# Preface

In recent years the UNHCR has expressed mounting concern at how 'war, violence and persecution' in the world have 'left one in every 122 humans on the planet a refugee, internally displaced or seeking asylum', and has expressed disquiet over how the world is failing the victims in an 'age of unprecedented mass displacement'. It is now clear that, 'the level of worldwide displacement is higher than ever before, with a record 59.5 million people living exiled from their homes'. Yet, it will come as no surprise to anyone to learn that the war in Syria has been the single largest driver of displacement. Thus, even by the end of 2014, 'the conflict had forced 3.88 million Syrians to live as refugees in the Middle East and beyond, and left 7.6 million more internally displaced. In blunter terms, one in every five displaced persons worldwide was Syrian'.[1] More than one-third of refugees arriving are children.[2]

The western world has not escaped this turmoil. In its Editorial, 'Age of Anxiety', *The Times of London* explained how '[u]nchecked immigration from Syria, the wider Middle East and sub-Saharan Africa has changed the terms of politics in Europe' and that '[f]ears about the migrant surge has nudged the far right into governing coalitions' in many countries where the 'appeal is to those terrified of Islam; the sense of Muslims being an alien presence' and that, '[t]hese are Europe's new rulers, the product of the age of anxiety'.[3] A spate of books have addressed the refugee issue. Three recent books by Wolfgang Baur,[4] Charlotte Mcdonald-Gibson,[5] and Patrick Kingsley[6] argue for an improvement in the living conditions of neighbouring countries into which refugees are displaced; the importance of identifying the dead; greater investment in Africa; more aid to Lebanon and Jordan both of which are home to vast refugee camps; and more support for Greece and Italy which bear the brunt of the arrivals – all of which are suggestions which have been made before. Kingsley additionally disposes of the myth that the people smugglers are causing the migration crisis. Instead it is of our making caused by the chaos of how we have received them. Yet, it is easy to overlook the fact that no

[1] Sam Jones, 'One in every 122 people is displaced by war, violence and persecution, says UN'. Referring to the UNHCR annual global trends survey finds a record 59.5m people were refugees, internally displaced or seeking asylum by the end of 2014. *The Guardian*, Thursday, 18 June 2015. Available at http://www.theguardian.com/global-development/2015/jun/18/59m-people-displaced-war-violence-persecution-says-un, last accessed 30 March 2019.

[2] Lizzie Deardon, 'Refugee crisis: Children make up more than a third of arrivals and more than ever are making deadly crossings alone Charity workers said children as young as nine were risking their lives on smugglers' boats completely alone' *The Independent*, 28 May 2016. Available at http://www.independent.co.uk/news/world/europe/refugee-crisis-children-make-up-more-than-a-third-of-arrivals-and-more-than-ever-are-making-deadly-a7052911.html, last accessed 30 March 2019.

[3] Editorial, 'Age of Anxiety' *The Times*, Monday, 23 May 2016 at p. 27.

[4] Wolfgang Bauer, *Crossing the Sea: With Syrians on the Exodus to Europe* (And Other Stories, 2016).

[5] Charlotte McDonald-Gibson, *Cast Away: Stories of Survival from Europe's Refugee Crisis* (Portobello Books, 2016).

[6] Patrick Kingsley, *The New Odyssey: the Story of Europe's Refugee Crisis* (Guardian Faber, 2016).

one single form of regulation and protection is sufficient. Law and politics operate amid a sea of shifting sands. In the words of Caroline Moorheard:[7]

> one of the things that makes the subject so confusing is the way that it shifts: Egypt, once considered a safe haven in the Middle East, ceased to be one when Abdel Fattah el –Sisi and the military took power and turned against the Syrians who had found shelter there.

So dramatic and overwhelming is the change that one even loses sight of who is the refugee and who is not as new forms of irregular migration emerge. Moorhead has drawn a distinction between the 'good' refugees and the 'bad' refugees. She writes:

> Whether those who flee are 'good' refugees (in the sense of falling under the 1951 Refugee Convention, facing justifiable 'fear of being persecuted for reasons of race, religion, nationality' if they return home) or 'bad' (so called because they are seeking work or a better life) has become largely meaningless in the world today. No one, ever, anywhere , wants to be a refugee, but for many there is no alternative.[8]

But there is another distinction, one that Robert Fisk[9] makes, that of 'Muslim' refugees and non-Muslim refugees. In many ways, this far better accounts for the frenzy of restrictions against today's refugees. This new wave of migrants originates mostly from Syria (21 per cent), Afghanistan (12 per cent) and Iraq (6 per cent), as well as Albania (8 per cent) and Kosovo (5 per cent). The result is that we have reached today an impasse whereby, as Jeremy Harding observed in the London Review of Books, wealthy States 'have learned to think of generosity as a vice'.[10]

