1. Refugee law as perpetual crisis

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There is no doubt that the refugee law regime is in crisis. There are several dimensions to this crisis. On the political plane, prosperous refugee receiving states are increasingly moving to close their borders to asylum seekers, to assert new mechanisms of control over access to asylum, and to limit the rights associated with asylum. From the perspective of individuals on the move, extra-legal migration is growing in all regions of the globe and this intensifies pressure on the asylum system because it is the only exception to the rule of sovereign control over borders. The need for refugee resettlement is vastly disproportionate to the small amount of resettlement which occurs annually around the world and which is, in any case, beyond the reach of the current legal regime. Advocates persist in calling for changes to the refugee definition, and states are only too pleased to join these calls. The crisis diagnosis has been proclaimed at regular intervals over the past two decades.

I have previously argued that the resilience of the refugee regime in the face of both geopolitical pressures and critique from all quarters is a key indicator of the strength of the regime *as law* and has important implications for the growth of the rule of law in both the international realm and in migration governance.¹ That argument is related to the project of this chapter but here I take a different tack. On this occasion, my objective is to take ‘crisis’ as the starting point; to accept the persistence of a notion of crisis; and to explore its consequences. Principal among these is the idea that refugee law cannot be ‘normalized’ either within its international law setting or in its various domestic frameworks. The idea of crisis sustains the structure of refugee law, supporting its greatest strengths as well as its weaknesses.

The starting point for this analysis must be the banal. Mass movements of refugees are crises, and we name them as such: the Indochinese crisis,

¹ See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008) 50–68 and 169–90.

the Congo crisis, the Kosovo crisis, and so on. Indeed, in its origins, the contemporary refugee regime was devised to address the crisis of mass displacement in Europe following the Second World War.² The paradigmatic association between refugee law and crisis is a starting point for this analysis: refugee law is designed to respond to crises. From this starting point one must follow several paths to see how this originary trope has shaped refugee law in such a way that it is now possible to develop key insights about the law – its management and its likely futures – by seeing refugee law itself *as crisis*. In this short chapter, I trace the imprint of ‘crisis’ on refugee law in three ways: within refugee jurisprudence; within refugee politics; and within our understandings of international law as a whole. These three lenses also reveal how refugee law is linked to the broader ‘refugee regime’ as envisioned in the world of international relations.

CRISIS AND REFUGEE JURISPRUDENCE: THE HERMENEUTIC EFFECTS OF CRISIS

Within refugee jurisprudence, crisis is a useful lens for understanding interpretive patterns. The starting points here tug in two, disparate, directions.

The first issue that presents itself jurisprudentially is the inherent tension between the paradigm of crisis – a refugee crisis being broadly understood as a sudden, mass, displacement of people fleeing some particular threat – and the individual focus of the refugee definition.³ Here, attention to the role of crisis serves to highlight the political location of the definition. The dissonance between an individually focused definition and the paradigm of mass movement underscores that refugee law reflects first and foremost the interests of powerful Western

² The 1951 Refugee Convention (United Nations Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150) came into force in 1954 and is the legal backbone of this regime. The Convention was amended by the 1967 Protocol relating to the Status of Refugees, 606 UNTS 267/ [1973] ATS 37. Together I refer to these two instruments as ‘international refugee law’.

³ The Refugee Convention, above note 2, Art. 1(A)(2) defines a refugee as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’.

states. The ‘crisis’ in this sense is the spectre of mass arrivals: individualizing this mass renders the arrivals manageable, and limits state responsibility. This insight is certainly not new, but it is a useful introduction to understanding the function of a ‘crisis’ focused analysis.⁴

The second issue that presents itself is that refugee jurisprudence is marked by a consistent ‘crisis bias’. While one objective of the 1950s legal regime was certainly to control state responsibility, within the hermeneutic development of refugee law, a connection to crisis has proven a good indicator of where growth occurs within refugee law. In terms of understanding the central feature of the definition – a risk of being persecuted – crisis is central: something happens and then you flee. Forms of persecution without the quality of sudden urgency have been harder to fit within the refugee paradigm. It is along this fault line that a jurisprudence has developed that talks about distinguishing ‘mere discrimination’ from persecution;⁵ or that talks about progressive standards (for example, in meeting the obligations set by social and economic rights) rather than non-derogability.⁶ This means that under the ‘surrogate protection’ of refugee law, states might not need *actually* to protect the rights of citizens; good faith efforts are enough.⁷ Protection from harms that are generalized (such as homophobic violence), and harms that are privatized (such as domestic violence) are harder to fit within the persecution framework.⁸ These harms tend to be endemic and chronic, rather than acute and crisis driven.

