Part V The Scope of Refugee Protection, Ch.36 Complementary Protection

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1. Introduction

In addition to refugees, there are other forced migrants in need of international protection. The principle of *non-refoulement* extends beyond article 33 of the Refugee Convention to preclude (at a minimum) the removal of people who face a real risk of being arbitrarily deprived of their life, or subjected to the death penalty, torture, or cruel, inhuman, or degrading treatment or punishment. These obligations derive from international human rights law, although it is only in the past few decades that States have come to accept such protection as a matter of international legal obligation, rather than goodwill. Some scholars have identified an even broader principle of refuge in customary international law,[1] which Goodwin-Gill describes as an 'overarching principle of protection, sufficient to accommodate all those instances where States are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms'.[2]

The present chapter focuses on the principle of *non-refoulement* in human rights law, which provides a clear, definitive basis for non-removal that is recognized in the law and practice of many States and which also encompasses the provision of a legal status. Although not a term of art, this is known generally as 'complementary protection'. The 'complementary' element describes protection derived from sources *complementary to* (p. 662) the Refugee Convention—such as human rights treaties (or more general humanitarian principles, such as assisting those fleeing generalized violence)—while the 'protection' element implies a status that confers more than the benefit of *non-refoulement* alone.[3] According to the Inter-American Court of Human Rights, 'complementary protection constitutes a normative development that is consistent with the principle of non-*refoulement*, by means of which States safeguard the rights of those who do not qualify as refugee[s]…but who cannot be returned'.[4] In State practice, it consists of 'a number of administrative or legislative mechanisms…in place for regularizing, on a variety of grounds, the stay of persons, including those who may not be eligible for refugee protection but who may be in need of international protection'.[5]

Complementary protection should be distinguished from protection granted solely on compassionate grounds or for practical reasons (such as the inability to obtain travel documents).[6] It is also distinct from the expanded protection provided by the African and Latin American refugee instruments, which extend Convention refugee status to a wider class of beneficiaries (who are also described as 'refugees').[7]

As a concept, then, 'complementary protection' refers to a status in domestic law that is granted to individuals who have been determined not to be refugees under the Refugee Convention, but who nonetheless have an international protection need based on the principle of *non-refoulement*. Standards of treatment vary between States, but according to UNHCR's Executive Committee of States, they should, at the very least, 'provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of [beneficiaries] without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles'.[8]

Many States now have domestic complementary protection regimes in place, including in Albania,[9] Australia,[10] Bosnia,[11] Canada,[12] Costa Rica,[13] the European Union (p. 663) (EU),[14] Hong Kong,[15] New Zealand,[16] Macedonia,[17] Mexico,[18] Montenegro,[19] Nicaragua,[20] Norway,[21] Serbia,[22] South Korea,[23] Switzerland,[24] Turkey,[25] Ukraine,[26] the United Kingdom (UK),[27] the United States (US),[28] and parts of Africa.[29] Complementary protection is typically granted in situations where a person: (a) has a well-founded fear of being persecuted that is not linked to one of the five Refugee Convention grounds; (b) is

precluded from being granted refugee status owing to a domestic carve-out; or (c) is at risk of harm that does not reach the level of severity of 'persecution' under the Refugee Convention.[30]

2. Scope and Content

States' *non-refoulement* obligations under international human rights law may be express or implied. Why such an obligation has been implied in some contexts, and (p. 664) not others (including with respect to one 'absolute' right),[31] begs further analysis. Article 3 of the CAT expressly prohibits States from removing an individual in any manner whatsoever where there are substantial grounds for believing that doing so would expose him or her to a danger of being subjected to torture.[32] By contrast, the prohibition on torture and cruel, inhuman, or degrading treatment or punishment contained in article 7 of the ICCPR[33] (with parallels in other international and regional instruments)[34] has been interpreted as preventing the removal of individuals who face a real risk of being exposed to those forms of harm[35]—as have article 6 of the ICCPR and article 2 of the ECHR with respect to the right to life.[36] Article I of the American Declaration of the Rights and Duties of Man, which protects everyone's 'right to life, liberty and the security of his person',[37] has been interpreted broadly, arguably precluding removal to a wider range of harms than comparable provisions elsewhere.[38]

(p. 665) Human rights law also precludes removal to situations where individuals face a real risk of being subjected to the death penalty[39] or an enforced disappearance.[40] In each case, these rights are absolute. No exceptions to,[41] derogations from, or reservations to the prohibition on removal are permitted.[42]

The majority of complementary protection claims are made on the basis that the feared harm constitutes cruel, inhuman, or degrading treatment. As noted below, even though it is widely accepted that most other human rights could independently found a *non-refoulement* claim, the absolute nature of non-return to cruel, inhuman, or degrading treatment, its reflection in international, regional, and domestic law, and the extensive jurisprudence that has developed as to its meaning, make it the 'go to' complementary protection ground. Arguably, this has stultified the development of other grounds for protection since violations of other rights are recharacterized as examples of cruel, inhuman, or degrading treatment.