The *Elgar Handbook on Refugee Law* consists of a series of carefully chosen, innovative, and path-breaking chapters, by leading experts in the field of refugee law. Together with some notable emerging scholars, they provide a critical perspective on the legal ordering for refugees today, at a time when the legitimacy and politics of transnational regulatory governance are in question as never before. Today, nearly three-quarters of a century after the international system was set up, following the Second World War, which included the *Convention Relating to the Status of Refugees 1951*, hot on the heals of *The Universal Declaration of Human Rights 1948*, the paradigm has shifted. Shortly after coming to power, the US under President Trump in 2016 determined to exit global agreements, such as the Paris Pact[11] and the Trans Pacific

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[7] Caroline Moorhead, 'A tide that can't be turned' *New Statesman*, 20–26 May 2016, pp. 38–40, at p. 40.

[8] Ibid.

[9] Robert Fisk, 'Donald Trump's arbitrary, cruel ban on refugees from Muslim countries sets a chilling precedent' *The Independent*, 28 January 2017 (available at https://www.independent.co.uk/voices/donald-trump-refugee-ban-muslim-countries-christians-welcomerobert-fisk-a7550941.html, last accessed 23 April 2019).

[10] Jeremy Harding, 'The Uninvited' (February 2000) 22(3) *The London Review of Books*, pp. 3–25. (available at http://www.lrb.co.uk/v22/n03/jeremy-harding/the-uninvited, last accessed 30 March 2019).

[11] The 'Paris Pact on Water and Adaptation to Climate Change in the Basins of Rivers, Lakes, and Aquifers' sets out to provide recommendations of actions that should be undertaken without delay at the most relevant scale for water management adaptation to climate change – i.e., the basins of lakes, rivers, and aquifers. The Pact also calls for actions of basin organizations and other relevant institutions (e.g., governments, international organizations, donors, local authorities, civil society and companies). Such actions will contribute to reach target 6.4 to 6.b of the SDGs.

Partnership.[12] Following *The United Kingdom European Union Membership Referendum* in June 2016, the UK also embarked on negotiating *Brexit* so as to leave the European Union after June 2017.[13] Yet, both the US and the UK had been instrumental in creating the very edifice of the international system after World War II following 1945. Nation states are increasingly turning inwards. A renewed nationalist vigour abounds. The efficacy and effectiveness of a transnational legal order is in question. The full implications of a multiplicity of regional blocs also has yet to be worked out. There is Economic Community of West African States (ECOWAS); the East African Community (EAC); the South African Development Community (SADC); alongside the failing European Union (EU). On top of this, there are the implications of global mobility for refugee security. Wolfgang Streeck has recently argued that we are entering 'a period of uncertain duration in which the old order is dying but a new one cannot yet be born' where the old order was 'the state system of global capitalism' and that 'what the still to be created new order will look like is uncertain' so that we are now in what Antonio Gramsci termed an 'interregnum'.[14]

This makes the inquiry into refugee law all the more compelling. This is not least given that the modern refugee law system has always been contested. In the words of David A. Martin today, '[e]specially objectionable, say many of the writers, is the dichotomy between political refugees on the one hand, and who can claim a host of legal protections, and economic migrants or displaced persons on the other, who cannot',[15] thus giving less than sanguine support to Mathew Price's thesis that asylum's function historically was always 'to protect unfortunates from specifically political harms'. The distinction between the political and the economic migrant 'is particularly inept' given 'the travails of the developing world' which is 'the source of most of today's … refugees'.[16] The view has been widely echoed by other writers of renown in refugee law.[17] So the truth of the matter is that even less than 40 years after the Convention,

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[12] The Trans-Pacific Partnership (TPP) was the centre-piece of President Barack Obama's strategic pivot to Asia. Its aim was to set up the world's largest free trade deal, covering 40 per cent of the global economy, so that the TPP would have expanded US trade and investment abroad, spurred economic growth, lowered consumer prices, and created new jobs, while also advancing US strategic interests in the Asia Pacific region. President Trump withdrew from this deal in 2017 because he saw it as likely to accelerate US decline in manufacturing, lower wages, and increase inequality.

[13] Oliver Wright and Charlie Cooper, 'Brexit: What is it and why are we having an EU referendum?' *The Independent* 23 June 2016 (available at https://www.independent.co.uk/news/uk/politics/what-is-brexit-why-is-there-an-eu-referendum-a7042791.html, last accessed 30 March 2019).

