LIDEWIJ OOSTERHOFF

CROSSING BORDERS FOR PROTECTION

The relationship between an internationally displaced person and their host State under international law

LLM RESEARCH PAPER

LAWS 523: THE LAW OF ARMED CONFLICT

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

VICTORIA UNIVERSITY OF WELLINGTON

2015

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Abstract

This Paper seeks to establish what duties are owed to an asylum-seeker by his or her host State under international law. The Paper explains how an individual can be recognised as a genuine refugee, as opposed to an asylum-seeker and what exactly this means under the relevant international law instruments. It analyses what responsibilities and duties are owed to refugees by their host State and when these can be revoked.

Focusing on the large influx of displaced people from Syria who have come into Europe recently, the Paper concludes that the majority of Syrians would not meet the requirements for recognition as a genuine refugee. However, while the instruments do not place binding duties on States to offer protection to displaced persons, a number – for example, Geneva Convention IV and Additional Protocol I, Human Rights instruments and the responsibility to protect – do place discretionary duties.

In the past, the EU – mainly through the Courts – has shown a willingness to be bound by these discretionary duties. Whether this will continue in regards to the Syrian asylum-seekers remains unclear at time of writing. The Paper canvases a number of alternative ways for Europe to approach the Refugee Crisis.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,505 words.

Subjects and Topics

Asylum-seekers
Refugees
International Humanitarian Law
Refugee Law
State Sovereignty
The Responsibility to Protect
The European Refugee Crisis

I Introduction

In 2015 Europe entered into what is being described as a humanitarian emergency, after well over half a million displaced Syrian persons – who were mainly displaced due to a Non International Armed Conflict (NIAC) in their homeland – entered into Europe seeking to escape the conflict.[1]

This has placed a strain on European countries as they struggle to find resources to cater for the extra people.[2] Europe continues to discuss the best way to deal with what has been labelled the *European Refugee Crisis.* The options range from mass resettlement and inclusion on the one hand, to building a wall to separate Greece from the rest of Europe on the other.[3] Obviously this is polarising Europe, igniting sectarianism and bolstering both the extreme left and extreme right.[4]

This paper will examine the international law instruments – including International Humanitarian Law (IHL) – governing the relationship between a displaced person and their host State. While there are many displaced people across the world,[5] this Paper focuses on displaced Syrians who are currently within the European Union (EU)[6]. It canvases what international law applies to this situation and what duties, responsibilities and rights this law places on both displaced Syrians and their host EU State.

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1 United Nations High Commissioner for Refugees UNHCR and International Organisation for Migrants (IOM) "A million of refugees and migrants flee to Europe in 2015" (press release, 22 December 2015).

2 António Guterres, UNHCR "UNHCR's proposal in light of the EU response to the refugee crisis and the EU package of 9 September 2015" (conference paper, Brussels, 10 September 2015) at 3.

3 Patrick Kingsley "When there's a wall there's no way: refugee crisis needs a better idea" *the Guardian* (online ed., London, 25 January 2016).

4 C.J. Polychroniou "Interview with Noam Chomsky: is European Integration Unravelling?" *Truthout* (online ed., 25 January 2016).

5 UNHCR "World-wide displacement hits all-time-high as war and persecution increase" (press release, 18 June 2015).

6 The EU zone has been chosen as the focus because once as person is in one of the EU countries, movement to other countries is much less difficult due to the Schengen Visa Zone.

It starts by outlining the common terms and explores their relevance. This includes explaining how a person can be recognised as a genuine refugee, as opposed to an asylum-seeker. The Paper concludes that despite fleeing from grave war crimes in Syria, it is unlikely that the majority of Syrians in The EU will be recognised as genuine refugees and therefore will not trigger the application of compulsory protection from their host State. It assesses what exactly this distinction means in practice and under the relevant instruments, and outlines how it affects the relationship between host State and displaced persons.

While host States do not have a compulsory legal duty, international law does place a largely discretionary duty on States to protect displaced persons who do not meet the test as a genuine refugee, as well as a negative duty not to return (*refouler*) an asylum-seeker to a place where they face persecution.

The Paper looks to EU case law to establish that, in the past, the EU Courts have interpreted a host State's duty under international and EU law in a broad manner. While it is unclear how EU States will deal with the *Syrian Refugee Crisis*, in the past, Courts have shown a propensity to focus on asylum-seekers' rights rather than State sovereignty.

The Paper concludes that EU States are not required under international law to provide asylum, however, it can be granted as a discretionary decision. If a discretionary scheme proves too time consuming, EU States can consider entering into a region specific instrument, similar to one implemented in Africa and the Americas, to assist with recognising and assimilating displaced persons easily. Should States not wish to provide asylum, the Paper provides some alternative ways to protect refugees from war crimes, including temporary asylum and 'safe-zones'.

II Definitions

To better understand what the relationship should be between displaced Syrian persons and their host State, it is important to understand the meaning of a number of important terms.

A Asylum-seeker

The word asylum relates to the protection a State can grant on its territory to a person who seeks it. Therefore, an asylum-seeker is someone in search for that protection from a State that is not his or her State of nationality.[7]

The term asylum-seeker is broad and covers a diverse range of people. However, often these people seek recognition as a refugee and the subsequent protection afforded as a result of this recognition.[8]

While there is currently no legal instrument outlining exactly what asylum is and how people can be granted asylum, the Court of Justice of the European Union has suggested the granting of asylum is a discretionary decision States may make under domestic or international law.[9] This Paper discussed what discretionary protections can be afforded to asylum-seekers under international law.

This paper focuses on the relationship and the duties owed by States to both asylum-seekers and refugees. However, the majority of persons it refers to have not been recognised as a refugee and the Paper suggests it is unlikely they will they be recognised as such. To avoid confusion, they will not be referred to as 'refugees' but as 'asylum-seekers' or 'displaced persons'.

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7 María-Teresa Gil-Baso "Asylum as a General Principle of International Law" (2015) 27 Int J Refugee Law 3 at 4.

8 At 4.

9 *Bundesrepublik v B and D* (joined cases C-57/09 and C-101/09) [2010] ECR I-10979 a para 121.

B Refugee

The Refugee Convention defines a refugee as any person who:[10]

> … owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …

The difference between 'refugee' and 'asylum-seeker' status is an important legal distinction. While refugees are afforded comprehensive, compulsory protections under international law, asylum-seekers are afforded discretionary rather than mandatory protection.[11]

C Internally displace person

An internally displaced person (IDP) is a person who has not crossed an international frontier but has fled from their home.[12]

The United Nations defines IDPs as:[13]

> … persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human right … and who have not crossed international borders.

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10 Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 1(A)2.

11 David A Martin and others *Forced Migration: Law and Policy* (Thomson/West, Saint Paul, 2007), at 71.

12 International Committee of the Red Cross (ICRC) (eds) *International Humanitarian Law: Answers to your Questions* (Focus, Geneva, 2014) at 69.

13 *Guiding Principles on Internal Displacement* Com. Hum. Rts. res 1998/50, LIV E/CN.4/1998/53/Add.2 (1998), art 2.

While this Paper focuses on internationally displaced persons, it is worth noting IDPs are also protected under International Law, mainly under International Humanitarian Law (IHL). Convention Relative to the Protection of Civilian Persons in Time of War[14] (Geneva Convention IV) protects IDPs not taking an active part in hostilities and also protects against forcible transfer or displacement in cases where no military necessity exists[15].

D Non-refoulement

The principle of *non-refoulement* prevents a State from returning a person to a territory where there is a risk his or her life or freedom would be threatened on the grounds of race, religion, nationality, membership of a social group or political opinion.[16]

The Office of the United Nations High Commissioner for Refugees (UNHCR) – that has a mandate to lead and co-ordinate international action to protect refugees and asylum-seekers – describes *non-refoulement* as "a cardinal protection principle enshrined in the Refugee Convention, to which no reservations are permitted."[17] The UNHCR describes the principle of *non-refoulement* as fundamental for the maintenance of the Human Rights Law prohibition on torture and cruel and inhuman or degrading treatment or punishment.[18]

Non-refoulement has been described as the "most significant right"[19] granted to refugees by the 1951 United Nations Convention of the Status of Refugees[20] ("the Refugee Convention") and its 1967 Protocol[21] ("the Refugee Protocol"), and a "cornerstone of international refugee protection".[22] The principle is now so fundamental that the UNHCR has called it a *jus cogens* principle of international law.[23]

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14 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10.

15 Art 49.

16 Art 33.

17 *Note on International Protection* GA Note A/AC.95/951, LVI (2001) at [16].

18 At [16].

19 Gil Loescher, Alexander Betts, and James Milner *The politics and practice of refugee protection into the twenty-first century* (Routledge, New York, 2008) at 15.

20 United Nations Convention on the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entry into force 22 April 1954).

21 United Nations Protocol Relating the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entry into force 4 October 1967).

22 Loescher and others above, n 19, at 15.

23 At 16.

E State sovereignty

State sovereignty is a State's independence and exclusive authority over its territory and those who reside in it.[24] In excising its State sovereignty, the Parliament of the sovereign State is able to "legislate contrary to fundamental principles of human rights".[25]

In relation to refugees and asylum-seekers, "the traditional theory of dichotomy between State sovereignty and individual security is often emphasized",[26] as it can weaken the ability of a State to decide who is and who is not allowed in its territory.[27]

A State's right to accept or deny people to reside in its sovereign zone is one of the oldest and most recognised powers of a sovereign State.[28] When referring to refugees, the interests of the State and the individual needing protection must be reconciled.[29] Gil-Baso states that this century has witnessed a move away from unfettered State discretion in deciding who can enter its territory.[30]

The boundary of a State's discretion to allow or deny people onto its territory is relevant when examining a host State's responsibility.[31] If one accepts State sovereignty is absolute, then a State only owes duties to asylum-seekers if it agrees to this.[32]

III The situation in Syria

The conflict in Syria began in March 2011, after a group of 13 year old boys were tortured for writing 'the Government must go!' on the side of a building in the southern city of Der'a. [33]

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24 Christian Henderson "The Arab Spring and the Notion of External State Sovereignty in International Law" (2014) 35 Liverpool Law Rev 175 at 175.

25 *R v Secretary of State for the Home Department (Ex parte Simms)* (2000] 2 AC 115 at 131.

26 Ann Vibeke Eggli *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers, The Hague, 2002) at 153.

27 Gil-Baso, above n 7, at 4.

28 *The East India Company v Sandys* (1684) 10 ST 371 (KB) at 350.

29 At 153.

30 Gil-Baso, above n 7, at 4.

31 Abu Bakar "State sovereignty: a hindrance to refugee protection (14 April 2010) The Patriotic Vanguard <www.thepatrioticvanguard.com>.

32 Abu Bakar, above.

33 Lucy Rodger and David Gritten "Syria: the story of the conflict" *The BBC* (online ed., London, 9 October 2015).

Outraged by the torture, residents of the small town took to the streets to protest and demonstrate in favour of democracy.[34] The Government responded by allowing security forces to open fire on the demonstrators.[35] The demonstrations and unrest quickly spread around the country, as did the Government response to it. [36]

In February 2012 – while the conflict was not yet recognised as a Non-International Armed Conflict (NIAC) – the United Nations (UN) General Assembly voted overwhelmingly in favour of intervention in Syria. The UN Arab Peace Plan that aimed to change the regime in Syria included a call for President Bashar al-Assad to step down. However, the Plan was never put into action because China and Russia used their UN Security Council veto rights to preclude any intervention, stating the intervention would violate Syria's sovereignty.[37]

By the middle of 2012, the extent and sustained nature of armed violence between Syrian Government forces and a number of well organised non-State groups, led the International Committee of the Red Cross (ICRC) to conclude a NIAC was operating in Syria, thereby making IHL applicable to the whole country.[38]

At the time of writing, a NIAC remains in place in Syria. Amnesty International and other humanitarian organisations have recorded that grave war crimes and crimes against humanity have been committed by both the Government and the opposing forces.[39]

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34 Rodger and Gritten, above n 33.

