Articles

Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies

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Abstract

The international community's affirmation of the 1951 Convention's centrality in the international refugee protection regime is difficult to reconcile with the practical reality: large groups of refugees living in sub-standard conditions, even in countries that are party to the Convention. It is a sad but common feature of mass influx situations that refugees are denied many of the economic and social protections stipulated by the Convention. While some rights restrictions may be justifiable during the initial emergency phase of a mass influx, protection should, in the spirit of the Convention, improve over time rather than stagnate or deteriorate. Yet it appears that the price States have demanded in admitting large numbers of refugees is a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention. Thus, *non-refoulement* extends through time, so that although persons are not returned to persecution and other situations of harm, they are essentially left in a legal limbo.

This article discusses traditional legal and policy responses to large-scale refugee situations, which illustrate States' difficulties in effectively managing the passing of time in such situations. The challenge, it seems, lies in regulating the manner in which the passing of time affects the accrual of States' obligations under the Convention, beyond *non-refoulement* alone. Emergency situations must be acknowledged and catered for, but must also be justified, and their attendant restrictions on rights must be limited to the strictly necessary. Human rights law contains an important tool for acknowledging, and strictly regulating, certain situations in which States cannot fully comply with their obligations: the derogation clause. This article argues that the incorporation of a derogation clause in the Convention would provide States facing mass influx situations with some valuable 'breathing space', as a prelude to full, albeit gradual, implementation of the Convention's standards.

1. Introduction and background

This article is premised on the belief that the manner in which States handle refugee flows and treat refugees is a matter not just of international concern, but of international law. In other words, the protection needs of refugees are best addressed by legal frameworks, in which commitments,

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rights and obligations are delineated and mutually agreed, rather than through *ad hoc* mechanisms lacking cohesion and predictability. Further, it is submitted that the 1951 Convention Relating to the Status of Refugees[1] and its 1967 Protocol[2] stand at the centre of the international refugee protection regime, and thus provide the legal framework for any meaningful discussion of States' obligations to respect and to ensure respect for the fundamental human rights of refugees.

There is support for these convictions. In December 2001, representatives of the Contracting States to the Convention assembled in Geneva at the invitation of Switzerland and UNHCR and adopted a Declaration '[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope' and '[a]cknowledging the continuing relevance and resilience of this international regime of rights and principles'.[3] This acknowledgement led the Contracting States to '[s]olemnly reaffirm [their] commitment to implement [their] obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments'.[4]

This Declaration was the culmination of a year-long process of Global Consultations, launched by UNHCR to coincide with the 50th anniversary of the Convention, with the stated objective of revitalizing the international regime of refugee protection.[5] The first substantive meeting of the 'third track' of the Global Consultations was devoted to the issue of 'Protection of Refugees in Mass Influx Situations' — the focus of this article. The background documentation provided by UNHCR made clear that, in the context of this meeting, the term 'mass influx situations'[6]

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 Apr. 1954) 189 UNTS 137 ('Convention', 'Refugee Convention' or '1951 Convention').

[2] Protocol Relating to the Status of Refugees (adopted 31 Jan. 1967, entered into force 4 Oct. 1967) 606 UNTS 267 ('1967 Protocol').

[3] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 13 Dec. 2001) UN Doc HCR/MMSP/2001/09 (16 Jan. 2002) ⟨www.unhcr.ch/cgi-bin/texis/vtx/protect⟩ (18 Feb. 2003) Preamble [2], [4].

[4] Ibid. art. 1.

[5] 'Revitalizing the Refugee Protection Regime: The Road Ahead as the Convention Turns 50': Statement by Erika Feller (Director UNHCR Department of International Protection) to the 51st Session of the Executive Committee (Oct. 2000) ⟨www.unhcr.ch/cgi-bin/texis/vtx/protect⟩ (18 Feb. 2003).

[6] There is no universal definition of a 'mass influx'. It is not referred to at all in the Convention or the 1969 OAU Refugee Convention. It is mentioned, but not defined, in the UN Declaration on Territorial Asylum (adopted 14 Dec. 1967 UNGA Res 2312 (XXII)) art. 3(2). Until the 1980s, it was more commonly referred to as 'large-scale influx': UNHCR EXCOM Conclusion No. 15 (XXX) 'Refugees without an Asylum Country' (1979); UNHCR EXCOM Conclusion No. 19 (XXXI) 'Temporary Refuge' (1980); UNHCR EXCOM General Conclusion No. 21 (XXXII) 'International Protection' (1981); UNHCR EXCOM Conclusion No. 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981); UNHCR EXCOM Conclusion No. 23 (XXXII) 'Problems Relating to the Rescue of Asylum-Seekers in Distress at Sea' (1981); UNHCR EXCOM Conclusion No. 35 (XXXV) 'Identity Documents for Refugees' (1984); UNHCR EXCOM Conclusion No. 44 (XXXVII) 'Detention

covered both the phase in which States are faced with refugee arrivals on a large scale, and the situation of States 'which host a large [refugee] population over many years'.[7] The meeting witnessed a:

> broad recognition of the primacy and centrality of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol in the international refugee protection regime, *including in situations of mass influx*. Absolute respect for the right to seek asylum and the principle of *non-refoulement* was underlined. Many delegations stressed the importance of the *full and inclusive application* of the Convention as the basis for discussions in the Global Consultations. The applicability of *complementary* regional refugee instruments, particularly the 1969 OAU Refugee Convention and 1984 Cartagena Declaration, was recalled.[8] (emphasis added)

Yet the meeting failed to elaborate on how a 'full and inclusive application' of the Convention could be brought to bear on situations of mass influx. Despite the fact that the bulk of the Convention's provisions concern the rights and obligations of refugees in the territories of Contracting States, the meeting's report made only one reference to standards of treatment. Furthermore, this was in the context of the 'exceptional and interim' mechanism of temporary protection[9] — a response which itself falls outside the Convention framework. In other sections of the report, measures to promptly register and improve the physical security of refugees in camps were presented as prerequisites to the enjoyment of a more comprehensive set of rights.[10] However, the report gave no indication as to the content of such rights, nor the standards of 'quality' for which States would be accountable in their asylum practices.