[14] Wolfgang Streeck, 'The Return of the Repressed' (2017) 104 *New Left Review*, pp. 1–8 at p. v 4 (available at https://newleftreview.org/II/104/wolfgang-streeck-the-return-of-the-repressed, last accessed 30 March 2019).

[15] David A. Martin, 'The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource' in H. Adelman (ed.) *Refugee Policy: Canada and the United States* (Toronto: Centre for Refugee Studies, 1991) Ch 5, at p. 30.

[16] Ibid.

[17] James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 150, 163–5; Michael G. Heyman, 'Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife' (1987) 24 *San Diego Law Review* 449; Andrew Shacknove, 'Who is a Refugee' (January 1985) 95(2) *Ethics* 274; Peter Singer and Renata Singer, 'The Ethics of Refugee Policy' in Mark Gibney (ed.) *Open Borders? Closed Societies?* (New York: Greenwood Press, 1988), p. 111; D. Perlus and J.F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 *Virginia Journal of International Law* 551; Guy Goodwin-Gill, 'Non-refoulement and the New Asylum Seekers' (1986) 26 *Virginia Journal of International Law*

it was possible to ask that 'surely we ought to think again about the morality of trying to base an immigration policy on the difference between economic and political motivations'.[18] With the BRIC countries on the rise today, and Europe and the US in relative decline, can we afford not to think more strategically about the long-term benefits of hosting refugees – particularly if it is the case that this will be a politically astute guarantee of future diplomatic and trade alliances? It is time to see refugees, not as collateral damage to be tidied up, but as core indicators of failures of national and international, economic and political governance.

Against this background, this anthology begins in Part I with five chapters under the heading 'Refugees, Displaced Persons and the Rise of Temporary Protection'. It opens with a first chapter on the 1951 Geneva Convention, where *Julian Lehman* makes a case for saying how it is today at a crossroads. He reminds us of the Refugee Convention's requirement of alienage, namely, that the refugee 'is outside the country of nationality' and has a 'well-founded fear of being persecuted', suggesting that from the very beginning the refuge regime has responded to the disadvantages only of people who were outside the country of their nationality, which was a consideration of legal anomaly and of practicality. He argues that today, whereas the Convention has remained relevant by proving flexible in the use of human rights law, it must not lose its distinctive focus on actor-inflicted human rights harm connected to a Convention ground, by allowing human rights to cannibalise the Convention so that it is forced to be interpreted more broadly than it otherwise would be.

The second chapter by *Tamara Wood* is on the 1969 OAU Convention, who observes how there are few parts of the world more associated with refugees than Africa. Given that the vast majority of refugees in Africa come from within the continent itself, the OAU Convention proclaims itself to be the 'regional complement' to the 1951 Convention, such that it is intended to be applied alongside it. Unfortunately, implementation by African states has frequently been compromised by lack of resources, capacity, and political will, such that a better understanding is essential. Moreover, scholarly analyses of the 1969 Convention are rare. Yet, it is the only binding regional refugee law instrument to expand the 1951 Convention definition of a refugee. It also develops key protection principles related to *non-refoulement,* asylum, responsibility-sharing and security. Therefore, properly understood it could provide better protection for refugees in Africa, and could serve as a model for other regions.

*Brid Ni Gharainne* in the third chapter considers internally displaced persons (IDPs), who outnumber refugees by almost two to one, amounting to over 40 million, and being boosted further by the crises in Syria, Yemen, Iraq, Afghanistan, the DRC, and Ukraine. Yet, being an IDP does not entitle a person to additional rights, or to an IDP legal 'status', or protection by a specific international agency. Accordingly, the author poses two distinct questions: whether IDPs and refugees should be treated differently, and whether the increase in IDP protection through the 'Guiding Principles on Internal Displacement 1998' should obviate the need for international protection and asylum.

The fourth chapter by *Claire Higgins* describes 'in-country programmes in refugee-like situations' for people who have not yet fled across an international border, whereby they are first processed in their countries of origin, before being settled abroad. These programmes are particularly well deployed by the governments of the US, Canada, and Australia, and provide

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897; Karl Hailbronner, 'Concerning "Nonrefoulement" and the "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 *Virginia Journal of International Law* 857.

[18] 'No Way to Judge Refugees', *New York Times*, 8 May 1986, p. A27.

for a safe and legally-secure transfer of refugees without a dangerous journey over land or sea. The orderly nature of this mechanism should not be used to avoid responsibility but instead to shore up the integrity of the international protection regime, where states can mitigate the risk to applicants.

