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## **The Refugee Convention as a rights blueprint for persons in need of international protection**

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## Introduction

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

Complementary protection is largely about this intersection. A feature of most western protection regimes, it describes protection granted by States to individuals with international protection needs falling outside the 1951 Convention framework.<sup>5</sup> It may be based on human rights treaties, such as the prohibition on *refoulement* expressly in article 3 of the CAT<sup>6</sup> and impliedly in article 7 ICCPR,<sup>7</sup> or on more general humanitarian principles, such as providing assistance to persons fleeing from

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

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

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

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

<sup>5</sup> Australia is exceptional in having no formal system of complementary protection. The only means for an asylum seeker to have a non-Convention protection claim considered in Australia is if, following a negative primary decision and an unsuccessful appeal to the Refugee Review Tribunal, he or she seeks to invoke the non-compellable, non-delegable and non-reviewable discretion of the Minister for Immigration and Multicultural and Indigenous Affairs under section 417 of the Migration Act 1958 (Cth). For a critique of this section and suggested alternatives to it, see Senate Select Committee on Ministerial Discretion in Migration Matters: Senate Select Committee on Ministerial Discretion in Migration Matters *Report* (Commonwealth of Australia March 2004)

<[www.aph.gov.au/senate/committee/minmig\\_ctte/report/index.htm](http://www.aph.gov.au/senate/committee/minmig_ctte/report/index.htm)> (8 January 2005) esp Ch 8. For a discussion of how complementary protection might operate in the Australian context, see eg Refugee Council of Australia, National Council of Churches in Australia and Amnesty International Australia 'Complementary Protection: The Way Ahead' (April 2004) <[www.refugeecouncil.org.au/docs/current\\_issues/Complementary\\_Protection\\_model\\_files/Complementary%20Protection%20Model-.doc](http://www.refugeecouncil.org.au/docs/current_issues/Complementary_Protection_model_files/Complementary%20Protection%20Model-.doc)> (2 November 2005); UNHCR Australia 'Discussion Paper: Complementary Protection' (No 2, 2005) <[www.unhcr.org.au/pdfs/Discussion22005.pdf](http://www.unhcr.org.au/pdfs/Discussion22005.pdf)> (2 November 2005). New Zealand does not at present have a complementary protection regime, but it is highly likely that one will be introduced into the Immigration Act as part of current reforms: Dept of Labour 'Immigration Act Review: Discussion Paper' (April 2006) section 14.

<sup>6</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

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

generalized violence.<sup>8</sup> (It is on this latter basis that temporary protection in mass influx situations is premised.) Importantly, complementary protection derives from legal obligations preventing return, rather than from compassionate reasons or practical obstacles to removal. Even though these latter instances of ‘protection’ may be humanitarian in nature, they are not based on international protection obligations per se and therefore do not fall within the legal domain of ‘complementary protection’.

At first glance, it appears that international law has little to say about the relatively amorphous concept of complementary protection. Although there is longstanding State practice of protecting extra-Convention refugees, encompassed by such terms as ‘de facto refugees’, ‘B status refugees’, ‘OAU and Cartagena-type refugees’ and ‘humanitarian refugees’, the term ‘complementary protection’ appears in no international treaty and has no singular connotation in State practice.<sup>9</sup> An EXCOM Conclusion adopted in October 2005 specifically refers to ‘complementary protection’, but does not define it.<sup>10</sup>

The first binding, supranational instrument on complementary protection was concluded in April 2004 by the European Union, but it adopts the term ‘subsidiary protection’ instead. Beneficiaries of subsidiary protection are defined as those facing a real risk of the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or a serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict,<sup>11</sup> and who do not meet the Convention definition of a refugee. Significantly, the Qualification Directive also sets out the rights to which beneficiaries are entitled. This is a considerable step forward for some EU States, which previously simply ‘tolerated’ the presence of non-removable persons but did not grant them a formal legal status. There are well-documented cases of the financial, social and

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

<sup>9</sup> See survey of State practice in R Mandal ‘Protection Mechanisms outside of the 1951 Convention (“Complementary Protection”)’ UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (June 2005). For discussion of OAU Convention refugees, see text to n72. Refugees under the Cartagena Declaration include ‘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’: Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85) Conclusion 3.

<sup>10</sup> ExCom Conclusion No 103 (LVI) ‘The Provision of International Protection including through Complementary Forms of Protection’ (2005). For background discussion paper: Mandal (n9); ExCom Standing Committee 33<sup>rd</sup> Meeting ‘Providing International Protection including through Complementary Forms of Protection’ UN Doc EC/55/SC/CRP.16 (2 June 2005); on original recommendation for an ExCom Conclusion: UNHCR *Agenda for Protection* (2<sup>nd</sup> edn March 2000) 34; for text of preliminary draft: Global Consultations on International Protection ‘Complementary Forms of Protection’ UN Doc EC/GC/01/18 (4 September 2001) [11].

