

# An analysis of the prohibition on causing displacement within the 1951 Refugee Convention



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# An analysis of the prohibition on causing displacement within the 1951 Refugee Convention

Kathryn Lucy Allinson<sup>1</sup>

**Abstract:** The treaties and legal instruments of International Refugee Law (IRL) contain no provision providing an explicit prohibition on the causing of refugee or, more broadly, displacement flows. This article explores the absence of a prohibition on causing displacement within the IRL framework. Nowhere in the *Convention Relating to the Status of Refugees* (the 1951 Convention),<sup>2</sup> the cornerstone and core international instrument of IRL,<sup>3</sup> is the question of the rightness or wrongness of causing displacement considered. Through an examination of its object, purpose and context, this article examines why the prohibiting of displacement was left out of the drafting of the 1951 Convention. It will present that, while the framework that the Convention inherently disapproves of the causing of displacement, it was never intended to prevent the creation of refugees, only to protect them. As a result, other areas of international law must be utilised to understand if displacement is prohibited.

**Keywords:** displacement, international refugee law, causation, prohibition, international state responsibility

## 1. Introduction

There are now more displaced people in the world than ever before.<sup>4</sup> While the statutes and provisions of International Refugee Law (IRL) guide how States respond to refugees, the absence of a prohibition on displacement within this framework has meant the focus of discussions around 'responsibility' have focussed on solidarity and collective responsibility *ex ante* for 'managing' and receiving the flows of people, as opposed to individual responsibility *ex post* of the culpable State(s) who caused the displacement.<sup>5</sup> This coupled with the poor response by developed nations to support

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<sup>2</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

<sup>3</sup> The author acknowledges the existence of later international instruments: 1967 Optional Protocol to the 1951 Convention, UNHCR Statute and guidelines as well as regional instruments: The African Union Convention for Refugees, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection on Refugees in Central America, Mexico and Panama, held in Cartagena on 19–22 Nov. 1984; and in the European Union (EU), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011. However, she takes the 1951 Convention as the blueprint for IRL.

<sup>4</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Global Trends: Forced Displacement in 2018, June 2019 p2, 18; See also: [unstats.un.org/unsd/methodology/m49/](http://unstats.un.org/unsd/methodology/m49/) for a list of countries included under each region.

<sup>5</sup> See Nafees Ahmad, 'Refugees: State Responsibility, Country of Origin and Human Rights' (2009) 10 *Asia-Pacific Journal on Human Rights and the Law* 1; R Hoffman, 'Refugee-Generating Policies and the Law of State Responsibility' [1985] *ZaoRV*; Katja S Ziegler, *Causing Refugee Flows as a Delict under International Law - International Responsibility of the State of Origin for Causing Refugee Movements* (Duncker and Humblot 2002); C Tomuschat, 'State Responsibility and the Country of Origin' in Vera Gowlland-Debbas (ed), *The Problems of Refugees in the light of Contemporary International Law Issues* (Marinus Nijhoff Publishers 1996).

displaced people<sup>6</sup>, whether through funding,<sup>7</sup> humanitarian aid<sup>8</sup> or resettlement<sup>9</sup>, is in stark contrast to the continued military involvement in displacement-generating conflicts by developed States.<sup>10</sup> States avoid legal responsibility for causing displacement because traditional readings of international law place responsibility primarily with the Country of Origin (CoO)<sup>11</sup> or an occupying force.<sup>12</sup> The absence of a prohibition within IRL creates a situation where displacement becomes an inevitable outcome of conflict or natural disasters, rather than an occurrence which can be avoided, mitigated or held accountable.

To explore why a prohibition of displacement is not included in the IRL framework, this research analyses the *Convention Relating to the Status of Refugees* (the 1951 Convention),<sup>13</sup> the cornerstone and core international instrument of IRL.<sup>14</sup> It will examine the absence of an explicit prohibition within its text and consider whether IRL implicitly prohibits the causing of displacement in light of the context, object and purpose, and wider system of related rules and State practice.

Utilising a doctrinal approach based upon Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the article will propose that, while the 1951 Convention and the IRL framework more generally, inherently disapproves of the causing of displacement, it was never intended to prevent the creation of refugees, only to protect them. It initially conducts a textual analysis of the 1951 Convention to examine the absence of the prohibition of displacement within its core articles. The article will then look to the broader object and purpose of the Convention through an analysis of the

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<sup>6</sup> Amnesty International, *An International Failure: The Syrian Refugee Crisis* (13 December 2013) <[http://www.sos-europe-amnesty.eu/content/assets/docs/An\\_International\\_Failure\\_-\\_The\\_Syrian\\_Refugee\\_Crisis.pdf](http://www.sos-europe-amnesty.eu/content/assets/docs/An_International_Failure_-_The_Syrian_Refugee_Crisis.pdf)> accessed on 1 December 2015.