The fifth chapter by *Meltern Ineli-Cigar* focuses on 'temporary protection' where again, despite the fact that it affects the lives of thousands of forced migrants, there is no international legal instrument providing for a clear definition of temporary protection or what it entails as a protection framework. The author accordingly embarks on an examination of the laws and policies of the European Union, Turkey, the US and Australia, and demonstrates how temporary protection still has a vital role to play for forced migrants today.

This compendium then continues onto Part II where there is a discussion in a further six chapters on 'Burden-sharing, Internal Relocation and the Shift to Cooperation Agreements'. Thus, 'Burden-sharing' discussed in Chapter 6 by *Eddie Bruce-Jones*, is another example of protection of refugees existing outside the Refugee Convention. There are a number of defining ways in which 'burden-sharing', including as a legal obligation, as a discourse of marketisation, as border securitisation, as crisis management, and as commitment to solidarity, all of which are carefully analysed, before it is concluded that, unless the notion of 'burden' is expanded, present practices only redouble local inadequacies on a global scale.

*Mariagiulia Giuffre and Violetta Moreno-Lax* describe in Chapter 7, the rise of higher levels of sophistication in EU Member States' responses to unwanted arrivals. What has emerged is a transition from the well-documented and thoroughly discussed model of unilateral/passive deterrence to orchestrated forms of consensual and pro-active containment of trans-boundary flows. This has been done through the implementation of a novel variant of the 'deterrence paradigm', which dominated during the last 30 years of employing strategies of outright containment, but with a 'deputational twist' that also now involved the inducement to countries of transit being provided by the countries of destination requiring them to exert control on migrants, on behalf of the countries of destination. What is being developed therefore is a 'contactless' system of migration, which does not only deter migrants, but pro-actively restrains the onwards movement of refugees to European territory.

Chapter 8 is a contribution by the late *Stefania Eugenia Barichello*, on the evolution of shared responsibility in Latin America, with a particular emphasis on Brazil, where refugee policies only emerged at the end of the 1970s. The way in which this has been done, is not through a focus on 'burden-sharing' but 'responsibility-sharing', whereby the first responsibility is of regional character and refers to the need for the states to act together to solve the common problems, by emphasising a notion of 'regional solidarity'; and the second responsibility is of an international character. The author extols the success of the regional programme of resettlement in Latin America and suggests that it could encourage similar initiatives in other parts of the world, emphasising the importance of cooperation at regional and intercontinental levels.

In Chapter 9, *Jessica Schultz* addresses the 'protection elsewhere' dynamic of international refugee law as seen in the 'internal protection alternative' (IPA), which is designed to deny refugee status to persons whose risk of persecution is present in only part of a country. This mechanism permits removal of refugee claimants to their home state even if they cannot safely return to their former residence. The consequence for the claimant is usually a return to internal displacement. She explains how it is that despite widespread acceptance among state parties to the Refugee Convention of an IPA limit, debate persists regarding the treaty

basis for IPA practice and, as a consequence, its operational parameters. The focus of UNHCR guidance, and most academic commentary, has been on establishing safeguards rather than contesting the legality of IPA practice itself. What the author does, however, is to critically consider how the IPA relates to the requirements for refugee status contained in the 1951 Refugee Convention, before concluding that operational parameters point to a narrow scope for IPA application.

Thereafter, *Juss and Mitchell* also analyse in Chapter 10 'internal relocation' in circumstances where even if victims of war and persecution cannot be sent back to their hometowns, they can still be forcibly returned to another area of their home country – even if they have no firm ties to that locale and its living conditions are dire. In the UK, this policy is facilitated by the 'Country Guidance Notes' produced by the Home Office, which provide 'Country of Origin Information' (COI) and legal guidance to assist decision-makers throughout the asylum process. However, given that many war refugees today apply for asylum, not under the 1951 Refugee Convention, but under the subsidiary protection criteria in Article 15(c) of the European Union's Qualification Directive, on the basis that return to their state of origin would pose a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict', one of the most important elements of a 'Country Policy and Information Note' (CPIN) is the determination of whether a state of *indiscriminate violence* exists in all or part of a given country. Thus, the assessment of indiscriminate violence in the country guidance notes has become a crucial determinant of whether refugees can obtain asylum in the UK, and yet it is under-examined as an element of the asylum process. Accordingly, this chapter first examines the role of UK country guidance notes in the asylum process and their primary failings. Second, it is interrogates the conceptual basis underlying 'indiscriminate violence' and its facilitation of internal relocation.