<sup>11</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 art 15.

psychological hardship suffered by persons left in legal limbo.<sup>12</sup> However, rather than recognizing the *need* for protection as triggering protection entitlements equivalent to those of Convention refugees, part of the political compromise reached in drafting the Qualification Directive was the dilution of standards for beneficiaries of *subsidiary* protection. While certain delegations sought to justify a secondary status on the ground that subsidiary protection needs are of a more temporary nature—an assertion not supported by empirical evidence—ultimately no legal justification was offered to support the establishment of a protection hierarchy.<sup>13</sup> In addition to the unjustified dilution of subsidiary protection beneficiaries’ rights, differentiation in treatment may lead to States favouring subsidiary protection by ‘defining out’ categories of persons who legitimately fall within article 1A(2), so as to avoid the more stringent obligations required for Refugee Convention refugees. Procedurally, it may also create an incentive for appeal by beneficiaries of subsidiary protection, attempting to ‘upgrade’ their status.<sup>14</sup>

This paper seeks to establish the fundamental conceptual connections between international refugee law and human rights law in order to argue that under *international* law, beneficiaries of protection, whether as Convention refugees or otherwise, are entitled to an identical status. While there are clear policy reasons why this should be the case, there are also cogent legal arguments that support the extension of Convention status to extra-Convention refugees. These are based on a conceptualization of international law as a body of interrelated norms that must be interpreted in relation to, and be informed by, each other.

The discussion begins by reflecting on the inadequacy of human rights law in providing a legal *status* for beneficiaries of complementary protection. I argue that while human rights attach to all persons in principle—irrespective of their nationality or formal legal status<sup>15</sup>—in practice such characteristics can significantly affect the extent of rights an individual is actually accorded. In reality, States *do* differentiate between the rights of citizens and the rights of aliens (and even between different categories of aliens), premising this on their sovereign right to determine who remains in their territories and under what conditions. While the rights set out in the Refugee Convention are not inherently superior to those in the universal human rights treaties,

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<sup>12</sup> See eg *Ahmed v Austria* (1997) 24 EHRR 278, and discussion in O Andrysek ‘Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures’ (1997) 9 *International Journal of Refugee Law* 392.

<sup>13</sup> GS Goodwin-Gill and A Hurwitz ‘Memorandum’ in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [19], in House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) Oral Evidence 2–3. This is contrasted to Canadian practice relating to ‘protected persons’: Immigration and Nationality Act 2001 ss 95–97.

<sup>14</sup> House of Lords Select Committee (n13) [102], [111]. The Minister (Angela Eagle MP Parliamentary Under Secretary of State at the Home Office) acknowledged that this already happens. For a discussion of appeal processes, see J McAdam ‘Complementary Protection and Beyond: How States Deal with Human Rights Protection’ UNHCR *New Issues in Refugee Research* Working Paper No 118 (Geneva August 2005).

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

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

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

It is for this reason that the paper then seeks to demonstrate, through historical analysis, why the status set out in the Refugee Convention should attach to all those whom the principle of *non-refoulement* protects. This does not have to be viewed as an attempt to broaden the scope of article 1A(2), but rather as recognition that the widening of *non-refoulement* under customary international law and treaty requires a concomitant consideration of the status which beneficiaries acquire. Though a specialist treaty, the Refugee Convention nevertheless forms part of the corpus of human rights law, both informing and informed by it. Accordingly, with respect to the status it confers on protected persons,<sup>20</sup> the Convention acts as a type of *lex specialis*. It does not seek to displace the *lex generalis* of international human rights law, but rather complements and strengthens its application.

### **The inadequacy of *non-refoulement* plus human rights law alone**

Beyond providing a widened threshold for claiming protection, international human rights law alone is an inadequate alternative source of substantive protection. Many

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<sup>16</sup> Many of the provisions of the Convention were based on the UDHR and the draft ICCPR and ICESCR: see nn 47 and 48 below.

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

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

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

<sup>20</sup> Complications arise with respect to persons whom States cannot remove under human rights law, but who are expressly excluded from refugee status by article 1F of the Refugee Convention. Their status under international law is addressed in J McAdam *Seeking Refuge in Human Rights: Complementary Protection in International Refugee Law* (OUP Oxford forthcoming).

States undertake human rights obligations at the formal level, but do not ensure that the rights subscribed to can actually be claimed.<sup>21</sup> Unless special measures are taken to ensure that such provisions are translated into national law, then certain benefits may be inaccessible.<sup>22</sup> Even where individuals may not be barred from enjoyment of a right, 'they are in practice often deprived of it inasmuch as it is dependent on the fulfilment of certain formalities, such as production of documents, intervention of consular or other authorities, with which ... they are not in a position to comply.'<sup>23</sup> While human rights law requires States to respect the rights it sets out in relation to *all* persons within its jurisdiction or territory, the quality of each right may vary depending on the individual's legal position vis-à-vis the State. Thus, while the *standard* of compliance with human rights law is international, the State retains discretion in its choice of *implementation*<sup>24</sup> - whether and how to incorporate treaty provisions into domestic law.