State practice in this area is not encouraging. There is ample documentation of the sub-standard conditions under which many of the larger groups of refugees in the world continue to live, even after a decade or more in exile, and notwithstanding the constant reaffirmation of the applicable legal framework.[11] At present, most refugee emergencies are dealt with in an

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of Refugees and Asylum-Seekers' (1986). It has also been described as 'mass outflow' and 'mass exodus': UNHCR EXCOM General Conclusion No. 65 (XLII) 'International Protection' (1991). It was recently defined in the European context as the arrival of 'a large number of displaced persons, who come from a specific country or geographical area': Council Directive 2001/55/EC of 20 July 2001on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12 ('EC Directive') art. 2(d).

[7] Global Consultations on International Protection 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations' UN Doc EC/GC/01/7 (19 Feb. 2001) [11].

[8] Global Consultations on International Protection 'Report of the First Meeting in the Third Track' UN Doc EC/GC/01/8/Rev.1 (28 June 2001) [5].

[9] Ibid. [14].

[10] Ibid. [18]–[38].

[11] See J Crisp 'No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa' UNHCR *New Issues in Refugee Research* Working Paper No. 75 (Geneva Jan. 2003); S Dick 'Responding to Protracted Refugee Situations: A Case Study of Liberian Refugees in Ghana' UNHCR (July 2002) EPAU/2002/06; 'United Republic of Tanzania' in UNHCR *Global Appeal 2002* (UNHCR Geneva

unregulated, *ad hoc* manner. With saving lives being the overriding imperative, basic human rights are divided into 'survival' rights and others, with relief management occurring at the expense of individual rights and freedoms.[12] Crisp's analysis of protracted refugee situations in Africa has revealed common 'restrictive conditions' placed on refugees, including limited physical security, limited freedom of movement, limited civil and political rights, limited legal rights and lack of status, limited freedom of choice, and limited or no ability to engage in any income-generating opportunities.[13] This is taking place on a continent on which all refugee-hosting States are party to the 1951 Convention and the 1969 OAU Refugee Convention.[14] While a temporary suspension of rights and freedoms at the start of a refugee emergency will generally be regarded as non-problematic, as the situation drags on the same limitations are likely to be seen as increasingly intolerable. Crisp observes that in too many situations, the refugees' 'right to life has been bought at the cost of almost every other right'.[15]

In States which are not party to the 1951 Convention, but at times also in the territories of Contracting States to the Convention, an even more unfortunate response to mass influx situations has been to deny that the persons arriving *en masse* are 'refugees' at all — a denial that makes it easier for States to evade their international obligations. In some respects it may appear counter-productive, since mass *refoulement* is usually not a realistic option and denying that the arrivals are refugees might ultimately frustrate attempts at enlisting international solidarity. History shows, however, that this is not necessarily the case. Indo-Chinese boat people were referred to as 'displaced persons' and 'asylum seekers' for many years, not only by receiving countries in South-East Asia, but by the international community as a whole. Likewise, European States and UNHCR were extremely reluctant to place the 'refugee' label on victims of ethnic cleansing who fled Bosnia and Kosovo *en masse*. The debate surrounding temporary protection throughout the 1990s was dominated by an urge to avoid 'refugee' terminology, without, however, giving the impression that the application

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Nov. 2001); UNHCR *Global Report 2001: Strategies and Activities* (UNHCR Geneva 2001); UNHCR *Global Report 2000: Achievements and Impact* (UNHCR Geneva 2000).

[12] For example, in most cases, no legal excuse is given for curtailing rights stipulated in the Convention, such as under articles 15 (right of association), 16 (access to courts), 17 (wage-earning employment), 18 (self-employment), 22 (public education), 24 (labour legislation and social security) 27 (identity papers) and 28 (travel documents). Freedom of movement (article 26) tends to become the exception rather than the rule. Although not capable of any reservation, article 3 on non-discrimination is almost inevitably violated when large groups of refugees are held in camps, while less numerous arrivals are treated in accordance with Convention standards.

[13] Crisp, above n. 11, at 11–12.

[14] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 Sept. 1969, entered into force 20 June 1974) 1001 UNTS 45 ('OAU Convention'). The relationship between the OAU Convention in relation to the 1951 Convention is discussed below. For information on the size of refugee populations in Africa, see Crisp, above n. 11, at 2.

[15] Crisp, above n. 11, at 11.

of the Convention was suspended. States were forced to admit that there had to be Convention refugees among the beneficiaries of temporary protection, but they did not want to be bound by legal constraints. The device they used was a temporary suspension of asylum procedures, or at least of asylum decisions, coupled with the discretionary grant of an *ad hoc* 'interim' status.[16] Fitzpatrick has observed that States tend to reinvent the system of protection each time a mass influx occurs, tailoring its application and scope to domestic and international pressures, rather than in accordance with a formal and predictable legal regime.[17]

Tampering with the definition of a 'refugee' surely sets a bad precedent, shifting the problem from the quantitative level (large numbers) to the qualitative (refugee identity and protection). This is not a purely philosophical discussion, as popular support for refugee protection depends very much on the clarity of the refugee's image. It is ironic that it is precisely in those situations which the public most easily identifies as refugee situations (the exodus of boat people from Indo-China and the plight of Bosnians and Kosovars) that western governments have shied away from the refugee concept.

If one considers this body of practice, the Global Consultations' suggestion that '[f]uture responses to mass influx ... should build on the Convention framework and draw on positive lessons from practice'[18] may be a risky proposition, since the practice of refugee protection in mass influx to date has probably contributed to undermining the Convention framework more than it has affirmed it as its legal foundation.

Is this to say that the solemn reaffirmation by the Contracting States of the fundamental importance of, and their own commitment to, the 1951 Convention framework was sheer cynicism? Not necessarily. After all, the Global Consultations were a deliberate exercise in *exploring the limits* of the existing legal regime, made necessary by the realization that important gaps existed in the international legal framework of refugee protection, which the Convention was not able, or simply not meant, to address. As the Director of UNHCR's Department of International Protection explained:

> We launched the Global Consultations process because there was a sense of growing disillusionment among a number of States about their capacity to manage contemporary population movements using the tools available — and, in particular, the 1951 Convention and its 1967 Protocol. ... The quality of asylum was waning, State commitment to protection using the available

[16] UNHCR 'Note on International Protection' (7 Sept. 1994) UN Doc A/AC.96/830; J Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *AJIL* 279.

[17] Fitzpatrick, above n. 16, at 281.