35 Rodger and Gritten, above.

36 Rodger and Gritten, above.

37 Paul Harris and others "Syria resolution vetoed by Russia and China at United Nations" *The Guardian* (online ed., New York, 4 February 2012).

38 ICRC "Syria: ICRC and Syrian Arab Red Crescent maintains effort amid increased fighting (press release, 17 July 2012).

39 Amnesty International "War crime in the Syrian conflict" (press release, 7 April 2015).

Among the breaches of IHL are indiscriminate shelling of heavily populated civilian areas, the use of cluster bombs on civilians, use of weapons in a reckless manner resulting in harm to civilians and mass execution of individuals in custody.[40] It is also estimated about 65,000 people have forcibly disappeared since the violence began, more than 58,000 of them civilians.[41]

These and other acts of war have caused widespread international and internal displacement, as civilians flee their homes to seek refuge.[42] Between January and November 2015, the UNHCR estimated European States received 587,060 Syrian asylum applications, compared to 137,947 in total in 2014.[43] While this Paper focuses on international displacement, it is worth noting that more than 6.5 million Syrians are estimated to be displaced within Syria.[44]

IV The Law

A number of areas of international law apply to the displaced persons and their host State. The idea that vulnerable persons require protection during armed conflict is recognised under IHL, International Refugee Law and International Human Rights Law.

The Refugee Convention and its Protocol are the primary conventions dictating what the relationship between refugee and host State should resemble. While this is not an IHL instrument but an International Refugee Law instrument, the two legal areas are complimentary in this field. They share one common goal, the protection of lives, health and people's dignity.[45] IHL protects civilians during armed conflict while Refugee Law protects these same people should the conflict force them to flee their homes.[46]

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40 Amnesty International, above n 39.

41 Amnesty International (ed) "Syria: 'between prison and the grave': enforced disappearances in Syria" (Amnesty International Publishing, London, November) at 7.

42 Gouda Ali Gouda *Internal Displacement Law and Policy: Analysis of International Norms and Domestic Jurisprudence* (Vandeplas Publishing, Lake Mary, 2009).

43 UNHCR "New Asylum Applications lodged in Selected Counties" (10 December 2015) UNHCR data sharing portal <www.data.unhcr.org.nz>.

44 Beth Mitchneck "How to Help Internally Displaced Refugees" *Foreign Affairs Magazine* (online ed., 22 January 2016).

45 Emanuela-Chiara Gillard, ICRC Legal Advisor *Humanitarian Law, Human Rights Law and Refugee Law – the Three Pillars* (International Association of Refugee Law Judges world conference, Stockholm, 21-23 April).

46 Gillard, above.

IHL further compliments Refugee Law in terms of war criminals; anyone considered a war criminal under IHL cannot be recognised as a refugee under Refugee Law.[47]

Apart from the general protection for civilians under IHL, refugees are further protected if they are in a State involved in an armed conflict.[48] IHL recognises that refugees are vulnerable, especially when they are also aliens in another State's territory and are not protected by their State of nationality.[49]

The analysis of the applicable law aims to canvas the legal instruments that apply to displaced Syrians in the EU. The Paper concludes that the majority of displaced Syrians are not entitled to protection as recognised refugees under the Refugee Convention. However, discretionary protection under a number of other instruments of international law is available to them, including Geneva Convention IV[50] and Additional Protocol I[51], the responsibility to protect principle and Human Rights Law.

A The 1951 Refugee Convention and 1967 Protocol

The Refugee Convention was born in aftermath of World War II. When this conflict ended, European States needed to put mechanisms in place to support the millions of people displaced who were unlikely to return to their country of origin.[52] The Refugee Convention ensured these people were lawfully admitted and integrated into the population of their host country and that they had the right to education, employment, housing, public relief, social security and access to the Courts.[53]

The Refugee Convention was originally only intended to protect refugees after the war and therefore, only applied to Europeans. The 1967 Protocol later expanded its scope to protect people who were displaced across the world.[54]

A right-wing Dutch politician, Halbe Zijlstra, used the distinction between the Refugee Convention and its Protocol to argue this allowed European States to refuse entry for

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47 Gillard, above.

48 ICRC, above n 12, at 69.

49 At 69.

50 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10.

51 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3 (1977, entered into force 7 December 1978).

52 David A Martin and others, above n 11, at 69.

53 At 70.

54 UNHCR *The Legal Framework for Protecting Refugees* (UNHCR publishing, Geneva, 2011) at 1.

Syrian asylum seekers and contravene their obligation under the instruments. Zijlstra released a statement saying the Convention and its Protocol should be rendered null and void altogether.[55]

Zijlstra incorrectly argued that only European States had ratified the 1967 Refugee Protocol, while the rest of the world did not. The "world can apply for asylum here, but not the other way around. We can not [sic] solve the world's problems in Europe."[56] In fact, of the 148 State-parties, 142 States have ratified both the Refugee Convention and its Protocol. Madagascar and Saint Kitts and Nevis are the only countries to ratify only the Refugee Convention.[57]

The analysis below will show the majority of displaced Syrians in the EU do not fall under the Convention and are therefore not legally entitled to compulsory protection under it, making Zijlasta's argument not only incorrect but also irrelevant. However, interestingly, Syria is not a party to either the Refugee Convention or its Protocol and while reciprocity is not a requirement under the Convention, it would seem Zijlstra could have had a more effective argument had he based it on that concept.

1 Article 1

The Refugee Convention and its Protocol define a refugee as a person who is unwilling to avail him or herself to the protection of their country of nationality due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (Article 1A(2) of the Refugee Convention).[58] The requirement that the persecution occurs for one of the five reasons listed in this Article appears to be the reason why a large majority of displaced Syrian persons will not satisfy the test, as outlined below.

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55 Janene Pieters "VVD leader criticized in call to end Refugee Convention" *NL Times* (online ed., 21 December 2015).

56 Pieters, above.

57 UNHCR "State Parties to the 1951 Convention and its 1967 Protocol" (April 2015) Office of the United Nations High Commissioner for Refugees <www.unhcr.org>.

58 United Nations Convention on the Status of Refugees, above n 20, art 1(A)2.

(a) Race

Discrimination based on race is considered one of the most "striking violations of human rights … therefore, [it] represents an important element in determining the existence of persecution".[59] The UNHCR encourages States to interpret the term 'race' as broadly as possible. This includes an interpretation covering all kinds of ethnic groups that can be loosely referred to as a 'race' in common usage.[60] The UNHCR has even gone so far as to suggest that 'race' can be interpreted to include members of a specific social group that form a minority within the population.[61]

Syrian President Bashar al-Assad belongs to the Alawites, a Shia sect that makes up 12 per cent of the population and is a minority group within the mainly Sunni country, who make up about 75 per cent of the population.[62] While there is definitely a racial element to the conflict, in the Middle East it is difficult to separate this from the religious, political and ideological elements.[63]

Whether this racial division is driving discrimination to an extent that it is forcing Syrian people to flee their homes is unlikely. It is difficult to understand the exact nature of the conflict in Syria, but at the time of writing there is insufficient evidence to suggest people are fleeing their homes due to a real threat to their life or freedom on account of race, there is also no evidence to suggest they are part of a vulnerable racial minority:[64]

> … the sharpest divide may not so much be religious or ethnic as it is ideological and existential, pitting Muslims who want to align politics with religion against those who wish to keep them apart.

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59 UNHCR (ed) *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (UNHCR Publishing, Geneva, 2012) at [68].

60 At [68].

61 At [68].

62 Lucy Rogers and others "Conflict background" *BBC News* (online ed, 9 October 2015).

63 Seth Kaplan "Syria's Ethnic and Political Division" (2013) Fragile States <www.fragilestates.org>.

64 Kaplan, above.

(b) Nationality

'Nationality' in terms of the Refugee Convention overlaps with race and again, it seems unlikely discrimination can be proven on this ground.

(c) Membership of a Social Group

Under the Refugee Convention, there are two approaches to assessing whether a group of people constitutes a 'social group', the protected characteristics and the social perception approach.[65]

The protected characteristics approach examines whether a group is united by an immutable characteristic so fundamental to human dignity that no person should be compelled to forsake it.[66] This includes characteristics that are historical and cannot be changed and those which, though it is possible to change them, ought not be required to change because they are closely linked to the person's identity or are a fundamental human right.[67]

The social perception approach on the other hand looks at the common characteristics that people in a group share and whether these set them apart from society at large.[68] There seems to be some overlap here with the different grounds for discrimination, especially when 'race' is interpreted in its widest sense as mentioned above.

An example of discrimination based on membership of a social group can be seen in the large scale killing, forced disappearance and torture of the educated, wealthy upper class that occurred during General Augusto Pinochet's coup d'état in Chile.[69]

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65 Volker Türk and Frances Nicholson "Refugee protection in international law: an overall perspective" in Feller, Türk and Nicholson, at 17.

66 At 17.

67 UNHCR *Guidelines on Protection: Membership of a particular social group* HCR/GIP/02/02 at [12].

68 At [7].

69 David Connett, John Hooper and Peter Beaumont "Pinochet arrested in London" *The Guardian* (London, 18 October 1998).

In the lead up to the outbreak of the Syrian conflict, President Assad introduced neo-liberal economic measures to bolster the urban middle class, to increase the opportunities for corruption and suppress the rural majority of mainly small agriculture producers.[70] This could potentially be persecution under the social perceptions test. However, it appears to fall short of meeting the full test under Article 1 of the Refugee Convention, because there is no evidence this is causing the widespread displacement of Syrians.

(d) Political opinion

This category relates to persons who are persecuted because they hold a political opinion that differs to that of the ruling party, especially when this opinion is critical of those in power.[71]

The UNHCR suggests some individuals who have been openly critical of the Assad regime have disappeared.[72] At the time of publication, a number of civil society activists, human rights defenders, journalists, humanitarian workers and Syrian civilians remain in arbitrary detention without trial, because they have criticised the ruling party.[73]

A number of Syrians on both sides of the conflict have also fled to the EU to desert the army.[74] It seems defectors are the types of people this Article attempts to protect and for this relatively small group this may give rise to recognition as a genuine refugee.

(e) Religion

The protection from discrimination on religious grounds is based on the idea that all individuals should have the right to freedom of thought, conscience and religion; including the right to manifest in public or in private any religious teaching, practice, worship or observance. [75]

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70 Nick Danforth and Graham Pitts "The Syrian War and Sectarianism" (blog, 6 December 2013) Dissent Magazine <www.dissent.org>.

71 UNHCR, above n 59, at [80].

72 Amnesty International "Syria: 'between prison and the grave': enforced disappearances in Syria", above n 41, at 7.

73 Human Rights Watch "World Report 2015: Syria" (online ed, New York, 2015).

74 Christopher Lee "Syrian Exodus" (22 December 2015) The Ground Truth Project <www.thegroundtruthproject.org>.

75 UNHCR, above n 59, at [71].

There is undoubtedly a religious element to the conflict in Syria, Islam in the Middle East is not simply a religion, it is also a way of life, so it would be practically impossible for it not to be an influencing factor.[76] Again, this overlaps with both the nationality and the race category, as religious lines often coincide and blur with racial lines. [77]

In Syria, persecution on religious grounds comes coupled with a stronger political element.[78] Many of the parties fighting in the conflict are divided along political and religious lines.[79] Alongside this, there are further divisions within the religious groups, for example, the educated urban Sunni population and the rural Sunni agricultural workers.[80]

While this Paper does not attempt to give an outline of the complex religious and racial divides within Syria and the Middle East, it is worth noting that the nature of this conflict potentially gives rise to two grounds of persecution under the Refugee Convention: political opinion and religion. Despite this, the main factor that appears to contribute to the displacement of Syrians is indiscriminate attacks on civilians – itself a war crime – but not a ground that places a duty on States to offer protection to the individuals.

