Germany might be a specially interested state, see *supra* note 65; New Zealand: Butler v. A.G., CA 181/97 [1999] N.Z.A.R. 205, ¶¶ 32, 50 (Ct. Appl. Oct. 13, 1997); Refugee Appl. No. 71684/99, [2000] I.N.L.R. 165, ¶¶ 57-61 (Ref. Status, Appls. Auth.); Switzerland: *In re M.C.C.*, Dec. 2006/2 – 015 (Switz. Asylum Appls Comm'n 13 Dec. 2005); the United Kingdom: Sec'y St. Home Dep't v. A.H. (Sudan), [2007] U.K.H.L. 49 (H. Lords Nov. 14, 2007); Januzi v. Sec'y St. Home Dep't, [2006] U.K.H.L. 5 (H. Lords Feb. 15, 2006); Jasim v. Sec'y St. Home Dep't, [2006] EWCA Civ 342, [2006] All ER (D) 453 (Mar) (Ct. Appl., Civ. Div. Mar. 30, 2006); Karanakaran v. Sec'y St. Home Dep't, [2000] E.W.C.A. Civ. 11 (Ct. Appl. Jan. 25, 2000); K.A. v. Sec'y St. Home Dep't, ((domestic violence – risk on return); Pakistan CG) [2010] U.K.U.T. 216 (IAC) (Upper Trib., Immigr. & Asylum Ch.); T.K. v. Sec'y St. Home Dep't, ((Tamils – LP updated) Sri Lanka CG) [2009] U.K.A.I.T. 49 (Asylum & Immigr. Trib.); the United States: *Truong v. Holder*, 613 F. 3d 938 (9th Cir. July 27, 2010).

260. See *Januzi v. Sec'y St. Home Dep't*, [2006] U.K.H.L. 5 (Bingham, L.) (distinguishing two approaches to the internal flight alternative).

rights); and (3) the protection is not illusory or unpredictable.<sup>261</sup> The second approach is to compare the situation for persons with the relevant characteristics in the individual's area of residence and the proposed area of protection.<sup>262</sup> This approach arose out of UK case law that tends to merely consider whether it is "unduly harsh" to return an individual to the alternate region of the state.<sup>263</sup> The House of Lords held in favor of the second approach because the first approach was not mandated by the EU Council Directive 2004/83/EC, the Refugee Convention did not appear to provide a basis for it, there was no sufficient practice to support it, and the Lords thought it would be strange to permit an individual to escape the general conditions of life that all his fellow countrymen were subject to just because he would suffer persecution in one area of the country.<sup>264</sup>

The cases in other countries appear to fall on either end of this spectrum or somewhere in between. Countries such as France<sup>265</sup> and Switzerland<sup>266</sup> appear to apply a test closer to that of the first approach, whereas countries such as Germany<sup>267</sup> appear to take the second approach. The European Union has established a slightly different test of whether the individual could lead a "normal

261. *See id.*

262. *See id.*

263. *See Sec'y St. Home Dep't v. A.H.*, [2007] U.K.H.L. 49; *Januzi v. Sec'y St.*, [2006] U.K.H.L. 5, ¶ 47 ("The words "unduly harsh" set the standard that must be met for this to be regarded as unreasonable."); *Karanakaran v. Sec'y St. Home Dep't*, [2000] E.W.C.A. Civ. 11 (holding that when assessing the reasonableness of internal flight alternative, the decision-maker should simply ask: would it be "unduly harsh" to expect the applicant to settle there?).

264. *See Januzi v. Sec'y St.*, [2006] U.K.H.L. 5 ¶¶ 15-19.

265. *See ECRE Country Report 2004*, *supra* note 5 ("The Commission examines the possibility for applicants to have a 'normal life' in another part of the country, taking into account social and economic criteria, as well as the possibilities of finding a job."). Also note that France may be considered a specially interested state based on the receipt of high numbers of refugees and persons in refugee-like situations. *See supra* note 65 and accompanying text.

266. *See e.g., In re M.C.C., Dec. 2006/2 – 015* (holding that in certain conditions return to Somalia might be reasonable, *e.g.*, special strong ties to the safe region, able to establish a stable existence, ability to rely on a functioning family/clan structure, etc.; however, the court determined that it was not reasonable in the situation at hand).

267. *See e.g.*, Case No. 1 LA 79/04 (OVG Schleswig-Holstein Oct. 7, 2004) (only examining the risk of persecution in the safe area); Case No. 1 K 3266/01, VG Arnsberg (17 Mar. 2004) (same); Case No. 25 K 3188/03.A, VG Düsseldorf (16 Dec. 2004) (same); Case No. 6 K 4833/03.A, VG Düsseldorf (15 July 2004) (same); Case No. A 11 K 10417/02, VG Karlsruhe (10 Mar. 2004) (same); Case No. 2 E 1598/02.A, VG Kassel (2 June 2004) (same); Case No. 2 A 94/01, VG Lüneburg (26 Feb. 2004) (same); Case No. 1 A 2944/01, VG Oldenburg (17 May 2004). *But see e.g.*, Case No. 2 LB 54/03, OVG Schleswig-Holstein (16 June 2004) (examining the degree of effective government); Case No. 8 UE 216/02.A, VGH Hessen (10 Feb. 2005) (same); Case No. VG 33 X 302.96, VG Berlin (2 Feb. 2004) (same); Case No. A 7 K 31035/03, VG Dresden (16 Mar. 2004) (same); Case No. 7 K 1517/00.A, VG Frankfurt/Oder (2 Mar. 2004) (same); Case No. 5a K 8121/95.A, VG Gelsenkirchen (11 Nov. 2004) (same); Case No. 9 K 4856/03.A, VG Minden (26 Apr. 2004) (same); Case No. 5 K 1900/03.NW, VG Neustadt a.d.W. (26 Apr. 2004) (same); Case No. 7 E 2245/03.A(V), VG Wiesbaden (4 Nov. 2004). Also note that Germany may be considered a specially interested state, *see supra* note 65 and accompanying text.

life” in the alternate region.<sup>268</sup> The ECHR has held only that establishing an internal flight alternative test is acceptable as long as *refoulement* to persecution does not result.<sup>269</sup>

Because the internal flight/relocation alternative exception is widespread, and also because the test for an internal flight alternative could be argued to be inherent in the refugee qualification regime, it appears to be part of refugee law under customary international law. Which of the variations of the exception controls is not entirely clear; however, a broader test for a relocation alternative is more likely to be the approach favored by the House of Lords. The reason to favor this interpretation is that, since the exception partly arises from the terms of the Refugee Convention itself, which merely requires *non-refoulement* to persecution (as well as torture and situations of serious internal disturbances under customary international law), it follows that an individual is not relieved of the general conditions of life of his countrymen that do not rise to the level of persecution.

### C. Safe Third Country or Country of Origin Policies

States also apply safe third country and/or safe country of origin tests to refuse claims without further review.<sup>270</sup> Similar to the discussion above, there are

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268. See *Qualif. Dir.*, *supra* note 103, at art. 8(1) (providing that states may reject claims for refugee status if there is an internal flight alternative); *ECRE Country Report 2004*, *supra* note 5 (“The Commission examines the possibility for applicants to have a ‘normal life’ in another part of the country, taking into account social and economic criteria, as well as the possibilities of finding a job.”).