There is therefore a gap between the theory of human rights and the ability to enjoy those rights.<sup>25</sup> As Hathaway notes, '[t]he divergence between the theory and the reality of international human rights law is strikingly apparent.'<sup>26</sup> At the international level, the content of rights is very broad and ill-defined, and it may be possible for States to 'guarantee' such rights without doing much towards their positive implementation. A common problem is that State constitutions often guarantee rights only to 'citizens',<sup>27</sup> making enforcement for non-citizens' rights difficult. In 1967, Weis described international measures for safeguarding human rights as 'modest',<sup>28</sup> and nearly 25 years later Hathaway still characterized them as 'generally sluggish and only occasionally effective.'<sup>29</sup> As Goodwin-Gill observes, the test of whether a treaty is effectively implemented domestically depends not on form alone, but on an overall assessment of practice.<sup>30</sup>

It is this that makes reliance on human rights law, either alone or in combination with *non-refoulement* under customary international law,<sup>31</sup> a precarious option. Even though the Refugee Convention repeats many of the same rights as the universal treaties, its retention as a specialist refugee instrument is not redundant. As Hathaway argues, refugee law has its own legitimacy, and coordination between refugee and human rights law should not lead to a downgrading of protection for persons in need

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<sup>21</sup> GS Goodwin-Gill and J Kumin 'Refugees in Limbo and Canada's International Obligations' (Caledon Institute of Social Policy September 2000) 4.

<sup>22</sup> *ibid* 5.

<sup>23</sup> Ad Hoc Committee on Statelessness and Related Problems 'A Study of Statelessness' UN Doc E/1112, E/1112.Add.1 (NY August 1949); Andrysek (n12) 411.

<sup>24</sup> GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 237.

<sup>25</sup> UNHCR 'Note on International Protection' A/AC.96/898 (3 July 1998) [45].

<sup>26</sup> JC Hathaway 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113, 113.

<sup>27</sup> ECOSOC Commission on Human Rights 'Prevention of Discrimination: The Rights of Non-Citizens' (26 May 2003) E/CN.4/Sub.2/2003/23 [24]; 'General Comment 15' (n15) [3].

<sup>28</sup> P Weis 'Human Rights and Refugees' Lecture, Yale University Law School (7 November 1967) 13 (Refugee Studies Centre (Oxford) Archive WEIS A21.6 WEI).

<sup>29</sup> Hathaway (n26) 113.

<sup>30</sup> Goodwin-Gill and Kumin (n21) 4.

<sup>31</sup> For its scope, see E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003).

of international protection.<sup>32</sup> Furthermore, if the substantive rights of beneficiaries of complementary protection were dependent on human rights law alone, the quality of protection would be contingent on the combination of treaties ratified (and implemented) by the State and status would consequently be very inconsistent.<sup>33</sup> For example, while the ICESCR and many of the ILO Conventions cover similar rights to articles 17 to 24 of the Convention, certain parties to the Convention have not ratified those instruments and hence they would not apply.<sup>34</sup>

### **The Refugee Convention as a human rights treaty<sup>35</sup>**

Given this state of affairs, it is important to inquire into whether there is a means of extending the protection which States recognize for Convention refugees to others in need of international protection. Accordingly, this part of the paper considers the historical context in which the Refugee Convention arose, and takes a dynamic approach towards interpreting how that may have a bearing on the expansion of the principle of *non-refoulement* to those falling outside the terms of article 1A(2). It does this in light of the Convention's humanitarian object and purpose<sup>36</sup> to ensure to 'refugees the widest possible exercise of ... fundamental rights and freedoms',<sup>37</sup> and by deriving or inferring<sup>38</sup> subsequent agreement between the contracting States and State practice bearing on the Convention's interpretation.<sup>39</sup> Relevant examples include the regional OAU Convention and Cartagena Declaration, the 2005 ExCom Conclusion on complementary protection, and the various domestic regimes States have consistently implemented in response to flows of extra-Convention refugees.

The drafting of the 1951 Convention represented a 'profound re-orientation' in refugee organizations, agreements and agendas, but it was '*evolution*, not *revolution*'.<sup>40</sup> In 1947, the Commission on Human Rights adopted a resolution that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of

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<sup>32</sup> Hathaway (n26) 117. States that are not party to the Convention do not have superior protection regimes: see eg BS Chimni 'The Legal Condition of Refugees in India' (1994) 7 Journal of Refugee Studies 378, 398; A Helton 'What is Refugee Protection?' (1990) Spec Issue International Journal of Refugee Law 119, 125.

<sup>33</sup> In monist States, international treaties have direct effect, whereas in dualist States, they must be implemented domestically following ratification to be justiciable.

<sup>34</sup> W Kälin 'The Legal Condition of Refugees in Switzerland' (1994) 7 Journal of Refugee Studies 82, 95.

<sup>35</sup> IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999); UNHCR 'Note on International Protection' UN Doc A/AC.96/975 (2 July 2003) [49]–[52] emphasizes relevance of human rights law to refugee issues.

<sup>36</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(1). Even though the Vienna Convention was adopted after the conclusion of the Refugee Convention, it codifies principles of customary international law and is therefore applicable. ExCom has noted that refugee law is a dynamic body of law which is 'informed by the object and purpose' of the Convention and Protocol 'and by developments in related areas of international law, such as human rights and international humanitarian law': ExCom Conclusion on Complementary Protection (n10) para (c).

<sup>37</sup> Refugee Convention Preamble.