(f) Fear of persecution

While it is suggested that displaced Syrians will fall short of falling into one of the five categories under Article 1, it is worth considering the other requirement under the Article to give a better understanding of how it operates. This fear of persecution requirement under Article 1 is vague and exactly how it should be interpreted has been widely debated since it was introduced.[81] It seems a relatively well-established notion that the word 'persecution' is central to determining whether an individual falls within the ambit of 'refugee' under the Refugee Convention.

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76 William T Cavanaugh *The myth of religious violence: Secular ideology and the roots of modern conflict* (Oxford University Press, New York, 2009) at 26.

77 Kaplan, above n 63.

78 Armenak Tokmajan "Religious Leaders, and Violence in the Conflict in Syria" (October 2015) Fragile States <www.fragilestates.org>.

79 Tokmajan, above.

80 Kaplan, above 63.

81 Eiko Theilemann "In need of a burden sharing approach: Ensuring fair and human asylum policies in the EU" (blog post, 22 January 2016) British Law and Policy, London School of Economics and Political Science <www.blogs.lse.ac.uk>.

Dr Weis in his analysis of the Refugee Convention's *Travaux Preparatoires* suggests the well-founded fear of persecution should be an established legal threshold, investigated through the analysis of objective facts.[82] While no exact test is recorded in the Refugee Convention or its preparatory material, the judicial view seems to be that it should involve injurious or oppressive action.[83]

The House of Lords (*R v Secretary of State for the Home Department, ex parte Sivakumaran*[84]) confirmed the test to establish a 'well founded fear of persecution' involved an analysis of whether a *reasonable possibility* of persecution would occur, should the person return to their country of origin (emphasis added).[85] In that case, the Court found the Secretary of State was able to take all relevant facts and circumstances into account when considering an application for refugee status, including ones not known to the applicant.[86] Based on evidence that there had been no persecution of Tamils generally or of any specific group of Tamils in Sri Lanka, the Secretary of State rejected six Sri Lankan Tamils' refugee applications.[87]

One of the other leading tests comes from the United States' case *Ghaly v Immigration and Naturalization Services*[88]. In *Ghaly,* the Court held that the persecution faced must be "both subjectively genuine and objectively reasonable".[89]

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82 Dr Paul Weis "The Refugee Convention – the Travaux Preparatoires analysed with a commentary by Dr Paul Weis" (1990) United Nations High Commissioner for Refugees <www.unhcr.org> at 7.

83 At 8.

84 *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] 2 WLR 92 (HL).

85 Weis, above n 82, at 8.

86 Sivakumaran, above n 83, per Lord Goff of Chieveley.

87 Weis, above n 82, at 8.

88 *Ghaly v Immigration Naturalization Services* 58 F3d 1425, 1431 (9th Cir 1995).

89 At [II].

While the individual characteristics of the asylum-seekers are not yet known, the general consensus seems to be that the majority of Syrians seeking asylum in the EU are fleeing armed conflict in their country of origin.[90] Again, it appears that while the war crimes are both 'subjectively genuine' and 'objectively reasonable', there are no grounds to argue there is 'subjectively genuine' and 'objectively reasonable' *persecution* resulting from these war crimes. This appears to leads to the conclusion that the displaced persons do not satisfy the test in *Ghaly*.

The Refugee Convention has been widely criticised for this narrow interpretation of 'refugee', especially because it does not include persons persecuted against because of gender or sexual orientation.[91] But most importantly, as the above example shows, the Refugee Convention does not provide protection for civilians fleeing the general dangers of war or more specifically, those fleeing war crimes and crimes against humanity.[92] It appears that this is where the Refugee Convention fails to protect the majority of displaced Syrians.

2 Protection

If a person is recognised as a genuine refugee under the Refugee Convention, this instrument imparts a range of protective principles on them. This includes being entitled to the same treatment as nationals in areas such as, being able to access the Courts[93]; the right to employment[94]; the right to elementary education[95]; access to public relief and assistance[96]; and the right to be issued identity papers[97].

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90 Philippe Fargues and Christine Fandrich *The European Response to the Syrian Refugee Crisis – What Next?* (MPC, San Domenico di Fiesole, 2014) at 4.

91 Petter Hojem "Fleeing for love: asylum seekers and sexual orientation in Scandinavia" (Research Paper, UNHCR, Geneva, 2009) at 5.

92 Mélanie Jacques *Armed Conflict and Displacement: the Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge University Press, New York, 2012) at 157.

93 United Nations Convention on the Status of Refugees, above n 20, art 16.

94 Art 17.

95 Art 22.

96 Art 23.

97 Art 27.

3 Article 33

Article 33 of the Refugee Convention says that no contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to a territory where his life or freedom would be threatened on "account of his race, religion, nationality, membership of a particular social group or political opinion."[98] This principle is considered "the modern-day linchpin of refugee protection".[99]

The Article places a negative duty on Member States not to *refouler* the individual to his or her country of origin.[100] However, it does not impose a positive duty on the State to offer the person asylum or to give him or her work authorisation or residency status.[101] Nor does it require the host State to allow the individual to stay in its sovereign zone; it only requires that the host State does not send the individual to the country where their life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[102]

Article 1 assesses whether 'a well-founded fear of persecution' exists, whereas Article 33 assesses whether the person's life or freedom is 'threatened'.[103] The first requirement seems to include a more objective element, whereas the second is more subjective. This could suggest the test for *refouler* of a person already on another country's soil is less stringent than the test for recognition as a refugee.

The Refugee Convention does not place a positive duty on Member States to provide asylum for people who are recognised as refugees under Article 1.[104] It does, however, prevent the *refoulement* of people who are already on a member State's territory under Article 33.[105]

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98 United Nations Convention on the Status of Refugees, above n 20, art 33.

99 Martin and others, above n 11, at 70.

100 At 69.

101 At 70.

102 At 70.

103 United Nations Convention on the Status of Refugees, above n 20, art 1 and art 31.

104 Martin and others, above 11, at 71.

105 Bill Frelick "Paradigm Shifts in International Responses to Refugees" in James D White and Anthony J Marsella (eds) *Fear of Persecution: Global Human Rights, International Law, and Human Well-Being* (Lexington Books, Plymouth, 2007) 33 at 38.

Again, the test for *non-refoulement* under the Refugee Convention requires the individual to show a threat to their life or freedom on the five grounds discussed above. Although other internal law safeguards against *refouler* exist, a closed reading of the Refugee Convention seems to suggest this would be a possible option that EU host States could consider.

B The Refugee Convention and the Syrian situation

The lack of genuine grounds for recognition as a refugee under the Refugee Convention, does not automatically suggest States do not need to offer the displaced persons any protection, rather is merely means States are not required to recognise them as a refugees. As explained below, a number of other instruments deal with the responsibilities owed to displaced persons and these outline duties – mainly discretionary – that States may have towards persons not recognised as refugees.

The original Convention was drafted more than 60 years ago and to interpret and apply it effectively in the twenty-first century, it appears that one must give consideration to the vastly different global landscape we have now. Applying Refugee Law is a delicate process and the law must allow for, and be applicable to, vastly differing circumstances.[106]

While the Refugee Convention's wording and intention is direct, in practice EU States have granted asylum to people who are not recognised under the Convention (examples are discussed in the case law below).[107] This does not breach the Refugee Convention, rather this instrument merely outlines when a State *must* recognise an individual as a refugee and consequently owes a duty to them; it is not concerned with when a State *may* offer protection to a displaced person.[108]

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106 María-Teresa Gil-Baso, above n 7, at 5.

107 At 5.

108 At 6.

C Exceptions to recognition as a refugee

There are situations where the law prohibits a person from being recognised as a refugee. Serious breaches of IHL are considered war crimes that States must prosecute either in their own courts or by handing the individual over to another State.[109] In situations where war criminals and witnesses for proceedings in the International Court of Justice seek asylum or apply for refugee status, IHL and Refugee Law overlap.[110]

Article 1F of the Refugee Convention precludes the Convention from applying to persons for whom there are serious reasons to consider they have committed a war crime, a crime against the peace or a crime against humanity.[111] The motivation behind this Article is to prevent the very people who created the refugees from claiming the right of refuge.[112] Article 1F also prevents people from claiming refugee status if there is reason to suspect the person has committed a serious non-political crime outside the country of refuge prior to being admitted to that country[113], or has been guilty of acts contrary to the purpose and principle of the United Nations[114].

Under Article 1F(a) people who have committed war crimes, crimes against peace or crimes against humanity, as defined in the international instruments listing these provision, are precluded from applying for refugee status.[115] The international instruments this Article refers to are found in IHL, for example the Geneva Conventions and Additional Protocols and more recently, the Rome Statute of the International Criminal Court 1998, which establishes the International Criminal Court and defines the four main international crimes.[116] IHL and Refugee Law share a similar objective, namely holding war criminals to account for their actions.[117]

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109 ICRC, above n 12, at 95.

110 Fannie Lafontaine, Joseph Rikhof, Laurel Baig "Special Issue: the interaction between Refugee Law and International Criminal Justice" (2014) 12 J Int Criminal Justice 901 at 910.

111 United Nations Convention on the Status of Refugees, above n 20, art 1F(a).

112 Ella Watt "International Criminal Law and New Zealand Refugee Status Determinations: a Case Note on *Attorney General v Tamil X* (2012) 43 VUWLR 235 at 240.

113 United Nations Convention on the Status of Refugees, above n 20, art 1F(b).

114 Art 1F(c).

115 Art 1F(a).

116 ICRC, above n 12, at 6.

117 Ned Djodjevic "Exclusions under Article 1F(b) of the Refugee Convention" 12 J Int Criminal Justice 901 at 1058.

1 Article 1F(a)

IHL is based on the assumption that people who commit war crimes must be held accountable for this. An integral part of this includes ensuring they are not able to claim asylum in a third country, Article 1F(a) of the Refugee Convention recognises and embodies this long-held objective.[118] It also recognises the whole international community has an interest in ensuring those who commit genocide, war crimes or crimes against humanity are brought to justice.[119] While the International Criminal Court has a mandate to bring people who commit these crimes to justice, sovereign States retain the ability to prosecute these people under domestic law.[120]

The motivation of the drafters of the Refugee Convention to include this sub-article appears self-evident. It seems possible a war criminal would try to seek refuge in a third country, either to prevent retribution in the country where he or she had committed those crimes or to evade detection. When a war criminal faces retribution, it raises a complicated conundrum. Article 1 F precludes the individual from protection as a refugee under the Refugee Convention and consequently, the person is not entitled to protection from *refouler* under Article 33. It would, however, appear to be against morality to return these persons to their host country if they could face torture or death there.

Applying the exceptions to the protection under the Refugee Convention is complicated in practice. Since 2011, Amnesty International has been monitoring the Syrian conflict, talking to citizens in an attempt to get names of the perpetrators of war crimes.[121] However, it will be many years – if at all – before these people are brought before the International Criminal Court or a specialist tribunal set up to assess Syrian war crimes.[122]

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118 Dennis McNamara "the Protection of Refugees and the Responsibility of States: Engagement of Abdication?" 11 Harv. Hum. Rts. J. 355 at 359.

119 David McGregor "Bringing War Criminals to Justice in Australia: Upholding international criminal law and the principle of *non-refoulement*" (2007) 32 Alt LJ 154 at 154.