Decision-makers often do not clearly distinguish between treatment that is 'cruel', 'inhuman', or 'degrading',[43] instead viewing them either as a sliding scale of ill-treatment (with torture the most severe form[44]), or collectively as the 'compendious expression of a norm' that 'proscrib[es] any treatment that is incompatible with humanity'.[45] In some domestic schemes, such as the Australian Migration Act, decision-makers must identify precisely which form of ill-treatment the applicant fears;[46] by contrast, it is rare for the (p. 666) Human Rights Committee to explain which element of article 7 of the ICCPR has been violated (which explains the limited jurisprudence from that body about the nature of each type of harm). The case law of the European Court of Human Rights falls somewhere in between, although it has come to consider the various types of ill-treatment as a whole, and has observed that, as a ' "living instrument which must be interpreted in the light of present-day conditions"[,]…certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.[47]

In practical terms, it is not hard to see why complementary protection has developed in this way. It is much harder to successfully mount a case for *non-refoulement* with respect to a 'qualified' right, which can be derogated from in certain circumstances, be subject to reservations, or balanced against competing considerations. For example, while the preservation of family unity may in some cases mandate against removal, this will be balanced against what is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights

and freedoms of others'.[48] As noted above, in such cases, it is common for applicants to seek to characterize the harm (eg family separation) as 'inhuman or degrading treatment'.[49] This provides a more straightforward basis for the protection claim, and involves a less stringent threshold than the 'flagrant denial of a right' test, discussed below. Further, as the European Court of Human Rights noted in *Z and T*, 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 [freedom of thought, conscience, and religion] would not also involve treatment in violation of Article 3 of the Convention'.[50]

The Human Rights Committee,[51] the Committee on the Rights of the Child,[52] the European Court of Human Rights,[53] the Committee on the Elimination of Racial (p. 667) Discrimination,[54] the Inter-American Court of Human Rights,[55] the House of Lords,[56] and States themselves in the 2018 Global Migration Compact[57] have all acknowledged that the principle of *non-refoulement* may extend to other rights,[58] which is why it is problematic that different thresholds have emerged in some contexts, depending on the nature of the right concerned.

Of all the international and regional bodies, the European Court of Human Rights has engaged in the most detailed analysis of the scope of other human rights (beyond the right to life,[59] and the prohibition on torture and cruel, inhuman, or degrading treatment or punishment) to entail a *non-refoulement* obligation.[60] It has expressly recognized this with respect to articles 4 (prohibition of slavery and forced labour),[61] 5 (right to liberty and security),[62] 6 (right to a fair trial),[63] 8 (right to respect for private and family life),[64] and 9 (right to freedom of thought, conscience, and religion).[65] However, in that jurisdiction, a very high standard is required in such cases—a 'flagrant denial' of a right—which has rarely been met.[66] It requires a breach 'so fundamental as to amount to a nullification, or destruction of the very essence, of the right (p. 668) guaranteed'.[67] An individual must demonstrate an added 'measure of persecution, prosecution, deprivation of liberty or ill treatment' beyond a 'mere' violation of the right.[68] This is because the State may have a 'legitimate aim' in restricting a qualified right, such that

> it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.[69]

This seems to be premised on the idea that the ECHR's Contracting States are not the 'indirect guarantors of [rights] for the rest of the world',[70] and on 'a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention'.[71] As Foster rightly observes, this 'certainly raises a question as to the universality of human rights'.[72] Costello argues that the flagrant breach standard 'hamper[s] the progressive development of the law'[73] because it is 'unduly uncertain and excessively stringent'.[74]

By contrast, the Human Rights Committee and the Committee on the Rights of the Child have stated that individuals must not be removed to any country where they face a real risk of 'irreparable harm'. That term is not defined, but both committees cite arbitrary deprivation of life, torture, and cruel, inhuman, or degrading treatment or punishment as examples of such harm.[75] In the context of interim measures, the Human Rights Committee has stated that the 'essential criterion' of irreparable harm is 'the irreversibility of the consequences'.[76] While Noll has argued that this is 'ambig(p. 669) uous' and 'opens up a

new arena for indeterminacy',[77] in practice it has not been used as an independent standard.

The distinctions between absolute and qualified rights are problematic, especially when contrasted with refugee law's more holistic assessment of the conditions amounting to persecution. There is a paucity of cogent reasoning by decision-makers as to when a *non-refoulement* duty attaches and why—especially when it comes to the nature of the right concerned (absolute/qualified), and the requisite degree of involvement by the State (in cases relating to inadequate resources or medical care, where there are 'fault-lines in the case law around the source of the harm').[78] Much of the reasoning seems to be based on policy concerns rather than anything more normative,[79] with Costello suggesting that the European Court of Human Rights seems to be deferring more to States' migration control prerogatives than to anything more principled.[80]

When it comes to domestic complementary protection regimes, most prohibit removal to the 'clear-cut' cases of arbitrary deprivation of life, the death penalty, torture, and cruel, inhuman, or degrading treatment or punishment. Indeed, the Human Rights Committee has stated that States parties to the ICCPR '*must* allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*'.[81] In some jurisdictions, the legislation refers directly to the relevant treaty provision as the source of the *non-refoulement* obligation,[82] whereas in others, the legislation itself defines the scope of the obligation.[83] The EU Qualification Directive additionally precludes a civilian's removal to a real risk of a 'serious and individual threat to…life or person by reason of indiscriminate violence in situations of international or internal armed conflict',[84] while Nicaraguan law prohibits the return of people suffering violations of their human rights.[85] Harm may result both from positive acts (eg the actual infliction of harm) as well as from deprivation (eg resources being withheld).[86] Furthermore, the individual circumstances of each case will influence whether or not the particular ill-treatment feared attains the minimum level of severity required.