<sup>38</sup> Goodwin-Gill (n24) 367, discussing the Vienna Convention rules in relation to interpretation of the Refugee Convention.

<sup>39</sup> Vienna Convention art 31(3).

<sup>40</sup> GS Goodwin-Gill 'Editorial: The International Protection of Refugees: What Future?' (2000) 12 International Journal of Refugee Law 1, 2.



nationality, as regards their legal status and social protection and their documentation.’<sup>41</sup> At the request of ECOSOC, the Ad Hoc Committee on Statelessness and Related Problems was asked to draft a binding legal instrument to implement articles 14 and 15 of the UDHR,<sup>42</sup> firmly cementing the Convention’s foundations in human rights law. Its purpose was to ‘consolidate existing agreements and conventions and, further, to determine the status of those refugees who had so far enjoyed no protection under any of the existing instruments.’<sup>43</sup> Although the Convention took as its departure point human rights principles contained in the UDHR, it revised, consolidated and substantially extended earlier agreements to create a new protection regime.<sup>44</sup> Many substantive provisions were based on principles of the UDHR<sup>45</sup> and the embryonic ICCPR and ICESCR, known then as the draft Covenant on Human Rights.<sup>46</sup>

The Convention was to establish practical but universal standards<sup>47</sup> for the rights of refugees that went beyond the lowest common denominator, ‘since a convention would hardly be useful if it contained only the minimum acceptable to everyone.’<sup>48</sup> Early UNGA resolutions support its underlying human rights basis, with an emphasis on assisting the most needy,<sup>49</sup> affirming basic principles relating to solutions,<sup>50</sup> and recommending increased protection activities.<sup>51</sup>

The result is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR and ICESCR in such provisions as the acquisition of property, the right to work, housing, public education, public relief, labour legislation, social security, and

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<sup>41</sup> Commission on Human Rights Report to ECOSOC on the 2<sup>nd</sup> Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 [46], in P Weis ‘Human Rights and Refugees’ (1971) 1 Israel Yearbook on Human Rights 35, 37.

<sup>42</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III); Ad Hoc Committee on Statelessness and Related Problems, First Session ‘Summary Record of the 1<sup>st</sup> Meeting’ (NY 16 January 1950) UN Doc E/AC.32/SR.1 (23 January 1950) [4] (Secretariat).

<sup>43</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Summary Record of the 2<sup>nd</sup> Meeting’ (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 9 (High Commissioner).

<sup>44</sup> Refugee Convention Preamble.

<sup>45</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ Annex II to Ad Hoc Committee on Statelessness and Related Problems ‘Draft Report of the Ad Hoc Committee on Statelessness and Related Problems’ (16 January–February 1950) UN Doc E/AC.32/L.38 (15 February 1950) 36 (art 3 non-discrimination), 46 (art 26 education); Ad Hoc Committee on Statelessness and Related Problems ‘Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems’ (Document E/1618) UN Doc E/AC.32/L.40 (10 August 1950) 31 (France on UDHR art 29(1)).

<sup>46</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ (n45) 58; see UN Doc E/1572, 12 (art 32 (then art 27) expulsion).

<sup>47</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Summary Record of the 2<sup>nd</sup> Meeting’ (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 18 (High Commissioner); Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Summary Record of the 3<sup>rd</sup> Meeting’ (3 July 1951) UN Doc A/CONF.2/SR.3 (19 November 1951) 10 (France).

<sup>48</sup> Ad Hoc Committee on Statelessness and Related Problems, First Session ‘Summary Record of the 25<sup>th</sup> Meeting’ (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68].

<sup>49</sup> UNGA Res 639 (VI) of 20 December 1952; UNGA Res 728 (VIII) of 23 October 1953.

<sup>50</sup> UNGA Res 1166 (XII) of 26 November 1957; ECOSOC Res 686 (XXVI) B of 21 July 1958.

<sup>51</sup> UNGA Res 1284 (XIII) of 5 December 1958 [1], in GS Goodwin-Gill ‘The Language of Protection’ (1989) 1 International Journal of Refugee Law 6, 14.

freedom of movement.<sup>52</sup> Moreover, it reinforces States' protection of refugees as an international legal duty, arising from article 14 of the UDHR and embodied in binding form by the principle of *non-refoulement* in article 33 of the Convention. As one commentator remarks: 'The framers' unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles.'<sup>53</sup> Lauterpacht and Bethlehem stress that the law on human rights that has emerged since the Convention's conclusion is 'an essential part of [its] framework ... that must, by reference to the ICJ's observations in the *Namibia* case, be taken into account for purposes of interpretation.'<sup>54</sup> UNHCR has also emphasized that:

The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.<sup>55</sup>

While developments in human rights law may shape interpretations of 'persecution',<sup>56</sup> they may also *independently* form grounds for non-removal. Article 3 CAT, article 7 ICCPR and article 3 ECHR<sup>57</sup> are recognized sources of human rights *non-refoulement* (or complementary protection) which prohibit removal in circumstances additional to (and sometimes overlapping with) article 1A(2). External to and independent of the Convention,<sup>58</sup> the instruments provide only a trigger for protection and do not elaborate a resultant legal status. The main problem with the EU Qualification Directive, and one which has characterized many ad hoc complementary protection schemes, is that beneficiaries do not receive the same level of rights as Convention refugees. In so far as there is no legal justification for distinguishing between the status granted to Convention or extra-Convention refugees,<sup>59</sup> it makes sense that the

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<sup>52</sup> J Patrusic 'International Protection of Refugees in Armed Conflicts' (reprinted by UNHCR Protection Division from *Annales de Droit International Médical* (July 1981)) section 4.