120 At 154.

121 Amnesty International, above n 41, at 7.

122 Amnesty International, above n 41, at 7.

The Netherlands faced a similar situation near the end of last century. During the 1980s and 1990s, the Netherlands opened its borders to many people displaced by conflict around the word, including a large number from Afghanistan.[123] However, it was later discovered that not only civilians arrived in the Netherlands from Afghanistan; senior Government officials, including members of the Afghani Secret Service – the KhAD – who were responsible for grave war crimes and crimes against humanity, had also sought asylum.[124]

In response to a Dutch media investigation that found at least 35 Afghan people suspected of committing war crimes living in the Netherlands, the Government set up the *unit 1F* (named after the Article of the Refugee Convention to which is relates) as a special unit within the *Immigratie-en Naturaliedienst* (Immigration and Naturalisation Service, part of the Ministry of Justice).[125] The *unit 1F* uses specially trained international law experts, information from non-government organisations, and intelligence gathered by *Buitenlandse Zaken* (the Ministry of Foreign Affairs) to assess whether someone could potentially have committed war crimes in their country of origin.[126] This includes, amongst other things, greater scrutiny of individuals who have served in the armed forces.[127]

Should a similar unit be set up for Syrian asylum-seekers, it seems unlikely any intelligence allowing European authorities to investigate Syrian individuals suspected under Article 1F(a) will be available in the near future.[128]

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123 Leslie Haskell "EU asylum and war criminals: no place to hide" (Blog post, 18 September 2014) EU Observer <www.euobserver.com>.

124 Leslie Haskell, above.

125 Immigratie-en Naturaliedienst "Nederland geen vluchthaven voor plegers van oorlogsmisdaden (the Netherlands will not be a haven for war criminals)" (2015) Immigratie-en Naturaliedienst <www.ind.nl>.

126 Immigratie-en Naturaliedienst, above

127 Immigratie-en Naturaliedienst, above.

128 Kenneth Roth "Ending Syria's Atrocities is a Prerequisite to Ending its War" *Human Rights Watch* (online ed., 20 January 2016).

For the exclusion to be applied, individual criminal responsibility must be established for one of the excluded acts under Article 1F.[129] The test for individual responsibility includes establishing whether the person committed or made substantial contributions to the acts, with knowledge the acts constituted a criminal offence.[130] These sorts of investigations often take years, if not decades, and require vast resources.[131] For example, in the Netherlands an ex-Afghan war criminal was arrested in October 2015 for crimes committed in the Afghan province of Kunar on 30 April 1979.[132] The suspect had come to the Netherlands in 1990, where he was granted asylum and later citizenship, and he had lived in Rotterdam for 25 years before his arrest.[133]

When a person does not fall under the Refugee Convention – as it is argued the majority of the Syrians do not – it normally follows they do not fall under its exceptions either. This could mean a potential war criminal, who would ordinarily not be recognised as a refugee, will also not fall under the exceptions to refugee status under Article 1 F. While it remains to be seen how this will apply in practice in regards to the *Syrian Refugee Crisis*, it raises questions about what exactly this will entail for these people.

To address this and make it easier to ensure war criminals are apprehended, EU States could consider implementing domestic or EU legislation allowing for the prosecution of these people under domestic law, similar to Australia.

Australia has introduced extra domestic legislation – The War Crimes Amendment Act 1988 – to prevent war criminals from gaining asylum there.[134] The Act allows the domestic criminal justice system to place people residing in Australia on trial for war crimes. The domestic justice system has the power to denaturalise and deport the persons (if found guilty), without needing to wait for the international courts.[135]

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129 UNHCR (ed) "Statement on Article 1F of the 1951 Convention" (Statement, Geneva, 2009) at 9.

130 At 9.

131 Roth, above n 128.

132 Openbaar Miniterie (Office of the Public Prosecutor - the Netherlands) "Afghan war crimes suspect arrested in the Netherlands" (press release, 30 October 2015).

133 Openbaar Miniterie, above.

134 McGregor, above n 119, at 155.

135 At 155.

Introducing similar legislation could ensure war criminals are not granted discretionary asylum (given they are not apprehended) or if they are, that this can be easily revoked and could ensure war criminals are prosecuted in a more timely manner.[136]

EU States could also consider a hybrid domestic-international model that could allow them to work efficiently to ensure war criminals are not able to seek refuge for a long period.[137] Alongside the benefits mentioned above, this model can combine staffing, operative law, structure, financing, and rules of procedure and bridge the gap between domestic criminal justice proceedings and the International Criminal Court, ensuring a timelier and financially viable process.[138]

EU States could also consider enforcing a more rigorous vetting scheme, such as that imposed in the Netherlands. However, without much information available to anyone regarding the situation in Syria and given the sheer volume of people arriving every day, it seems difficult to establish what exactly a competent vetting scheme would look like and how it would operate.

2 Article 1F (b)

Under Article 1F(b), a person will not be recognised as a refugee if he or she has committed a "serious non-political crime outside his country of refuge prior to his admission to that country as a refugee."[139]

It has been suggested that any crime "characterized as criminal by the receiving State's legal system is adequate to raise the possibility of exclusion".[140] This gives the host State wide discretion to decide whether any crime under its criminal code is both 'serious' and 'non-political'.[141]

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136 Beth Van Schaack "International Justice Year-in-Review: Looking Backwards, Looking Forwards (Part 2)" *Just Security* (online ed., January 19 2016).

137 Schaack, above.

138 Schaack, above.

139 United Nations Convention on the Status of Refugees, above n 20, art 1F(b).

140 Djodjevic, above n 117, at 1060.

141 At 1060.

It has also been argued the crime should be one of the crimes listed in Article 1F(a), for example, war crimes and crimes against humanity.[142] "These are seen as crimes which attack the fundamental values of the international community by compromising the peace, security and well-being of the world as a whole."[143] However, in defining 'serious' and 'non-political' crimes as crimes already listed in the first subsection, these commentators appear to be making Article 1F(b) obsolete and this gives rise to questions regarding its relevance at all.

Interestingly that this Article only applies to people who have committed a crime *outside* their host country, meaning that people who commit crimes *within* their host country can technically still be recognised as a 'refugee'. This is particularly topical in terms of the current situation in the EU, where a number of high-profile crimes have been linked to Syrians asylum-seekers. For example, the Paris bombing on 13 November 2015[144] and the mass assault on women on New Year's Eve 2015 in Cologne.[145]

The intention behind including 'non-political' crime is discussed in more detail in the next section.

(a) *Attorney-General v Tamil X (2010)*

The Supreme Court of New Zealand recently dealt with the exceptions for refugee status under Article 1F(a) and (b) in *Attorney-General v Tamil X*.[146] In this case, the Applicant was convicted and served three years in an Indian prison for transporting explosives for the Sri Lankan Tamil Tigers.[147] This group was responsible for at least 20 attacks between 1985 and 1996, mainly against civilians.[148] X argued that he was unaware of what he was transporting.[149]

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142 Djodjevic, above n 117, at 1060.

143 At 1061.

144 Inti Landauro, Matthew Dalton and Adam Entous "Paris attacks: Syrian migrant was amongst the bombers" *The Wall Street Journal* (online ed., Paris, 14 November 2015).

145 Emma Graham-Harrison "Cologne Protest over sex attacks" *The Guardian* (online ed., Cologne, 9 January 2016).

146 *Attorney General v Tamil X* [2010] NZSC 107. [2011] 1 NZLR 721.

147 At [7] – [10].

148 At [49].

149 At [17].

The Court held it was up to the person applying for refugee status to prove they had a claim and, if necessary, that Article 1F did *not* apply to them (emphasis added).[150] The reverse burden of proof approach was later criticised and considered inconsistent with international jurisprudence.[151]

In considering whether X had committed war crimes under 1F(a), the Court looked to IHL, specifically the Rome Statute. The Court confirmed that when interpreting the Refugee Convention, it was not "confined to international instruments existing at the time of making of the Convention".[152] Therefore, even though the Rome Statute was drafted nearly 50 years after the Refugee Convention, it could be used to interpret the earlier document.[153]

The Court assessed whether X was guilty of crimes against humanity under Article 7 of the Rome Statute due to complicity under Article 25 and 30. In assessing whether X was complicit or had joint enterprise-liability, the Court stressed that refugee-status decision makers should adopt an approach that:[154]

> … fully reflects the principle that those who contribute significantly to the commission of an international crime with the stipulated intention, although not direct perpetrators of it, are personally responsible for the crime.

So even if one of the displaced Syrians in the EU could establish that he or she meets the stringent criteria for recognition as a genuine refugee, if they could be linked to a war crime under IHL, this would automatically preclude them from receiving any protection from their host State.[155] In *Tamil X*, the Court found that he was not precluded under Article 1F(a) or (b), because the crime he committed was a political one, accordingly the Court referred the case back to the Refugee Status Appeals Authority for review.[156]

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150 At [43].

151 Watt, above n 112, at 244.

152 *Attorney General v Tamil X*, above n 146, at [47]

153 At [47]

154 At [70].

155 At [47]

156 At [101].

The Court also explained the intention behind Article 1F(b) is two-fold. It ensures that those who commit serious non-political crimes do not avoid prosecution by claiming protection under the Convention.[157] Secondly, it protects a host State's security by not obliging it to offer protection to an individual who has shown a propensity to commit serious non-political crimes.[158]

The exception for non-political crimes dates back to the nineteenth century.[159] Its purpose was to give host States the option to refuse extradition of a political dissident who faced an unfair trial or excessive punishment.[160] While the political crime the person was accused of committing could be serious, the drafters of the Convention believed it unlikely the person would commit a similar crime in their country of refuge.[161]

Tamil X provides a good example of the interaction of Refugee Law, IHL and domestic law.

D Exceptions to non-refoulement

Although a person will not be precluded from refugee status and protection from their host State if they commit crimes there, they can be prevented from benefiting from the principle of *non-refoulement.*[162] Article 33(2) of the Refugee Convention states:[163]

> [t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

157 At [82].

158 At [82].

159 *Attorney General v Tamil X*, above n 146, at [85].

160 At [85].

161 At [82].

162 Weis, above n 82, at 237.

163 United Nations Convention on the Status of Refugees, above n 10, art 33(2).

The exceptions to *non-refoulement* must be separated from the exceptions under Article 1F. Article 1F forms part of the definition of 'refugee', whereas Article 33(2) does not form a part of the definition nor does it provide a ground for exclusion from protection under the Refugee Convention.[164] Article 1F aims to protect the integrity of the host State while Article 33(2) aims to protect the security of the host State by allowing the withdrawal of the protection under the principle of *non-refoulement* in certain circumstances.[165]

Article 33(2) appears quite vague as it does not give guidance as to what the test for 'reasonable grounds' is, what can be regarded a 'danger to the security' and how serious a 'serious crime' should be.

The motivation behind this sub-Article is to ensure people do not abuse the right to asylum.[166] Dr Weis states the wording was purposefully drafted in a vague manner to allow "the State to decide whether the danger entailed to refugees by expulsion outweighs the menace to public security if they were permitted to stay."[167]

As with any large group of people, it would be foolish to assume there are no criminally minded persons amongst displaced Syrians. For example, in Germany, over 30,000 Syrian displaced arrived in November 2015 alone, or equivalent to just over 1,000 people per day.[168]

At the time of writing, European leaders are investigating the option to impose tougher sentences, including deportation for asylum-seekers who commit serious crimes within their host country.[169]As more people arrive, the general consensus appears to be pointing to a model whereby the duties of States towards the displaced persons come coupled with duties of the individuals seeking asylum.

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164 UNHCR, above n 129, at 8.