269. See *Sheekh v. Neth.*, Appl. No. 1948/04, Eur. Ct. H.R. (2007) (holding that the indirect removal of an alien to an intermediary country did not affect the responsibility of the expelling contracting state to ensure they were not, consequently, exposed to treatment contrary to Article 3 of the ECHR). There was no reason to hold differently where expulsion was to a different area of the country of origin.

270. See *e.g.*, Austria: I. (2006/19/0967) v. Indep. Fed. Asylum Bd. (“UBAS”) (VwGH [Admin. Ct.] Sept. 21, 2006); 2003/01/0534 v. UBAS (VwGH Nov. 9, 2004); G.M. (99/21/0163) v. UBAS (VwGH, Dec. 13, 2002) (applying safe third country test but finding that the refugee did not find safety in the third country, namely Hungary); Canada: Council for Refugees et al. v. H.M. the Queen (Can.), Case No. IMM-7817-05, [2007] F.C.J. No. 15831; [2007] F.C. 1262; 162 A.C.W.S. (3d) 813; 317 F.T.R. 246 (Fed. Ct. Nov. 29, 2007), *aff’g*, Queen v. Can. Council for Refugees, Case No. A-37-08, [2008] F.C.A. 229 (June 27, 2008) (applying safe third country test but finding that the refugee did not find safety in the third country, namely the United States); Germany: Case No. 2 BvR 1938, 2315/93 (BVerfG May 14, 1996) (regarding transit from Iraq through safe countries); Norway: In re A (Serbia) (Immigr. Appls Bd., Grand Bd. Dec. 14, 2006) (regarding flight from Kosovo but safe residence in Serbia for five years); Spain: Jesús v. Admin. del Estado, Rec. 5515/2001 (Trib. Sup. [Spec. Nat’l Ct. (Admin.)], Sala 3, Sec. 5, Oct. 6, 2004) (regarding transit from Cuba through Switzerland); Switzerland: S.A.R. v. Swiss Fed. Ofc. of Refugees, (AAC Jan. 23, 2001) (regarding one month in safety in Iran); M.A. v. Swiss Fed. Ofc. of Refugees (AAC Mar. 10, 2000); Australia: V872/00A v. Min. Immigr. & Multicult. Aff’rs, 69 A.L.J. 615 (Fed. Ct. June 18, 2002); the United States: INA § 208(a)(2)(A); Nyo v. Holder, 2010 U.S. App. LEXIS 8981 (2d Cir. Apr. 30, 2010); Makadji v. Gonzales, 470 F. 3d 450 (2d Cir. Dec. 5, 2006) (regarding flight from Mauritania but safe residence in Mali for ten years); Maharaj v. Gonzales, 450 F. 3d 961 (9th Cir. June 9,

two approaches to applying these tests. The first approach is considering a safe third country as a factor in the assessment of whether the person qualifies under the Convention. The second approach is using the safe third country test as a means to refuse claims outright without analysis if the individual is coming from a country that has been deemed safe. This second possibility is often paired with expedited processing procedures. It is this second practice that will be addressed here.

It goes without saying that no state is entirely safe. The UNHCR reports on the states of origin of refugees or other persons of concern. The list is surprisingly universal, including most states in the world. Although there are clearly states that produce a significant amount of refugees,<sup>271</sup> even Gibraltar, Palau, the Turks and Caicos Islands, Brunei, Luxembourg, St. Kitts and Nevis, Samoa, Tuvalu, San Marino, Nauru, Norway, Finland, Tonga, Timor-Leste, Iceland, Lesotho, Malta, Andorra, Cyprus, Macao, and Ireland produce a handful of refugees each per year.<sup>272</sup>

Some states have provided under their municipal laws and international agreements for the discretion to refuse claims where the individual is in transit from a safe country.<sup>273</sup> The arguments for these policies are: (1) that in order to manage the countless number of applications, it is efficient and in line with the

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2006).

271. See Table 2, *2007 UNHCR Statistical Yearbook*, <http://www.unhcr.org/4981b19d2.html> (for statistics dated at the end of 2007). The states from which the most refugees come are as follows: Iraq (2,279,245), Afghanistan (1,909,911), Sudan (523,032), Somalia (455,356), Burundi (375,715), D.R. Congo (370,386), Palestinian Territories (335,219) and Vietnam (327,776).

272. See Table 2, *supra* note 271; see also, *id.* for additional refugee statistics on small numbers of refugees from a variety of states and territories, e.g., Hong Kong (11), New Zealand (13), Bahamas (14), Denmark (14), Botswana (16), Sweden (16), Belize (17), and the Maldives (17).

273. See e.g., Canadian-America arrangements: Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 102 (Can.) (providing for designation of safe third countries); Immigration Act, 1976, R.S. 1976-77, c. 52, as amended by S.C. 1988, c. 35 & 36 (Can.) (providing for designation of safe third countries); INA § 208(a)(2)(A) as amended by Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-690 (Sept. 30, 1996) § 604 (U.S.) (permitting bilateral or multilateral agreements to establish safe third countries); Bilateral agreements – see e.g., U.S.-Can. Smart Border Declaration, Dec. 12, 2001, <http://www.international.gc.ca/anti-terrorism/declaration-en.asp>. Also note that Canada and the United States might be considered specially interested states, see *supra* note 65 and accompanying text; EU arrangements: Convention Determining the State Responsible for Examining Applications for Asylum Requests Lodged in One of the Member States of the European Communities, June 15, 1990, reprinted at 30 INT'L L. MATS. 425; Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, reprinted at 30 INT'L L. MATS. 84; Schengen Agreement (1985) (introducing safe third country concept to EU); Dublin Convention (1990) (providing system for determining the responsible state since all EU states were deemed safe); Council Reg. (EC) 343/2003 (Feb. 18, 2003) 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, 2003 Of. J. (L 50) 1-10 (Feb. 25, 2003) (known as the “Dublin II”, which integrates the principles of the 1990 Dublin Convention into the community context).

Refugee Convention to assess certain states as safe and deny all applicants from that state, and (2) individuals should not engage in forum-shopping for the adjudication of their refugee status claim but should instead apply in the first safe country they reach. Based on these arguments, governments designate certain states as “safe” and prohibit application from their nationals and, if their state of origin is not safe, return individuals to the first safe state that the individual reached upon fleeing. There is no provision in the Refugee Convention for these policies, since the definition of refugee only considers whether the person is outside his state of nationality and whether he qualifies. Nonetheless, the United States has adopted safe third country legislation,<sup>274</sup> as has Finland,<sup>275</sup> France,<sup>276</sup> Germany,<sup>277</sup> Ireland,<sup>278</sup> Switzerland,<sup>279</sup> among others, as have the non-EU European states of Belarus<sup>280</sup> and Norway.<sup>281</sup> Many of the European states were quick to designate other EU and EFTA states as “safe.” In addition, the Qualification Directive defines refugees as third party nationals or stateless persons, meaning that EU nationals are excluded from the definition.<sup>282</sup> What is curious is that of the other EU states not already mentioned above as producing refugees (Luxembourg, Finland, Malta, Cyprus, and Ireland, and the EU-linked entities of

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274. See INA § 208(a)(2)(A).