(p. 670) 3. Particular Issues

a. The Impact of Subsidiary Protection on Refugee Law and Protection

A long-standing concern is whether complementary protection regimes might result in the atrophy of refugee law. Many domestic regimes require asylum seekers' claims to be assessed in accordance with the Refugee Convention first, and only subsequently assessed against the complementary protection grounds if they are found not to be a refugee.[87] However, there remains a risk that if it is simpler for a decision-maker to identify a particular form of harm as 'inhuman treatment', rather than analysing in detail whether it constitutes persecution on account of membership of a particular social group, for instance, then refugee law jurisprudence may suffer.[88] Durieux contends that the long history of human rights-based protection in Europe 'reveals a worrying trend of using the *non-refoulement* potential of article 3 ECHR not as subsidiary or complementary to, but rather as a substitute for, refugee status'.[89] As such, Costello cautions that human rights law has the capacity to undermine refugee law 'as cases are siphoned into human rights claims'.[90] Highly divergent recognition rates throughout the EU Member States suggest that decision-makers are applying different tests and interpretations, developing refugee jurisprudence in some jurisdictions but not in others.[91]

A related—and very real—problem is that if complementary protection results in beneficiaries receiving a lesser status, there may be policy pressures to grant that, rather than refugee status. This seems to be borne out in practice. Whereas Australia, Canada, and New Zealand grant identical rights to refugees and beneficiaries of complementary protection,[92] the EU permits differential treatment. Even though the recast EU Qualification Directive has moved towards a greater convergence of rights for refugees (p. 671) and beneficiaries of subsidiary protection,[93] several EU Member States have since reduced the latter's entitlements to the minimum allowed by EU law.[94] Furthermore, the European Commission's proposal for a Qualification Regulation, which would replace the Directive and directly bind Member States, seeks to entrench inequalities in treatment in three areas: duration of protection, social benefits, and exclusion.[95]

The evidence suggests that differential statuses mean people are being denied protection as refugees.[96] Following the arrival of 890,000 Syrian asylum seekers in Germany in 2015, a policy change reducing the entitlements of beneficiaries of subsidiary protection (including no family reunion) saw a surge in grants of that status, and a sharp decline in grants of refugee status. As a result, thousands of people appealed their subsidiary protection determination to try to 'upgrade' to refugee status—with over 75 per cent succeeding in 2016.[97] Such practices raise valid legal concerns about discrimination, given that any differences in treatment between the holders of different forms of migration status must be objectively and reasonably justified.[98]

b. Risk of Generalized Violence or Armed Conflict

Beyond protection based on specific provisions of human rights treaties, there has been a consistent, albeit varied, trend in State practice to provide some form of protection to (p. 672) 'persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin'.[99] As noted above, the EU Qualification Directive expressly prohibits the removal of civilians who are individually at risk during conflict,[100] with the caveat that '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.[101]

In such cases, considerable attention has focused on the extent to which the individual must be personally targeted.[102] The Court of Justice of the EU has clarified that a person does not have to 'adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances',[103] but, rather, show that the harm 'is so serious that it cannot fail to represent a likely and serious threat to that person'.[104] The more a person is individually affected, 'the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself'.[105] Canada's Federal Court has similarly held that demonstrating a personal and objectively identifiable risk 'does not mean that the risk or risks feared are not shared by other persons who are similarly situated'.[106]

c. Children's Protection Needs

In addition to the general grounds for complementary protection outlined above, children may require special protection. Article 3 of the CRC requires that a child's best interests are a primary consideration in any decision concerning him or her. They may only be outweighed if another consideration (individual or cumulative) is inherently more significant,[107] and cannot be overridden by non-rights-based arguments (such as migration control).[108] (p. 673) This is a 'fundamental, interpretative legal principle'[109] and 'substantive right',[110] not merely a procedural rule.[111] Indeed, an age-sensitive approach to a child's protection needs[112] is central to the question whether removal is in the child's best interests or not. Protection may be triggered by 'degrees of risk falling short of a well-founded fear or serious reasons of anticipated harm', as well as by '*types* of risk not generally or directly relevant to refugee or complementary protection, such as deprivation,

destitution, denial, exploitation, or absence of care'.[113] The Committee on the Rights of the Child has stated that a child should not be removed if there is 'a "reasonable risk" that such return would result in the violation of fundamental human rights…and in particular, if the principle of *non-refoulement* applies'.[114]

d. Domestic Carve-outs

Some domestic regimes contain carve-outs to preclude complementary protection from being granted. For example, Australia, Canada, and the EU deny protection if the risk is faced by the population generally and not by the individual in particular.[115] Canada and New Zealand refuse protection if the risk stems from a State's inability to provide adequate health or medical care.[116] Australia, Canada, and New Zealand deny protection if the risk is inherent or incident to lawful sanctions (that are not inconsistent with international standards).[117] Neither Australia nor the EU grants protection if an internal flight alternative is available.[118]

(p. 674) 4. Threshold or 'Standard of Proof'

In general, the relevant standard is that there are 'substantial grounds' for believing that a person would face a 'real risk' of harm if removed. It derives from article 3 of the CAT and has been adopted by the Human Rights Committee and the European Court of Human Rights, as well as incorporated into the legislation of some States.[119] In terms of best practice, the 'real risk' threshold should be interpreted as equivalent to the 'well-founded fear' test in refugee law (as in Australia, New Zealand, and the UK, for example).[120] The UK Asylum and Immigration Tribunal has noted that it would be strange if a different standard were to apply:

> Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.[121]

A different approach has been taken in the US and Canada, however, where the test is 'more likely than not'.[122] This imposes a higher standard for complementary protection than for refugee claims, where the 'well-founded fear' test is interpreted as a 'reasonable possibility' of persecution (in the US)[123] or a 'reasonable chance' or 'serious possibility' of persecution (in Canada).[124] The Committee against Torture has criticized the US for using a standard that is inconsistent with international law and at odds with the (p. 675) Committee's jurisprudence.[125] Similarly, the Human Rights Committee has criticized Canada for relying on outdated international jurisprudence to justify a higher test for complementary protection claims.[126] As noted above, for qualified rights, the European Court of Human Rights requires a 'flagrant breach' or a 'flagrant denial' of a right.