165 At 8.

166 Weis, above n 82, at 237.

167 At 237.

168 UNHCR "New Asylum Applications lodged in Selected Counties" (10 December 2015) UNHCR data sharing portal <www.data.unhcr.org.nz>.

169 Kate Connolly "Angela Merkel seeks tougher laws to deport migrants after Cologne sex attacks" *The Guardian* (online ed., Berlin, 9 January 2016).

E Convention Relative to the Protection of Civilian Persons in Time of War [170]

Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) protects civilians, or persons taking no active part in hostilities, including members of the armed forces who have laid down their arms.[171]

The Convention lists the minimum standards that parties to the conflict must abide by, including a prohibition on murder, violence, taking hostages and outrages on personal dignity.[172] As civilians in the conflict zone, Syrian IDPs who are taking no active part in hostilities are afforded protection against these prohibited acts under Geneva Convention IV.[173]

In terms of the internationally displaced Syrians, Geneva Convention IV lays down explicit rules in IHL concerning the relationship between refugees and their host State on the one hand and with their State of origin on the other.[174]

Article 4 of Geneva Convention IV defines a 'protected person' as:[175]

> … those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

As it currently stands, Syrians are not 'protected persons' under Geneva Convention IV unless they are in the hands of a party to the conflict.[176] Therefore, civilians on the territory of a neutral host State, as the Syrians in the EU are, are not 'protected persons'.[177]

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170 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10.

171 Art 3(1).

172 Art 3(1).

173 Art 3(1).

174 Jacques, above n 92, at 159.

175 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10, art 4.

176 Jacques, above n 92, at 159.

177 At 159.

Determining exactly who ‘protected persons’ are under Article 4 of Geneva Convention IV can be complex, but the general consensus points to the idea that displaced persons cannot claim the benefits of a ‘protected person’ under the Convention.[178] The Commentary for the Convention suggests that displaced persons were considered during its drafting, “the Rapporteur to Committee III pointed out that it thus complied with the recommendation made to the Diplomatic Conference by the representative of the International Refugee Organization”.[179] However, the Commentary later concedes some speakers pointed out that the term ‘nationals’ did not cover all cases, “in particular cases where men and women had fled from their homeland and no longer considered themselves, or were no longer considered to be nationals of that country.”[180]

Article 44 of the Convention on the other hand deals specifically with refugees and makes this clear by using the term ‘refugee’.[181] The Article outlines that a State party to the conflict shall not treat refugees on its territory as enemy aliens.[182]

Under Article 44, the term ‘refugee’ is not defined, but the Commentary suggests it should be given a wide interpretation - a wider interpretation than under the Refugee Convention.[183] While the Article does not place any positive duties on States beyond not identifying refugees as enemies, the Commentary suggests that State parties should interpret it “in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees.”[184]

To claim protection under the Article, a person must be seeking asylum in a country that is at war with their country of origin.[185] While the United Kingdom and France are assisting the United States with bombing operations in Syria, the countries cannot really be considered parties to the conflict,[186] therefore making it unlikely Syrians can claim the protection of this Article.

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178 Jean de Preux *Commentary on the Geneva Conventions of 12 August 1949* (ICRC Publishing, Geneva, 1958) at 46.

179 At 46

180 At 46.

181 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10, art 44.

182 Art 44.

183 de Preux, above n 178, at 265

184 At 265

185 At 264.

186 Ghadi Sary “Syria conflict: Who are the groups fighting Assad?” *BBC News* (online ed., 11 November 2015).

Even if protection could be claimed under the Article, no guidance is given as to exactly what this protection would entail. The Commentary suggests that the Article was left ambiguous on purpose, so plethora of possible modes of protection could fall under it.[187] It was never intended to be a blanket protection for all refugees and the Article recognises that refugees can pose a threat to the security of a State.[188] Therefore, the Article is not considered to be a protection against all forms of security measures such as internment.[189] There is no evidence to suggest that refugees should be entitled to work or be given citizenship in their host State either.[190]

As mentioned above, Geneva Convention IV distinguishes between the protection that all civilians are entitled to and what 'protected persons' are entitled to, that is civilians who are not nationals of the Power they find themselves in the hands of.[191] The second group of people is entitled: respect for the person (Article 27 Geneva Convention IV), humane treatment (Article 31 Geneva Convention IV) and protection from deportation (Article 41 Geneva Convention IV).

While it is not generally accepted that refugees are automatically recognised as 'protected persons', Jacques argues all displaced persons should be afforded this status under Geneva Convention IV.[192] She suggests that the Convention as it is currently drafted does not adequately protect or take into account people who have fled their own country but do not enjoy the protection of their State of origin.[193]

Jacques bases this argument on the judgment of the International Criminal Tribunal on the Former Yugoslavia (ICTY) case *Prosecutor v Tadić.*[194]

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187 de Preux, above n 178, at 265.

188 At 264.

189 At 264.

190 At 264.

191 Jean de Preux *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Dordrecht, 1987) at 847.

192 Jacques, above n 92, at 160.

193 Jacques, above n 92, at 160.

194 *Prosecutor v Tadić* ICTY Appeals Chamber IT-94-1-A 1 at [164 – 165].

The section of *Tadić* Jacques uses to argue this point looks at the example of the legal bonds of nationality afforded to the refugees of German Jewish ancestry who had fled to France and were on French territory when Germany invaded. [195] The judgment in *Tadić* suggests these people should be 'protected persons' as they no longer benefitted from the normal diplomatic protection of their host State or State of origin.[196] The Tribunal goes on to suggest that the main purpose of Geneva Convention IV is the protection of civilians "who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves".[197]

Although the Tribunal in *Tadić* is referring to victims who were within their own country of nationality but were being persecuted there, Jacques suggests this quote should be used to create a wider 'substance of relations' doctrine. This doctrine would class civilians who are outside their country of nationality – but not on the territory of a party to the conflict, including civilians internationally displaced due to a NIAC – as 'protected persons', therefore granting them the protection under Geneva Convention IV, no matter where they are.

Article 45 of Geneva Convention IV provides protection against *refoulement* for 'protected persons': [198]

> In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

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195 Jacques, above n 92, at 160.

196 *Tadić*, above n 194, at [165].

197 At [168].

198 Convention Relative to the Protection of Civilian Persons in Time of War, above n 10, art 45.

F Geneva Convention Protocol Additional I 1977

After the introduction of the 1949 instrument, the ICRC expressed concern that it did not adequately protect refugees, especially those considered 'stateless'.[199] To address this, Article 73 of Additional Protocol I was introduced to apply to persons whom:[200]

> … before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence …

This eliminated the requirement for diplomatic relations between the asylum-seeker's host country and the country of origin.[201] However, it does not appear the introduction of this Additional Protocol in 1977 means more internationally displaced Syrians are protected by the instrument in 2016.

Despite broadening the group of people protected by Geneva Convention IV, Additional Protocol I did not extend its protection to include people who were not recognised by the existing relevant international instruments – most notably the Refugee Convention and any other "instruments containing a definition of refugees or stateless persons".[202] It also does not extend protection to persons not considered refugees before the hostilities began.[203] As outlined above, the majority of Syrian asylum-seekers will probably not qualify for refugee status under the Refugee Convention and consequently, do not meet the first requirement under Article 73 of Additional Protocol. Secondly, they are fleeing armed conflict, meaning they were not considered 'stateless' before the hostilities began.

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199 Jacques, above, n 92, at 160

200 Protocol Additional to the Geneva Conventions of 12 August 1949, above n 51, art 73.

201 de Preux "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", above n 191, at 845.

202 At 849.

203 Protocol Additional to the Geneva Conventions of 12 August 1949, above n 51, art 73.

The Commentary suggests the first requirement was expressly drafted to ensure States were only bound by instruments they had formally agreed to.[204] The second requirement ensured the protection only applied to those escaping persecution not directly related to the conflict and did not apply to people escaping the general horrors of war.[205] The reason given for this at the time of drafting was to avoid encouraging acts of treason or desertion.[206]

Interestingly, during the consultation, the Syrian representative particularly deplored the fact that the protection afforded by this provision was not extended to include civilians who were fleeing from an armed conflict.[207]

G Human Rights Law

One of the problems faced when applying the Refugee Convention is that the political, legal and social setting worldwide has altered considerably since 1951. The overall population alone has increased by more than 5 billion people.[208] Some areas of international law have developed to reflect the changes, especially international Human Rights Law.

Where the Conventions mentioned above have failed to protect individuals, Human Rights Law has been used as a means to circumvent the stringent requirements under those instruments. [209] This approach has been particularly popular in Europe, where the Courts have opted to apply Human Rights Law instead of the Refugee Convention or Geneva Convention, in an attempt to protect an individual who would otherwise not be protected.[210]

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204 de Preux "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", above n 191, at 849.

205 Jacques, above 92, at 161.

206 At 161.

207 At 162.

208 Martin De Wulf "Population Pyramids of the World" (October 2015) Population Pyramid <www.populationpyramid.net>.

209 Jacques, above n 92, at 178.

210 See for example, *M.S.S v Belgium and Greece* (30696/09) Grand Chamber, ECHR, 21 January 2011.

Whether this will be a continuing trend in the EU that will be applied to displaced Syrians remains to be seen, but it appear there is a possibility that given the shortage of resources and the sheer volume of people, this practice may cease to be as prevalent. However, the following instruments will continue to operate.

1 European Convention on the Protection of Human Rights and Fundamental Freedoms

The European Convention on the Protection of Human Rights and Fundamental Freedoms[211] tries to maintain an effective political democracy through a common understanding and observance of the Human Rights on which this depends.[212] All EU Member States are party to the Convention.[213]

Article 2 states everyone's right to life will be protected by law, apart from if the person is convicted for a crime for which the death penalty is available.[214]

Article 3 prohibits "inhumane or degrading treatment or punishment".[215] There are no exceptions or limitations on this right.

The European Court of Human Rights has said Article 3 implicitly prevents a party to the Refugee Convention from returning a person to a country where there is a real risk that the person could face inhumane treatment, this includes war crimes against civilians.[216]

2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[217] (ICCPR) recognises the equal and inalienable rights of all people are "the foundation of freedom, justice and peace in the world". [218]

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211 Council of Europe "European Convention for the Protection of Human Rights and Fundamental Freedoms" CETS No.005 (opened for signature 4 November 1950, entered into force 3 September 1953), introduction.

212 Introduction.

213 Luc Leboeuf and Evangelia Tsourdi "Towards a Re-definition of Persecution? Assessing the Potential Impact of Y and Z" (2013) 2 E.H.R.L.R 402 at 403.

214 European Convention for the Protection of Human Rights and Fundamental Freedoms, above n 211, art 2.

215 Art 3.

216 Jacques, above n 92, at 178.

217 International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407 (opened for signature 16 December 1966, entered into force 23 March 1976).

Article 7 of the ICCPR prohibits torture or cruel, inhumane or degrading treatment or punishment.[219]

The UNHCR insists this right allows for no limitations or derogation, not even in situations of public emergency.[220] The UNHCR has also suggested that ICCPR prevents State parties from "exposing individuals to the danger of torture or cruel, inhumane or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*".[221]

If the UNHCR's Commentary is accepted as binding, not even a public emergency will allow for derogation from the right.[222] This would suggest that not even large-scale disturbances, for example a terror attack, will act as a sufficient objective to return of Syrian asylum-seekers to Syria.

H Other international law instruments

3 The Dublin II Regulation

The Dublin II Regulation[223] technically applies to all EU Member States. It dictates that applications for refugee status must be processed – with some exceptions – by the country where the individual first entered the EU. [224]

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218 ICCPR, above n 217, Preamble.

219 Art 7.

220 *General Comment: Article 7* Human Rights Committee General Comment 20, A/44/40 1(992) at [4].