Similarly, in the case of the doctrine of state protection which comprises the second half of the risk of persecution analysis, crisis is an instructive aspect. Beginning with the seminal Supreme Court of Canada

⁴ See James C. Hathaway’s discussion of this history of the Refugee Convention in *The Law of Refugee Status* (Toronto: Butterworths, 1991) 6–10. See also Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007) 20–37.

⁵ See Michelle Foster’s analysis in *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007) 226–32.

⁶ *Ibid.* 90–111.

⁷ James C. Hathaway’s work has been the focal point in disseminating the view of refugee law as ‘surrogate protection’. See *The Law of Refugee Status*, above note 4.

⁸ These challenges are explored in Jenni Millbank, ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 *Melbourne University Law Review* 144 and Efrat Arbel ‘The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases’ (2013) 58(3) *McGill Law Journal* (forthcoming).

ruling in *Canada v Ward*, there has been an assumption that states are capable of providing basic rights protection to their citizens.⁹ This presumption is difficult to dislodge, and the availability of state protection is a significant issue in many refugee determinations.¹⁰ In this jurisprudence, an inability to protect is a significant crisis in the basic functioning of a state. Furthermore, when state officials are themselves the agents of persecution, it is now accepted that a refugee claimant faces a lower onus of proof.¹¹

In other aspects of the refugee definition, the crisis paradigm is similarly instructive. For example, a crisis perspective helps explain how the different grounds of persecution have been treated by decision-makers. There is a crisis element associated with the lower level of scrutiny that attaches to the ground of 'political opinion' rather than to other grounds – in other words, being persecuted on the grounds of one's political opinion seems to fit the refugee paradigm better than other forms of persecution. Politics is a volatile activity prone to shifts large and small. Regime change within a state is often dramatic and is, at the same time, predictable for all states: no regime will last forever. We expect political dissent to be outspoken, eruptive, sudden, and to respond to the events of the day. This view of the nature of political opinion is shaped by the experience of Western liberal democracies, as is all of refugee law. The other grounds – race, religion, nationality and membership in a particular social group – have been the areas where a jurisprudence talking about a requirement for individuals potentially to curtail their behavior, or to 'tolerate' some degree of human rights infringement, has developed.¹²

A focus on crisis also yields some insights into the development of interpretive patterns around other aspects of the law as well, such as the question of 'well-founded fear' and the analysis of 'refugees *sur place*'.

⁹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

¹⁰ In the forthcoming second edition of *The Law of Refugee Status* (by James C. Hathaway and Michelle Foster, Cambridge University Press, 2013), state protection is allocated its own lengthy chapter. This was a topic that was not even allocated a sub-heading at the time of the 1991 edition.

¹¹ *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891 (UKCA).

¹² The Australian High Court rejected this analysis in cases involving gay men fleeing persecution on the basis of their sexuality in the seminal ruling in *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, but this ruling has not successfully prevented decision-makers from embarking on this type of analysis: see James C. Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *NYU J Int'l L and Pol.* 315.

In the former case, the refugee decision-maker must consider what is likely to happen to an individual if returned to her home country. The more likely that such a return will provoke a crisis of some sort, the more likely the decision-maker will draw the conclusion that her fear is well founded. In the latter case, the law makes a protective space for those who did not actually flee their home country, but who later fear returning home because of a crisis that has changed the political landscape in their absence.¹³

In the fast growing area of exclusions from protection,¹⁴ complicity in international crimes is often analyzed in Canada by asking whether a claimant for refugee status ‘disassociated’ herself from the group *at the first possible moment after she became aware of their activities*.¹⁵ In other words, did she correctly identify the crisis and respond to it as such. Individuals who react with deep contemplation to a situation that develops over time face greater evidentiary hurdles, as do those who decide that the risks involved in sudden flight make it impossible.

The notion of a ‘crisis bias’ in refugee jurisprudence is principally descriptive. Particularly within the context of this project, where I am pursuing the argument that refugee law *is* crisis, the ‘crisis bias’ is a description rather than a critique. It is vital to note that the description cuts two ways: crisis limits the reach of the law, and within these limits, highlights where expansive interpretations are most likely to develop. It also has an explanatory capacity beyond mere description, as it predicts some scenarios that refugee decision-makers are likely to respond to favorably, in contrast with others that decision-makers are likely to challenge or reject. Additionally, it must be noted that focusing on a crisis bias within refugee jurisprudence explains and identifies trends that are generally well known already, and to that extent it is vulnerable to a pretty powerful ‘so what’ critique. Crisis tells the story in a new way, but the story is not new. The advantage that crisis bias offers is that it can

¹³ See *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562 (Eng. CA).