In Chapter 11, *Nikolas Feith Tan* also examines how deterrence policies are used by states. As he argues, there remains a clear gap between the right to asylum and the obligation of *non-refoulement*. As a consequence, refugees generally cannot be *refouled* if they never arrive, and because of this, states often seek to avoid international responsibility for refugees by operating in the grey areas of international law, such that the widespread presumption that extraterritorial actions are less likely to incur international responsibility remains. The result is that developed states have introduced a range of deterrence policies to prevent asylum seekers reaching their territories or accessing national asylum systems. The author analyses the rise of one form of deterrence, namely international cooperation preventing access to asylum, which he refers to as 'cooperative non-entrée', whereby a developed state undertakes deterrence in cooperation with a regional developing state to prevent asylum in the first state. The author's focus is accordingly on *bilateral cooperation arrangements*. Cooperation falls into five categories: funding, equipment and training; joint patrols and interdiction; financial incentives; people exchange; and extraterritorial processing and protection elsewhere. However, the author also considers issues relating to legal challenges to deterrence; the allocation of international responsibility in such arrangements; and finally, the potential for cooperative non-entrée policies to contribute to refugee burden-sharing.

Midway through this volume, there is, in Part III, a consideration of what many consider to be the very edifice of refugee law – the jus cogens – namely the 'Principles of *Non-Refoulement* of Refugees and their Non-penalisation'. This section is in four chapters. In Chapter 12, *James Simeon* considers the principle of *non-refoulement* as the cornerstone of the modern international refugee protection system, observing how the UNHCR has asserted that

*non-refoulement* is a fundamental principle of international law and one that is accepted by the international community of states. He demonstrates how the jurisprudence of the European Court of Human Rights is the most progressive in the protection of asylum seekers with respect to the principle of *non-refoulement*, in comparison to the judgments of the Supreme Court of the US, the Supreme Court of Canada, and the High Court of Australia. In fact, the interdiction policies and practices of the US and Australia have been upheld by their highest courts, and even the *Suresh* judgment of the Supreme Court of Canada allows for refugees to be deported on grounds of national security risks, even in the face of torture back home. Worryingly, as he describes, under the EU-Turkey deal, asylum seekers are being held in refugee settlement centres in Greece and then being sent back to Turkey. Such measures serve as deterrent measures to discourage asylum seekers from attempting to travel and enter the EU, with serious long-term consequences for the principle of *non-refoulement*.

In Chapter 13 *Penelope Mathew* also explores the concept of constructive *refoulement*, particularly in relation to Australian practice. *Refoulement* means to force back or turn away and she examines the possible breaches of Article 33 of the Refugee Convention when the state makes life so miserable for a refugee or asylum seeker that he or she 'decides' to return home. At the very least, she argues this is a potential consequence of the state's policies. This amounts to 'constructive *refoulement*'. However, it is uncommon to find case law that uses the term, and even less common to find case law in which a court finds a violation that could be described as constructive *refoulement*. It is also unclear exactly what the threshold for a constructive *refoulement* would be. The concept, she argues, appears to be an intuitive idea akin to constructive dismissal in labour law, which often occurs when the employer makes life so miserable at work, that the employee 'chooses' to resign.

*Yewa Holiday* in Chapter 14 looks at the much neglected provision of Article 31(1) of the Refugee Convention which prohibits the *penalisation of refugees* 'coming directly from a territory where their life or freedom was threatened in the sense of Article 1' for offences of illegal entry and presence as long as they 'present themselves without delay to the authorities' and 'show good cause' for the illegal entry or presence. Despite this, the penalisation of asylum seekers does occur in the form of fines and imprisonment and summary deportation. It also includes the delaying, obstructing or denying of access to asylum. Refugees without proper documentation may also be channelled into 'an inferior refugee procedure'. The author argues that properly understood Article 31(1) exempts all asylum seekers from penalisation except those who have found permanent protection from persecution and therefore have no need to resort to irregular methods of travel.

The specific example of Australia is provided by *Savitri Taylor* in Chapter 15 when she undertakes a critical analysis of Australian refugee policy, and the strategies which Australia has employed to minimise the impact of its Refugee Convention obligations on its ability to implement its immigration and border control agenda. She shows how the chapter is of wider relevance because, in the wake of the Syrian refugee crisis, commitment to human rights is receding and anxieties about uncontrolled population movement are coming to the fore in an increasing number of states parties to the Refugee Convention and many countries are looking to Australia for lessons on how to respond.