5. Exclusion from Complementary Protection

Although the prohibition on removal to certain types of serious harm is absolute, many States' complementary protection regimes contain exclusion clauses that are based on articles 1F and 33(2) of the Refugee Convention.[127] This does not mean that States can remove people contrary to international law, however.[128] Instead, people are typically denied the legal status granted to other beneficiaries of complementary protection, often resulting in legal limbo and even indefinite detention.[129] Although State practice varies considerably and is marked by unsystematic, *ad hoc* approaches, it seems to be underpinned by the (misplaced) assumption that the need to remain will necessarily be temporary; thus, cases are regularly reviewed to determine whether (p. 676) removal is

possible.[130] This considerable protection gap has been described as a ‘fundamental system error’.[131]

6. Conclusion

While on one reading, complementary protection has expanded the bases on which people cannot be removed to serious harm, on another it has diluted refugee protection and risked reducing international protection to *non-refoulement* alone.[132] As Durieux reminds us, human rights instruments like the ECHR do ‘not actually deal with asylum, if that concept is construed to mean the sum total of protection afforded by a State to refugees on its territory or under its jurisdiction’.[133] He argues that whereas refugee law is framed ‘positively’, affording a legal status to aliens we want to protect, human rights law is framed ‘negatively’, simply limiting who can be removed.[134] As such, EU law ‘induces the phenomenon of a “vanishing refugee” ’, who is ‘blurred, marginalized or ignored’.[135]

There is clearly a need for greater, principled articulation of the relationship between refugee law and human rights law when it comes to the principle of *non-refoulement* and—importantly—the legal status granted to those who cannot be removed. The dissonance between the protection afforded by article 3 of the ECHR and subsidiary protection under the EU Qualification Directive is illustrative of a systemic disjointed approach that results in protection gaps—gaps that can rarely be explained by principled reasoning.

(p. 677) Finally, just as the meaning of the ‘refugee’ definition in the Refugee Convention has evolved over time through robust judicial, institutional, and legislative engagement,[136] so, too, must the interpretation of complementary protection remain alive to developments in international human rights law. Among other things, this means giving considered attention to the role of *non-refoulement* with respect to rights other than the right to life and the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment.

Footnotes:

1 On this, see Chapters 13 and 37 in this volume.

2 Guy S Goodwin-Gill, ‘*Non-Refoulement*, Temporary Refuge, and the “New” Asylum Seekers’ in David J Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 458. See also Walter Kälin and Nina Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches’, UNHCR Legal and Protection Policy Research Series, PPLA/2012/01 (2012) 65. See further Chapter 13 in this volume.

3 UNHCR Executive Committee (ExCom) Conclusion No 103 (LVI), ‘The Provision of International Protection including through Complementary Forms of Protection’ (2005) paras (n), (s).

4 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory-Opinion OC-21/14), Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 240.

5 ExCom (n 3) preamble.

6 Standing Committee of the Executive Committee of the High Commissioner’s Programme, ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’, EC/50/SC/CRP.18 (9 June 2000) paras 4–5; ExCom (n 3) para (j).

[7] OAU Convention, art I(2); Cartagena Declaration, conclusion III(3). See also Chapters 15, 17, and 34 in this volume.

[8] ExCom (n 3) para (n).

[9] Law on Asylum in the Republic of Albania, No 121/2014, art 78. This example, along with Bosnia, Macedonia, Montenegro, Norway, Serbia, South Korea, Turkey, and Ukraine, are cited in Bill Frelick, 'What's Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime' (2020) 8 Journal on Migration and Human Security 42. He also cites South Africa's Refugees Act 1998, s 3, but this definition is based solely on the expanded definition in the OAU Convention.

[10] Migration Act 1958 (Cth), s 36(2A)–(2C) (Migration Act).

[11] Bosnia and Herzegovina, Law on Asylum, No 11/2016, art 22.

[12] Immigration and Refugee Protection Act SC 2001, c 27, s 97.

[13] Ley General de Migración y Extranjería No 8764 (10 September 2009) arts 6(6), 94(12).

[14] EU Qualification Directive (original), arts 2(e), 15; EU Qualification Directive (recast), arts 2(f), 15.

[15] Immigration Ordinance, Cap 115, Laws of Hong Kong, part VIIC.

[16] Immigration Act 2009, ss 130, 131.

[17] Law on Asylum and Temporary Protection, L No 07–3664/1 (2003), arts 2, 5.

[18] Ley sobre Refugiados Protección Complementaria y Asilo Político, arts 28–32.

[19] Law on International and Temporary Protection of Foreigners (29 December 2016) arts 4, 25.

[20] Ley No 761—Ley General de Migración y Extranjería (7 July 2011) art 220.

[21] Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act), s 28.

[22] Law on Asylum (2007), arts 2, 4.

[23] Refugee Act, Law No 11298 of 2012, art 2(3).

[24] Federal Act on Foreign Nationals and Integration of 16 December 2005, art 83(3)–(4).

[25] Law No 6458 of 2013 on Foreigners and International Protection (as amended 29 October 2016), arts 46, 48, 55, 63. Of note is that, in addition to EU-like subsidiary protection grounds (in art 63), a humanitarian permit may be granted *inter alia* 'where the best interest of the child is of concern', 'where, notwithstanding a removal decision or ban on entering Turkey, foreigners cannot be removed from Turkey or their departure from Turkey is not reasonable or possible', or 'in extraordinary circumstances'.

[26] Law of Ukraine on Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine 2011, No 3671-VI, art 1(4), (13).

[27] Immigration Rules (as updated 2 May 2017), part 11, paras 339C–339CA. The UK is not bound by the recast EU Qualification Directive.

[28] Immigration and Nationality Act 8 CFR §§ 208.16, 208.17 (protection from return to torture pursuant to CAT).