275. See Nina Lassen & Jane Hughes, eds., Danish Refugee Council, *Safe Third Country Policies in European Countries 2*, (Jan. 14 1998), <http://www.drc.dk/eng/pub/safe3rd/finland.html> (discussing Finland and explicitly designating the safe countries in the text).

276. See ECRE Country Report 2005, *supra* note 102, at 108 (noting that France created a list of “safe countries of origin” in June 2005).

277. See Asylum Procedure Act, June 26, 1992, § 26a, BGBl. I S.1430, Ann. I (July 1, 1992) (explicitly designating safe third countries and including all EU states and EFTA states); GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 348, nn. 98-9 (2nd ed. 1998) (reporting on the Swiss and German laws on safe third countries, specifically that both Switzerland and Germany designated Bulgaria, the Czech Republic, Gambia, Ghana, Hungary, Poland, Romania, Senegal, and the Slovak Republic as safe); Sam Blay & Andreas Zimmermann, *Current Development, Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT’L L. 361 (Apr. 1994). Also note Germany’s importance as a specially interested state, *see supra* note 65.

278. See Refugee Act 1996, sec. 4(a), *as amended*; ECRE Country Report 2005, *supra* note 102, at 158 (“Designations of safe country of origin status were made, and continued in force in 2005 regarding Romania, Bulgaria, Croatia and South Africa; however Nigeria was not included in this safe country of origin list.”); European Council on Refugees and Exiles, ECRE Country Report 2003, *supra* note 39 (Ireland has only placed Nigerians in the expedited process under this ground).

279. See Law on Asylum Procedure of 1982 (border police were allowed to reject asylum applicants if the applicants had been “safe from persecution in another country”); GOODWIN-GILL, *REFUGEE*, *supra* note 277, at 348 nn.98-9.

280. See Law “On Refugees”, reported in European Council on Refugees and Exiles, *Country Report 2006: Belarus, Moldova, Russia, Ukraine - Situation for refugees, asylum-seekers and internally displaced persons (IDPs)*, July 2007, <http://www.unhcr.org/refworld/docid/470363f22.htm> [hereinafter ECRE Country Report 2006].

281. See ECRE Country Report 2003, *supra* note 39.

282. See *Qualif. Dir.*, *supra* note 103, at art. 2(c); *see also* EU Council Dir. 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Dec. 1, 2005), Ann. II, Dec. 13, 2005, 2005 O.J. (L 326) 13-34 [hereinafter *Granting Refugee Status Dir.*].

Gibraltar, Iceland, San Marino, Norway, and Andorra), the UNHCR reports the following states as countries of origin of refugees: Austria (23 refugees from Austria in other states), Belgium (60), Bulgaria (3,311), Czech Republic (1,384), Estonia (262), France (101), Germany (129), Greece (92), Hungary (3,386), Italy (90), Latvia (662), Lithuania (466), the Netherlands (43), Poland (2,915), Portugal (32), Romania (5,306), Slovakia (342), Slovenia (52), Spain (41), and the United Kingdom (200). To this list of EU countries, we can also add the EFTA state of Switzerland (31).<sup>283</sup> The Qualification Directive therefore appears to be an attempt to redefine the meaning of refugee and exclude individuals qualifying under the Refugee Convention. In addition to exclusion of other European nationals, Germany and Switzerland have both also designated Gambia, Ghana, and Senegal as “safe,” and excluded their nationals from qualifying as refugees accordingly. This act is strange in that the UNHCR names those states as the country of origin of 1,267, 5,060, and 15,896 refugees, respectively,<sup>284</sup> so their designation as “safe” does not appear to be entirely accurate. The United Kingdom has designated all of the countries of the former USSR as safe countries.<sup>285</sup> In sum, certain states have asserted the right to redefine the qualifications for being a refugee and limit the application of the Refugee Convention.

In addition to this policy, some states have also created an expedited processing mechanism for certain applicants for recognition of refugee status. The United Kingdom has adopted twenty-four-hour expedited processing for individuals from nationals of the following countries: Ghana, India, Nigeria, Pakistan, Poland, Romania, and Uganda. This expedited processing appears to have a normative effect in that applications reviewed through expedited processing resulted in almost a 100% refusal rate (5,735 refusals, 3 grants, and 996 pending).<sup>286</sup> The result is that individual cases that are selected for expedited processing have been prejudged as failing. The number of refugees from those states of origin mentioned as reported by UNHCR has already been noted immediately above, but recall the numbers for India (20,463), Nigeria (13,902), Pakistan (31,858), and Uganda (228,959). Again, this policy appears inconsistent with the significant refugee flows originating from those states.

Courts have accepted the right of states to refuse to accept claims based on safe third country criteria, but have demanded that the claims be assessed on their merits rather than procedurally refused based on the stated country of transit (or on other criteria deemed to apply to the country, such as merely having signed the Refugee Convention or the ECHR).<sup>287</sup> Additionally, the UNHCR

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283. See Table 2, *supra* note 271.

284. *Id.*

285. See Arthur C. Helton, *Forced Migration in Europe*, 20-Fall FLETCHER F. WORLD AFF'RS 89, 97 n.35 (1996) (citing British Immigration Plan, 2(10) MIGR. NEWS (Dec. 1995)).

286. See GOODWIN-GILL, REFUGEE, *supra* note 277, at 348, nn.98-9; Helton, *supra* note 285, at 98-9.

287. See e.g., Bulgaria: *In re* Abdusalam, Case NB-46/2004 (Sofia City Ct., 3-G Dep't 9 Feb.

Executive Committee has argued that states should not deny asylum simply because it may be sought elsewhere.<sup>288</sup> Clearly, the adoption of safe third country policies appears to be at odds with the UNHCR determination of state of origin of refugees, and the policies accordingly appear to violate the Refugee Convention when they do not permit substantive assessment of qualifications under it. In addition, some have argued that safe third country policies violate the ECHR.<sup>289</sup>

In sum, there appears to be a growing trend in favor of safe third country or country of origin policies. The states that impose such policies are not the most