[18] Global Consultations on International Protection 'Follow-up to the First Meeting of the Third Track: Refugees in Mass Influx Situations' Annex II to *Update on Global Consultations on International Protection* UN Doc EC/51/SC/CRP.12 (30 May 2001) [3].

instruments was faltering, and the gaps in the protection framework and the inconsistencies between regional approaches and international standards were becoming all too apparent. The Global Consultations were our effort to rise to these challenges. . . .[19]

There is no questioning the seriousness of these challenges or the wisdom of this effort. Unrealistic expectations of the Convention, or an over-extensive interpretation of its provisions, will not contribute to its proper and principled implementation. On the other hand, it can only be harmful to the continuing relevance of the instrument to neglect its unequivocal provisions. In the final analysis, it is necessary to examine the gaps in the existing legal framework and capture their proper dimension, as a pre-requisite to narrowing them down. The sheer size of the refugee problem in Africa, and the human suffering it entails on a daily basis, should motivate us to give the most urgent priority to this 'gap-defining' exercise as it applies to mass influx situations on that continent.

2. Sizing up the gap

The first issue which must be addressed is whether the Convention framework is adequate in providing standards of treatment for refugees in mass influx situations. The debate on this question is unfortunately contaminated by a number of enduring misperceptions.

First, there is a common misperception that the Convention does not apply to mass influx situations because its definition of a refugee is 'essentially individualistic'.[20] Yet the Convention itself contains nothing to suggest its inapplicability in cases of mass influx. While the definition of a refugee in article 1A(2) may be individualistic with regard to the 'well-founded fear of being persecuted' standard, the categories on which a claim of persecution may be founded are clearly group ones.[21] To assert that the Convention does not apply in cases of mass influx is tantamount to saying that the individual does not exist in a group. Similarly, the *travaux préparatoires* do not reveal any intention to exclude collective persecution from the ambit of the Convention.[22] Rather, discussion at the drafting stage centred on 'categories of refugees', with the implication that

[19] Statement by Erika Feller at the 24th Meeting of the Standing Committee (Geneva 25 June 2002) ⟨www.unhcr.ch/cgi-bin/texis/vtx/protect⟩ (18 Feb. 2003).

[20] GS Goodwin-Gill *The Refugee in International Law* (2nd edn OUP Oxford 1996) 8. He argues that this is because the text seems to require a case-by-case examination of subjective and objective elements.

[21] See T Spijkerboer 'Subsidiarity in Asylum Law: The Personal Scope of International Protection' in Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002); IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999) 464–65.

[22] See e.g. *Ad Hoc* Committee on Statelessness and Related Problems First Session 'Summary Record of the 18th Meeting' (New York 31 Jan. 1950) UN Doc E/AC.32/SR.18 (8 Feb. 1950).

refugeehood was not an individualized concept but one that depended on belonging to a category or group.[23] Finally, during the Global Consultations, States recognized the Convention's relevance to mass influx situations,[24] demonstrated the 'strongly held view that refugees recognised on a *prima facie* basis are entitled to the same rights as refugees recognised under an individual refugees status determination scheme',[25] and stated that '[i]t is quite possible, within the Convention, to develop a response to large-scale group arrivals'.[26]

It is contended that any 'gap' in the Convention framework in dealing with mass influx stems not from the Convention itself, but from the suspension of individualized processes that States have put in place to implement it — a point that was raised but not developed during the Global Consultations.[27]

The second misperception is the converse of the first: that the OAU Convention applies only to groups, not to individuals. This can be aggravated further by arguing that refugees recognized under the OAU Convention are not entitled to the benefits of the 1951 Convention because the OAU Convention 'does not include a corresponding guarantee to accord socio-economic rights'.[28] Both claims are contradicted by the very wording of the OAU Convention. The definition of a refugee in article 1 contains nothing to suggest that the OAU Convention cannot apply to individuals. On the contrary, the first branch of the definition refers to:

> *every 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.

While the second, novel branch also states that:

> [t]he term 'refugee' shall also apply to *every person* who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to

[23] Ibid. This notion had informed refugee definitions in international instruments concluded under the auspices of the League of Nations.

[24] Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees 'Chairperson's Report on Roundtable 2: "International Cooperation to Protect Masses in Flight" *(inter alia* mass influx, burden and responsibility sharing, security and additional instruments)' (13 Dec. 2001) 2.

[25] Ibid.

[26] UNHCR Global Consultations 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework' (EC/GC/01/4) (19 Feb. 2001) [18].

[27] Ibid. [17].

[28] M Barutciski 'The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) 10 *IJRL* 700, 714.

leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[29]

Article 8(2), in turn, describes the OAU Convention as a regional *complement* to the Convention — a point that was reaffirmed in 1999 on the 30th anniversary of the OAU Convention.[30] On its face, the only possible interpretation of this provision is that a person recognized as a refugee under either branch of the definition in the *complementary* OAU Convention is entitled to the rights contained in the *primary* 1951 Convention.

A third misperception arises in the context of *prima facie* determination of refugee status, which is the traditional response to mass influx and remains widespread in Africa today.[31] *Prima facie* refugee determination is made on the basis of the objective circumstances leading to the mass displacement[32] and the obvious refugee character of the individuals concerned.[33] From both a conceptual and practical perspective, *prima facie* determination appears to be a constructive way of coping with mass influx. It is frequently used by States of first asylum to declare the 'refugee' character of the influx for external communication purposes — as a cry for help to the international community, highlighting that the receiving State needs assistance in obtaining a satisfactory durable solution.[34] Unfortunately, usage of this tool tends to be imprecise and unpredictable. States do not always declare their intention to treat arriving groups as refugees, nor do they necessarily record such a determination in an official document.[35] The legal basis for doing so may simply be lacking at the domestic level. Furthermore, although *prima facie* refugees' quality of protection ought to be identical to that of Convention refugees,[36] they are commonly subjected to *ad hoc*

[29] OAU Convention art. 1 (emphasis added).

[30] 'Comprehensive Implementation Plan' (CONF.P/OAU30TH/REPORT — Annex II) (2001) 20 Refugee Survey Q 32. Furthermore, domestic legislation may include incorporation of both definitions, e.g. South Africa's Refugees Act 1998.

[31] UNHCR, above n. 26, at [4]; B Rutinwa '*Prima Facie* Status and Refugee Protection' UNHCR *New Issues in Refugee Research* Working Paper No. 69 (Geneva Oct. 2002) 2.

[32] See UNHCR *Handbook for Emergencies* (2nd edn 2000) 13; UNHCR 'Note on International Protection' (31 Aug. 1993) UN Doc A/AC.96/815 [27].