¹⁴ Article 1F of the Refugee Convention identifies three categories of persons who are considered undeserving of refugee protection: those who have committed international crimes; those who have committed serious non-political crimes; and those who are guilty of acts contrary to the purposes of the United Nations. On the recent rise in this use of Art. 1F, see Asha Kaushal and Catherine Dauvergne ‘The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions’ (2011) 23(1) *International Journal of Refugee Law* 54.

¹⁵ *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306; *Morena v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298.

also explain how and why these jurisprudential trends work in tandem, and, beyond this, it can join an understanding of the jurisprudence to the two other factors that I want to talk about briefly: the politics of the refugee regime and the place of the refugee regime within international law.

THE POLITICS OF THE REFUGEE REGIME

All states want refugees to disappear. Contemporary refugee law originated as a temporary provision to resolve a short-term problem. The terms of the 1951 Convention explicitly contemplate temporary protection, the need for which may lapse because of changed politics.¹⁶ Advocates too would be happy, under the right conditions, to see the end of refugee status. The United Nations High Commissioner for Refugees (UNHCR) 2011 campaign mobilizing slogan was ‘one refugee is too many’, with variations such as ‘one family torn apart by war is too many’, ‘one refugee without hope is too many’. The new 2012 campaign similarly aims at ending refugeehood with the theme ‘no one chooses to be a refugee’.

The politics of the contemporary refugee regime is organized around the notion of crisis. Crisis is short-term, it is high profile and it is intense. This framing of refugee politics has several results. At the broadest level, states resist responding to refugee flows as though they were a permanent feature of how we have organized the international realm. The system instead embeds the idea that some states ‘produce’ refugees, and that this production is because of a defect within the state. This is essential to the

¹⁶ Refugee Convention, above note 2, Art. 1(C)(5) and (6) state:

This Convention shall cease to apply to any person falling under the terms of section A if: ... (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

notion that the refugee regime spreads the burden of providing surrogate human rights protection for the individual throughout the international community, when the state of nationality is unable or unwilling to provide it. The notion of defect is anathema to the idea of sovereign equality of states. It also is premised on an idea (which is at once Western, liberal and modern, just like the regime itself) of progress towards a norm of human rights enlightenment. Good states, normal states, states under ordinary conditions, do not produce refugees. Refugee production is deviant, and as such has a crisis element. This certainly cuts against a presumption that there will always be some states that produce refugees, and belies the evidence of the first 60 years of the contemporary refugee regime.

Resisting permanence affects refugee politics in a number of ways: responses are ad hoc; each new crisis is 'exceptional' in its own way and no one response will stand as a precedent for other responses; there will be deep resistance to ongoing commitments; ongoing budget allocations will perpetually be low. Given the crisis logic, refugee movements can never be 'normalized'. Such normalization would amount to capitulating to failure in the international sphere.

Closely related to this effect is the widely shared attitude towards refugee resettlement. The vast majority of those currently identified as refugees by the UNHCR live in the poorest regions of the world, in geographic proximity to the states they have fled. Moving refugees on a permanent (or quasi-permanent) basis to prosperous Western states that would be better able to provide robust support for them, is rarely pursued as a solution. Only the United States, Canada and Australia accept significant numbers of refugees for resettlement each year, and the total number of refugees resettled is vastly overshadowed by the total number of people who obtain refugee status by seeking asylum.¹⁷ And both these numbers (about 100,000 and 900,000, respectively) are dwarfed by the number of people considered to be refugees (more than 15 million).¹⁸

¹⁷ In 2011, the most recent year for which UNHCR statistics were available at the time of publication, the other countries that resettled refugees included: Sweden, Norway, the United Kingdom, Finland, New Zealand, Germany, the Netherlands and Denmark. Among these, Sweden accepted the most refugees for resettlement at 1,900. Beyond these countries, 'all other' countries accepted 232 UNHCR identified refugees for resettlement, see UNHCR, *Projected Resettlement Needs 2012* (Geneva: Division of International Protection, 2011).