221 At [9].

222 At [4].

223 Dublin II Regulation 343/2003 [2003] OJ L 50/1.

224 Art 10.

The Regulation aims to allocate responsibility for processing asylum application equally across Europe,[225] while introducing a uniform scheme across Member States.[226] It dictates that all EU States must accept the validity of other States' asylum decisions (within reason) and prevents people abusing the system through submitting multiple applications.[227]

The UNHCR has outspokenly critiqued the scheme, saying in practice it places most of the responsibility for processing asylum applications on a small portion of States.[228] This is clearly the case with the Syrian situation, where a majority of the applications would technically need to be assessed by Greece (this is the most common entrance to the EU by boat) and Hungary (this is the most common entrance to the EU from Turkey, through Bulgaria and Serbia).[229] Whether this is in line with EU law is outside the ambit of this Paper.

Impoverished Greece is already stretched far beyond its limit with the number of asylum-seekers arriving there daily and as the case *M.S.S v Belgium and Greece,* below, points out, Greece has failed to provide adequate protection in the past.[230] Hungary on the other hand is trying to build a razor wire fence to keep asylum-seekers out (a number of other countries are also considering, or implementing, this option).[231]

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225 Gabriela Coman "European Union Policy on Asylum and its Inherent Human Rights Violations" (1998) 64 Brooklyn L. Rev. 1217 at 1219.

226 Moira Sy "UNHCR and Preventing Indirect *Refoulement* in Europe" (2015) 27 Int J Refugee Law 457 at 466.

227 European Court of Human Rights – Press Unit "*Dublin* cases" (factsheet, Strasbourg, July 2015) at 1.

228 Laura Kok *The Dublin II Regulation – a UNHCR Discussion Paper* (UNHCR Publishing, Brussels, 2006) at 10.

229 Barbara Tasch and Mike Nudelman "This map shows the routes of Europe's refugee nightmare – and how it's getting worse" *The Business Insider* (online ed., 15 September 2015).

230 See *M.S.S v Belgium and Greece* (30696/09) Grand Chamber, ECHR, 21 January 2011 at 4.

231 Rick Lyman "Bulgaria puts up new wall, but this one keeps people out" *The New York Times* (online ed., Lesovo, 5 April 2015).

The UNHCR has long called for the system to be replaced by one allocating resources and processing claims based on the need of the individual seeking asylum.[232] At the time of writing, the EU has conceded that the Regulation is not enforceable, and is therefore considered partially redundant.[233] In response to the apparent flaws of the Regulation, EU leaders are discussing its future, including a possible overhaul. [234]

In response to the Regulation, Betts has suggests asylum-seekers be allowed to fly to Europe to prevent the burden of processing their application falling on Greece and Hungary.[235]

I Non EU Conventions

At the end of last century, Africa and the Americas dealt with large numbers of refugees who chose to leave their homes to alleviate their misery.[236]

This has resulted in the Convention Concerning the Specific Aspect of Refugee Problems in Africa (OAU Convention)[237] and the Cartagena Declaration.[238] These two Treaties widened the definition of 'refugee'[239] beyond what is provided in the Refugee Convention. Outside of Human Rights Law, these Treaties are the first legal instruments that would recognise the displaced Syrians as refugees, should the instruments apply in EU. This Paper will use the two instruments to assess whether EU States should consider entering a region specific Treaty in regards about displaced Syrian people.

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232 Kok, above n 228, at 9.

233 Duncan Robinson "How the EU plans to overhaul 'Dublin regulation' on asylum claims" *the Financial Times* (online ed., Brussels, 20 January 2016).

234 Duncan Robinson "How the EU plans to overhaul 'Dublin regulation' on asylum claims" *the Financial Times* (online ed., Brussels, 20 January 2016).

235 Alexander Betts "Let Refugees Fly to Europe" The New York Times (online ed, Oxford, 24 September 2015).

236 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 1001 UNTS 45 (opened for signature 10 September 1969, entered into force 20 June 1974) at Preamble.

237 At Preamble.

238 Declaración de Cartagena sobre Refugiados, adopted during the Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984) (Cartagena Declaration).

239 OAU Convention, above n 236, art 2 and Cartagena Declaration, above n 238, art 3.

This is analysed from the viewpoint of what is beneficial for the displaced persons, not from a State sovereignty perspective.

1 Convention Concerning the Specific Aspects of Refugee Problems in Africa

The OAU Convention was entered into near the end 1960s by African States to address the growing issue of displaced persons in the continent. In addition to using the same definition for a 'refugee' as the Refugee Convention,[240] it contains a second, complementary definition, covering:[241]

> … every person who, owing to an 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.

Should EU States wish to recognise the displaced persons as genuine refugees, but are blocked by the stringent requirements under the Refugee Convention, EU States could consider entering into a separate EU-only Convention that follows the OAU Convention's wider definition of 'refugee'. It is suggested that, should EU host States be willing to re-home the displaced persons, a new Convention could make recognition as a 'refugee' and assimilation into the host State's society easier.

2 Declaración de Cartagena Sobre los Refugiados (Cartagena Declaration on Refugees)

The Cartagena Declaration is a non-binding agreement adopted in 1984 by Mexico, Panama and Central American States.[242] The instrument aims to coordinate and harmonise the humanitarian action for recognised refugees and work towards effective protection of their human rights.[243]

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240 OAU Convention, above n 236, art 1.

241 Art 2.

242 Cartagena Declaration, above n 238, preamble.

243 Office of the United Nations High Commissioner for Refugees *Cartagena Declaration* (UNHCR - Media Relations and Public Information Service, Switzerland, 1984) at 33.

The Declaration's definition further expands on the one drafted in the OAU Convention to include threats of generalised violence and human rights violation. Although not legally binding, it recommends that Member States:[244]

> … include among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Again, for the Syrian situation, this definition seems to recognise the displaced persons as genuine refugees. It appears to recognise the more contemporary reasons diving persons flee their homeland. In the Syrian case, this appears to be the threat of generalised violence and other violations of human rights.

Similar to the Refugee Convention, the Cartagena Declaration requires the individual seeking refugee status to show a causal link between themselves and a real risk of harm or a real threat to their life, safety or freedom.[245] If a similar definition is applied to displaced Syrians in the EU, it appears this could help separate the genuine asylum-seekers from the migrants. The implications of introducing the scheme are not within the scope of this Paper.

J The Responsibility to Protect

The principle of a collective responsibility to protect is not in itself a legal principle, rather it finds its roots in previous bodies of international law, including IHL.[246] The principle is narrow in scope and is supposed to complement IHL by sharing the joined objective of protecting vulnerable persons during armed conflict.[247]

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244 Cartagena Declaration, above, n 238, art 3.

245 Art 3.

246 Australian Red Cross *International Humanitarian Law and the Responsibility to Protect* (Handbook, Australian Red Cross, Carlton, 2011) at 5.

247 At 5.

Glanville says since the start of the century, the idea that States have a collective responsibility to protect has gained traction in international law.[248] The idea entails that sovereign States not only have a responsibility to protect their own populations from atrocities, but they also have a collective responsibility to protect the population of other States, if the State is manifestly failing to do so.[249]

Those in favour of a collective responsibility to protect believe the days of independent and sovereign States are numbered.[250] This will be replaced by, not only a negative duty from perpetrating harm, but a positive duty to protect others from harm.[251]

While relatively new, the principle has been interpreted to mean a State has the responsibility to intervene to protect another State's population from genocide, war crimes, ethnic cleansing and crimes against humanity, through the use of appropriate diplomatic, humanitarian and other peaceful means, such as trade sanctions.[252] How and when exactly this international legal obligation of bystander States should apply is not yet confirmed.[253]

In terms of the Syrian situation, those in favour of a wider collective responsibility to protect beyond borders, suggest EU States owe this responsibility to the Syrian people.[254] Fargues and Fandrich, amongst others, suggest this responsibility includes offering the people asylum within EU States, if they cannot guarantee protection within Syria.[255]

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248 Luke Glanville "The Responsibility to Protect Beyond Borders" (2012) 1 Hum Rts L Rev 1 at 1.

249 At 5.

250 At 5.

251 At 5.

252 At 13.

253 At 4.

254 Fargues and Fandrich, above n 90, at 15.

255 At 15.

In the judgment *Bosnia and Herzegovina v Serbia and Montenegro*[256], the International Court of Justice (ICJ) found while an international collective responsibility to protect beyond borders does exist, this only applies to protecting against genocide.[257] The interesting point in this case was that the genocide it referred to was committed in Bosnia against Bosnians by Serbians, therefore the judgment could not attach the responsibility to a territorial link.[258] The ICJ judgment concluded that a collective responsibility to protect exists for failing to *prevent and punish* the crime genocide.[259]

This was distinguished from *complicity* in committing genocide, for which the Court imposed a stringent test that it found the organs of the Serbian State had not met.[260] First, the crime of genocide must have actually occurred (*actus rea*),[261] and secondly, the State accused of breaching its responsibility must have had knowledge of the specific intent (*dolus specialis*) of the principle perpetrator (*mens rea*).[262] The State organs of Serbia were not found to have this knowledge.[263]

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256 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Judgment)* [2007] ICJ Rep 43 (*Bosnia and Herzegovina v Serbia and Montenegro*).

257 At [430].

258 Rachael Lorna Johnstone "State Responsibility: a Concerto for Court, Council and Committee" [2009] 1 DJILP 63 at 66.

259 At 72.

260 *Bosnia and Herzegovina v Serbia and Montenegro*, above n 256, at [422].

261 At [421].

262 At [421].

263 At [424].

Despite the clear links between the collective responsibility to prevent (through complicity) genocide and the collective responsibility to prevent and punish genocide, the Court found Serbia had breached only the second responsibility.[264] For this finding, the Court imposed a carefully distinguished test. While the *actus rea* for complicity required positive actions, for failing to prevent, omissions will suffice.[265] In this case, Serbia did nothing to prevent the genocide, which was considered enough to satisfy the test.[266] It need not be shown the "State concerned had the power to prevent the genocide; it is sufficient that it had the means to do so and it manifestly refrained from using them."[267] The mental element could be satisfied if it can be shown that those in charge of the State's organs are aware there is a "serious danger that the acts of genocide would be committed".[268]

As mentioned above, there is insufficient evidence to believe mass genocide is occurring in Syria.[269] However, while the ICJ judgment ruled the responsibility to protect beyond border principle was only applicable to preventing and punishing genocide, other organisations, including the UN and International Law Commission (ILC), advise it could also apply to war crimes, ethnic cleansing and crimes against humanity.[270]

As it currently stands, the extended application of the principle is not legally binding and the UN's Secretary-General has suggested Member States can opt out of it if they wish.[271] However, given the speed at which the principle has developed in the past 15 years, there is a distinct possibility it will further develop to include these crimes.[272] Therefore, it is beneficial to see if the wider responsibility would place further duties on EU States in relation to Syrian asylum-seekers.

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264 Glanville, n 248, at 17.

265 Johnstone, above 258, at 72.

266 *Bosnia and Herzegovina v Serbia and Montenegro*, above n 256, at [438].

267 At [438].

268 At [432].

269 Seth Kaplan "Syria's Ethnic and Political Division" (2013) Fragile States <www.fragilestates.org>.

270 See for example: *2005 World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005) at [138] and *Yearbook of the International Law Commission 2001* GA Res 56/83, A/Res/56/83 (2001) at 31.

271 *Implementing the responsibility to protect* Secretary General Report A/63/677 (2009) at 8.