<sup>53</sup> MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff The Hague 2002) 314.

<sup>54</sup> Lauterpacht and Bethlehem (n31) [75].

<sup>55</sup> UNHCR 'Note on International Protection' UN Doc A/AC.96/951 (13 September 2001) [4].

<sup>56</sup> See JC Hathaway *The Law of Refugee Status* (Butterworths Canada 1991) 112, approved in *Horvath v Sect'y of State for the Home Dept* [2001] 1 AC 489 (HL) 495 (Lord Hope of Craighead); *Sepe v Sect'y of State for the Home Dept* [2002] 1 WLR 856 (HL) [7] (Lord Bingham); *Ullah v Sect'y of State for the Home Dept* [2004] UKHL 26 [32] (Lord Steyn); International Association of Refugee Law Judges Human Rights Nexus Working Party 'Rapporteur's Report' (1998 Annual Conference Ottawa 12–17 October 1998) 8. See eg gender-related persecution.

<sup>57</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950).

<sup>58</sup> Although some States may procedurally determine the order in which protection may be invoked.

<sup>59</sup> UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 14109/01 ASILE 54 (16

Convention, as a ‘Magna Carta for the persecuted’,<sup>60</sup> applies to both. It is argued that since the Convention is itself a specialist human rights instrument, the protection conceptualization it embodies is necessarily extended by developments in human rights law, rather than via the conventional means of a protocol. It therefore acts as a form of *lex specialis* which applies to persons encompassed by that extended concept of protection.

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

Analysis of the Convention’s conceptualization of ‘protection’ invariably focuses on the refugee definition in article 1A(2), since an individual must satisfy its requirements to trigger Convention status. Article 1A(1), which extends the benefits of the 1951 Convention to any person who

[h]as been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization

is generally overlooked as an historical remnant. Although eligibility under article 1A(1) is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant, since they typically protected victims of armed conflict or communal violence. The incorporation of these definitions necessarily broadens the Convention’s conceptual basis of protection, making it difficult to sustain the argument that, conceptually, the Convention does not support the grant of its international legal status to persons fleeing situations of armed conflict or communal violence.<sup>61</sup> This has particular significance for persons seeking complementary protection on the basis of civil war, and challenges the EU’s current approach of creating a new and separate protection status for such persons.

Furthermore, even though an applicant today cannot invoke an article 1A(1) instrument as the basis of an asylum claim, the fact that Convention status flows from the definitions contained in those instruments, which embody what Melander has termed the ‘humanitarian refugee’ concept,<sup>62</sup> makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds. Not only has State practice continued to recognize both ‘humanitarian’ and Convention refugees, but the dominant legal refugee instrument implicitly retains the humanitarian concept of protection within its definitional provision, further illuminating the Convention’s object and purpose.<sup>63</sup>

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November 2001) [46]; UNHCR ‘Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive’ (March 2004) 2.

<sup>60</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Summary Record of the 19<sup>th</sup> Meeting’ (Geneva 13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 27 (International Association of Penal Law).

<sup>61</sup> Of course, many of those fleeing such circumstances may qualify for protection under article 1A(2). For discussion of this, see Mandal (n9) [21]–[24].

<sup>62</sup> G Melander ‘Refugee Policy Options—Protection or Assistance’ in G Rystad (ed) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund University Press Lund 1990) 146–47.

<sup>63</sup> Vienna Convention art 31(1).

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

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

Recommendation E of the Final Act of the Conference of Plenipotentiaries, which is appended to the Refugee Convention, expresses ‘the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons

in their territory as refugees, and who would not be covered by the terms of the Convention, the treatment for which it provides.’ This was a UK initiative, prompted by the deletion of a former article which would have allowed the Contracting States to add to the definition of the term ‘refugee’.<sup>64</sup> The UK representative explained that his delegation had felt that a general recommendation was called for to cover those classes of refugees who were altogether outside the scope of article 1A.<sup>65</sup>

Recommendation E of reveals that the drafters of the 1951 Convention to some extent ‘envisaged a complementary protection system’.<sup>66</sup> This statement needs further explanation to avoid any suggestion that the drafters envisaged a separate complementary protection system operating outside the Convention’s parameters, which is not sustained when one considers the phrasing of the Recommendation. Certainly the Recommendation envisages the expansion of the Convention to encompass additional categories of refugees not provided for by the terms of article 1A(2) of the Convention.<sup>67</sup> Its wording makes clear that what is imagined is not a

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<sup>64</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference’ UN Doc A/CONF.2/1 (12 March 1951) 5 (citations omitted). A Final Act to a treaty provides a formal summary of the conference proceedings, and may also seek to establish political, rather than legal, agreement on particular issues or set out matters for future discussion. It may also provide a useful aid for interpretation of the treaty, and at times the treaty text may even be incorporated into the Final Act: see I Brownlie *Principles of Public International Law* (5<sup>th</sup> edn OUP Oxford 1998) 610; A Aust *Modern Treaty Law and Practice* (CUP Cambridge 200) 73–74.