[33] UNHCR, above n. 26, at [4].

[34] GJL Coles 'Temporary Refuge and the Large-Scale Influx of Refugees' annexed to UNHCR 'Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21–24 Apr. 1981)' (17 July 1981) UN Doc EC/SCP/16/Add.1.

[35] In Ghana, for example, some *prima facie* refugees were given ration cards evidencing their *de facto* status, however once food rations were withdrawn, so was their documentation. The National Mobilization Programme registered refugees on occasions for administrative but not status determination purposes: S Dick, above n. 11, at [98]. Despite the overall lack of regulation, the main mechanisms for granting *prima facie* status in Africa are ministerial declaration and status determination by a specified body: see Rutinwa, above n. 31, at 6–11. For a South African perspective, see I van Beek '*Prima facie* asylum determination in South Africa: A Description of Policy and Practice' in J Handmaker, L de la Hunt and J Klaaren (eds.) *Perspectives on Refugee Protection in South Africa* (online web launch 28 May 2001) ⟨http://www.lhr.org.za/projects/refugee/publications/perspectfull/contents.htm⟩ (2 Aug. 2003).

[36] Ministerial Meeting of States Parties, above n. 24, at 2.

procedures. According to Hyndman and Nylund, *prima facie* determination has developed as a pragmatic and strategic approach rather than as a legalistic response to mass influx.[37]

Such deficiencies in the implementation of *prima facie* determination may implicitly underpin the misperception that the mechanism creates 'only' a presumption of refugeehood and therefore entails an incomplete (or secondary) refugee status. Okoth-Obbo, for example, contends that *prima facie* determination is *provisional* consideration of a person's eligibility as a Convention refugee[38] which remains to be conclusively determined at some later time.[39] By contrast, Jackson argues that the determination of *prima facie* status 'raises a presumption that the individual members of the group are refugees', who can accordingly benefit from international protection and assistance.[40] In his view, *prima facie* refugee status is *conclusive*, unless the State decides to subject it to scrutiny on an individual basis, and finds against the individual asylum seeker.

Jackson's argument is legally more convincing. This is demonstrated through Rutinwa's useful analysis of the law of evidence, which shows why a *prima facie* presumption is not an interim status yet to be confirmed, but *full* evidence 'in the absence of any evidence to the contrary'[41] (which is, according to the UNHCR Handbook, the meaning of '*prima facie*').

Interestingly, even though Okoth-Obbo regards *prima facie* status as provisional, he nevertheless states that it is a status that exists until there is a 'specific decision to the contrary'.[42] That this is the appropriate procedure is confirmed by State practice. In the case of asylum seekers from Hungary in 1956, Austrian authorities were prepared to consider them 'to be within the scope of the Convention and to issue them with a normal eligibility certificate to this effect as soon as it [was] technically possible, unless eligibility examinations show[ed] that any individual applicant should not be entitled to the benefits of the Convention'.[43] One must conclude that *prima facie* recognition entails full refugee status, and beneficiaries of it are entitled, in Contracting States, to the standards of treatment stipulated by the 1951 Convention.

[37] J Hyndman and BV Nylund 'UNHCR and the Status of *Prima Facie* Refugees in Kenya' (1998) 10 *IJRL* 21, 33.

[38] In the African context, references to 'Convention' status and rights incorporate by implication the OAU Convention as well.

[39] G Okoth-Obbo 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *RSQ* 79, 119.

[40] Jackson, above n. 21, at 4, as cited in Rutinwa, above n. 31, at 4.

[41] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (2nd edn 1992) HCR/IP/4/Eng/Rev.1 [44].

[42] Okoth-Obbo, above n. 39, at 120.

[43] UNHCR 'The Problem of Hungarian Refugees in Austria' (17 Jan. 1957) UN Doc A/AC.79/49, 2, as cited in Jackson, above n. 21, at 117.

Having dispelled these misperceptions about mass influx — that the 1951 Convention does not apply to mass influx situations because its definition of a refugee is individualistic; that the OAU Convention does not afford socio-economic rights to individual refugees; and that *prima facie* determination of refugees creates 'only' a presumption of refugeehood and therefore entails an incomplete refugee status — there is no good *legal* excuse for not granting refugees in large groups the benefit of *all* the provisions of the 1951 Convention.[44]

3. *'Non-refoulement'* through time

Nevertheless, the international community seems to have conceded that granting full Convention rights to refugees in mass influx situations cannot be realistically pursued. Whenever a mass influx of refugees occurs, the longer-term provisions of the Convention, in particular its self-reliance rights, are sacrificed to the peremptory norm of *non-refoulement* and the immediate imperative of admission to safety. Describing this trade-off, Goodwin-Gill explains that whereas in the individual case admission to the territory carries a presumption that a local solution will follow, no such presumption is raised in cases of mass influx.[45] Such presumptions are not derived from the plain language of the Convention, for as Goodwin-Gill makes clear, the argument is a political rather than a legal one. The price that States have demanded in accepting the obligation to admit large numbers of refugees and asylum seekers is a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention. Thus, *non-refoulement* extends through time, so that although persons are not returned to persecution and other situations of harm, they are in essence left in a legal limbo.[46] Goodwin-Gill argues that to pursue an ideal of asylum, in the sense of an obligation imposed on States to accord lasting solutions (with or without a correlative right of the individual), is 'currently a vain task'.[47] 'States', he notes, 'are not prepared to accept an obligation without determinable content or dimension'.[48] Perhaps more convincingly — since, after all, the content of Convention obligations is determinate enough — he adds that 'the duty to accord *non-refoulement* through time cannot be separated in practice from that other complex duty which recognizes the responsibility of the community of States in finding durable solutions'.[49] This complex collective duty is clearly not regulated by the Convention, nor, for that matter, by any other binding instrument

[44] The issue of reservations is discussed below.
[45] Goodwin-Gill, above n. 20, at 202.
[46] Ibid. 196.
[47] Ibid. 203.
[48] Ibid.
[49] Ibid. 204.

of international law. At the same time, the plain language of the Convention does not make any of its 'solution-oriented' provisions contingent upon a demonstration of international solidarity.