¹⁸ In 2011, 15.2 million people were considered to be refugees and 0.9 million sought asylum in a Western industrialized country. 92,000 refugees were referred by the UNHCR for resettlement, and according to national government

Resettlement is a permanent solution – it must be because it moves people to remote and unfamiliar areas of the globe and presents them with immense challenges in terms of how they will adapt. For all parties, the effort is too intense for this to be done on anything less than a permanent basis. One of the most significant changes in the global approach to refugees following the Second World War was the turn away from resettlement.¹⁹ This fits with a crisis focus. If the problem is temporary, a solution which is permanent is unnecessary. In the interwar period, the opposite approach had dominated the international community's fledgling efforts towards developing a refugee regime, and permanent resettlement had been the emerging norm.²⁰ The press towards temporariness also has political appeal: there is a presumption, likely correct, that states will be more inclined to assist refugees if they need only do so on a short-term basis. This drives some advocacy efforts.²¹ It has also been central in state and UNHCR efforts over the past decade to 'regionalize' refugee solutions, so that refugees remain geographically close to their countries of origin and thus, at least in theory, easier to repatriate.²²

A similar logic is behind the principal alternative to resettlement, the refugee camp. One justification for the non-solution of pooling masses of individuals in camp conditions just over the border from their home state is that this situation – both the turmoil and the camp – is short-term. Another is, of course, that there is no alternative. A refugee camp is a crisis response. While no one seriously imagines anymore that the

statistics, 79,800 were resettled. These figures are comparable to those for the preceding five years. In 2005, the number of refugees was the lowest of those years, at 13 million, and 2007 was the highest at 16 million. The highest asylum total was 1 million in 2009, and the lowest was 0.7 million in both 2006 and 2007. Resettlement referrals peaked at over 110,000 in 2009, but no other year has seen over 100,000 in the past five. See UNHCR, 'Global Trends 2011', available at www.unhcr.org.

¹⁹ Shauna Labman, 'Resettlement's Renaissance: A Cautionary Advocacy' (2007) 24(2) *Refugee* 35.

²⁰ *Ibid.*

²¹ Most prominently, see James C. Hathaway and Alexander Neve, *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997).

²² See the initiative, Convention Plus, UN High Commissioner for Refugees, FORUM/2005/8. But see also Matthew Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007).

world's major refugee camps are temporary, the underpinning of a crisis framework blunts political responses to their permanence. The UNHCR has defined 'protracted' refugee situations as any in which more than 25,000 people of the same nationality had no solution other than displacement for more than five years.²³ Five and a half million people were within the rubric in 2008.²⁴ Little progress has been made in reducing these numbers, but the notion of a 'protracted' situation has worked its way into the everyday discourse of refugee status. The imaginary of the refugee camp, regardless of how long-term the situation is, corresponds with the crisis logic of the system.

The UNHCR is not to blame for this; crisis drives its mandate also. Indeed, crisis is central to the micro-politics of the UNHCR. The organization depends on the support of states, and states are easier to mobilize in a crisis. Eighty-five percent of the UNHCR's staff are field workers, in comparison with a reasonably small headquarters staff, including a tiny legal staff in the organization's Geneva headquarters.²⁵ The effects of this are so pronounced that Gil Loescher has observed that, '[w]hile UNHCR and other humanitarian organizations are able to deliver large quantities of humanitarian supplies under extremely difficult conditions, they are much less successful in protecting civilians from human rights abuses'.²⁶ In other words, the organization is well-tooled to respond to crisis, and poorly equipped to oversee the Refugee Convention and to shepherd development of the law.

The camp image and its logic also speak to another aspect of the politics of the refugee regime; a global mutual reinforcement of the lowest common denominator in refugee protection. Even while refugee jurisprudence is broadening (following crisis bias fault lines), states are consistently moving to limit their exposure to it. Ever since the marked growth in asylum seeker numbers in the 1980s, prosperous states have moved progressively to limit access to their borders. A number of measures have grown up around the refugee regime which can now be considered ordinary in what might be considered the 'domestic' politics

²³ UNHCR Division of Programme Support and Management, '2009 Global Trends', available at www.unhcr.org. The definition was altered in 2009 to remove the 25,000 criterion.

²⁴ *Ibid.*

²⁵ For general staffing information, see 'About Us, Figures at a Glance, UNHCR Figures, Staff Figures', available at www.unhcr.org.

²⁶ Gil Loescher, 'UNHCR at Fifty: Refugee Protection and World Politics' in Niklaus Steiner *et al.* (eds), *Problems of Protection: The UNHCR, Refugees and Human Rights* (New York/London: Routledge, 2003) 13.

of the refugee regime. These include: carrier sanctions through which transport companies are heavily penalized for bringing people without appropriate travel documents into any country; safe third country provisions in which states cooperate to limit options for those seeking asylum; expanded use of visa requirements which serve to limit the ability of people from refugee producing states to reach prosperous Western nations and claim protection; overseas migration screening in which government officials conduct border screening thousands of miles away from the geographic border; biometric indicators and enhanced security screening, the results of which are now widely shared among cooperating Western states. It is evident that those seeking asylum are not welcomed at Western borders, they are instead deterred on all fronts. Arrival itself is analogized as 'crisis', whether at the micro-level of one individual making it across the border or in the group arrivals that make headline news when a boat or shipping container arrives full of people who want refugee status.