<sup>7</sup> UNHCR Briefing, Funding shortfall risks critical humanitarian response for Syrian refugees, internally displaced, 11 September 2018, Available at: <https://www.unhcr.org/uk/news/briefing/2018/9/5b97790b4/funding-shortfall-risks-critical-humanitarian-response-syrian-refugees.html>

<sup>8</sup> Patrick Stewart and Shervin Ghaffari, 'A Massive Humanitarian Failure in Syria' (*Council on Foreign Relations*); Stephen Thompson, 'Emergency Humanitarian Response to Longer-Term Development in Refugee Crises' [2017] *Institute of Development Studies* 16; Monica de Castellarnau Cirera, 'Refugee Crisis in Europe: The Triple Failure |' (Medecins Sans Frontiers 2015).

<sup>9</sup> UNHCR Briefing, Less than 5 per cent of global refugee resettlement needs met last year, 19 February 2019, Available at: <https://www.unhcr.org/uk/news/briefing/2019/2/5c6bc9704/5-cent-global-refugee-resettlement-needs-met-year.html>

<sup>10</sup> For example, UNHCR Global Trends (n1) finds that 68% of refugees come from 5 countries: Syria, Afghanistan, South Sudan, Myanmar and Somalia respectively. Of these, only Myanmar has avoided airstrikes by the US over the last 20 years with extensive attacks by US and its allies in both Syria and Afghanistan: <https://www.openglobalrights.org/the-us-role-in-forced-migration-from-the-middle-east/>. Recent strikes in Somalia have accounted for over 200 deaths: <https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-actions-2019-strike-logs> See also: <https://theglobepost.com/2018/12/21/us-syria-refugees/> For further discussion of causes of refugee flows, see Section 3

<sup>11</sup> Ahmad (n 5); Ziegler (n 5).

<sup>12</sup> Yoram Dinstein, 'Protection of the Civilian Population under Belligerent Occupation', *The International Law of Belligerent Occupation* (Cambridge University Press 2011).

<sup>13</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

<sup>14</sup> The author acknowledges the existence of later international instruments: 1967 Optional Protocol to the 1951 Convention, UNHCR Statute and guidelines as well as regional instruments: The African Union Convention for Refugees, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection on Refugees in Central America, Mexico and Panama, held in Cartagena on 19–22 Nov. 1984; and in the European Union (EU), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011. However, she takes the 1951 Convention as the blueprint for IRL.

drafting materials and historical context in which the Convention developed. Finally, it will explore the subsequent developments relating to the 1951 Convention and its implementation to ascertain if these shed light on the implicit prohibition on displacement within IRL.

## 2. Textual analysis

### 2.1. Introductory Text and preamble

Throughout the 1951 Convention, the articles are exemplary of the Convention's purpose in protecting refugees. They outline the rights and obligations endowed to refugees upon arrival in a Country of Asylum (CoA). Of the six Chapters of the Convention, four of them focus upon the rights of refugees.<sup>15</sup> The introductory note states that the 1951 Convention 'is the centrepiece of international refugee protection'<sup>16</sup> and is found to 'provide the most comprehensive codification of the rights of refugees at the international level.'<sup>17</sup> The Convention 'lays down basic minimum standards for the treatment of refugees'<sup>18</sup> and in the preamble it highlights that it is intended to consolidate previous 'agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments.'<sup>19</sup> The role of the High Commissioner is outlined as 'providing for the protection of refugees, and the effective co-ordination of measures.'<sup>20</sup> The first two paragraphs of the preamble of the Convention provide evidence of the central place of protection provision in IRL.<sup>21</sup>

There is evidence that the preamble is balancing two conflicting elements. On the one hand to provide protection, on the other to encourage the sharing of the 'burden' of refugees between States who want to maintain sovereign control over who enters their territory.<sup>22</sup> In *Roma Rights*, Lord Bingham claimed that the 1951 Convention was 'a compromise between competing interests...the need to ensure humane treatment of victims...and the wish of sovereign States to maintain control over those seeking entry...'<sup>23</sup> Foster argues that these two are reconciled by seeing the burden sharing of States as the mechanisms for ensuring the protection of refugees.<sup>24</sup> It was explored in *Shah*, where the House of Lords described its purpose as 'twofold': firstly, that 'all human beings shall enjoy fundamental