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2004) (must consider the merits of an individual case, it cannot base a negative decision purely on the fact that the country of origin is considered a safe country); Canada: *Can. Council for Refugees v. H.M. the Queen* (Can.), Case No. IMM-7817-05, [2007] F.C.J. No. 1583; [2007] F.C. 1262 (Fed. Ct. Nov. 29, 2007) (holding that the United States is not a safe third country for refugees due to one-year bar on asylum applications, exclusions from asylum for broadly interpreted terrorist activities, and poor appreciation of gender and sexual orientation asylum claims; also discussing the Safe Third Country Agreement, Washington D.C., 5 Dec. 2002, Can.-U.S. (entered into force Dec. 2004) (providing that refugees arriving at the national border and requesting asylum must be returned to the other country so that the refugee may apply there)); Canada AG v. Ward, [1993] 2 S.C.R. 689, 725 (Sup. Ct. Can. June 30, 1993); *Kadenko v. Can.* (SG), [1996] 143 D.L.R. (4th) 532 (Fed. Ct. Appl.); *Can. (Min. Employ. & Immigr.) v. Satiacum*, [1989] 99 N.R. 171 (Fed. Ct. Appl.) (courts will presume that state parties to the Refugee Convention will interpret the Convention fairly). Also note that Canada might be considered a specially interested state, *see supra* note 80; Sweden: *Decision (Migrationsdomstolen [Migration Ct.], Malmö, Sept. 6, 2010) reported at Greece 'Unfit' for Asylum Reviews: Swedish Court, THE LOCAL* (Sept. 6, 2010) <http://www.thelocal.se/28804/20100906/> (finding an implicit exception to the Dublin II agreement of strong humanitarian grounds for refusal to return a person to the EU Member State of first arrival and reviewing the quality of the sister Member State's asylum determination procedures and jurisprudence). Also note that Sweden might be considered a specially affected state, although it is less affected than some other states, *see supra* note 65; the United Kingdom: *Yogathas v. Sec'y St. Home Dep't*, [2003] 1 A.C. 920 (H. Lords Oct. 17, 2002) (following the reasoning in *T.I. v. U.K.*, Appl. No 43844/98, Eur. Ct. H.R. (2000), but holding that a particular state's slightly different interpretation of the Refugee Convention did not result in a risk of *refoulement*); *Ex parte Adan*, [2001] 2 A.C. 477 (H. Lords, Apr. 2, 1998) (holding that the particular state's different interpretation of the Refugee Convention did result in a risk of *refoulement* because that country did not recognize persecution by non-state agents); *Ex parte Salas* (unreported) (July 10, 2000) (*cited in Can. Council for Refugees v. H.M. the Queen*, [2007] F.C. 1262). Also note that the United Kingdom might be considered a specially interested state, *see supra* note 65. *See also T.I. v. U.K.*, Appl. No 43844/98 (the United Kingdom could not rely automatically on arrangements made in the Dublin Convention to refuse to assess the claim, and must examine whether the "safe" country operated under a different interpretation of the Refugee Convention criteria but was nonetheless sufficient protection against the risk of indirect *refoulement*).

288. *See* UNHCR, Executive Committee Conclusion No. 15 (XXX), ¶ (h)(iv). *See also* UNHCR, *Note on International Protection*, *supra* note 236 (advising that often claimants are sent to a safe third country but that country fails to accept responsibility for the individual who is then returned to their country of origin); UNHCR, *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the iWHCR Programme* 33 (1980); Sztucki, J., *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT'L J. REF. L. 285 (1989).

289. *See* Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?*, 26 GA. J. INT'L & COMP. L. 375 (Spr. 1997) (arguing that the ECHR prohibits states from expelling refugees to "safe" countries).

representative ones, although a few specially interested states are included. Even if a rule of customary international law has been crystallized, it is important to note that those policies may not operate as procedural denial of claims. Instead, it appears that the safe country policies must operate at a level of holistic substantive review. Therefore, the definition of refugee as a person outside his country of nationality has evolved to cover only a person outside his country of nationality who has not arrived in any other safe country yet.

#### *D. Prohibitions on Applying for Recognition of Refugee Status*

States have sometimes imposed certain regulations that entirely prohibit the filing of an application for refugee status (or demand an automatic denial of an application) under certain circumstances. These provisions do not narrow the definition of refugee, rather they assess the broader scope of refugee status. They will nonetheless be considered here briefly. Note that in some of these situations, the burden of proof is placed on the applicant to establish that he has no disqualifying acts or conditions.<sup>290</sup>

Mandatory denial of asylum or withholding of removal is required in some states if the applicant is a “terrorist”<sup>291</sup> or is a former Nazi, or “*genocidaire*.”<sup>292</sup> Although it may be acceptable under the Refugee Convention to refuse refugee status to those who have persecuted others,<sup>293</sup> committed a particularly serious crime,<sup>294</sup> or a serious non-political crime<sup>295</sup> or are otherwise a danger to state security,<sup>296</sup> these cases appear to refuse refugee status based on another status—that of simply being a “terrorist,” “Nazi,” or “*genocidaire*”—rather than being based on the specific culpable acts the person undertook. The recent judgment of the European Court of Justice in *Bundesrepublik Deutschland v. B*, Case C-57/09, 1990 E.C.R. and *Bundesrepublik Deutschland v. D*, Case C-101/09, 2010 E.C.R. (a joined case) seems to have disposed of any traction this rule may have had as a seed of customary international law when it held that “terrorist” status

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290. See e.g., 8 C.F.R. §§ 208.13(c)(2)(ii), 1208.13(c)(2)(ii); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751 (8th Cir. 2004); *Ahmetovic v. Immigr. & Naturalization Serv.*, 62 F.3d 48 (2d Cir. 1995) (holding that international legal obligations did not compel finding that the burden of proof was unlawful). Also note that the United States might be considered a specially interested state, see *supra* note 65.

291. See e.g., Rea; ID Act of 2005, § 101(b), Pub. L. No. 109-13 (2005); INA § 212(a)(3)(B)(i)(I) – (IV), (VI); § 237(a)(4)(B).

292. See e.g., INA § 237(a)(4)(D).

293. See e.g., INA § 241(b)(3)(B)(i); 8 U.S.C. § 1231(b)(3)(B)(i); *In the Matter of A-H-*, 23 I&N. Dec. 774 (A.G. 2005).

294. See e.g., INA § 241(b)(3)(B)(ii); 8 U.S.C. § 1231(b)(3)(B)(ii); *Alaka v. A.G.*, 456 F.3d 88 (3d Cir. 2006).

295. See e.g., INA § 241(b)(3)(B)(iii); 8 U.S.C. § 1231(b)(3)(B)(iii); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

296. See e.g., INA § 241(b)(3)(B)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv); *Yusupov v. A.G.*, 518 F.3d 185 (3d Cir. 2008).



alone cannot be a bar to an individualized refugee status determination when applying the usual criteria for such status under international law.<sup>297</sup>

In addition, some states claim that they may impose a time limit within which the individual must apply for recognition of refugee status, although some states do not.<sup>298</sup> Austria permits applications up to three months after entry;<sup>299</sup> Belgium had a time limit policy but abolished it;<sup>300</sup> Germany and the Czech Republic require an application for recognition to be filed within forty-eight hours of admission to their respective territories;<sup>301</sup> Spain also had a time limit policy until the Spanish Supreme Court ruled that it was a violation of the obligation to consider claims under the Refugee Convention;<sup>302</sup> the law in Ukraine stipulated strict time limits for submission of applications for refugee status (five days for asylum seekers who crossed the Ukrainian borders legally and three days for those who crossed the borders illegally<sup>303</sup>), but this law was revised to require an application simply “without delay”,<sup>304</sup> and the United States requires applicants to file within one year of arrival (unless there are changed circumstances).<sup>305</sup>

Moreover, several states have introduced an obligation that an alien must not have committed any acts of fraud, misrepresentation, or other falsehood during their migration. Failure to comply can result in mandatory denial and expul-

297. See Case C-57/09, *Bundesrepublik Deutschland v. B*, 1990 E.C.R.; Case C-101/09, *Bundesrepublik Deutschland v. D.*, 2010 E.C.R. Note that the ECJ initially makes reference to the Refugee Convention as the applicable standard under international law, although it also refers to EU Council Directive 2004/83/EC, discussed *infra*, at 54, for the substance of the refugee definition. However, the question in the case principally revolved around the need for an individualized assessment of the exclusionary clause, not the precise definition of refugee existing under international law. See *id.* at ¶¶ 67, 94.