Both the camp and the boat are crisis images. Provocatively, one seems to belong to international space and the other to domestic, but in reality the contrast between the two is not in a difference between international and domestic locations, but in gradations of sovereignty. For prosperous and powerful Western states, refugee law impinges on sovereignty through an obligation to admit, assess and possibly retain, those who arrive at the border seeking refugee protection. For states in the Global South which share a border with the principal refugee producing nations of the contemporary era, sovereignty is breached not in a theoretical and highly legalized sense, but in the arrival of tens of thousands, or more, who literally cannot be turned away short of a massive armed response (which would be condemned by the eponymous 'international community'). In this sense the refugee regime has become a measure of sovereignty. The question 'what crisis and for whom', is answered in terms that belie the myth of sovereignty equality. Understanding the role of sovereign infringement – the paradigmatic crisis point for the international state regime – provides an entrée into analyzing how understanding refugee law *as* crisis reveals how refugee law fits into our understandings of international law at the broadest level.

REFUGEE REGIME AS INTERNATIONAL LAW

International refugee law occupies a vitally important place in the overall scheme of international law. This is so for two main reasons. First, the refugee definition is one of the most relentlessly hermeneutic pieces of

international law. Few international legal texts are interpreted more frequently. The refugee definition is interpreted and applied with every asylum decision made – in 2011 there were 876,100. The refugee definition is also used in status determinations in other settings, for example, by the UNHCR when assessing resettlement eligibility and other forms of entitlement for assistance. It is not an exaggeration to say that this international legal text was considered and applied a million times in 2011. This is a conservative estimate.

The second reason for the importance of refugee law is because of its relationship with international human rights. In the grand narrative of international law, the post-Second World War period is remarkable for the appearance of individuals as subjects of international law. The shift is located primarily with the remarkable growth of international human rights law, and its potential to hold individual states to account. This trajectory is not straightforward, and it is fraught with issues of access and enforceability, but it is significant both at the level of grand narrative and in terms of how we theorize the reach, purposes and law-like-ness of international law. Refugee law has always had a somewhat uneasy relationship with international human rights law. The Refugee Convention is not considered by the Office of the High Commissioner for Human Rights to be a core human rights instrument, and while human rights standards often inform interpretation of the Convention, it is similarly clear that not all human rights breaches will come within the ambit of ‘being persecuted’ for Refugee Convention purposes.²⁷ But despite this unease, the Refugee Convention does more than any human rights statement to make the individual a subject of international law.

There are, in turn, two reasons for this. The first is that applications of the refugee definition are always and only individual. While the commonsense notion of ‘the refugee’ conjures masses, the legal formula is individual focused. This device limiting state responsibility is, somewhat ironically, key to securing refugee law’s prominence within contemporary international law. The second is because the constraint on state sovereignty which is refugee law is a very real constraint. The questions of enforceability, access and remedy which plague human rights law are not present in the refugee setting. The question of ‘surrogate protection’ for major discriminatory breaches of human rights has become firmly anchored in the international law regime, in a way that is truly light years ahead of human rights law more generally. This development has occurred because refugee law’s starting premise unhinges the individual

²⁷ Hathaway, above note 4, at 99–134; Foster, above note 5, at 87–111.

from the state. Circumstances that create refugees thrust the individual into the international realm – it is not a matter of legal fiction or political convenience.

In turning to unpackage these features of refugee law's importance, and to analyze their implications for what we understand international law to be, crisis is again a key indicator. Crisis provides a key to locating refugee law within theoretical accounts of international law – a space where (paradoxically) it has often been absent. Emma Haddad's 2008 book provides a starting point in this regard.²⁸ Haddad asserts that the refugee is an ordinary, predictable, consequence of the current organization of international society. Accordingly, an expectation that refugees ought to disappear fails to take seriously the role this subject position plays in the international realm. Within Haddad's analysis, a focus on 'crisis' appears to be misguided: refugees will be perpetually present within international society under contemporary conditions. On this point, I agree with Haddad, but would go further. I concur that refugees will be perpetually present, but I believe that they are perpetually present *as crisis*. That is, at a political or a jurisprudential level, analyses such as Haddad's will be resisted or ignored because her perspective embeds a normative critique of crisis logic.²⁹ I take the same starting point, but follow a different path. I am asserting that the persistence of the refugee regime is, itself, a way of locating crisis. Persistence and crisis are thus intertwined, each serving to sustain and explain the other.