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<sup>15</sup> Chapters 2-5 outline the rights owed to refugees by the CoA, these include: Article 15. Right of Association, Article 16. Access to Courts, Article 21. Housing, Article 22. Public Education, Article 26. Freedom Of Movement, Article 27. Identity Papers and Article 28. Travel Documents

<sup>16</sup> United Nations General Assembly resolution 429(V) of 14 December 1950,

<sup>17</sup> *Convention Relating to the Status of Refugees*, Introductory note, p3

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*, preamble, para 3

<sup>20</sup> *Ibid*, para 6

<sup>21</sup> 1951 Convention, (n1) Preamble Para 1: '*considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, (para 2) ... considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms...*'

<sup>22</sup> McAdam J, *Interpretation of the 1951 Convention in Andreas Zimmermann, Jonas Dörschner and Felix Machts, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP Oxford 2011) 91.

<sup>23</sup> *R v Immigration Officer at Prague Airport, ex parte Roma Rights Centre* [2004] UKHL 5, [2005] 2 AC 1(UK) para 15

<sup>24</sup> Foster and Hathaway, *The Law of Refugee Status* (Second Edition, CUP 2014) p.44

rights and freedoms’ and secondly ‘that counteracting discrimination...was a fundamental purpose of the Convention.’<sup>25</sup> In *Ward*, similarly the Canadian Supreme Court highlighted the preamble’s reference to the Charter of the United Nations and the UDHR as evidence of the Convention’s object.<sup>26</sup> The preamble demonstrates that the focus of the 1951 Convention is to facilitate the protection of refugees, with a focus on human rights and obligating States to protect refugees who arrive in their territory.

The only text within the preamble, that addresses the creation of refugees and displacement, is para 5, which claims that ‘all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,...’<sup>27</sup> This statement encourages States to participate in collective endeavours to protect refugees but also highlights the problem of causing displacement and its potential to upset harmonious relations with the international community. This demonstrates the position of the 1951 Convention wherein the causing of displacement is implicitly acknowledged as being contrary to its object and purpose.

## 2.2. The refugee definition

Central to the international refugee legal regime is the definition of a refugee as found within Article 1(A) of the 1951 Convention. It provides that a refugee is someone with:

‘...a 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...’<sup>28</sup>

The question is whether in affirming refugee status some judgement is made of the State who is ‘unable’ or ‘unwilling’ to protect the individual from their ‘well-founded fear of persecution’. The following section will look to analyse these terms to establish their meaning.

### a) ‘well-founded fear’

The term ‘well-founded fear’ was first seen in the 1933 *Convention Relating to the International Status of Refugees*<sup>29</sup> but was proposed by the United Kingdom to be included in the 1951 Convention,<sup>30</sup> and its meaning was kept purposefully broad in order to avoid its scope being limited.<sup>31</sup> The necessity of having a well-founded fear of persecution is ‘the most important factor concerning the determination of refugee status.’<sup>32</sup> According to Zimmerman’s 2011 commentary, the wording well-founded fear

<sup>25</sup> *R v Immigration Appeal Tribunal and another, ex parte Shah* (1999) 2 AC 629 (UK) p.639

<sup>26</sup> *Canada (attorney General) v Ward* [1993] 2 SCR 689 (Canada)p.733

<sup>27</sup> *Ibid* para 5

<sup>28</sup> *Ibid*, Article 1(a)(2)

<sup>29</sup> League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663

<sup>30</sup> Zimmermann, Dörschner and Machts (n 22) 336.

<sup>31</sup> *ibid*.

<sup>32</sup> Paul Weis, ‘The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis’ (UNHCR, 1990) 7 <<http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>> accessed 27 July 2017.

'can be interpreted as a reference to the conditions in the CoO.<sup>33</sup> Hathaway claims an assessment of a well-founded fear should focus only on an objective judgement of the conditions in order to avoid anyone in need of protection falling short of a subjective assessment.<sup>34</sup> Fear of persecution is not just a question of the individual's mind, but must be 'well founded' and as such should be measured objectively based upon the factual situation within the CoO.<sup>35</sup> As a result, such a finding of a 'well-founded fear' is based upon an assessment of the objective measure of the protection, or lack thereof, provided by the CoO.