Goodwin-Gill aptly describes this situation as a paradox, noting that 'the concept of temporary refuge/temporary protection, in the context of large movements ... stands paradoxically as both the link and the line between the peremptory, normative aspects of *non-refoulement* and the continuing discretionary aspect of a State's right in the matter of asylum as a permanent or lasting solution, and in the treatment to be accorded to those in fact admitted'.[50] This paradox can be overcome if, and only if, *non-refoulement through time* is construed as a dynamic concept, allowing for a gradual evolution of the basic duty to admit refugees into a more compete set of solution-oriented obligations, which are no less real for being shared with the international community at large. The challenge, it seems, lies in regulating the manner in which the passing of *time* affects the accrual of States' obligations under the Convention, beyond the *non-refoulement* standard which is both peremptory *and* immediate.

Interestingly, the Convention architecture is itself characterized by a gradual improvement of standards of treatment over time. On a literal reading, access to such rights is dependent on the nature of the refugee's stay in the host State, rather than on the State's capacity to accord such rights.[51] Some provisions of the Convention are limited to refugees 'lawfully staying' in Contracting States, some apply to those 'lawfully in' such States, while others apply to refugees regardless of the nature of their stay. Upon closer analysis, however, it appears that the differing terminology is intentional[52] and depends to a large extent on which rights carry financial or social responsibilities or multilateral implications for the host State.[53] During the drafting of the Convention, the American representative explained that 'lawfully in' was intended to apply to all refugees lawfully in the country, even those who were not permanent residents,[54] and noted that '[t]here was no harm in the provision even if it theoretically applied to refugees who were in a country for a brief sojourn, since the individuals would hardly seek the benefit of the rights contemplated'.[55]

[50] Ibid. 202.

[51] This is contrasted to the progressive implementation of rights under the International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec. 1966, entered into force 3 Jan. 1976) 993 UNTS 3 ('ICESCR').

[52] See e.g. *Ad Hoc* Committee on Statelessness and Related Problems First Session 'Summary Record of the 25th Meeting' (New York 10 Feb. 1950) UN Doc E/AC.32/SR.25 (17 Feb. 1950) [16]–[17], [41]–[42]; *Ad Hoc* Committee on Refugees and Stateless Persons Second Session 'Summary Record of the 41st Meeting' (Geneva 23 Aug. 1950) UN Doc E/AC.32/SR.41 (28 Sept. 1950) 9–18; Ad Hoc Committee on Refugees and Stateless Persons Second Session 'Summary Record of the 42nd Meeting' (Geneva 24 Aug. 1950) UN Doc E/AC.32/SR.42 (28 Sept. 1950) 11–36.

[53] UNHCR ' "Lawfully Staying": A Note on Interpretation' (3 May 1988) [11].

[54] 41st Meeting, above n. 52, at 9–10; 25th Meeting, above n. 52, at [17].

[55] 25th Meeting, above n. 52, at [17].

This differentiation appears to give States some latitude in providing Convention rights to persons arriving in a mass influx situation. Articles 18 (self-employment), 32 (expulsion) and 26 (freedom of movement) apply to refugees whose presence is lawful. Lawful presence (being 'lawfully in' the territory) implies admission in accordance with the law, which is valid even for a temporary purpose (such as a visitor's visa). According to UNHCR, at a minimum, presence will be lawful when formalities have been officially dispensed with.[56] By contrast, lawful residence,[57] described by the term 'lawfully staying in' (which gives rise to the enjoyment of such Convention rights as association, gainful employment, social security and labour protection, and the right to apply for travel documents) describes persons enjoying asylum in the sense of residence and lasting protection.[58] It therefore goes beyond lawful presence. The *travaux préparatoires* support this view, with the French representative to the *Ad Hoc* Committee noting that 'an examination of the various articles in which the words "résident régulièrement" appeared would show that they all implied a settling down and, consequently, a certain length of residence'.[59]

Admittedly the distinction between lawful presence and lawful residence is often difficult to maintain in practice due to the different approaches adopted in national systems.[60] Yet at the same time, the vast body of State practice which now exists in applying the Convention to different circumstances and regions should provide a solid basis for clarifying the thresholds between the different levels of attachment envisaged by the Convention. Such an exercise would go a long way towards giving content to *non-refoulement* through time. In the current state of affairs, we can safely submit that once refugees have been admitted and treated as refugees over a number of years (albeit on a *prima facie* basis), and no other State will assume responsibility for them, asylum States cannot hide behind the semantic ambiguity of 'lawfully in' or 'lawfully staying' clauses to deny them the full benefits of the Convention.

By contrast to the different levels of attachment envisaged by the Convention — rights that adhere as time passes — reservations are a static mechanism. Although they inject a degree of flexibility into States' initial assumption of international obligations under the Convention, they may only be made at the point of accession or ratification[61] and thus are

[56] UNHCR, above n. 53, at [9].

[57] It was decided not to use the term 'lawful residence' in the Convention, apart from in relation to travel documents, due to the word 'resident' having 'different connotations in different countries': 25th Meeting, above n. 52, at [17].

[58] Goodwin-Gill, above n. 20, at 308.

[59] 42nd Meeting, above n. 52, at 12.

[60] Goodwin-Gill, above n. 20, at 307.

[61] Refugee Convention art. 42.

unable to adapt to the dynamic nature of refugee flows. Secondly, reservations are not monitored (except unofficially by other States parties). This means that once a reservation has been made, even if intended as an interim measure, States have no obligation to report periodically to UNHCR (or any other body) about the on-going need for the reservation or about steps being taken to remove it. Thus, while both UNHCR and the UN General Assembly have continued calling for States to lift existing reservations and for new States acceding to the Convention to do so without reservations,[62] States are under no legal obligation to do so. Article 26 (freedom of movement) is by far the most widely reserved provision in the Convention (18 States).[63] Interestingly, however, no State has reserved this or any other provision specifically for cases of mass influx. On the other hand, broad-brush reservations on account of public order and/or national security are common,[64] and mass influxes can be expected to trigger these types of concerns. Public order and national security are highly discretionary notions, and the lack of any monitoring procedure means that reservations on such grounds largely escape the scrutiny of other States and UNHCR. Related to this is Higgins' concern that '[r]eservations provide for non-compliance with selected international standards even in non-crisis situations'.[65] This alludes to an important point: permanent non-compliance by reservation necessarily ignores the distinction between non-crisis and crisis situations because it is a static device. While States may in fact have no need to withhold their obligations in the former, there is at present no mechanism in the Convention which allows them to do so only for the latter.[66]

[62] Declaration of States Parties, above n. 3, at arts 4–5.

[63] As at 1 Oct. 2003.

[64] See e.g. reservations by Greece, Latvia, Malawi, Mozambique and Namibia.