298. See *ECRE Country Report 2006*, *supra* note 280 (e.g., there are no time limits for the submission of applications for refugee status on the territory of Belarus).

299. See Asylum Act 2005, *Bundesgesetzblatt* (“BGBl”) [Legal Gazette] Pt. I, No. 100/2005 (rendering claims “manifestly unfounded” if filed more than three months after entry, after a residence ban has been executable, or if the asylum-seeker is believed to have deceived the authorities with regard to his/her identity, nationality or submits false documents).

300. See Royal Decree of 3 Feb. 2005 (abolishing time limit of 8 days following arrival, however application after 8 days must be justified or it can still be declared inadmissible).

301. See U.S. Committee for Refugees, *World Refugee Survey 1994*, 135 (1994); Sam Blay & Andreas Zimmermann, Current Development, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INTL L. 361, 373 (Apr. 1994).

302. See Decision of 23 June 2004 (Sup. Ct., Sp.) (holding that the time limit imposed by Spanish Regulation, R.D. 203/1995, art. 5.6-Asylum, could not be applied to presume the application was manifestly unfounded and must assess the merits).

303. See *ECRE Country Report 2006*, *supra* note 280, at 32.

304. See *id.* (“Despite the fact that the time limits for submitting an asylum application were removed from Ukrainian refugee legislation in 2005, and replaced with the term ‘without delay’ – this is in practice interpreted literally and can still be given as a reason for a refusal to accept an asylum application on formal grounds.”).

305. See e.g., INA § 208(a)(2)(B), (D); 8 U.S.C. § 1158(a)(2)(B), (D); *Joaquin-Porras v. Gonzalez*, 435 F.3d 172 (2d Cir. 2006).

sion. Among these states are Austria,<sup>306</sup> Bulgaria,<sup>307</sup> and Finland,<sup>308</sup> although there are examples of state practice with the opposite results. For instance, falsehood alone could not be a reason for refusal to examine the application in Ireland.<sup>309</sup> There does not appear to be any basis in the Refugee Convention for this treatment. If the person qualifies as a refugee under the Convention, then he may not be returned regardless of falsehood.

Last, a variety of miscellaneous practices exist. Some states impose a mandatory denial of asylum if a previous asylum application was denied and there is no proof of changed circumstances;<sup>310</sup> in others there is the isolated practice of refusing to apply Article 31(1) of the Refugee Convention that requires states to overlook illegal entry or presence for asylum seekers,<sup>311</sup> so applications may be refused on that basis; and in even others the issuance of a visitor visa—required for individuals of nationality of the major refugee producing states—can be conditional upon a guarantee that the visiting person will not apply for a permanent stay, including asylum,<sup>312</sup> again making it possible to refuse refugee status on that basis.

These are interesting prohibitions on lodging refugee applications, but they are different from one another and rather diffuse. None appear to attract the widespread and consistent practice sufficient to form a rule of customary international law. The only rules among these practices that could arguably form the basis for a rule of customary international law are the prohibition on applications by terrorists and other similarly designated persons, the rules on time limits for applications, and the rules against fraud. However, the prohibitions on applications by terrorists and similar individuals are not widespread, and in any event they are most likely not permissible as a procedural bar. The rules on time limits are so varied in their specific length and the countries with fraud rules are so un-

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306. See Asylum Act 2005, (rendering claims “manifestly unfounded” if filed more than three months after entry, after a residence ban has been executable, or if the asylum-seeker is believed to have deceived the authorities with regard to his/her identity, nationality or submits false documents).

307. See Law on Asylum and Refugees, art. 17(2) (2002), *as amended* Apr. 2005 (allowing revocation of refugee or humanitarian status in cases where the refugee has used a false identity or has concealed material information related to his/her case).

308. See Aliens Act, § 108 (2004) (“if the applicant has, when applying for asylum deliberately or knowingly given false information which has affected the outcome of the decision, or concealed a fact that would have affected the outcome of the decision.”); *ECRE Country Report 2005*, *supra* note 102 (“There have for example been cases of resettlement in which officials have discovered that the person had given misleading information prior to selection as a quota refugee to Finland.”).

309. See Ref. No. 22, 2006 (Ref. Appls. Trib. 2006) (applicant from Zimbabwe changed story at the appeal stage and was found to have failed to tell the truth at Questionnaire and Interview stage).

310. See *e.g.*, INA § 208(a)(2)(C), (D); 8 U.S.C. § 1158(a)(2)(C), (D); § 1129a(c)(7)(C)(ii); *Zheng v. Mukasey*, 509 F.3d 869 (8th Cir. 2007).

311. See *e.g.*, European Council on Refugees and Exiles, *Hungary, Synthesis of ECRE Country Reports 2002*, [http://www.ecre.org/files/Country\\_Report\\_2002.pdf](http://www.ecre.org/files/Country_Report_2002.pdf).

312. See *ECRE Country Report 2004*, *supra* note 5 (reporting on Denmark).

representative that they are unlikely to be considered as rules of customary international law. In addition, in some of those cases the states have already moved to suspend or modify their time limit requirements, sometimes recognizing their non-compliance with international law in the process.

#### *E. Recognition of Refusals by Other States*

Some states also assert a right to expel an individual claiming refugee status without assessing the person's qualification, based on a notion similar to *res judicata*, i.e., by recognizing the prior decision of another state as to a person's refugee status.<sup>313</sup> Additionally, if no prior status determination took place and the individual was found to likely be a refugee, then EU states comply with the Council Directive ordering the person to be returned to the state where the status determination should have taken place, as discussed above.<sup>314</sup> If he was not found to be a refugee in the status determination, then he may be returned to his state of origin without further inquiry.<sup>315</sup> These rules also do not appear to have become rules of customary international law because the practice is isolated to EU and EEA states. This practice must be viewed in the context of the EU system of handling refugee applications and safe third country of origin policies. Given that this practice is relatively limited, it seems a hard argument to consider that it amounts to customary international law.

#### *F. Manifestly Unfounded Applications*

Another trend in refugee claims is for governments to either refuse to consider applications or to consider them in an expedited fashion by characterizing the claim as "manifestly unfounded" based on specific conditions present in the application. States that have adopted this policy include Australia,<sup>316</sup> Austria,<sup>317</sup>

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313. See *Granting Refugee Status Dir.*, *supra* note 282. See also, e.g., Belgium: Amendment of Aliens Act (Sept. 1, 2004), art. 8 (implementing EU Dir. 2001/40/EC on *mutual recognition of expulsion decisions* (May 28, 2001)) (Minister of Home Affairs can recognise an expulsion decision taken by an administrative authority of another EU Member State bound by the Directive and expel the person based on a danger to public security or non-compliance with the legislation on entry and residence); Switzerland: (creating a ground for inadmissibility to the state due to a negative asylum decision from an EU or EEA country, except for subsequent persecution), *reported in ECRE Country Report 2004*, *supra* note 5; the United Kingdom: *Yogathas v. Sec'y St. Home Dep't*, [2002] U.K.H.L. 36 (H. Lords, Oct. 17, 2002).

314. See Council Regulation (EC) No. 343/2003 (Feb. 18, 2003) (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; this regulation, known as the "Dublin Convention", integrates the principles of the 1990 Dublin Convention into the community context).