This feature of the refugee regime illuminates several developments in contemporary refugee and migration scholarship. Two important examples here are the engagement of contemporary scholars with Carl Schmitt and Giorgio Agamben. In Schmitt's case, refugee scholars have been drawn to his analysis of the 'state of exception' as a way of understanding the heightened focus of states on having complete control over border closure.³⁰ In Agamben's case, much productive work has been done from

²⁸ Emma Haddad, *The Refugee in International Society: Between Sovereigns* (New York: Cambridge University Press, 2008).

²⁹ This argument can be supported tangentially by engaging with the ongoing critique of the current refugee definition. This too is important to Haddad's position. I disagree with Haddad on this point as well, but I suspect this may be because I am a refugee lawyer, and in any case, a debate about the refugee definition is quite far from the central point I want to pursue here.

³⁰ As elaborated in Carl Schmitt, *The Concept of the Political* (expanded edn, London: University of Chicago Press, 2007). See Jeremy Webber, 'National Sovereignty, Migration, and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion?) of Carl Schmitt' in Oliver Schmidtke and

the starting point of his 'bare life' figure and his camp analogy.³¹ In each instance, however, these analyses require refugee scholars to pull away from some features of the underlying theory. With respect to Schmitt, the element which is often jettisoned is the anti-democratic tendency. Many contemporary scholars seek to apply Schmitt's analysis to the ongoing activities of democratic states with respect to non-citizens in general, and refugees in particular. This work usually focuses on his idea that the sovereign is defined by the power to decide the exception. Schmitt himself was not particularly concerned about preserving democratic principles at the point of exception. With respect to Agamben, it is easy to slip into his perspective of analogizing the refugee camp to the concentration camp, and to mapping the refugee onto the bare life figure. Both analogies, however, neglect Agamben's careful work in situating *homo sacer* outside of political life. The refugee most assuredly is not. The latter half of the twentieth century has seen the refugee transformed into a central figure of international politics (and this, of course, is vital to the resonance of Haddad's work).

The two facets of refugee law's importance – its relentless hermeneutics and its constraint on sovereignty – serve as important correctives in these approaches to Schmitt and Agamben. In the first case, the fact that refugee law is used so frequently, even constantly, emphasizes that focusing on it theoretically as an 'exception' will be misleading. In the second case, the importance of refugee law in asserting the individual *into* international law, rather than out of it, belies the camp analogy (even while it pushes us to grapple with why the reality of refugee camps is so starkly similar to that of concentration camps). These correctives are two sides of the same coin, and illuminate the thread that draws together Schmitt and Agamben. It is the now routinized predictability of refugee law, the political place that has been carved out for refugees *because of* refugee law, that counters both Schmitt and Agamben.

Saime Ozcurumez (eds), *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (Palgrave Macmillan, 2008) 61–90; Kay Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptation of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001.

³¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Palo Alto, CA: Stanford University Press, 1995). See Patricia Owens, 'Reclaiming "Bare Life"?': Against Agamben on Refugees' (2009) 23 *International Relations* 567; Barbara Yngvesson, 'Transnational Adoption and European Immigration Politics: Producing the National Body in Sweden' (2012) 19(1) *Ind. J Global Legal Stud.* 327; Greta Bird, 'An Unlawful Non-Citizen is Being Detained or (White) Citizens are Saving the Nation from (Non-White) Non-Citizens' (2005) 9 *University of Western Sydney Law Review* 87.

What unites both of these points is that they draw on an understanding of refugee law *as* crisis. As in responding to Haddad, it is the intertwining of perpetual presence and crisis that locates the refugee regime in relation to Schmitt and Agamben. Schmitt understood, and was deeply concerned about, the decentering of the state in international law. The refugee figure is central to that: refugee law is the crisis of sovereign infringement. In Agamben's case, those excluded from refugee law are a much richer terrain for work drawing on Agamben, than the refugee herself. Exclusion from refugee law pushes the individual outside of politics, beyond even surrogate protection, into a negative space of no access to human rights.³² This insight, however, relies on understanding how the crisis bias in refugee jurisprudence has served to anchor its robust growth, and its rich transformation into the rule of law.

One of the ironies of the development of refugee law in the most recent decades is that even as prosperous Western states have repeatedly taken actions aimed at limiting the number of refugees who arrive at their doorsteps, and at narrowing the reach of key provisions in the law, none has withdrawn from the Refugee Convention, or even formally altered the terms of their agreement to be bound by the international rules (which would be possible by entering a reservation to their ratification). Rather, states have been eager to argue that their actions comply with the Convention. All of this has occurred in the absence of any effective mechanism for enforcement of the Convention, thus ensuring that states can openly applaud potential breaches by the other states party as lowering the standard to which each will be held.³³ What can account for the resilience of the Convention under these conditions? It is now possible to conclude that refugee law has taken on key rule of law characteristics in the international realm. States experience the Convention as a necessary and binding aspect of the international framework. The ratification rate is high, as is the moral value of the law.³⁴ But adhesion to refugee law goes beyond these factors, which are shared by many human rights instruments that have not gathered the same traction

³² Asha Kaushal and I begin the work of exploring this space in the conclusion of our co-authored work, 'The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions' (2011) 23(1) *Int'l J Refugee L* 54.