[65] R Higgins 'Derogations under Human Rights Treaties' (1976–77) BYBIL 281, 315.

[66] During the drafting of the Convention, the United Kingdom proposed inserting an article permitting derogation 'at time of national crisis' from any provision in the Convention 'to such extent only as is necessary in the interests of the national security', requiring notification to other Contracting States through the Secretary-General of the derogation and its date of termination (UN Doc E/1618). The United States believed that the proposed derogation clause was too wide because it permitted derogation from *any* article of the Convention, and as later discussions revealed, there was concern at the potentially wide interpretation that could be given to the vague notion of 'national security'. An alternative UK proposal, to insert a clause permitting provisional measures in the interests of national security, was ultimately preferred and became article 9. Although the UK delegate stated that this article was a blanket provision allowing 'in strictly defined circumstances of emergency, derogation from any of the provision of the Convention ... in the interests of national security', its application was eventually limited to 'time of war or other grave and exceptional circumstances' and in relation to 'a particular person'. This provision has not been interpreted by States as permitting derogation from the Convention, and accordingly the static system of reservations is the only device that authorizes non-compliance with the Convention. See *Ad Hoc* Committee on Statelessness and Related Problems 'Summary Record of the 35th Meeting' (Geneva 15 Aug. 1950) E/AC.32/SR.35 (25 Sept. 1950) 7–11; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 'Summary Record of the 28th Meeting' (Geneva 19 July 1951) A/CONF.2/SR.28 (28 Nov. 1951) 4–10.

4. From mass influx to humanitarian emergency

As noted above, the concept of mass influx has no precise legal definition, but has two key ingredients: the size of the influx; and the suddenness of the arrivals.[67] In 1992, the Representative of the United Nations Secretary-General on Internally Displaced Persons, Francis Deng, proposed a working definition of 'internally displaced persons' as those 'forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or made-man disasters'.[68] The sudden and unexpected nature of flight highlights the devastating effect of displacement on the individuals concerned — on family relationships, socio-community ties, means of livelihood, and so on. However, when those in flight cross a border, there are often drastic consequences for the receiving State, too (such as strains on asylum procedures, shortages of essentials such as food, clothing and medicine, and concerns about public order and national security), which may spill into the broader international community as well. Indeed, there is no doubt that a large number of States lack the resources to immediately grant the full gamut of Convention rights to sudden large influxes of refugees, no matter how good their intentions. During the Global Consultations it was noted that due to 'the very nature of mass influx, it may be difficult or impossible to provide immediately the full standards of treatment foreseen under the 1951 Convention'.[69] In this context, the 1981 EXCOM Conclusion No. 22[70] was referred to as an enduring 'important yardstick' for both UNHCR and States.[71] Nevertheless, in general, EXCOM Conclusion No. 22 contains a rather mixed assortment of standards, and the rationale behind some limitations on refugee rights is not made clear. It imports standards contained in

[67] Note that in the context of discussions of the EC Directive, above n. 6, the European Council on Refugees and Exiles criticized its failure to include 'suddenness' as a component of mass influx, arguing there is a danger that temporary protection (the EC Directive's mechanism for dealing with mass influx) could be used in situations where another form of international protection, such as Convention status, would be more appropriate: European Council on Refugees and Exiles 'Information Note on the Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof' (1 Sept. 2001) 3.

[68] Analytical Report of the Secretary-General on Internally Displaced Persons (14 Feb. 1992) UN Doc E/CN.4/1992/23 [17]. The final definition adopted in the 1998 Guiding Principles on Internal Displacement was: 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border'. See Guiding Principles on Internal Displacement UN Doc E/CN.4/1998/53/Add.2 Annex (11 Feb. 1998) Introduction [2].

[69] UNHCR, above n. 26, at [8].

[70] EXCOM Conclusion No. 22, above n. 6.

[71] UNHCR, above n. 26, at [8].

articles 31 and 33 of the Convention into the measures of protection it recommends, alongside vague wording referring to 'the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights'.[72] Critically, its value as a model for the treatment of refugees temporarily admitted to a country pending arrangements for a durable solution is seriously eroded by the fact that it was crafted within a specific context — the Indo-Chinese exodus — in which the front-line States were not party to the Convention. In this sense, EXCOM Conclusion No. 22 filled a gap by setting normative standards for States not bound by the Convention or Protocol,[73] but it would be wrong to substitute its provisions for those in the Convention where the latter is applicable.

The concept of 'emergency' provides a considerably more useful tool for analysing the application of the Convention in mass influx situations, not least due to its clear time dimension. It connotes a sense of urgency requiring an extraordinary *and* immediate response; a situation in which 'the life or well-being of refugees will be threatened unless immediate and appropriate action is taken, and which demands an extraordinary response and exceptional measures'.[74] The emergency 'level' of a refugee influx depends on the response capacity of the receiving State — in other words, how well its own resources can cope with the situation. If the influx does not place — or no longer places — exceptional pressure on the State's resources or institutions, then there is no emergency and exceptional measures are not — or no longer — justifiable. Inherent in this definition is the time-bound nature of an emergency *phase*: exceptional measures are justified in response to an immediate problem, but these should cease once the urgency of the problem diminishes.

The difficulties that States face in guaranteeing rights in very serious emergencies has been acknowledged in human rights law by the mechanism of the derogation clause. Derogation clauses are well-established in human rights treaties (such as the ICCPR,[75] ECHR[76] and ACHR[77]), and several of the principles contained in them have been recognized as principles of general international law.[78] While we do not suggest that a

[72] Art. IIB2(b).

[73] Fitzpatrick, above n. 16, at 295.

[74] *Handbook for Emergencies*, above n. 32, at 4 (emphasis removed).

[75] International Covenant on Civil and Political Rights (adopted 16 Dec. 1966, entered into force 23 Mar. 1976) 999 UNTS 171 ('ICCPR').

[76] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 Nov. 1950, entered into force 3 Sept. 1953) ('ECHR').

[77] American Convention on Human Rights (adopted 22 Nov. 1969, entered into force 18 July 1978) 1144 UNTS 123 ('ACHR').

[78] J Oraá 'The Protection of Human Rights in Emergency Situations under Customary International Law' in GS Goodwin-Gill and S Talmon (eds.) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press Oxford 1999) 414–29.

mass influx of refugees can be regarded as an 'emergency' in the sense of these human rights instruments, namely as one that threatens the life of the nation,[79] there are nevertheless features of the human rights derogation clauses which could be incorporated into the Convention framework.