315. See *Granting Refugee Status Dir.*, *supra* note 282.

316. See *Somaghi v. Min. Immigr. Local Gov't, & Ethnic Aff'rs*, (1991) 31 F.C.R. 100 (Fed. Ct., Austl.) (the court was not persuaded to grant refugee status to "... a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin.").

Bulgaria,<sup>318</sup> Hungary,<sup>319</sup> the Netherlands,<sup>320</sup> Norway,<sup>321</sup> and the United States.<sup>322</sup> The Qualification Directive also permits states to refuse claims that are “manifestly unfounded.”<sup>323</sup> Under the Qualification Directive, states may inquire whether actions by the applicant that give rise to a well-founded fear of persecution were taken merely as a pretext for claiming refugee status.<sup>324</sup>

However, the manifestly unfounded analysis is arguably in violation of the Refugee Convention. The terms of the Convention make no mention of good faith or bad faith actions on the part of the refugee that lead to the acquisition of refugee status. The Refugee Convention merely seeks to prevent removal to situations of persecution (aside from clearly articulated cases where the claimant is considered undeserving of refugee status). Without the discovery of conclusive indications that any practice and *opinio juris* is attempting to specifically reverse the treaty, we cannot agree that a new, contradictory rule has emerged under customary international law. Recalling the language from *Delimitations of the Continental Shelf*, 18 R.I.A.A. 3, Award, ¶ 47, (June 30, 1977):

[T]he Court recognises both the importance of the evolution of the law of the sea which is now in progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations. . . . [O]nly the most conclusive indications of the intention of the parties to the [treaty] to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable . . . .<sup>325</sup>

Therefore, it will be important to find conclusive indications to support the ex-

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317. See Asylum Act 2005 (providing for subsidiary protection rendering claims manifestly unfounded or “disallowed if filed more than three months after entry, after a residence ban has been executable, or if the asylum-seeker is believed to have deceived the authorities with regard to his/her identity, nationality or submits false documents).

318. See Case No. N 3229/2004-Budali (Sofia City Ct., 3-B Dep’t 28 Mar. 2005) (holding that claim was not contradicted by information regarding Algeria’s human rights record, so it was not manifestly unfounded).

319. See *Synthesis of ECRE Country Reports 2002*, [http://www.ecre.org/files/Country\\_Report\\_2002.pdf](http://www.ecre.org/files/Country_Report_2002.pdf).

320. See De Vereniging Asieladvocaten en – Juristen Nederland (“VAJN”) [Org. Asylum Lawyers in the Neth.] & Het Nederlands Juristen Comité voor de Mensenrechten (“NJCM”) [Neth. Lawyers Comm. for Hum. Rts.] (Dutch Sec. of the Int’l Comm’n Jurists) v. Neth., Ct. Appl., The Hague, Case No. 00/68 KG [KG 99/1251]; LJN: AE9573; NJ (Nederlandse Jurisprudentie) 2002/632 (Ct. Appl., The Hague, 1st Civ. Ch. Oct. 31, 2002), reprinted at ILDC 143 (NL 2002), *aff’d* HR C03/018HR, LJN: AO7808, NJ 2006/28 (H.J. Snijders); AB 2005/74 (GAvdV); RvdW 2004/102, (Neth. Sup. Ct. Sept. 3, 2004).

321. See ECRE Country Report 2004, *supra* note 5.

322. The policies sometimes include actual *refoulement*. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (holding that the US government could return Haitians directly to Haiti, without access to a refugee determination, if the Haitians were interdicted on the high seas).

323. See *Granting Refugee Status Dir.*, *supra* note 282.

324. See *Qualif. Dir.*, *supra* note 103, at art. 4(3)(d).

325. *Delimitations of the Continental Shelf* (U.K./Fr.), Award, ¶ 47, 18 R.I.A.A. 3 (June 30, 1977).

pedited processing of manifestly unfounded claims as a new rule accepted under customary international law.

There appear to be two different applications of this policy. The first consists of cases where the individual would not qualify under the law even if the facts could be proven (compare to “summary judgment”). The second consists of cases where there is merely a lack of evidence. Courts have found that the manifestly unfounded policy cannot be applied in situations where the claim is manifestly unfounded only due to a lack of evidence.<sup>326</sup>

As for the other area of application—the “summary judgment” processing—this policy has been criticized, especially when the designation of “manifestly unfounded” appears to be very liberally used.<sup>327</sup> That being said, the UNHCR appears to have accepted the manifestly unfounded assessment practice provided that it is not applied to deny legitimate refugees the status they deserve.<sup>328</sup> Providing an expedited “summary judgment” processing may very well assist legitimate applicants by directing further resources to careful evaluation and processing of legitimate applications. The acceptance of this practice by the UNHCR specifically would appear to be fairly conclusive so that, to the degree that the policy contradicts the Refugee Convention, it has reversed it through customary international law.

Thus it would appear that the presumption of refugee status, and the rights accrued to those with presumptive refugee status, do not apply in cases where the person clearly does not qualify. In cases where the person clearly does not qualify, the state need not consider that the person might be a *de facto* refugee in its treatment of the person. The manifestly unfounded policies appear to be regarded as unlawful where they operate to refuse claims based purely on evidentiary concerns, but not where they operate to efficiently dismiss claims that could never succeed on the law. In the latter, during the pendency of the mani-

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326. See Case NB-604/2004 - Dai Dzyu Huang (Sofia City Ct., Dep’t 3-G June 1, 2004) (holding that had the claimant given coherent and plausible statements and made a genuine effort to substantiate their story, the application should be referred for further consideration as the manifestly unfounded criteria should not be legally applied purely on the basis of lack of evidence (the benefit of the doubt principle)).

327. See VAJN & NJCM v. Neth., Ct. Appl., The Hague, ILDC 143 (NL 2002) (holding that mandatory detention policy at the Application Centre (such as at Schiphol Airport) during the accelerated 48-hour procedure for “manifestly unfounded” claims violated Art. 5 of the ECHR because it restricted freedom of movement by demanding that individuals who leave automatically withdraw their asylum application; also observing that the UNHCR had criticized the increasingly liberal interpretation of “manifestly unfounded”); Chiara Martini, *Is the EU abandoning non-refoulement?*, 25 FORCED MIGR. REV. 62 (May 2006) (reporting that under the “accelerated procedures” provision, a wide range of asylum claims – more than 80% according to Amnesty International – are arbitrarily judged to be “manifestly unfounded”).

328. *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedure* Date: 3 Sep. 1982 *International Protection (SCIP)*, U.N. Doc. EC/SCP/22/Rev.1 (expressing acceptance of measures for manifestly unfounded or abusive applications for refugee status but expressing concern that genuine applications not be overlooked).

festly unfounded claim, the state may not even need to consider the applicant as a presumptive refugee.