One of the most redeeming features of modern refugee law, however, is how it is stretched to provide protection in new spheres of protection, in the midst of changing idioms of protection, persecution, and *non-refoulement*. These are discussed across a range of areas such as Family Re-Union, Gender Discrimination, Gay Rights, Human Trafficking and Climate

Refugees, the latter which at the time of writing, is still struggling for proper protection. Part IV consists of six further chapters where these are analysed. In Chapter 16, Emily Darling looks at the right to family reunion for refugees, given that refugees are often separated from family members as a result of the refugee experience. The issue often comes to the fore when after obtaining residence rights in the new host country, refugees seek to reunite with family members they have been able to locate in their home countries or elsewhere, after which an essential part of the process of resettlement in the new country becomes one of reuniting with close family members. The international obligations and standards that apply in the context of refugee family reunion is what the author carefully critiques. She considers particularly the level of protection that these standards in practice offer, along with the limitations on access to family reunification. Limitations on family reunification include the need for implementation of the rights at domestic level, narrow definitions of family members who are eligible for reunification and barriers created from ineffective administrative processing. Her firm conclusion is that although it is more difficult to establish a right to family reunification, there is a stronger case for refugees and children to be granted the right quite simply because family reunification is an essential part of the resettlement process for refugees starting a new life in another country.

*Janna Wessels* in Chapter 17 discusses the implications of the UK Supreme Court judgment on *gay rights* in *HJ (Iran)* [2010] UKSC 31, which inspired a fierce debate among refugee law scholars on the role of a claimant's acts, identity and rights, especially in the article 'Queer Cases Make Bad Law' by James Hathaway and Jason Pobjoy in 2012. She argues that the judgment and the reaction to that decision by Hathaway and Pobjoy's article crystallises a broader dispute concerning an asylum seeker's future conduct in refugee law at the heart of refugee protection. She remarks on how this debate systematises the two broad trends that literature and case law reveal in this debate, which are represented by the judgment and the article. The author proceeds thereafter to reflect on the reasons why the claimant's future behaviour causes such trouble and suggests that the refugee law community might in fact be fighting over the 'right' solution to a different puzzle. In an insightful contribution, she raises questions which have not previously been raised. These are that any person has at least *some* discretion regarding what others know about their sexual characteristics, and this creates a dilemma for refugee status determination, which is based on a future-focused analysis, and yet it remains the case that claimants can influence that future to some extent. So, therefore, does this mean that claimants can be expected to hide their persecuted characteristics? If not, can claimants at the very least be required to exercise some restraint in their expression?

In Chapter 18 *Catherine Briddick* explores the issues that arise from a consideration of women's claims for recognition as refugees under international refugee law (IRL), subsidiary protection and/or protection from *refoulement* under international human rights law (IHRL). The first issue relates to women's access to protection. She draws attention to the increasing numbers of women seeking protection, and the gendered impacts that Europe's 're-bordering' has on those women who are forced to undertake 'illegalised' and dangerous journeys. She argues that the jurisprudence on violence against women and sex discrimination should be relied upon to challenge specific instances of re-bordering that impact disproportionately on women. The second issue considered is the scope of protection offered to women seeking protection from gender-based violence under IRL and IHRL. Here she argues that broad assertions of IHRL's primacy when it comes to affording women protection from violence are overly simplistic, so that recourse to a multiplicity of legal sources, particularly the spe-

cialist regimes developed to respond to violence and discrimination against women, should be undertaken. Third, she reports on a recent success: developments in IHRL that seek to improve the way that women's claims for protection are determined. Ultimately, she asks whether advocacy that focuses on securing procedural protections for women, when coupled with the attack on women's ability to access asylum, actually risks contributing to the denuding of the substantive right, the right to seek and enjoy asylum from persecution, by equating it, in effect, to compliance with a set of procedures that comparatively few women are able to benefit from.

The rights of women seeking asylum is still much overlooked as a whole in refugee law and practice and this is taken up in Chapter 19 by *Nora Honkala*. Women face specific challenges, especially in the UK. Their persecution is more likely to include sexual violence or rape. Significantly, it is also more likely to occur in the so-called private sphere and at the hands of non-state actors, and yet there is no gender ground in the Refugee Convention, and the practical reality of the rights protection on the ground remains bleak. The asylum processes have remained largely the same, and there is little evidence of any significant organisational shifts. The result is that asylum seeker women continue to claim their rights within a complex political climate. They are disadvantaged by restrictive immigration and asylum policies, cuts to legal aid, and the raising of appeals fees. Women fleeing gender-based persecution are subject to detention. This includes pregnant women. The continued erosion of asylum seeker women's rights deserves to be better known.