5. Features of a derogation regime

Derogation regimes in human rights law are an application of the doctrine of necessity, in that they acknowledge that there will be situations in which States cannot fully comply with their obligations. At the same time, they are not a free for all. Their purpose is, on the contrary, to prevent States from curtailing individual freedoms for reasons of national interest, as opposed to motives for the common good.[80] The whole point of recognizing a concept of public emergency in international law is to provide reasonable limits on the anticipated restrictions of rights that emergencies almost inevitably entail.[81] Thus, Higgins describes derogation clauses as a technique of accommodation.[82] Derogations are normal and legitimate when kept (and precisely because they are kept) within certain limits.[83] They are only acceptable when certain events make them necessary *and* they are proportionate to the dangers that those events represent, plus they should be subject to international scrutiny and review.[84] Without the legal possibility to derogate, States suspend individual rights and freedoms in emergencies, but without supervision and with a greater risk of abuse. As Hyndman and Nylund have noted, '*ad hoc* discretionary measures to assist refugees are too fickle and politically-driven to ensure any consistency in humanitarian provisions and human rights enforcement'.[85] This is particularly worrying given that there is often a high incidence of grave abuse during emergencies.[86]

A review below of the principles applicable to derogation clauses in the general human rights field will show how they may assist in filling gaps in refugee law. The first three are generally regarded as inherent in the doctrine of necessity: exceptional threat, proportionality and non-derogability of fundamental rights.[87]

[79] AV Eggli *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers The Hague 2002) 208–18; see also Goodwin-Gill, above n. 20, at 231–32.

[80] RSJ MacDonald 'Derogations under Article 15 of the European Convention on Human Rights' (1997) 36 *Columbia J of Transnational L* 225, 226.

[81] J Fitzpatrick *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press Philadelphia 1994) 36.

[82] Higgins, above n. 65, at 315.

[83] Oraá, above n. 78, at 416.

[84] Higgins, above n. 65, at 282–83.

[85] Hyndman and Nylund, above n. 37, at 46.

[86] Fitzpatrick, above n. 81, at 35.

[87] This has been demonstrated in the practice of the ILO organs in the *Greek* and *Polish* cases.

5.1 Exceptional threat

Declaring a state of emergency and suspending fundamental human rights are only legitimate in exceptional circumstances. According to article 4(1) of the ICCPR and article 15(1) of the ECHR, exceptional circumstances mean a 'public emergency which threatens the life of the nation'. The ECHR also includes 'in time of war', while article 27(1) of the ACHR expands the concept even further to mean 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'. Fitzpatrick argues that an emergency which threatens the life of the nation 'must imperil some fundamental element of statehood or survival of the population — for example, the functioning of a major constitutional organ, such as the judiciary or legislature, or the flow of vital supplies'.[88] At the outset, we should avoid the suggestion that a mass influx threatens the life of the nation. It is even imprudent to suggest that such a threshold is met where a mass influx compounds an economic and social condition of underdevelopment (as is the case in many African and Asian countries).[89] Instead, we envisage a different type of emergency threshold for a Convention derogation regime. Recalling the definition of 'emergency' from the UNHCR *Handbook for Emergencies* as a time when 'the life or well-being of refugees will be threatened unless immediate and appropriate action is taken, and which demands an extraordinary response and exceptional measures',[90] there needs to be a threshold that takes into account both the refugee rights at stake and the fact that the State cannot genuinely fulfil its obligations. The State will need to show that the influx makes compliance with Convention obligations impossible and/or impairs the functioning of national institutions.

5.2 Proportionality

This is where proportionality comes into play. Any derogation from human rights obligations must be proportionate to the dangers that the events (in this case, a mass influx) pose, both as a matter of degree and duration.[91] It is equally well established in human rights law that any suspension of rights and freedoms must also be limited to those places actually affected by the emergency — an aspect of proportionality well worth reflecting upon in the refugee context, since mass influxes tend, by

[88] Fitzpatrick, above n. 81, at 56.

[89] See generally Eggli, above n. 79, at 216–18; MacDonald, above n. 80, at 235–37; SP Marks 'Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts' in K Vasak and P Alston (eds.) *The International Dimension of Human Rights* vol. 1 (Greenwood Press Westport 1982) 180–82; International Law Association *Report of the 59th Conference Held at Belgrade* (1982) 105–07.

[90] *Handbook for Emergencies*, above n. 32, at 4 (emphasis removed).

[91] JF Hartman 'Derogation from Human Rights Treaties in Public Emergencies — A Critique of Implementation by the European Commission and the Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard Intl LJ* 1, 17.

their very nature, to affect the periphery of territories much more than the centre. Only where the effects of a local emergency threaten the life of the nation, for example if the functioning of national institutions is impaired, may nationwide derogations be acceptable.[92]

Another key aspect of proportionality, which some authors see as deserving the status of an autonomous principle,[93] is temporariness. From the analysis above, it is evident that the protection gap resulting from the 'massification' of refugee flows is all the more visible, and all the less tenable, as the passing of time freezes refugees in a legal limbo. A derogation clause would make it clear that the suspension of specific refugee rights cannot last longer than the emergency itself.[94] The aim is to restore full application of the Convention as soon as possible. Incidentally, this is not incompatible with the construction of the temporary protection regime in the EC Directive: if inability to process the influx is the main defining characteristic of a mass influx emergency, then the temporary protection regime cannot last longer than the time needed to upgrade asylum procedures so that they can cope with the larger numbers. Interestingly, this can be achieved not only through the individual efforts of the affected States, but also through Member States sharing their resources in a spirit of solidarity.

5.3 Non-derogability of fundamental rights

Derogation clauses in human rights treaties usually provide that measures taken by a State, which satisfy the requirements of the treaty, must additionally be consistent with its other obligations under international law. It would therefore be unthinkable that a derogation regime under the Convention would allow States to redefine, albeit temporarily, other treaty obligations from which they cannot derogate.

While article 42 of the Convention stipulates that certain articles are not capable of reservation, such a provision does not exist in the three human rights treaties under discussion. Thus, in determining which Convention rights should be non-derogable, it will be necessary to decide which rights are most susceptible to violation in an emergency, but also which are so fundamental that they cannot be derogated from. Article 33 prohibiting *refoulement* is the most obvious example; article 16(1) on the right of access to courts is another. One might also consider deriving from article 31(1) a non-derogable guarantee against arbitrary detention.