[29] David J Cantor and Farai Chikwanha, 'Reconsidering African Refugee Law' (2019) 31 IJRL 182 explain that Angolan law prevents the removal of individuals to a country where they will be subjected to torture or cruel or degrading treatment: Lei No 10/15, art 54(3). In Sierra Leone and the Central African Republic, people must not be expelled to a risk of torture: Refugees Act, s 16 and Loi No 07.019, art 22, respectively. Burundian law provides that asylum may be granted to any non-national 'whose life or liberty are threatened in

their country or who is exposed to inhuman or degrading treatment when such threats or risks emanate from persons or groups other than the public authorities of their country', and beneficiaries are granted the same rights as refugees: Loi No 1/32, art 5.

30 See Jane McAdam and Fiona Chong, 'Complementary Protection in Australia Two Years On: A Developing Human Rights Jurisprudence' (2014) 42 Federal Law Review 441. In New Zealand, 'persecution' encompasses inhuman or degrading treatment and the latter thus does not involve a lower level of harm: *AC (Syria)* [2011] NZIPT 800035, paras 70–80.

31 Article 4 of the ECHR prohibits slavery, servitude, and forced or compulsory labour. Article 4 was considered in *Ould Barar v Sweden* (1999) 28 EHRR CD 213 but there was no risk of a violation. See also *MO v Switzerland*, App No 41282/16 (ECtHR, 20 June 2017); *J v Austria*, App No 58216/12 (ECtHR, 17 January 2017), Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Tsotsoria, para 40.

32 CAT, art 3.

33 ICCPR, art 7, which is reflected in all domestic complementary protection regimes mentioned in this chapter except the US, which only safeguards against return to persecution or torture. In Costa Rica and Nicaragua, the obligation is expressed more broadly—non-return to places where individuals' lives are at risk, and non-return to places where people would suffer violations of their human rights: respectively, Ley General de Migración y Extranjería (n 13) art 6(6); Ley No 761 (n 20) art 220.

34 CRC, art 37(a); ECHR, art 3; EU Charter of Fundamental Rights, art 19(2); African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 5; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), art 8.

35 See eg UN Human Rights Committee, 'General Comment No 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)' (10 March 1992) para 9; UN Human Rights Committee, 'General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant', UN doc CCPR/C/21/Rev1/Add.13 (26 May 2004) para 12; *Soering v United Kingdom* (1989) 11 EHRR 439. There are procedural and evidentiary merits/drawbacks of the various adjudicatory bodies: Jane McAdam *Complementary Protection in International Refugee Law* (OUP 2007) 138–40.

36 See eg UN Human Rights Committee 2004 (n 35) para 12; UN Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN doc CCPR/C/GC/36 (30 October 2018) paras 30–1; *Bader and Kanbor v Sweden*, App No 13284/04 (ECtHR, 8 November 2005); *AL (XW) v Russia*, App No 44095/14 (ECtHR, 29 October 2015).

37 American Declaration of the Rights and Duties of Man (adopted at the 9th International Conference of American States, Bogota, 2 May 1948).

38 David J Cantor and Stefania E Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?' (2013) 17 International Journal of Human Rights 689, 693. The Commission has also precluded removal in the context of article XXVI 'not to receive cruel, infamous or unusual punishment': *Mortlock v United States*, Inter-American Commission on Human Rights Report No 63/08, Case No 12.534 (25 July 2008).

39 Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 999 UNTS 414; *GT v Australia*, UN doc CCPR/C/61/D/706/1996 (4 December 1997) para 8.5; *Judge v Canada*, UN doc CCPR/C/78/D/829/1998 (13 August 2003) para 10.4; CRC, art 37(a); EU Charter of Fundamental Rights, art 19(2); Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the

Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS 187; *Wong Ho Wing v Peru*, Inter-American Court of Human Rights Series C No 297 (30 June 2015) para 134.

40 This derives from the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16. This is reflected in Japanese law, which protects people from being removed where there are substantial grounds for believing that they would be in danger of being subjected to an enforced disappearance: Immigration Control and Refugee Recognition Act (Cabinet Order No 319 of 4 October 1951), art 53(3)(iii).

41 *Tapia Paez v Sweden*, UN doc CAT/C/18/D/39/1996 (28 April 1997) para 14.5; *Aemei v Switzerland*, UN doc CAT/C/18/D/34/1995 (9 May 1997) para 9.8. The Supreme Court's approach in *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3 is contrary to international law and has been criticized by the UN Human Rights Committee, 'Consideration of Reports: Concluding Observations on Canada', UN doc CCPR/C/79/Add.105 (7 April 1999) para 13.

42 This also means that there is no scope for balancing a person's conduct (however abhorrent) against the risk of harm if he or she is returned (see eg *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 79–80).

43 UN Human Rights Committee 1992 (n 35) para 4 has explained that any distinctions 'depend on the nature, purpose and severity of the treatment applied'.

44 eg *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

45 *Taunoa v Attorney-General* [2007] NZSC 70, para 82 (Elias CJ), referring to *Miller v R*, 1976 CarswellBC 321, [1977] 2 SCR 680, 690 (Laskin CJ).

46 Migration Act (n 10) ss 5, 36(2A).

47 See *Selmouni v France*, App No 25803/94 (ECtHR, Grand Chamber, 28 July 1999) para 101. The Committee against Torture has detailed a long, non-exhaustive list of situations that may indicate a risk of torture: Committee against Torture, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the context of Article 22' (2017), UN doc CAT/C/GC/4. Significantly, such acts (with a lesser degree of severity) could constitute cruel, inhuman, or degrading treatment or punishment.

48 ECHR, art 8(2).

49 *Z and T v United Kingdom*, App No 27034/05 (ECtHR, 28 February 2006); *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. In the Inter-American Court of Human Rights, see *Wong Ho Wing* (n 39) para 136.