In the same way, in Chapter 20 there is a consideration by *Tawseef Khan* of the complexity and diversity of sexuality, which the Refugee Convention overlooks in its five grounds of status. He argues that LGB individuals eligible to receive refugee protection experience persecution in unique and nuanced ways. Indeed, the UNHCR guidelines emphasise the intricacy of such claims, stating that an assessment of persecution in a sexual identity-based asylum claim is a complex determination, incorporating 'the circumstances of the case, including the age, gender, opinions, feelings and psychological makeup' of the applicant. He interrogates the status and assessment of legal sanctions that criminalise sexual acts between same-sex partners. He first outlines the development of a working definition of persecution across asylum-granting jurisdictions. He then gives a brief overview of the prevailing treatment of criminal sanctions across many traditional asylum-receiving states, with explicit reference to British asylum policy and the Court of Justice of the European Union (CJEU) case of *X, Y and Z*. in 2013. Finally, he advances the viewpoint on the serious and persecutory nature of the 'mere existence' of such legal sanctions.

*Vladislava Stoyanova* in Chapter 21 discusses how human trafficking law operates in parallel with refugee law. First, victims of human trafficking may qualify for refugee status or forms of complementary protection. Second, victims of human trafficking have been designated in EU legislation as vulnerable persons with special reception needs, as is clear from the EU Reception Conditions Directive (recast) and in the EU Procedures Directive (recast), and this is significant given that asylum seekers are vulnerable to human trafficking. Third, European law on human trafficking has challenged states' immigration control prerogatives, allowing victims of human trafficking to avoid deportation. Fourth, victims of human trafficking are eligible for certain assistance measures. Fifth, asylum seekers who are victims of human trafficking are entitled not to be punished on account of their illegal entry. Sixth, the two regimes of refugee law and human trafficking law interact on procedural issues, allowing an asylum seeker to benefit from protection if identified as a victim. Yet, many of the protection measures emerging from the human trafficking legal framework are limited to its regional manifestation

in the Council of Europe and EU. Whilst the European anti-trafficking framework contains binding obligations to assist and protect victims of human trafficking, the universal framework is very weak. Moreover, the anti-trafficking and the interrelated anti-smuggling measures adopted by states have a negative impact on the refugees in terms of their possibilities to leave countries of origin and to access the territory of countries of asylum.

In Chapter 22, *Matthew Scott* considers the relevance of the Refugee Convention to natural disasters and climate change. He argues that the political resonance of the 'climate refugee' idea does not translate readily into the inclusion clause at Article 1A(2) of the Refugee Convention and that this is unsatisfactory, because the legal arguments for inclusion are more persuasive than the moral arguments. He demonstrates this by arguing that refugee status determination should proceed from an appreciation of individual circumstances that is understood by reference to wider social patterns, such that it ought not be conducted with a narrow focus on disasters and climate change. The ultimate question remains whether a person seeking refugee status is able to demonstrate a well-founded fear of being persecuted for a Convention reason. However, denial of human rights is heightened in its probability after a disaster given that climate change brings more frequent and intense natural hazard events and processes to increasingly exposed and vulnerable societies, groups and individuals. In such a situation, the risk of being persecuted in this connection is raised for the foreseeable future. Even if most people displaced following natural disasters and climate change events are not refugees, refugee status determination should still be conducted with an awareness of the relevance of economic and social rights in the persecution enquiry.

In the final part of this tome, we consider in Part V the 'The Exclusion and Rejection of Refugees.' In Chapter 23 there is a discussion by *Kate Ogg* of new issues that have arisen in relation to Palestinian refugees under Article 1(D) of the Refugee Convention. Given recent decisions of *El Knott* and of *AD (Palestine)*, which have been scarcely analysed although they break away from earlier Article 1D jurisprudence, she embarks upon a critical examination of these two decisions by the CJEU and NZIPT, respectively. Her conclusion is that although these precedents provide greater opportunities for Palestinian refugees to obtain the benefits of the Refugee Convention, they also threaten the principle of continuity of international protection for Palestinian refugees, because they adopt a narrow understanding of the meaning of 'protection or assistance'. This is done by imposing on Palestinians 'an evidentiary paradox' requiring them to prove that their decision to flee was involuntary. In fact, the CJEU's approach favours those who have heroic or intrepid narratives. These can serve to disadvantage Palestinian women and girls because they create additional and often-insurmountable barriers to Palestinian refugees, who would wish to seek the benefits of the Refugee Convention, not supported by Article 1D's ordinary meaning or the Refugee Convention's object and purpose.