272 Glanville, above n 248, at 32.

The test for a collective responsibility to prevent and prosecute genocide from *Bosnia and Herzegovina v Serbia and Montenegro* will be applied to the current facts. It will look to establish whether a collective duty to prevent war crimes exists, as this appears to be the most relevant. In terms of what the duty specifically entails, the test aims to assess whether the EU States have a responsibility to prevent war crimes through offering displaced Syrians asylum. The alternative is that the Syrians remain in, or are returned to, Syria.

It has already been concluded that grave war crimes are a reality in the present-day Syria and this is causing persons to flee their homes. The material element (*actus rea)* is satisfied if it can be shown the EU States have the power to prevent war crimes but have manifestly refrained from using this. It seems there are sufficient grounds to argue that this test has been met. Through EU States offering asylum to displaced Syrians, it would appear that those persons are protected from war crimes.

It could also be argued the mental test is met. It seems likely the relevant organs of the EU States would be sufficiently informed of the crimes occurring in Syria. This suggests the persons in charge of these organs would have enough knowledge to conclude that there is a serious risk of persons in Syria experiencing war crimes.

There is considerable scope to argue the EU States have a responsibility to protect Syrian asylum-seekers. However, the ICJ has ruled the principle does not extend to include war crimes and any suggestion from the UN or ILC expanding the principle is not binding. Again, like the other instruments that could apply, this involves a State exercising its discretion and does not place a finite or active duty on the EU States.

V Case Law

Although case law involving persons who arrived as part of the *Syrian Refugee Crisis* will not be available for some time, the first two cases discussed below provide evidence of EU Courts' propensity to sympathise with asylum-seekers. This includes a tendency to circumvent the stringent requirements for recognition of refugee status under the Refugee Convention by opting to apply Human Rights instruments instead. The cases show that this law is applied so the Courts can ensure persons are entitled to protection from their host State in situations where the Refugee Convention would not mandate it.

A M.S.S. v Belgium and Greece[273]

This was the first judgment in relation to the Dublin II Regulation delivered by the Grand Chamber of the European Court of Human Rights, heralding a re-think about of how the Regulation applies and expanded the protection available for refugees entering the EU.[274] The case shows how applying the Dublin II Regulation to the *Syrian Refugee Crisis* could be problematic because, as mentioned above, a majority of displaced persons entered the EU through Greece.

In the case, the Applicant had fled Afghanistan and entered the EU through Greece, where his fingerprints were taken and he was detained for a week; he did not apply for asylum in Greece.[275] Later, he presented himself to the Aliens Office in Belgium and applied for asylum, where he was finger printed and the Office was able to establish he had originally arrived in Greece.[276]

Using Article 10 of the Dublin II Regulation[277], the Belgium Aliens Office ruled Greece was responsible for processing the applicant's refugee-status application and asked him to leave the country. Despite receiving a letter from the UNHCR a month earlier recommending a stop to all refugee transfers to Greece, the Office stipulated that there was no evidence to suggest Greece would not respect its obligations under the Refugee Convention.[278]

The Applicant claimed he faced a real fear of being murdered in Afghanistan because he had worked as an interpreter for international air force troops in Kabul and provided evidence of this employment.[279]

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273 *M.S.S. v Belgium and Greece* (15809/02) Grand Chamber, ECHR 21 January 2011.

274 Patricia Mallia "Case of *M.S.S. v Belgium and Greece*: a catalyst in the re-thinking of the Dublin II Regulations" (2011) RSQ 107 at 108.

275 *M.S.S. v Belgium and Greece*, at 273, at 4.

276 At 4.

277 Dublin II Regulation, above n 223, art 10.

278 *M.S.S. v Belgium and Greece*, above n 273, at 5.

279 At 6.

The Second Section of the European Court of Human Rights originally ruled the transfer to Greece was legal and refused the Applicant's appeal to remain in Belgium. On arrival in Greece, he:[280]

> … was locked up in a small space with twenty other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.

A number of other events occurred in the lead up to his appeal to the Grand Chamber of the European Court of Human Rights, none of which are material here. It is simply worth noting the Applicant described his time in Greece as very disagreeable and in violation of basic human rights.[281]

To establish whether the transfer to Greece was legal or not, the Grand Chamber analysed the Dublin II Regulation, the Refugee Convention and aspects of law specific to the EU, including the Lisbon Treaty and the European Charter of Fundament Rights.[282]

The Court first established that Greek authorities had violated Article 3 of the European Charter of Fundamental Rights that prohibits torture and inhumane and degrading treatment or punishment in their treatment of the Applicant.[283]

The Court used the Charter of Rights to extend the protection available to asylum-seekers beyond what is afforded under the Refugee Convention. The Court analysed an EU Directive on the reception of asylum seekers and Greek domestic legislation that transposed the Directive and the Charter of Rights.[284] The Court was of the opinion that while no law requires Greece to provide people seeking refugee status with financial assistance or a home, there was "an obligation to provide accommodation and decent material conditions to impoverished asylum-seekers in the terms of positive law".[285]

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280 At 7.

281 Mallia, above n 274, at 118.

282 At 113.

283 *M.S.S. v Belgium and* Greece, above n 273, at 19.

284 Mallia, above n 274, at 119.

285 At 119.

Rather than considering the individual's illegal entry into the EU as an aggravating feature, the Court chose treat it as a mitigating feature.[286] The Court held while the entry may have been illegal, this in itself did not justify detaining the individual.[287]

In discussing the applicant's asylum-seeker status, the Court stated that in assessing if Article 3 had been breached, the Applicant's vulnerability needed to be taken into account.[288] In its deliberation, the Court pointed out that the Applicant was "particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously."[289]

It was interesting the Court placed more weight on the rights of the Applicant simply because he was an asylum seeker. In essence, the Court suggests that the illegal immigrant status of the applicant meant he was entitled to better protection from the State authorities, not less.[290] The status definitely did not mean that the Applicant was less protected against arbitrary and degrading treatment.[291]

The judgment in *M.S.S. v Belgium and Greece* provides a good example of how the EU Courts have bypassed the stringent requirements of the Refugee Convention through using other legal instruments to interpret the law that applies.

The Court also analyses other EU instruments of Human Rights Law, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms[292] (Human Rights Convention).

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286 *M.S.S. v Belgium and* Greece, above n 273, at 19.

287 At 19.

288 At 47.

289 At 47.

290 At 60.

291 At 60.

292 Convention for the Protection of Human Rights and Fundamental Freedom 213 UNTS 222 (opened for signature 4 November 1950, entered into force 21 September 1970).

The Court looked at Article 13 (everyone who has their rights violated has the right to effective remedies under domestic law[293]), Article 3 (the prohibition of degrading or inhumane treatment[294]), and Article 2 (the right to life[295]) and concluded that when read together, these Articles prevent both direct and indirect *refoulement* and require the State to offer protection to the individual.[296]

In building the case against Belgium, the Court assessed whether the Dublin II Regulation meant Belgium was required to return the Applicant to Greece, no matter what the circumstances.[297] The Court concluded that no, it was not.[298]

Although the Court talked extensively about the principle of *non-refoulement*, but at no stage did it analyse Article 33 of the Refugee Convention, rather it chooses only to focus on breaches of the Human Rights Convention:[299]

> … in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority.

The case of *M.S.S. v Belgium and Greece* highlights the EU Courts' desire to find ways around the stringent requirements under Article 33 of the Refugee Convention through stretching the applicability of the Human Rights Convention. The case also highlights that the Courts are willing to override other EU legislation, such as the Dublin II Regulation, to ensure asylum-seekers are protected by their host State, even if they are not technically protected by the Refugee Convention.[300]

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293 Convention for the Protection of Human Rights and Fundamental Freedom, above n 292, art 13.

294 Art 3.

295 Art 2.

296 *M.S.S. v Belgium and Greece*, above n 273, at 54.

297 Mallia, above n 274, at 122.

298 At 122.

299 *M.S.S. v Belgium and* Greece, above n 273, at 59.

300 Mallia, above 274, at 123.

Given the sheer number of people who have arrived and the stress this has placed on Member States[301] it will be interesting to see whether the Courts will continue to interpret refugee law in a lenient manner shown in *M.S.S.* However, given the growing anti-Syrian sentiment in the EU, there is also a chance this will not continue.[302]

B Hirsi Jamaa and Others v Italy[303]

In this case, the applicants were part of a group of about 200 individuals from Eritrea and Somalia who were apprehended on their way by boat from Libya to Italy in 2009. About 35 nautical miles from the Italian coast the applicants were intercepted by Italian Police and Coast Guard boats, they were then transferred onto an Italian military boat and taken back to Tripoli.[304]

At a press conference held after the return of the individuals to Libya:[305]

> … the Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration.

When establishing whether the transfer was legal, the Court in this case also looked to Human Rights Law as a way to circumvent the Refugee Convention.[306] Instead of looking at Article 33 of the Refugee Convention, the Court analysed the principle of *non-refoulement* under Article 3 European Convention on Human Rights (the prohibition of torture or cruel and degrading treatment), placing significant weight on the irreversible damage that could result should a person be returned to a country where the risk of ill-treatment or torture could materialise.[307]

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301 António Guterres, above n 2, at 3.

302 Nesrine Malik "The migrant bogeyman is back" *The Guardian* (online ed., London, 14 January 2016).

303 *Hirsi Jamaa and Others v Italy* (27765/09) Grand Chamber, ECHR 23 February 2012.

304 At [10-11].

305 At [13].

306 At [200].

307 At [200].

Decisions of the European Court of Human Rights are binding on all European Union member States and its jurisdiction is compulsory for all members.[308]

C Germany v Y and Z[309]

This case examined what exactly 'persecution' in refugee law entails and whether a person who seeks asylum in Europe should have taken any step available to him or her which could have mitigated or prevented the persecution.[310]

This case was an appeal from the *Bundesverwaltungsgericht* (the German Federal Administrative Court) that had rejected the asylum applications of two Pakistani nationals, Y and Z, who were members of the Ahmadiyya religion.[311] Under Article 298C of the Pakistani Criminal Code, practicing the Ahmadiyya faith is a criminal offence. Essentially the German Courts wanted to know *inter alia* whether Y and Z's inability to practice their religion in public amounted to 'persecution'.[312]

The Court of Justice of the European Union analysed the case in light of the Refugee Convention and a Directive of the Council of the European Union on asylum,[313] the purpose of which was to create a common European asylum system, based on an inclusive application of the Refugee Convention its Protocol.[314]

The Court held that repression of a right of freedom of religion could amount to 'persecution' under Articles 9 and 10 of the Directive (or Article 1 of the Refugee Convention):[315]

> …where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a *genuine* risk of, inter alia, being prosecuted or subject to inhumane or degrading treatment or punishment… (emphasis added)

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308 Council of Europe *Access by the European Union to the European Convention on Human Rights* (online ed., 1 June 2010, Strasburg) at 1.

309 Cases C-71/11 and C-99/11 *Germany v Y and Z* [2012] ECR I.

310 Leboeuf and Tsourdi, above n 212, at 402.

311 *Germany v Y and Z*, above n 309, at [2].

312 At [3] – [5].

313 *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* 2004/83/EC [2004] OJ L304/12.

314 *Directive*, above 313, at introduction.

315 *Germany v Y and Z*, above n 309, at [62].

The Court used the 'consequences' test and emphasised the need to assess the severity of the concrete consequences that would arise, should the asylum-seeker not be granted the protection of his or her host State and potentially be subjected to *refoulement.*[316]

The Court further stated there must be causal link between the act of persecution and the reason for the persecution, which must correlate with one of the grounds listed in Article 10 of the Directive[317] (these are exactly the same as the grounds for persecution listed in the Refugee Convention, race, religion, nationality, political opinion and membership of a particular social group).