³³ The Refugee Convention provides that states parties to the Convention may take a complaint of non-compliance to the International Court of Justice (Art. 38), but this has never happened and is unlikely ever to happen.

³⁴ There are 144 states parties to the Refugee Convention and 145 to the 1967 Protocol.

in practice.³⁵ Refugee law has taken on rule of law characteristics because states follow it despite clearly not wanting to; because domestic courts persistently expand its reach and compel governments to follow; because its capacity to affect the lives of individuals is direct and dramatic; and because it is a legal text that constrains sovereignty by force of law alone. The crisis ethos is part of the explanation for this transformation as well, as it means that the actions and rhetoric of all supporters of the law, as well as the broader regime, converge on the goals of minimizing commitments. That is, crisis is the trope which ensures a convergence of support for refugee law as a regime and allows this rule of law transformation to unfold.

The rule of law transformation is vital to theorizing refugee law, because it is rare in the terrain of international law, where the formal rules focus on 'consent to be bound'. Refugee law therefore also relates to key contemporary reformulations of the broad sweep of international law. For example, in considering Koskenniemi's assertion of the shift from international law to international relations, refugee law could be read as a fulcrum piece.³⁶ In a parallel way, refugee law as crisis speaks to Toope and Brunnee's account of legitimacy in international law.³⁷ Both of these points are to be explored at length in a longer work.

CONCLUSIONS

Just as I have presented three ways to think about refugee law as perpetual crisis, I want to draw out three types of conclusions that grow from the crisis paradigm. These three conclusions do not map onto my three arguments, but, rather, cut across them. I hope that this serves to emphasize and intertwine the arguments that I have made here; to reinforce that the international responses to refugees are not only a question of law, or of politics, or of what international relations theorists analyze as a 'regime', but rather of all three at the same time. Understanding refugee law as perpetual crisis cuts across each silo of analysis, and therefore works to resist the scholarly analyses that sometimes result

³⁵ The Convention on the Rights of the Child (1577 UNTS 3, entry into force 2 September 1990) is the key example here as it is the most widely ratified international human rights instrument.

³⁶ See Martti Koskenniemi, 'Part I: The Politics of International Law' in *The Politics of International Law* (Oxford: Hart Publishing, 2011) 35–74.

³⁷ Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law* (New York: Cambridge University Press, 2010).

from trying to fit theory into one of these boxes. From my perspective as a legal theorist, what this means most specifically is that concerns and questions that do not fit squarely within international refugee law are nonetheless important to the law and exert pressures upon it, to which it then responds. From the perspective of international relations scholars, I believe the vital point is that while international law does not capture every aspect of the refugee terrain, it is vital to understand what the law does and does not address, and to appreciate the hard lines that give international refugee law its strength, and its value as law.³⁸ In other words, it matters that refugee law *is law*. In thinking about refugee law as perpetual crisis, one is driven towards theories that can integrate the law with the politics, because crisis operates strongly in both terrains.

The first conclusion of understanding refugee law as perpetual crisis is that there is no resolution on the horizon. This conclusion emphasizes the ‘perpetual’ descriptor over the crisis condition. Much of both refugee law jurisprudence and refugee politics react to crisis rather than to perpetuity. The persistent failure to accept this paradox shapes the law and the politics, and also fuels the growth of what international relations scholars call the refugee regime. We have failed, in all these arenas, to understand that given the state system, and the incessant imperfections of humanity, refugees will always be among us. Up to this point, this conclusion tracks closely with Emma Haddad’s analysis. But in distinction to Haddad (and because I am a lawyer), I want to go in a different direction from her analysis and argue that sustaining the crisis mode is both inevitable and consequential. That is, there is more to understanding refugees in the international realm than finding a way to analyze their unending presence. We must also understand their unending role *as crisis*. This involves two steps in reasoning: the second and third points in this brief conclusion.