<sup>65</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘Summary Record of the 35<sup>th</sup> Meeting’ (Geneva 25 July 1951) UN Doc A/CONF.2/SR.35 (3 December 1951) 44.

<sup>66</sup> H Storey and others ‘Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?’ (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author) 4.

<sup>67</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ‘35<sup>th</sup> Meeting’ (n65) 44. In 1966, it was observed that Recommendation E of the Final Act had encouraged States to ‘frequently accord the treatment provided for in the Convention to persons not falling within its terms’: Proposed Measures to Extend the Personal Scope of the Convention relating to the Status of Refugees of 28 July 1951 (Submitted by the High Commissioner in Accordance with Paragraph 5(b) of General Assembly Resolution 1166 (XII) of 26 November 1957) (12 October 1966) UN Doc A/AC.96/346 [2].

complementary status for such categories, but rather that the terms of the Convention itself would be extended by the General Assembly<sup>68</sup>:

EXPRESSES the hope that the Convention relating to the Status of Refugees will have value as an example *exceeding its contractual scope* and that all nations will be guided by it in *granting* so far as possible to persons in their territory *as refugees* and who would not be covered by the terms of the Convention, *the treatment for which it provides*. (emphasis added)

Read in this way, the Recommendation is a most useful guiding principle in the complementary protection debate. Though aspirational rather than a firm legal duty, the Recommendation helps to counter claims that the Convention is too restrictive to absorb the additional groups of refugees covered by complementary protection sources, or that the Convention was not intended to apply to additional groups. This interpretation is reinforced by an earlier version of the text, which was originally proposed as part of the Preamble to the Convention:

Expressing the hope finally that this Convention will be regarded as having value as an example exceeding its contractual scope, and that without prejudice to any recommendations the General Assembly may be led to make in order to invite the High Contracting Parties to extend to other categories of persons the benefits of this Convention, all nations will be guided by it in granting to persons who might come to be present in their territory in the capacity of refugees and who would not be covered by the following provisions, *treatment affording the same rights and advantages*.<sup>69</sup> (emphasis added)

Recommendation E is important in two respects. First, with respect to eligibility, it encourages the extension of protection to individuals not encompassed by the Convention definition of a refugee. Secondly, with respect to substantive rights, it envisages the application of the Convention framework to persons covered by extended eligibility, tacitly recognizing that the source of the harm causing flight is irrelevant for the purposes of status. This is in fact the position adopted in the 1969 OAU Convention, which, as a regional complement to the Convention, applies Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country of origin.<sup>70</sup> This is very significant in light of EU developments, where subsidiary protection status instead results in a lower form of rights than Convention status. The Recommendation supports the argument that there is no justification for creating two levels of rights simply by distinguishing between the source of harm (or the legal basis for protection).

The Hungarian refugee crisis of 1956 provided the first real challenge to the article 1A(2) definition, and reflects the first example of widespread Refugee Convention-

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<sup>68</sup> 'Comments on the Draft Convention and Protocol: General Observations' (n45) 34.

<sup>69</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 'Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference' UN Doc A/CONF.2/1 (12 March 1951) 2–3.

<sup>70</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art 1(2).

related complementary protection.<sup>71</sup> The refugees did not strictly fall within the temporal requirements of the Convention definition, however the High Commissioner determined that since the flight of Hungarian refugees was related to recent events and political changes resulting from the end of the Second World War, they should be considered as falling within the Convention's scope.<sup>72</sup> Austria followed this interpretation when it granted asylum to 180,000 Hungarian refugees.<sup>73</sup> It issued them with normal refugee eligibility certificates as soon as technically possible, unless individual status determination showed that a person was not entitled to the Convention's benefits.

Most other States granted protection on a *prima facie* basis, at least initially.<sup>74</sup> Norway granted all Hungarian citizens a residence permit for one year that included permission to work, renewed automatically on request. After two years, they could request a permanent residence permit, which was mostly granted. It was only at this point that individual status determination took place.<sup>75</sup> The distinction between Hungarian refugees and Convention refugees in Norway lay in the grant of travel documents. If an individual had not left Hungary for an article 1A(2) reason, then he or she was not entitled to a Convention travel document but to an alien's passport. In reality, this did not have a substantial impact on the rights received.

The UK did not have a special eligibility procedure for Hungarian refugees but granted them the same rights as Convention refugees. As in Norway, the only distinction was with respect to travel documents. In Germany, they were subject to a simplified eligibility procedure for recognition as Convention refugees and received Convention rights, including Convention travel documents.

A 1956 Resolution on Hungarian Refugees of the Consultative Assembly of the Council of Europe requested all Member States 'to accord to all of them who are able to work the facilities available under the system established by the Statute relating to refugees and provided for under the Geneva Convention of 1951.'<sup>76</sup> A memo by Paul Weis the following year revealed that:

On the whole ... no Government has, as far as we know, raised any objection to the application of the Convention to Hungarian refugees who otherwise fulfill the conditions of Article 1 of the Convention and it can, therefore, be assumed that the interpretation of the dateline of 1 January

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<sup>71</sup> Earlier instances of complementary protection can be found in relation to League of Nations instruments on refugee protection.