On this reasoning of *Y and Z*, it would seem unlikely the majority of Syrians in the EU would be recognised as refugees. Even if one ignores the five grounds for persecution under Article 1 of the Refugee Convention, it still seems unlikely that these people are able to point to any concrete consequences that will eventuate should they be *refoulered* to Syria. Even though grave war crimes are occurring daily in Syria, and as a collective group, displaced Syrians run a real risk of experiencing these if returned to Syria, it would not seem that there is a sufficiently concrete consequence or likelihood that this will occur specifically to each individual to satisfy the test in *Y and Z*.

Furthermore – and as mentioned above, this seems to be where international law precludes host EU States from having compulsory duties in relation to displaced Syrians – there is no causal link between war crimes occurring in Syria and one of the grounds listed in Article 1 of the Refugee Convention.

VI Alternatives

The *Syrian Refugee Crisis* gives rise to questions of what duties EU States have in regards to Syrian asylum-seekers, including whether States are required to grant them citizenship and provide employment opportunities and other necessities such as housing.[318] While international law does place a duty on EU and other host States, this duty is open to a lot of discretion and is essentially open to State interpretation in terms of how and when it will apply.

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316 *Germany v Y and Z*, above n 309, at [65].

317 At [55].

318 Jeanne Park "Europe's Migration Crisis" (23 September 2015) Council for Relations <www.cfr.org>.

From the displaced persons' perspective, it would appear a change to the Refugee Convention governing who can be granted asylum and who cannot, would be a preferable way forward in regards to the *Crisis*. This change could widen the definition of 'refugee', meaning persons escaping war crimes are recognised as genuine refugees, similar to the OAU Convention or the Cartagena Declaration.

If EU States do not regard this as a preferable option, there are a number of other possibilities States could consider.

A Refoulement

Large-scale return *(refoulement)* of Syrian asylum-seekers from the EU back to Syria at this stage does not appear to be a viable option for a number of reasons. Firstly, because in the past few years the EU Courts have given a strong indication to suggest people who face a real risk of murder, torture or inhumane or degrading treatment in their country of origin should not be returned. This has been held to apply to persons who would otherwise not be protected against *refoulement* by the Refugee Convention, because they do not fall under one of the five categories of that instrument.[319] In the current situation, given the widespread bombing of densely populated civilian areas, it seems unlikely that any State can guarantee protection.

It has also been suggested that the principle of *non-refoulement* could possibly be of *jus cogens* nature.[320]

B Voluntary repatriation

The option of voluntary repatriation after the hostilities have ended could be considered. If applied as directed by UNHCR, once the hostilities have concluded, refugees would be given a choice whether they wished to voluntarily return home, or continue to live in exile.[321]

Given the sheer volumes of refugees who have come into the EU, a more concrete version of voluntary repatriation could be considered, for example, through offering temporary asylum.

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319 See *Hirsi Jamaa and Others v Italy*, above n 302.

320 Sir Elihu Lauterpacht and Daniel Bethlehem "The Scope and Content of the Principle of *non-refoulement:* Opinion" Erika Feller Volker Türk and Frances Nicholson (eds) Refugee Protection in International Law (Cambridge University Press, Cambridge, 2003) 87 at 141.

321 Loescher and others, above n 19, at 16.

C Temporary asylum

When a displaced person is not recognised as a genuine refugee under the Refugee Convention, a State is able to exercise its sovereignty in determining whether to offer the person asylum or not.[322] Boston University School of Law suggests that EU States could also consider offering displaced Syrians temporary asylum, rather than permanent refugee status.[323]

The School makes a recommendation whereby the temporary protection scheme would offer both internally displaced Syrians and Syrians displaced in other areas of the Middle East temporary protection in an EU State.[324] The granting of temporary asylum would be a discretionary decision made by EU representatives within the Middle East. This decision would be based on family ties and any other factors that the State wishes to take into account.[325] This temporary asylum:[326]

> … will allow Syrians to receive the aid they need while retaining the ability to return home when the conflict is over— creating additional incentives for the EU to be more actively engaged in bringing the Syrian conflict to an end.

Offering temporary asylum would also fulfil the positive obligation placed on EU States by judgment *M.S.S. v Belgium and Greece*[327] to protect people from issues such a poverty and homelessness, even if the person is not a recognised refugee.[328]

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322 Gil-Baso, above n 7, at 6.

323 Sarah Bidinger and others *Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing* (Boston University Press, Boston, 2015) at 7.

324 At 8.

325 At 8.

326 At 8.

327 *M.S.S. v Belgium and Greece*, above n 273.

328 At 246.

D Internal 'safe zones'

'Safe zones' have been used in a number of previous conflicts, to varying levels of success, for example in Iraq in the 1990s[329], Haiti[330], Bosnia[331] and Rwanda[332].

The idea is to create temporary short-term protection pockets within the country of origin – or close to its border in a neighbouring country – where displaced people can find refuge until the cessation of hostilities or until fundamental changes can be implemented to allow the people to return home safely. These protection areas are normally created by, and looked after by governments of a third State, usually the United States; humanitarian institutions, such as the UNHCR; and non-government organisations.[333]

To run effectively, 'safe zones' are predicated to operate in an environment that has a functioning rule of law.[334] McNamara mentions when this rule of law is not present, it becomes very difficult for organisations such as the UNHCR to do their job.[335] States at war do not normally have a high functioning rule of law and as a result, will happily keep refugees on sensitive borders and arms routes rather than allowing them to leave the conflict area.[336]

McNamara further suggests that while 'safe zones' are reportedly created for humanitarian purposes, in reality they have been used as a mechanism to prevent the flow of asylum-seekers into third States. As a consequence, the UN and other parties to the humanitarian and peacekeeping process have been required to focus not only on protecting the camps' residents, but also on preventing their escape. [337]

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329 Bill Frelicks, above n 105, at 39.

330 At 39.

331 At 40.

332 At 42.

333 At 37.

334 McNamara, above n 118, at 357.

335 At 357.

336 At 357.

337 At 357.

The Refugee Convention does not prevent the creation of internal protection mechanisms, nor does it prevent States from granting refugee status to individuals who could have availed themselves to protection within, or near the border of their State of origin.[338] Should internal mechanisms be relied upon as a legal means to *refouler* Syrian persons from the EU to a 'safe zone' within, or near the border of, Syria, the EU States must be satisfied that they will "have access to meaningful internal protection against the risk of persecution".[339]

While on paper this sounds like an admirable and practical solution for the *European Refugee Crisis*, experience shows in reality it is not always as successful as it sounds. For example, around 7,000 Muslim men and boys were murdered in the 'safe zone' created for Bosnians in Srebrenica on 11 July 1995.[340] This event was the subject of the ICJ case *Bosnia and Herzegovina v Serbia and Montenegro* and was later classed as an act of 'genocide'.[341]

The French mandated 'safe zone' that was created in southwest Rwanda to protect both Hutus and Tutsis, ended in a Rwandan Government led "massacre on April 17 [1995, where] automatic rifles, machine-guns, grenades and rocket-propelled grenades were deployed against the camp's residents".[342]

The UN Security Council has found it difficult to come to an agreement about the conflict in Syria[343] and it is not clear if the Council will mandate the creation of a 'safe zone'. However, taking in mind the lessons learned from the Bosnian and Rwandan cases, it is suggested that the creation of a 'safe zone', funded by the UN, in one of Syria's border States could be considered to stem the flow of displaced persons into the EU.

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338 James C Hathaway and others (eds) *The Michigan Guidelines on the International Protection of Refugees 1998 – 2007* (University of Michigan Press, Ann Arbor, 2009) at 16.

339 At 24.

340 Declared a safe zone in: *Resolution: Bosnia and Herzegovina* SC Res 824, S/25700 (1993).

341 *Prosecutor v Krstić* (Judgment) ICTY Appeals Chamber IT-98-33, 19 April 2004.

342 Karin Landgren "Danger: safe areas" (1996) 104 Refugees Magazine 7 at 7.

343 ICRC, above n 38.

In fact, some moves have already been made to create a 'zone' of sorts in Turkey.[344] Near the end of 2015, EU States provided €3 billion of funding to Turkey in return for the State providing fast-track access to visas for displaced persons in Turkey in an aim to prevent them continuing on into the EU.[345] At the time of writing, EU States are planning to send displaced persons who are not given asylum in the EU to Turkey and are considering further funding.[346]

Given that there are currently close to 4 million refugees in Syria's neighbouring States, Lebanon, Jordan, Turkey and Iraq,[347] more than 2 million of which are already in Turkey, this could be a viable solution.[348] To succeed under the humanitarian spirit of IHL and the Conventions mentioned above, (particularly if EU States are sending the persons from the EU back to Turkey) EU States would need to ensure that displaced persons in Turkey are provided with the same or similar protections as they would be under the Refugee Convention. As it currently stands, the camps or 'zones' in Turkey are described as open-air prisons[349] (used for the purposes of retaining people rather than a humanitarian purpose, as described by McNamara, above) [350] and do not appear to be of an adequate standard. If extra funding could be used to build schools, provide work opportunities and the other basic rights provided under the Refugee Convention, this could be a way that EU States can fulfil their humanitarian obligations under IHL and other international instruments while retaining some of their sovereignty. The implications for Turkey are outside the scope of this Paper.

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344 Matthew Holehouse "EU agrees €3 billion action plan with Turkey to ease migrant crisis" *The Telegraph* (online ed., 16 October 2015).

345 Holehouse, above.

346 Raziye Akkoc "Turkey wants more money from EU after €3bn migration deal, Turkish PM says" *The Telegraph* (online ed., 22 January 2016).

347 UNHCR "Syrian Regional Refugee Response" (10 December 2015) UNHCR data sharing portal <www.data.unhcr.org.nz>.

348 Akkoc, above n 346.

349 Akkoc, above.

350 Frelicks, above n 105, at 37.

VII Conclusion

The Refugee Convention aims to protect genuine refugees by distinguishing them from other migrants. Under Article 1 of the Refugee Convention, refugees must meet stringent requirements to be granted protection under the instrument. It is concluded that the majority of displaced Syrians in the EU do not meet this stringent test and therefore, protections under the Convention do not automatically apply.

While displaced persons are protected under additional instruments of international law, notably under IHL in Geneva Convention IV and Additional Protocol I, recognition under these is reliant on the person being on the territory of a party to the conflict and in the case of the Protocol, application relies on the individual being recognised under the Refugee Convention.

Because the persons discussed are in the EU, there is possible scope to argue protections afforded under Human Rights Law could apply to them. Given the EU Courts propensity to circumvent the stringent requirements under the Refugee Convention, this could be an option applicable to displaced Syrian persons that allows them to legally stay in the EU.

Another option that EU host States can explore, is to expanding the definition for a recognised refugee under an EU-only Convention, similar to Africa and the Americas. This could extend the protection of the Refugee Convention to include persons who face a real threat of experiencing war crimes or generalised violence in their country of origin. This would allow displaced Syrians to benefit from the protection of their host State, while allowing EU States to satisfy their obligations under a number of Human Rights instruments (most notably the EU Charter of Rights which binds all Member States). It also recognises the principle to protect beyond borders and interprets the applicable IHL instruments in its widest humanitarian sprit, as recommended by the ICRC.

It is suggested that to fulfil the obligations listed above, EU States consider offering temporary asylum to those already in their territory. It is further recommended that persons be allocated between EU States based on the State's available resources, rather than the Dublin II Regulation. For persons seeking asylum who are currently outside the EU, it is suggested that EU States work with the UN and other States with a stake in this conflict, for example the United States, to create a 'safe zone' that really is *safe*. This zone would entitle the persons residing in it to the same protection from the supervising States as would be available to them from a host State under the Refugee Convention.

It is suggested that this recommendation would provide some humanitarian relief for a situation that is extremely complex.

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