50 *Z and T* (n 49) 7.

51 UN Human Rights Committee, 'General Comment No 15: The Position of Aliens under the Covenant' (11 April 1986) para 5. To date, however, all violations have been regarded as being encompassed by article 6 or 7: see eg *BL v Australia*, UN doc CCPR/C/112/D/2053/2011 (7 January 2015) para 6.5.

52 Committee on the Rights of the Child, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children outside Their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005) para 27.

53 eg *Soering* (n 35) para 113.

54 Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of

the Committee on the Elimination of Racial Discrimination: Japan', UN doc CERD/C/JPN/CO/3–6 (16 March 2010) para 23.

55 Advisory-Opinion OC-21/14 (n 4) para 231.

56 *Ullah* (n 49); *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368.

57 Global Compact for Migration, objective 21, para 37.

58 EU Qualification Directive, art 15(b).

59 Even these cases are generally recharacterized as inhuman treatment.

60 *Soering* (n 35) para 113. For a detailed discussion of case law on other provisions, see Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 280–5; Cathryn Costello, 'The Search for the Outer Edges of *Non-Refoulement* in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David J Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016) 181–2. For an overview of ICCPR rights, see Ben Saul, 'Affidavit of 18 August 2014' (evidence file, folio 6980), *Wong Ho Wing* (n 39).

61 *Ould Barar* (n 31).

62 See eg *El-Masri v Macedonia* (2013) 57 EHRR 25; *Abu Zubaydah v Lithuania*, App No 46454/11 (ECtHR, 31 May 2018) paras 657–8; *Al Nashiri v Romania*, App No 33234/12 (ECtHR, 31 May 2018) paras 691–2.

63 eg *Soering* (n 35); *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Tomic v United Kingdom*, App No 17837/03 (ECtHR, 14 October 2003); *Mamatkulov v Turkey* (2005) 41 EHRR 494 (Grand Chamber); *Othman (Abu Qatada) v United Kingdom*, App No 8139/09 (ECtHR, 9 May 2012); *Yefimova v Russia*, App No 39786/09 (ECtHR, 19 February 2013) para 218.

64 eg *F v United Kingdom*, App No 17341/03 (EctHR, 22 June 2004); *Üner v The Netherlands*, App No 46410/99 (ECtHR, Grand Chamber, 5 July 2005); *Al Nashiri* (n 62) paras 698–9; *Abu Zubaydah* (n 62) para 665.

65 eg *Z and T* (n 49); see also *Ullah* (n 49).

66 It was first met in *Othman* (n 63); see also *El-Masri* (n 62); *Al Nashiri v Poland*, App No 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (ECtHR, 24 July 2014). For a detailed overview of cases, see Costello (n 60) 197–205.

67 *Mamatkulov* (n 63) 537, para O-III14 (joint partly dissenting opinion of Judges Bratza, Bonello, and Hedigan), adopted by the court in *Othman* (n 63) para 260.

68 *Z and T* (n 49) 7.

69 *Ullah* (n 49) para 24 citing *Devaseelan v Secretary of State for the Home Department* [2002] UKAIT 00702, [2003] Imm AR 1, para 111.

70 *Z and T* (n 49) 7.

71 ibid 6.

72 Michelle Foster, '*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] 2 New Zealand Law Review 257, 276 (fn omitted); Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law Critique 221, 225, 228; Chapter 46 in this volume. For analysis of the court's various rationales as to when and why a *non-refoulement* obligation pertains, see Foster 268–72; Costello (n 60) 206. Costello argues that the

‘flagrant breach’ test ‘is symptomatic of the lack of a single coherent normative rationale for the *non-refoulement* case law’ (184).

73 Costello (n 60) 184 (fn omitted).

74 ibid 205.

75 UN Human Rights Committee 2004 (n 35) para 12; Committee on the Rights of the Child (n 52) para 27.

76 See also *Stewart v Canada*, UN doc CCPR/C/58/D/538/1993 (1 November 1996) para 7.7. For a critique of irreparable harm, see Foster (n 72) 273–4; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 464–7.

77 Noll (n 76) 466.

78 Costello (n 60) 184; see further Chapter 46 in this volume.

79 Foster (n 72) 276; Costello (n 60) 193, citing *SHH v United Kingdom* (2013) 57 EHRR 18.

80 Costello (n 60) 201.

81 *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019) para 9.3, referring to UN Human Rights Committee (n 36) para 31. See further Jane McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*’ (2020) 114 AJIL 708.

82 New Zealand’s Immigration Act (n 16) ss 130, 131 refer respectively to the CAT and ICCPR.

83 For example, Australia’s Migration Act (n 10) s 5(1) requires ‘intent’ to cause harm—namely, ‘an actual, subjective, intention on the part of a person to bring about suffering by his or her conduct’; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, para 8 (Kiefel CJ, Nettle, and Gordon JJ); para 114 (Edelman J).

84 EU Qualification Directive, art 15(c).

85 Ley No 761 (n 20) art 220.

86 On the latter, see Chapter 46 in this volume.

87 This is the case in the EU, Canada, Australia, and New Zealand, for instance.

88 See eg *F v United Kingdom* (n 64) and critique by Costello (n 60) 199; Spijkerboer (n 72) 224–8. On complementary protection being used for honour killings, see McAdam and Chong (n 30) 467–71. On concerns about stifling refugee law, see Jean-François Durieux, ‘The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection’ in Hélène Lambert, Jane McAdam, and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013) 254.

89 Durieux (n 88) 250. This trend continues: Council of Europe Commissioner for Human Rights, ‘Realising the Right to Family Reunification of Refugees in Europe’ (Issue Paper prepared by Cathryn Costello, Kees Groenendijk, and Louise Halleskov Storgaard, June 2017) 14.