While the article 3 provision regarding freedom from discrimination on the grounds of race, religion or country of origin should be a non-derogable right, the very nature of a mass influx may make this difficult. A

[92] MacDonald, above n. 80, at 239; Fitzpatrick, above n. 81, at 56.

[93] Oraá, above n. 78, at 417 referring to this as one of the principles developed by the Inter-American Commission on Human Rights.

[94] MacDonald, above n. 80, at 242.

refugee emergency is in most cases confined to the influx of refugees of a particular nationality. Refugees of other nationalities finding themselves on the territory of the host State, or entering in smaller numbers, should not have their freedoms restricted on account of the emergency. Two different regimes, both legitimate under the Convention, would thus co-exist for a period. A State would need to show that any discrimination is necessary in order to overcome the emergency and is proportionate to the threat.[95] Otherwise, it is undisputed that arbitrary measures that discriminate solely on the basis of race, colour, sex, language, religion or social origin would be unacceptable. One cannot imagine how such discriminatory measures could be 'strictly required' by the refugee emergency.[96]

5.4 Procedural guarantees

The requirements of derogation also include matters of a procedural nature, such as the principles of proclamation and notification, and monitoring and supervision. If the substantive elements of derogation are to have any meaning in practice, the 'existence of competent, active, and informed organs of supervision, both at the national as well as at the international level, is vital'.[97]

The derogation clauses in the ICCPR, ECHR and ACHR all contain a notification requirement. Under the ECHR, for example, it is normal for a State to explain the nature of the emergency, identify the legislation, orders or decree which appear to derogate from the rights contained in the ECHR, and to briefly explain their significance.[98] Under article 15(3), Contracting States are required to inform the Secretary-General of the Council of Europe when derogation measures have ceased and the ECHR's provisions are again being implemented. In the area of refugee protection, which is so closely linked to international solidarity and co-responsibility, it would be equally essential for other States parties to be made aware of the rationale for derogation, its extent, and the duration of the emergency. Notification also makes supervision more effective.

The Human Rights Committee, the European Court of Human Rights, and the Inter-American Human Rights Commission and Court have been regularly seized with disputes concerning the necessity of a proclaimed emergency and/or the legality of its consequences (for example, possible discriminatory aspects). It is true that no judicial control of State

[95] Oraá, above n. 78, at 433.

[96] One of the key concerns with the UK proposal for a derogation provision in the Convention was that, as drafted, it permitted derogation from all articles of the Convention: *Ad Hoc* Committee on Refugees and Stateless Persons Second Session 'Observations Concerning Article 5 of the Draft Convention relating to the Status of Refugees (E/1618): Statement by the World Jewish Congress, a Non-Governmental Organization in Category B Consultative Status' E/AC.32/NGO/1 (17 Aug. 1950); 35th Meeting, above n. 66, at 7–11.

[97] Fitzpatrick, above n. 81, at 60.

[98] Higgins, above n. 65, at 290.

performance exists under the 1951 Convention. However, UNHCR, as the treaty-monitoring body, finds in the Convention — and would find in a treaty-based derogation regime — a legal framework for its interventions. These interventions may be direct, with the State concerned, or indirect, by mobilizing the international community not only towards criticizing the affected State, but also towards demonstrating international solidarity and burden-sharing.

6. Conclusion

Fears that a derogation regime will water down Convention protection do not hold much weight when attention is focused on current practice. Presently, the bulk of Convention guarantees are simply ignored in situations of mass influx — not just diluted but abandoned altogether. Although a derogation regime may lead to problems of its own, which will need to be addressed, these are likely to be less severe than those which occur on a daily basis when the Convention is set aside in favour of *ad hoc* mechanisms.

Setting aside the Convention in mass influx situations has damaging consequences for refugees, host States, UNHCR and the international protection regime as a whole. The Assistant High Commissioner for Refugees has noted that protracted emergencies result in the 'wasted lives' of refugees,[99] who are prevented from enjoying Convention rights by being maintained in the compromised emergency phase of protection. Similarly, the resources of donors and host States are squandered through money spent on care and maintenance, rather than on enhancing capacities or solutions. The result is that refugee situations are 'perpetuated rather than tackled',[100] in turn providing little incentive for on-going long-term financial contributions. Failing a legal bottom line, a spiral of *ad hoc* compromises can easily develop in response to day-to-day pressures, lowering protection levels further and further. On a practical level, UNHCR, whose authority is largely based on respect for the Convention, faces serious difficulties in performing its function of providing international protection in an environment of loose, undefined and ever-changing legal parameters.

Incorporating a derogation clause in the architecture of the Convention is one way of addressing the practical gaps which arise in mass influx emergencies. It would give States 'valuable breathing space' during the emergency phase,[101] but at the same time strictly regulate it. Inherent in derogation is the fact that at some point the Convention regime will again

[99] K Morjane 'Protracted Refugee Situations: Impact and Challenges' (speech by the Assistant High Commissioner for Refugees in Copenhagen 23 Oct. 2002) 2.

[100] Ibid. 3.

[101] Coles, above n. 34.

take effect, thus maintaining it at all times as the legal focus of protection. The aim is to ensure that any derogation occurs within a strictly regulated regime and for a specified period of time, rather than indefinitely. In this way, *non-refoulement* through time would shift from protection as admission alone, to the progressive acquisition of rights guaranteed to Convention refugees.[102]

Of course, a derogation regime is no panacea. Even assuming that such a regime may function well in all its aspects throughout a time-bound emergency phase, the post-emergency situation will still need to be dealt with. Time alone is unlikely to solve the resources problem which countries of first asylum face when confronted with mass influxes, particularly in Africa. If derogation time is to be used constructively, therefore, it must open up real opportunities for international solidarity and burden-sharing in the pursuit of durable solutions.

[102] The progressive implementation of rights is not dissimilar to the regime in place under the ICESCR, which dictates a gradual, sustained improvement in rights protection. General Comment No. 3 of the Committee on Economic, Social and Cultural Rights sheds an interesting light on the concept of progressive realization in stating that the concept should not be misinterpreted as depriving treaty obligations of all meaningful content. Instead, it imposes 'an obligation to move as expeditiously and effectively as possible towards th[e] goal' of full realization of the rights in question: Committee on Economic, Social and Cultural Rights General Comment No. 3 'The Nature of States Parties Obligations' in UN Doc E/1991/23 (1990) [9].