<sup>72</sup> UNHCR 'The Problem of Hungarian Refugees in Austria' UN Doc A/AC.79/49 (17 January 1957) Annex IV [4].

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid* [5].

<sup>75</sup> Letter from A Fjellbu (Norwegian Refugee Council) to P Weis (1 July 1959), in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

<sup>76</sup> Resolution adopted by the Committee on Population and Refugees (Vienna 15 October 1956) COE Doc 587, adopted with certain amendments by Permanent Commission (Paris 19 November 1956) acting for Consultative Assembly between sessions, in Interoffice Memorandum to Mr M Pagès, Director from P Weis 'Eligibility of Refugees from Hungary' (9 January 1957) 22/1/HUNG [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

1951 contained in Document A/AC.79/49 Annex IV is accepted by Governments parties to the Convention.<sup>77</sup>

Of course, it cannot be overlooked that the policy of declaring every Hungarian to be a refugee ‘suited the ideological and racial preferences of western powers’<sup>78</sup>—Europeans fleeing Communism. Yet, in a sense, Recommendation E reflects an optimal system of complementary protection, operating more as a theoretical concept guiding the expansion of international protection within a broadened refugee law framework, than a separately defined system of protection (as has been created in the EU). Although from a pragmatic perspective, some form of codified complementary protection would seem necessary for States to acknowledge and fulfil their international obligations,<sup>79</sup> the international law regime in principle already contains sufficient safeguards.<sup>80</sup>

### **‘Complementary’ versus ‘subsidiary’: a final word**

Though the term ‘subsidiary protection’ is largely descriptive, it may also have some weak normative significance. UNHCR has criticized States’ increasing use of subsidiary forms of protection as a means of restricting asylum ‘on their own terms’, arguing that subsidiary protection implies less binding obligations on States than their obligations under international law.<sup>81</sup> It can be seen as an attempt to remove the entitlements of protected persons beyond the reach of international scrutiny. There is a danger of soft law edging out hard law obligations by ‘diluting principles and fudging standards.’<sup>82</sup>

In December 2001, representatives of the Contracting States to the Convention adopted a Declaration ‘[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope’.<sup>83</sup> UNHCR has repeatedly

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<sup>77</sup> Memo from P Weis to Mr J Mersch, UNHCR Branch Office in Luxembourg ‘Application of 1951 Convention to Hungarian Refugees’ (28 May 1957) Ref.G.XV.7/1/8, 6/1/HUN [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

<sup>78</sup> Independent Commission on International Humanitarian Issues *Refugees: The Dynamics of Displacement* (London 1986) 33, in G Melander ‘The Two Refugee Definitions’ Raoul Wallenberg Institute of Human Rights and Humanitarian Law *Report No 4* (Lund 1987) 14.

<sup>79</sup> This is the view expressed in Storey and others (n66) 14.

<sup>80</sup> For subsequent State practice, see eg Perluss and Hartman (n8); Goodwin-Gill (n8).

<sup>81</sup> ExCom ‘Summary Record of the 540<sup>th</sup> Meeting’ (Geneva 7 October 1999) UN Doc A/AC.96/SR.540 (12 October 1999) [44]. The Nordic States’ relatively generous complementary protection is counterbalanced by very low recognition rates of Convention refugees. Domestic complementary protection effectively takes refugee protection outside international law. In Denmark, the ratio was approximately one-third Convention refugees to two-thirds de facto refugees: KU Kjær ‘The Abolition of the Danish *De Facto* Concept’ (2003) 15 *International Journal of Refugee Law* 254, 258.

<sup>82</sup> Goodwin-Gill (n8) 914.

<sup>83</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) <[www.unhcr.ch/cgi-bin/texis/vtx/protect](http://www.unhcr.ch/cgi-bin/texis/vtx/protect)> (18 February 2003) Preamble [2], [4].

called for States to respect the primacy of the Convention.<sup>84</sup> In 1994 and 1995, the General Assembly passed two resolutions reiterating

the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status *or, as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted such protection*, while not diminishing the protection afforded to refugees under the terms of the 1951 Convention, the 1967 Protocol and relevant regional instruments.<sup>85</sup>

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

To provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents,<sup>86</sup> but as interconnected instruments which together constitute the international obligations to which States have agreed. In effect, therefore, this paper argues for a reconsideration of international law as a holistic and integrated system. Compartmentalizing international law into parallel but autonomous and non-intersecting branches leads not only to stultification, but to ineffectual implementation of the interlocking duties which States have undertaken to respect. Viewing the Convention as a discrete instrument implies that refugee law 'possesse[s] its own special purposes and principles which [are] determined essentially by its own constituent instruments and which [are] thus independent of those of human rights law.'<sup>87</sup> But human rights law contains principles that are explicitly or implicitly applicable to the refugee context,<sup>88</sup> having both influenced and been influenced by it. Human rights law not only provides an additional source of protection for persons with an international protection need, but also strengthens the status accorded to *all* refugees through its universal application. Accordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status.