90 Costello (n 60) 207.

91 See Minos Mouzourakis, *Refugee Rights Subsiding? Europe’s Two-Tier Protection Regime and Its Effect on the Rights of Beneficiaries* (AIDA and ECRE 2016) 13.

92 See Migration Act (n 10) s 36; Immigration and Refugee Protection Act (n 12) ss 95–7; Immigration New Zealand, *Operational Manual: Refugees and Protection* (8 May 2017) ch 5 pt 15.1. The regional African and Latin American refugee treaties envisage the extension of Convention refugee status to the broader categories of people they protect: OAU Convention, art VIII(2). Nothing in the Cartagena Declaration suggests a different status should be accorded to its wider category of 'refugees', referring to the OAU Convention as a precedent: Cartagena Declaration, conclusions III(3), III(8); see also Advisory-Opinion OC-21/14 (n 4) para 239.

93 Differences remain with respect to the length of residence permits granted (article 24), social assistance (which can be limited to core benefits for beneficiaries of subsidiary protection (article 29)), and access to employment, social welfare, healthcare, and integration facilities may be made contingent on the prior issue of a residence permit (recital 40).

94 Mouzourakis (n 91) 15–23.

95 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents' COM (2016) 466 final.

96 Some States tend to grant subsidiary protection instead of refugee status (eg Malta, Cyprus, Portugal, and Romania): European Council for Refugees and Exiles, 'Asylum Decisions in the First Half of 2019: Unlocking Statistics' (10 September 2019) <https://www.asylumineurope.org/news/10-09-2019/asylum-decisions-first-half-2019-unlocking-statistics> accessed 16 December 2020.

97 Whereas 95.8 per cent of Syrians had been granted refugee status in Germany in 2015, this decreased to 56.4 per cent in 2016 and only 35 per cent in 2017, while the rate of Syrians granted subsidiary protection rose exponentially from 0.1 per cent in 2015 to 41.2 per cent in 2016 and 56 per cent in 2017. A legislative amendment in March 2016 temporarily suspended family reunification for beneficiaries of subsidiary protection. See Mouzourakis (n 91) 8; Asylum Information Database, 'Differential Treatment of Specific Nationalities in the Procedure: Germany' <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/treatment-specific-nationalities> accessed 24 May 2019; Asylum Information Database, 'Criteria and Conditions: Germany' <http://www.asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and> accessed 24 May 2019. Arguably, had the Temporary Protection Directive been triggered (providing an interim status), Germany would not have used subsidiary protection in this way.

98 *Hode and Abdi v United Kingdom*, App No 22341/09 (ECtHR, 6 November 2012); European Commission (n 95) 23–6. In the context of internal displacement, see *Mapiripán Massacre v Colombia*, Inter American Court of Human Rights Series C No 134 (15 September 2005) paras 177–9.

99 UNHCR, 'Note on International Protection', A/AC.96/830 (7 September 1994) para 39; ELENA, 'Complementary/Subsidiary Forms of Protection in the EU States: An Overview' (April 1999); Council of Europe Committee Member, 'Recommendation Rec (2001) 18 of the Committee of Ministers to Member States on Subsidiary Protection' (27 November 2001).

100 EU Qualification Directive, art 15(c).

101 See EU Qualification Directive (original) recital 26; EU Qualification Directive (recast) recital 35.

102 There is a large literature on this; see generally Cantor and Durieux (eds) (n 2) and Chapter 45 in this volume.

103 Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I–921, para 45.

104 ibid para 42.

105 ibid para 37.

106 *Surajnarain v Canada (Minister of Citizenship and Immigration)* 2008 FC 1165, [2008] FCJ 1451, para 11.

107 *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, paras 26, 33; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, para 49; *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133. For factors that have been considered to outweigh the child's best interests, see Jason M Pobjoy, *The Child in International Refugee Law* (CUP 2017) 236–7.

108 Committee on the Rights of the Child (n 52) para 85. See also *Tarakhel v Switzerland*, App No 29217/12 (ECtHR, Grand Chamber, 4 November 2014) para 99; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App No 13178/03 (ECtHR, 12 October 2006) para 55; *Popov v France*, App Nos 39472/07 and 39474/07 (ECtHR, 19 January 2012) para 91.

109 Committee on the Rights of the Child, 'General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)', UN doc CRC/C/GC/14 (29 May 2013) para 6; see also Pobjoy (n 107) 6–7, 28–30, chs 3–5.

110 Committee on the Rights of the Child (n 109) para 6; Pobjoy (n 107) 7, 30–1, ch 6.

111 Committee on the Rights of the Child (n 109); Pobjoy (n 107) 6, 27–8, ch 2.

112 See eg Committee on the Rights of the Child (n 52) para 27.

113 Guy S Goodwin-Gill, 'Expert Roundtable Discussion on "The United Nations Convention on the Rights of the Child and Its Application to Child Refugee Status Determination and Asylum Processes": Introduction' (2012) 26 Journal of Immigration, Asylum and Nationality Law 226, 230.

114 Committee on the Rights of the Child (n 52) para 84. The use of 'in particular' indicates that the principle of *non-refoulement* is not the only relevant consideration in the case of a child. This approach has been echoed by Advisory-Opinion OC-21/14 (n 4) para 231.

115 Migration Act (n 10) s 36(2B)(c); Immigration and Refugee Protection Act (n 12) s 97(1)(b)(ii); EU Qualification Directive (original) recital 26; EU Qualification Directive (recast) recital 35.

116 Immigration and Refugee Protection Act (n 12) s 97(1)(b)(iv); Immigration Act (n 16) s 131(5)(b). See discussion in Chapter 46 in this volume.