### *G. Diplomatic Assurances*

The topic of diplomatic assurances remains controversial and the United Nations Special Rapporteur on Torture<sup>329</sup> and others<sup>330</sup> have argued that diplomatic assurances cannot relieve a state of its *non-refoulement* obligation. Nonetheless, the UK Government has concluded MOU with Jordan, Libya, and Lebanon in order to provide blanket assurances.<sup>331</sup> The Council of Europe Commissioner for Human Rights argued that “[t]he weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment.”<sup>332</sup> This is echoed by the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: “[T]he mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.”<sup>333</sup>

The Human Rights Committee established the standard that assurances may be accepted provided the state “institute[s] credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of ex-

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329. See Theo van Boven, U.N. Special Rapporteur on Torture, *Report to the General Assembly*, U.N. Doc. A/60/316, ¶ 51 (2005) (“It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment.”); Committee Against Torture, U.N. Doc. CAT/C/CR/33/3, ¶ 4 (Nov. 2004) (expressing concern at the United Kingdom’s reliance on diplomatic assurances to refoule); UNHCR, Executive Committee Conclusion No. 30 (XXXIV) – 1983, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylums (“recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees.”).

330. See U.N. Secretariat Memo, *supra* note 48 (citing U.N. Commission on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/60/370, ¶¶ 19-20 (Sept. 21, 2005); Council of Europe Commissioner for Human Rights, *Report on Visit to the United Kingdom, 4 – 12 November 2004*, §§ 12-13, Council Eur. Doc. CommDH/2005/6 (June 8, 2005); Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 17(4(D)) HUM. RTS. WATCH 18-19 (Apr. 2005).

331. See Guy S. Goodwin-Gill & Raza Husain, *Overview of the History and Current Scope of Non-Refoulement, and Current Attacks on the Principle, in Non-Refoulement Under Threat*, Proceedings of a Seminar Held Jointly By The Redress Trust (Redress) And The Immigration Law Practitioners’ Association (ILPA), May 16, 2006.

332. See Alvaro Gil-Robles, Council Europe, Commissioner for Human Rights, *Report on His Visit to Sweden, April 21-23, 2004*, Council Eur. Doc. CommDH (2004)13 (July 8, 2004).

333. See Robert K. Goldman, U.N. Commission on Human Rights, U.N. Independent Expert, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. E/CN.4/2005/103, 19, ¶ 56 (Feb. 7, 2005).

pulsion.”<sup>334</sup> The Special Rapporteur on Torture reached a similar conclusion when he stated that assurances would be acceptable where “the receiving State has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other form of ill-treatment, and that a system for monitoring the treatment of such persons has been put into place to ensure that they are treated with full respect for their human dignity.”<sup>335</sup> The successor to the Special Rapporteur, however, concluded that “[i]n the situation that there’s a country where there’s a systematic practice of torture, no such assurances would be possible.”<sup>336</sup> This is similar to the holding in *Agiza v. Swed.*, Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, ¶ 13.4 (Comm. Ag. Torture, May 24, 2005), where the Committee against Torture found that the assurances were insufficient to permit expulsion because:

At the outset [ . . . ] it was known, or should have been known, to the State party’s authorities at the time of the complainant’s removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. [The CAT also noted that the complainant was implicated in terrorist activities with national security implications.] In the Committee’s view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion [ . . . ] The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.<sup>337</sup>

It is also similar to the holding in *Suresh v. Min. Citz. & Immigr. & A.G.*, [2002] S.C.R. 3, ¶ 124-5 (Sup. Ct. Can.):

A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past . . . The former [death penalty] are easier to monitor and generally more reliable than the latter [torture].<sup>338</sup>

334. See U.N. Commission on Human Rights, *Concluding Observations on the Fifth Periodic Report of Sweden*, U.N. Doc. CCPR/C/74/SWE, ¶ 12 (Apr. 24, 2002).

335. U.N. Special Rapporteur on Torture, *Report*, U.N. Doc. A/57/173, ¶ 35.

336. See Manfred Nowak, U.N. Special Rapporteur on Torture, *What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?*, BBC RADIO 4, TODAY PROGRAMME (4 Mar. 2005), [www.bbc.co.uk/radio4/today/listenagain/zfriday\\_20050304.shtml](http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml).

337. See *Agiza v. Swed.*, Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, ¶ 13.4 (Comm. Ag. Torture, May 24, 2005) (citation omitted). See also *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa., 2008) (sufficiently reliable diplomatic assurances can preclude consideration of CAT claim or terminate a CAT claim that was granted).

338. See *Suresh v. Min. Citz. & Immigr. & A.G.*, [2002] S.C.R. 3, ¶ 124-5 (Sup. Ct. Can.). Also note that Canada might be considered a specially interested state, see *supra* note 80. See also *Canada: Min. Just. Can. v. Pacificador*, No. C32995 (Ct. Appl. Ont., Can., Aug. 1, 2002). Also note that Canada might be considered a specially interested state, see *supra* note 65; *Netherlands: Neth. (Min. Just.) v. Kesbir*, LJN, AS3366, 04/1595 KG (Ct. Appl. Neth. Jan. 20, 2005); *Advies inzake N. Kesbir*, EXU 2002/518, 02853/02/U-IT (Ct. Appl. Neth. 7 May 2004). Also note that the Nether-

It appears that assurances may be acceptable but only where they are genuine. Courts have blocked expulsions in such cases where the assurances were not credible.<sup>339</sup> Perhaps there is a presumption against their being genuine inherent in the fact that they are being requested, i.e., without credible concerns for the risk to the person being return, assurances would not be requested. In any event, a state proposing to expel a person cannot rely on assurances from a state with a record of violations. Additionally, the state expelling a person to a state from which assurances were requested must institute an effective monitoring capacity.<sup>340</sup>

Another situation in which a state could not issue assurances sufficient to relieve the expelling state of its *non-refoulement* obligations is where the individuals responsible for the potential persecution, torture, or other inhumane treatment are affiliated with non-state agents or rogue state agents that the state is unable or unwilling to control.<sup>341</sup> This, however, falls within the usual test of whether there are substantial grounds for believing that there is a real risk of the unacceptable treatment.<sup>342</sup>

As for the definition of refugee under customary international law, it appears that a state can defeat a claim of persecution (or other grounds of refugee qualification) by issuing assurances that such persecution (or other qualifying acts) will not occur. The quality of the assurances must then be assessed for their reliability, but might result in acceptance and *refoulement* of the individual to the state. Therefore, the definition of refugee has been modified from the exist-

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lands might be a specially interested state, although it is less affected than some of the other states, *see supra* note 65; the United Kingdom: Youssef v. Home Ofc., Case No: HQ03X03052, [2004] E.W.H.C. 1884 (QB), (High Ct. Q's Bench, July 30, 2004). Also note that the United Kingdom might be considered a specially interested state, *see supra* note 65; and the United States: *In the Matter of al-Jailani*, File #A 73 369 984 (Exec. Ofc. Immigr. Rev., Immigr. Ct., Penn., Dec. 17, 2004). Also note that the United States might be a specially interested state, *see supra* note 65.

339. *See e.g.*, Canada: Mahjoub v. Can. (Min. Citz. & Immigr.), [2005] F.C.J. No. 173 (Jan. 31, 2005); and the United Kingdom: Russ. Fed. v. Zakaev (Bow St. Magr. Ct. Nov. 13, 2003) (Workman, Hon.).