If international law already accommodates complementary protection within its existing framework, then why is there no discernable universal system of

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<sup>84</sup> eg ExCom 'Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee: Report of the First Meeting in the Third Track (8–9 March 2001) UN Doc A/AC.96/961 (27 June 2002) [14].

<sup>85</sup> UNGA Res 49/169 of 23 December 1994 [5]; UNGA Res 50/152 of 21 December 1995 [5] (emphasis added).

<sup>86</sup> On the fragmentation of international law: International Law Commission Study Group on Fragmentation (Koskenniemi) 'Fragmentation of International Law' (2003) <[http://www.un.org/law/ilc/sessions/55/fragmentation\\_outline.pdf](http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf)> (30 November 2005) esp 1.3; 3 (self-contained regimes).

<sup>87</sup> GJL Coles 'Refugees and Human Rights' (1992) 91 Bulletin of Human Rights 63, 63.

<sup>88</sup> *ibid*.



complementary protection? The problem lies not in international law itself, but rather in States' failure to adequately implement their international legal obligations in a holistic and bona fide manner, combined with a lack of enforcement mechanisms. A benefit of codifying States' complementary protection obligations in a new international instrument would be to clearly elucidate the source and (non-exhaustive) content of those obligations—explicitly drawing the links between States' general human rights obligations and their specific relevance to the protection context—and to expressly describe the legal status that results from recognition of a protection need on those grounds.

Yet, the dangers of codifying complementary protection have been amply illustrated by the negotiations on the Qualification Directive. They demonstrate that States may seek to dilute their obligations to a minimum level, extrapolating some aspects of existing law but not others, and closing off potential avenues for future protection needs.<sup>89</sup> In the context of setting out fundamental standards of humanity, the Commission on Human Rights has noted that any new instrument may be seen to 'undermine existing international standards ... or pose a risk to existing treaty law',<sup>90</sup> even where such standards are largely a 'repackaging' of existing international law. As such, it is imperative to identify the international legal basis of obligations in any codified complementary protection regime, so that 'soft law' is not used to fudge standards or replace treaty-based obligations.

Although an EXCOM Conclusion on complementary protection was adopted in October 2005, it does not explicitly address the question of beneficiaries' status. Instead, it contains important but relatively elusive statements calling upon States to 'provide for the highest degree stability and certainty by ensuring the human rights and fundamental freedoms of [beneficiaries of complementary protection] without discrimination',<sup>91</sup> and affirming that complementary protection should be applied 'in a manner that strengthens, rather than undermines, the existing international refugee protection regime'.<sup>92</sup> Further, it emphasizes the importance of applying and developing international protection in a manner that avoids the creation or continuation of protection gaps.<sup>93</sup> However, the Conclusion does not go so far as to expressly call for the equal treatment of Convention refugees and beneficiaries of complementary protection.<sup>94</sup> While this is perhaps not surprising, given the political climate and the results of the EU's recent deliberations about the Qualification Directive, it perpetuates at the international level an approach tied closely to *domestic* political concerns about asylum seekers, that require national governments to be 'seen' to be distinguishing between 'genuine' (Convention) refugees and 'others'. Yet, as one commentator has poignantly observed:

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<sup>89</sup> For a comprehensive analysis of the drafting process, see J McAdam 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461.

<sup>90</sup> Minimum Humanitarian Standards: Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21 UN Doc E/CN.4/1998/87 (5 January 1998) [94].

<sup>91</sup> ExCom Conclusion on Complementary Protection (n10) para (n).

<sup>92</sup> *ibid* para (k).

<sup>93</sup> *ibid* para (s).

<sup>94</sup> NGO delegations sought to have a statement to this effect included: Draft Conclusion on the Provision of International Protection including through Complementary Forms of Protection' (NGO version 12 July 2005) OP11 (copy with author).

In the past forty years the rich first world countries have received so many *de facto* refugees that it would not have made any difference if they had agreed to an expanded international definition . . . . In fact, it would here have helped clarify and identify those circumstances which were insufficiently clear-cut to merit recognition as refugee-like situations.<sup>95</sup>

By retaining the political discretion to determine to whom, and when, protection will be granted, States have in fact complicated the protection regime. Diverging statuses, different eligibility thresholds and variations from State-to-State have created incentives for asylum-seekers to forum-shop and appeal decisions granting subsidiary status. It is arguably in States' own interests to grant a single legal status based on the Convention to all persons in need of international protection. In this way, they acknowledge complementary protection as the natural extraterritorial response to their commitment to uphold and promote respect for human rights. A creative use of human rights law can thus enhance the legal status of refugees and asylum-seekers,<sup>96</sup> basing international protection on the individual's *need*, rather than on which treaty provides the legal source of the obligation.

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<sup>95</sup> P Nobel 'Blurred Vision in the Rich World and Violations of Human Rights—A Critical Assessment of the Human Rights and Refugee Linkage' (1992) 91 Bulletin of Human Rights 74, 80.

<sup>96</sup> Goodwin-Gill (n51) 16.