The second conclusion, therefore, is crisis logic pits refugees *against* states. Crisis mode is difficult to maintain, and it must be perpetually resisted. This resistance, as I have discussed, marks the jurisprudence and the politics of refugee law. Resistance is also part of the story of refugee law in international legal theory – in aiming for the theoretical whole, refugees are not a good fit. This is one reason why the grand theories of international law spend little time on refugees. In 2012, it is pressingly

³⁸ This is part of the argument for maintaining a distinction between refugee studies and forced migration studies. See James C. Hathaway, ‘Forced Migration Studies: Could We Just Agree to “Date”?’ (2007) 20(3) *Journal of Refugee Studies* 349.

evident that refugees will be a permanent part of the international landscape; while refugee numbers had dropped through the early years of the twenty-first century, they began rising again in 2006 and have not abated. At this juncture, shifts in worldwide migration regulation have intensified states' opposition to refugees. As states have moved over the past few decades to heighten migration control and to crack down on extra-legal migration, refugee law is the problem that cannot be solved. Refugee law is the sole constraint on states' legal authority to control movements of people across their borders. As such, it defeats border control aspirations. Further, as border control regulation and enforcement are heightened and made more efficient, and migration more difficult as a result, the incentive to 'be' a refugee increases exponentially. This incentive operates to encourage people who might in earlier eras simply have wanted to move to improve their life chances to consider themselves refugees. Some will be and some will not be. It also incentivizes some people who know (or suspect) that they are not refugees, to pose as refugees. In this mix, the bogus refugee emerges, and becomes itself a crisis sustaining figure. While human rights-respecting states are hesitant to criticize refugees, the bogus refugee is a universally reviled political subject.

In this aspect of the crisis, it therefore becomes important that the idea of 'refugee' functions at different scales, and that these scales all have some purchase. That is, while only those who fit within the legal framework are entitled to asylum, the blurred edges of the refugee regime serve to make refugee determination difficult and to increase the odds that blameless (as opposed to 'bogus') non-refugees will seek refugee protection. And outside the state framework, which is inherently oppositional towards refugees, there is much support for the broader ideals of the refugee regime. This breadth beyond the law is seen in the mandate of the UNHCR; in the drive to build law around internally displaced persons; in the movement to think in terms of 'forced migration' rather than simply in terms of 'refugee studies'. That is, there are good reasons for people who fall outside the framework of the law to think of themselves as deserving of protection and potentially within the law. Succinctly, the politics of refugee law, and the poor fit of refugees within international legal theory, both contribute to the crisis point that is represented by the figure of the bogus refugee.

The third conclusion is that seeking to resolve the perpetual crisis would amount to making refugees disappear. No matter how appealing this might be, and how multilaterally the goal could be embraced, it is not a good

thing.³⁹ If either the ‘crisis’ or its ‘perpetuity’ are removed from the frame, those in need of refugee protection will suffer. Underlying this conclusion is the awkward fit of refugees with international human rights law. An entitlement to human rights protection ought to be based simply on being human. That this is not, and has never been, enough, is the reason for refugee law. Refugee law provides *surrogate* protection, at a *lesser* level. If refugees were to be simply accepted as part of the international system, there would be no sense in having a separate, and lesser, rights regime for them. This would be a profound loss in terms of rights protections. Everyone who advocates for the Migrant Workers Convention,⁴⁰ or for a ‘hard law’ instrument for internally displaced persons,⁴¹ or for a legal formula for environmental refugees, understands the vital importance of keeping *separate* if *lesser* protections. Without the crisis element, the now-all-too-evident perpetuity of refugees will lapse back into ‘ordinary’ human rights. This would be a significant loss indeed, as international human rights law has been much less successful *as law* than international refugee law.

And this is really the most important conclusion. Refugee law works because of the perpetual crisis paradigm. There are myriad problems with this paradigm, but we depart from it at our peril. Over the past two decades, as states have been cracking down on migration and as numbers of asylum seekers have been rising, refugee law has been drawing closer to human rights law. This is a useful and important development for individual protection, but it tends towards implosion. There is much contested ground here.⁴² Implosion is a long way off, but it is a pinpoint on the horizon – a vanishing point. Working within perpetual crisis ensures the place of refugees, refugee law and the refugee regime in the international realm. Resistance is not futile, it is everything.

³⁹ For a thoughtful analysis of this dilemma see Audrey Macklin, ‘Disappearing Refugees’ (2005) 36 *Colum. HRL Rev.* 101.

⁴⁰ UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158.

⁴¹ For example, Chaloka Beyani *et al.*, ‘Hardening Soft Law: Implementation of the Guiding Principles on Internal Displacement’ (2008) 102 *Proceedings of the Annual Meeting, American Society of International Law* 108.

⁴² A powerful example is provided by the debate between James C. Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *NYU J Int’l L and Pol.* 315, on the one hand, and Jenni Millbank, ‘The Rights of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy’ (2012) 44 *NYU J Int’l L and Pol.* 497.