340. Even this option may not be permissible. Human Rights Watch has criticized the use of monitoring mechanisms in connection with assurances to permit expulsion because it has not found that when states violate the assurances that the expelling state has been found to have breached its *non-refoulement* obligations. Instead, the receiving state committing the acts was held responsible only for the acts and for violation of the assurances. *See* Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 17(4(D)) HUM. RTS. WATCH REP. (Apr. 2005), <http://www.hrw.org/reports/2005/eca0405/eca0405.pdf>; Human Rights Watch, *'Empty Promises': Diplomatic Assurances No Safeguard Against Torture*, 16(4(D)) HUM. RTS. WATCH REP. (Apr. 2004), <http://hrw.org/reports/2004/un0404/>.

341. *See e.g.*, Chahal v. U.K., Appl. No. 22414/93, 23 Eur. Ct. H.R. 413, 49 (1996).

342. *See* Hilal v. U.K., 33 Eur. Ct. H.R. 2 (2001); *but see* Svazas v. Sec'y St. Home Dep't, [2002] 1 W.L.R. 1891 (holding that in a Refugee Convention case the test is whether there exists a sufficiency of protection in respect of the acts of rogue state agents, measured in a general or systemic manner, that may co-exist with a real risk of prohibited ill treatment); Bagdanavicius v. Sec'y St. Home Dep't, [2005] U.K.H.L. 38 (H. Lords) (Brown, L.) (applying the same test in *Svazas* to ECHR, art. 3).



ing flight from a qualifying situation to flight from a qualifying situation where the state does not or cannot offer genuine assurances of the situation not occurring.

## V.

### CONCLUSION

This Article has examined the various ways in which customary international law is changing the definition of refugee in international law. It has attempted to balance the competing demands of international law, the state-centered and human-centered interests, in order to reach what is hopefully a convincing conclusion about the state of contemporary customary international refugee law.

First, this Article examined the Refugee Convention itself and its current interpretation. The initial and overriding conclusion to be drawn from the interpretation of the Convention is that it is usually interpreted with an emphasis on the teleological method, possibly in line with the intention of the drafters. This interpretive technique was applied in cases of the inclusion/exclusion and cessation provisions of the Convention. In some cases the interpretive technique has been used so as to verge on amending the treaty's explicit terms.

Second, this Article examined customary international law as applied in cases of refugees or individuals in refugee-like situations. Many scholars have concluded that there is no definition of refugee under customary international law. This Article refutes this conclusion by drawing on the extensive practice of states. As a preliminary matter, this Article identified the specially interested or specially affected states in matters of refugee law. This aspect of the formation of customary international law appears to be largely omitted in most analyses of customary international law on point. It was submitted that specially interested states in this case are those states that experience inward refugee flows, as measured by statistical studies of such flows by the UNHCR. With specially interested states identified, the analysis of the formation of customary international law on the definition of refugee can be appreciated in an entirely new light, especially the influence of certain regional instruments. This finding suggests that under customary international law, the definition of refugee may include: individuals persecuted on the basis of gender or sexual orientation, individuals fleeing from external aggression, occupation or other serious disturbances of public order, possibly including massive violations of human rights and/or torture, or even the imposition of the death penalty.

Continuing with the analysis of customary international law, this Article considered the influence of the widespread practice of "subsidiary protection," both under international law and municipal law. In many instances, however, this examination suggested that the subsidiary protection was enacted partly with the purpose of insulating the definition of refugee from further development under customary international law. Nevertheless, although the formal cate-

gories were in most cases retained, the consideration and actual treatment of individuals shows, at the minimum, that there may be a growing customary international legal obligation to provide for subsidiary protection and, at most, that subsidiary protection is now defining the new outer parameters of the definition of the refugee.

This Article has also considered, albeit cautiously, the contribution of the practice of international organizations to the definition of refugee. It still does not appear that contemporary international law has specifically accepted the practice of international organizations as contributing to the formation of customary international law, that is, as opposed to the practice of states within and through international organizations, where there is much more acceptance. The practice of international organizations suggests, again, a growing norm of subsidiary protection, if a conservative approach is taken to the appreciation of the formation of customary international law. Taking a more aggressive approach, there might even be something more significant happening. However, the overall practice appears a little too inconsistent for finding a new norm.

Last, this Article has had to look at the other side of the formation of customary international law: not the expansion of the definition, but the contraction. There are many instances of state practice attempting to narrow the definition, although the great majority of them are inconsistent, singular, or clearly perceived to be violations of refugee law rather than evolving customary law. One of the more significant developments in the narrowing of the definition is the growth of the concept of internal flight or relocation alternatives to regions within the state that are considered safe. From a comparative study of the practice of states on relocation alternatives, the law appears to permit, at a minimum, that individuals may be returned to a different region of a state where there is genuine access to meaningful protection, not illusory or unpredictable protection (e.g., the House of Lords “first approach,” discussed in *Januzi v. Sec’y St. Home Dep’t*, [2006] U.K.H.L. 5 (H. Lords Feb. 15, 2006)).<sup>343</sup> However, some states adopt the more restrictive “second approach” (that conditions in the proposed region of the state not be so different from the conditions of non-persecuted persons in the original region), and that approach may eventually crystallize into customary international law, though it does not appear to have done so yet. Safe third country and country of origin designation policies are also becoming increasingly popular; however, these policies do not appear to have moved into customary international law. First, they directly violate the Refugee Convention and therefore any customary international legal analysis will need to see evidence of clear intent to reverse a well-established treaty norm. Second, those blanket rules have failed in some jurisdictions for precisely that reason of their failure to consider cases on their merits, thus the states themselves have determined that their proposed policies were in violation of the norms on refugees, preventing the contrary norm from emerging in customary international law. A

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343. See *Januzi v. Sec’y St. Home Dep’t*, [2006] U.K.H.L. 5 (H. Lords Feb. 15, 2006).

number of other potential narrowing measures were each in turn found to have not crystallized into customary international law, including practices of automatic refusals of manifestly unfounded applications. The final practice that was considered was the reliance on diplomatic assurances that the acts against the person would not occur. This practice is not provided in the Refugee Convention as an exception to *non-refoulement*, but it appears to have crystallized in customary international law. That being said, the practice comes with the express condition that the assurances provide a credible basis for ensuring that the prohibited acts not occur. Where states have a systematic practice of engaging in the prescribed acts, assurances cannot be used as an exception to *non-refoulement*.

Therefore, the evolving definition of a refugee under conventional and customary international law is:

I. A person who, owing to a well-founded fear of being subjected to a situation of

(1) persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;

(2) torture, inhuman or degrading treatment and/or punishment; and/or

(3) a threat to life, security or liberty due to events seriously disturbing public order; that

(a) is so widespread that it exists in all parts of the state of origin where the person could flee and also exists in every state the person reached upon leaving his state of origin; and

(b) is unable to be cured by credible, reliable and genuine assurances offered by the state of origin, and any other state that the individual previously reached, of the situation not occurring to that individual;

and

II. Such person is outside the country of his or her nationality of former habitual residence and is unable or, owing to such fear, unwilling to avail himself of the protection of that country or return to it.

Based on the above, there is customary international law in the field of refugee law. Finding that such law exists does not, however, necessarily mean that refuge is only available to an expanded group of persons. International law is not always so kind. Instead, it means that protection is available for more persons, but also that that protection is also limited by additional rules. In the field of refugee law, there is usual balance between state freedom of action and state limitation on action, with states demanding increasingly liberal moral standards from themselves, but showing increasing reluctance to live by those standards. People in need of protection fall somewhere between these two extremes.