However, the purpose of this objective assessment of the existence of a 'well-founded fear of persecution' is not to find the CoO responsible. It rather concerns the evaluation of the objective conditions substantiating the fear of persecution of the individual who claims to be a refugee. Debates recorded at the meeting of the Ad Hoc Committee highlighted that it proposed an objective approach towards an assessment of alleged past persecution, and a subjective and objective assessment of the potential for future persecution.<sup>36</sup> Thus, agrees Hathaway's 1991 commentary, a well-founded fear is interpreted to include a subjective 'terror of persecution' matched with an objective assessment of the factual situation in the CoO that substantiates the individual's fear.<sup>37</sup> According to the Australian High Court, the term 'has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts relating to the conditions in the country of his or her nationality.<sup>38</sup> Evidence of the subjective fear must be demonstrated by the applicant, who 'must show good reason to fear persecution by adducing evidence of an objective risk.<sup>39</sup> Therefore, although finding that a person may fulfil this definition entails an objective judgement of the facts regarding persecution within the CoO, it does so to ascertain whether the individual is justified in fearing persecution and is in need of protection. It is not an overarching legal judgment of the CoO but one based upon the specific circumstances concerning that individual.

#### b) 'Persecution'

Despite persecution being the 'key element<sup>40</sup>' in the determination of refugee status, the term is not defined by the Convention itself and has been the most controversial in its application, because of the necessity of judging the situation within the sovereign State's boundaries. The term was left open by the drafters, as it was considered impossible to pre-empt all possible manifestations of persecution.<sup>41</sup> The intention of the finding of persecution was discussed in *Shah*. Here the UK Court of Appeal found that the object and purpose of the term "being persecuted" must be considered "a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in

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<sup>33</sup> Zimmermann, Dörschner and Machts (n 22) 336.

<sup>34</sup> James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 92.

<sup>35</sup> Weis (n 32) 7. See also Grahl-Madsen, *The Status of Refugees in International Law*, Vol 1 (Leyden, 1966) p 173, See further, pp 176, 188-189.

<sup>36</sup> Zimmermann, Dörschner and Machts (n 22) 336.

<sup>37</sup> Hathaway (n 34) 91.

<sup>38</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*, (2001) 206 CLR 57 (Aus. HC, May 3, 2001), 76. See also: *HJ (Iran) v. Secretary of State for the Home Department*, [2011] 1 AC 596 (UKSC, Jul. 7, 2010), 623, *Zgnat'ev v. Minister for Justice, Equality and Law Reform*, [2001] IEHC 70 (Ir. HC, Mar. 29, 2001), 6

<sup>39</sup> Hathaway (n 34).

<sup>40</sup> Zimmermann, Dörschner and Machts (n 22) 415.

<sup>41</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law: Refugee Character* (A W Sijthoff 1966) 193.

form.”<sup>42</sup> Thus, there is a two-fold purpose in the finding of persecution. Firstly, to enable flexibility to responding to changing contexts but also to ensure that there is consistency in protecting those who need it.

Persecution contains two elements: ‘a sufficiently severe human rights violation and a determination regarding the perpetrator of the violence;<sup>43</sup>’ meaning an abuse of human rights must be established and this must be attributed to an agent. Weis’s commentary of the Convention explains that ‘at the very least, a connection exists between persecution and the failure on the part of states to observe certain human rights.<sup>44</sup>’ As such, when a person is found to be fleeing persecution, there must be a judgement of fact made in regard to this ‘failure on the part of States’ or the ‘abuse by States’ as the perpetrator of the violence. Weis acknowledges that the ‘judicial view is that persecution connotes injurious or oppressive action.<sup>45</sup>’ This action must come from the State, or from a lack of State protection where the State is in some way implicated by this finding. In the debate between France and Germany, when the first generation of the EU Qualification Directive was being negotiated, it was defended that an element of culpability or at least complicity by the CoO – when persecution emanated from non-State actors – was necessary for refugee status to be recognised.<sup>46</sup> Thus ‘persecution’ highlights the responsibility of the CoO for causing the displacement. However, this connection between State action and persecution is a prospective finding of fact to establish if a person is a refugee, not a retrospective judgement in law to establish if the State has breached an obligation not to cause displacement under IRL. Such a finding places a burden upon the CoA to protect the refugee, but no responsibility or accountability is incurred by the CoO.