*Sarah Singer* considers the exclusion clauses of Article 1(F) of the Refugee Convention in relation to the War on Terror in Chapter 24 with respect to the *War on Terror*, which has become so important over the past two decades. She argues that the drive to deny the benefits of refugee status to terrorists has resulted in an expansion of the grounds of exclusion under the 1951 Refugee Convention and EU Qualification Directive. There are concerns over the most recent jurisprudence of the CJEU and future directions of this area of law. The singling out of refugees and asylum seekers as potential terrorist threats is curious and we should be suspicious of state attempts to infringe individual rights in the name of counter-terrorism operations. It is far better, she argues, that the 1951 Refugee Convention's mechanisms to address suspected criminality and state security are in themselves. We should not have to resort to

uncomfortable and ill-defined appeals to 'terrorism' or terrorist-related activity. The Refugee Convention already contains references to war crimes and other serious criminal activity in the first two limbs of Article 1F. This is a firmer and more reliable basis for exclusion from refugee protection. In addition, domestic criminal processes are also available to seek redress. On the other hand, what the global 'War on Terror' has done is to affect appropriate refugee protection frameworks and approaches across the globe.

*Joseph Rikhoff* considers the 'exclusion clauses' in Chapter 25. He demonstrates that, for Article 1F(a), the interaction between exclusion law and ICL has followed a different course in the area of crimes compared to that of extended liability. Further, decision-makers nationally have followed ICL closely for war crimes and crimes against humanity. They have also borrowed from other international crimes and relied on international precedents, and then developed their own parameters for these crimes. The area of extended liability has been a new approach for forms of liability so that in the last few years ICL has become a source of inspiration and the courts in the UK and Canada have developed the new test of voluntary, personal and significant contribution. For Article 1F(b), the elements of what is a crime, what is a serious crime, what law should apply for the determination of what is a crime, the meaning of outside the country, the concept of political crime and the issue of expiation all have been, and are still, in a considerable amount of flux at the international level with only the parameters of political crimes having been resolved in a consistent and satisfactory manner. Rikhoff argues that guidance from the highest national courts or even international institutions would be welcome if one is to avoid too much fragmentation of this important area of refugee law in the future. For Article 1F(c), the main issue is not as much the fact there has been disagreement among the various judicial decision-makers, given that all agree that acts of terrorism and human rights violations should fall within its description, but whether there is an independent meaning of 1F(c) as all forms of criminality used under this heading can also fall easily within the parameters of 1F(a) and 1F(c).

*Joris van Wijk and Maarten Bolhuis* point out in Chapter 26 how in cases where refugee status is denied to an applicant or revoked, host states normally require such a person to leave the country. Yet, this does not always happen and the removal of failed asylum seekers has become an issue of increasing public concern. Even more remarkable is the situation where a host country fails to remove an applicant whose claim for refugee status is denied or revoked on account of an allegation of involvement in serious non-political crime or crime against humanity. The authors here explore and assess the various policy options that states have to remove undesirable asylum seekers, such as voluntary return, forced return and relocation. But they also discuss situations in which such options are not available and the undesirable asylum seeker is *de facto* 'unreturnable'. What host states may then do is prosecute such failed asylum seekers and / or offer them a form of temporary leave to stay. Such an outcome for those that are deemed 'undesirable' and yet 'unreturnable' does not require a harmonised approach. So far, the UNHCR has considered the issue of unreturnable 1F-excluded asylum seekers to fall outside its mandate. It has not published any guidance in this regard. Member states prefer retaining full discretionary powers over the adoption of a harmonised approach. However, the inactivity of the EU or UNHCR should not prevent states from independently developing their own structural solutions to this elusive but important issue.

Given that many rejected asylum seekers fail in successfully having their decisions reviewed on grounds that the decision-maker has not acted contrary to law, so as to commit an 'error of law', *Rowena Moffatt* considers in Chapter 27 how asylum decisions are reviewed. She argues

that the proper standard of review is a 'merits review' rather than a 'legality review' – the former looks at the facts afresh whilst the latter looks at the way that the decision has been made. This, she argues, would give better protection to failed asylum seekers and should be embedded in the supranational norms governing asylum decision-making. The author considers the Refugee Convention, the European Convention on Human Rights, and the Asylum Procedures Directive, and concludes that given the nature of rights at stake 'merits review' should be adopted in asylum decision-making.

Finally, I would like to thank my authors for so readily agreeing to participate in this project and I trust that readers will find these accounts informative and moving in equal measure. I would like to record my gratitude for my publishers, and especially the Senior Editor at Elgar, Mrs Laura Mann, for her patient and unsparing support for the production of this work. Finally I would like to record my indebtedness to Mr Ben Booth, Senior Commissioning Editor, for commissioning me to undertake the enormous task of compiling this Handbook. This work is dedicated to the memory of Stefania Barichello (1983–2017). Dr Stefania Barichello was an inspiring, committed and passionate scholar who cared deeply about the refugee cause. She was awarded a PhD from the Institute of Advanced Legal Studies, University of London, in 2017.

Satvinder S. Juss
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