117 Migration Act (n 10) s 5; Immigration and Refugee Protection Act (n 12) s 97(1)(b)(iii); Immigration Act (n 16) s 131(5)(a). For discussion, see Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 Sydney Law Review 687, 701–2.

118 Migration Act (n 10) s 36(2B)(a); EU Qualification Directive (original) art 8; EU Qualification Directive (recast) art 8. See also Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill 2019) 298–302.

119 EU Qualification Directive (original) art 2(e); EU Qualification Directive (recast) art 2(f); Migration Act (n 10) s 36(2)(aa); Immigration Act (n 16) ss 130(1), 131(1). Others refer to a 'danger': Mexico, Canada, Costa Rica. For detailed analysis of the jurisprudence on the meaning of these terms, see McAdam (n 117) 716–25.

120 See *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, paras 246–8 (Lander and Gordon JJ), 297 (Besanko and Jagot JJ), 342 (Flick J); *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012) para 79. The Court of Justice of the EU has not ruled directly on the standard but would appear to regard 'well-founded fear' and 'real risk' as the same: International Association of Refugee Law Judges (IARLJ) European Chapter, *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis* (European Asylum Support Office 2016) 114–15, referring to C-71/11 and C-99/11 *Germany v Y and Z* [2013] All ER (EC) 1144, ECJ, paras 75, 79, 80.

121 *Kacaj v Secretary of State for the Home Department* [2001] UKAIT 00018, [2001] INLR 354, para 10, see also para 12; *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668, para 30.

122 See 8 CFR (n 28) §208.16(c)(2); *Li v Canada (Minister for Citizenship and Immigration)* 2005 FCA 1, [2005] 3 FCR 239, paras 27–9; cf Immigration and Refugee Board of Canada, *Consolidated Grounds in the* Immigration and Refugee Protection Act: *Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 39.

123 Compare 8 CFR (n 28) §208.16(c)(2) and §208.13(b)(2).

124 *Adjei v Canada (Minister of Employment and Immigration)* 1989 CarswellNat 40, [1989] 2 FC 680.

125 Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting (10 May 2000), UN doc CAT/C/SR.424, para 17.

126 Individual opinion (concurring) by Committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L Neuman, Mr Michael O'Flaherty, and Sir Nigel Rodley in *Pillai v Canada*, UN doc CCPR/C/101/D/1763/2008 (9 May 2011) 22.

127 See eg EU Qualification Directive, art 17; Immigration and Refugee Protection Act (n 12) s 98; Immigration Act (n 16) ss 137(2), 139; Migration Act (n 10) s 5H(2). US law also excludes certain 'undesirable' people from 'withholding of removal' but gives them 'deferral of removal' status (amounting to little more than toleration of their presence).

128 It will rarely be possible for States to extradite or prosecute people for the alleged crimes that have resulted in their exclusion from refugee or complementary protection status: Maarten P Bolhuis, Louis P Middelkoop, and Joris van Wijk, 'Refugee Exclusion and Extradition in the Netherlands: Rwanda as Precedent?' (2014) 12 Journal of International Criminal Justice 1115; Geoff Gilbert and Anna Magdalena Rüsch, 'Jurisdictional Competence through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' (2014) 12 Journal of International Criminal Justice 1093.

129 In New Zealand, the status of such people is left to executive discretion. This enables the greatest flexibility in individual cases but provides no certainty for the individuals concerned. Under the EU Qualification Directive (art 14(6)), 'refugees' denied refugee status (on the grounds of criminal activity or national security) are nevertheless entitled to the rights set out in articles 3, 4, 16, 22, 31, 32, and 33 of the Refugee Convention. No equivalent entitlement exists for those denied subsidiary protection (see EU Qualification Directive, art 19). See further Joined Cases C-391/16, C-77/17, and C-78/17 *M v Ministerstvo vnitra, X and Y v Commissaire général aux réfugiés et aux apatrides* [2019] OJ C255/2, paras 105, 109. For an overview of practices in a number of jurisdictions, see

Refugee Law Initiative, *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality Who Cannot Be Removed* (Conference report, 2016) <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf> accessed 27 November 2019.

130 For example, Norway grants a temporary residence permit with very limited rights, reviewed every six months. In the UK, excluded individuals may be granted restricted leave for up to six months. See Mi Christiansen and Terje Einarsen, 'The Situation in Norway' (Preliminary Workshop, Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot Be Removed, Vrije University Amsterdam, 27 March 2015) 2; Home Office, 'Restricted Leave (version 3.0)' (25 May 2018) 14; Sarah Singer, ' "Undesirable and Unreturnable" in the United Kingdom' (2017) 36(1) RSQ 9, 30.

131 Joke Reijven and Joris van Wijk, 'Caught in Limbo: How Alleged Perpetrators of International Crimes Who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law' (2014) 26 IJRL 248, 249.

132 Durieux (n 88) 251; cf Chetail who argues that 'human rights law has become the ultimate benchmark for determining who is a refugee': Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014); see also Chapter 11 in this volume.

133 Durieux (n 88) 247.

134 ibid 252; see also Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20 International Journal on Minority and Group Rights 147, 168–9. Kälin provides more nuance, distinguishing the approach of the Human Rights Committee—which regards States as having 'a duty to actively protect individuals against infringements of their rights'—from that of the Committee against Torture and the European Court of Human Rights—which preclude return 'based on a duty to abstain from treating individuals in an inhuman manner': Walter Kälin, 'Limits to Expulsion under the International Covenant on Civil and Political Rights' in Francesco Salerno (ed), *Diritti dell'uomo, estradizione ed espulsione* (CEDAM 2003) 159.

135 Durieux (n 88) 228.

136 UNHCR, 'Persons in Need of International Protection' (June 2017) 2–3.