The lack of retrospective judgement is explored in debates regarding the object and purpose of the term ‘persecution’ and has evolved into competing theories: the protection and accountability theories.<sup>47</sup> These were discussed in the Australian case *Minister of Immigration and Multicultural Affairs v Respondents*<sup>48</sup> which analysed the ‘ordinary meaning’ of the term persecution.<sup>49</sup> The accountability theory, that a State is only obligated to provide protection if the persecution comes from the CoO; was rejected as it ‘would only be justified if the Convention was exclusively concerned with State persecution of persons.<sup>50</sup>’ By contrast, the protection theory understands the 1951 Convention’s object to be to provide substitute protection and fair treatment when this protection is unavailable from the CoO.<sup>51</sup> McHugh rejected both theories. It was claimed that the 1951 Convention and according refugee status does not require ‘proof that the State has breached a duty that it owed

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<sup>42</sup> *R v. Immigration Appeal Tribunal and Another; Ex parte Shah*, [1997] Imm AR 145 (Eng. HC, Oct. 25, 1996), at [24], per Sedley J.

<sup>43</sup> Zimmermann, Dörschner and Machts (n 22) 345.

<sup>44</sup> Weis (n 32) 8.

<sup>45</sup> *ibid.*

<sup>46</sup> Steve Peers and Nicola Rogers, *EU Immigration and Asylum Law: Text and Commentary* (BRILL 2006). See also Hemme Battjer (Brill 2006)

<sup>47</sup> See Kalin, GILJ 15 (2001) pp.415-431

<sup>48</sup> *Minister of Immigration and Multicultural Affairs v Respondents* S152/2003(2004) 222 CLR 1(Australia)

<sup>49</sup> See Hugo Storey; What Constitutes Persecution? Towards a Working Definition, *International Journal of Refugee Law*, Volume 26, Issue 2, 1 June 2014, Pages 272–285; James C Hathaway, Hugo Storey; What is the Meaning of State Protection in Refugee Law? A Debate, *International Journal of Refugee Law*, Volume 28, Issue 3, 1 October 2016, Pages 480–492,

<sup>50</sup> *Ibid* para 66

<sup>51</sup> *Ibid* para 55

to the applicant...State culpability is not an element of persecution.<sup>52</sup> This demonstrate that while the role of the State in persecution may affect the establishment of refugee status, although not always, the intention of such a finding is not to hold the State accountable, but to determine the need to provide protection to the refugee fleeing persecution. In failing to protect their citizens from persecution, the CoO acts in a way that is contrary to the object and purpose of IRL but does not appear to be in breach an obligation not to displace.

The State's role in the perpetration of the persecution is important for establishing refugee status as it must be demonstrated that the State is no longer able or willing to provide protection from the persecution. For example, the persecution could be perpetrated by an agent of the State, alternatively, where it is perpetrated by non-State actor, the State may still be implicated because they are condoning, tolerating or unable to prevent the persecution.<sup>53</sup> In cases where the agents of persecution are organs of the State, this is found to be beyond doubt persecution.<sup>54</sup> However, where it is a non-State actor performing the persecution, the refugee must demonstrate that the State is not providing protection. In both cases, a judgement of the situation in the State is being made and should persecution be found, both situations cast the CoO in a poor light. While an act is made persecutory by the harm it causes to the rights and dignity of the individual, rather than who commits it; refugee status is dependent on the State no longer providing protection. However, Article 1(A)2 and the 1951 Convention do not outline a legal mechanism to hold the CoO accountable, only how and when to provide an individual protection from that persecution. Whether the perpetrator must 'intend' the persecution, has been questioned with courts denying applications where persecution came about as part of legitimate government policy.<sup>55</sup> The Rome Statute definition of persecution requires 'intentionality'<sup>56</sup> for it to be proved, yet, as the object and purpose of the 1951 Convention is 'to protect the victims of persecution rather than penalizing the respective offender, any such requirement cannot be transposed to refugee law.'<sup>57</sup>

While the State's role in the persecution may be evidence for refugee status, their motives are irrelevant to finding a person at risk of persecution. The fact that the persecution exists is what is important. This is evident in the EU Codification Directive Article 11(2)(a); the Directive finds that 'it is immaterial whether the persecution stems from the State, parties or organisations controlling the State, or non-State actors where the State is unable or unwilling to provide effective protection'<sup>58</sup>. Whether the State can no longer provide protection from persecution or if it is complicit in the persecution does not matter in regards to the fact that the individual fleeing persecution, from whatever source, is a refugee. However, when the persecution comes directly from the CoO there are additional obligations on the CoA to ensure protection. For example, the Internal Flight Alternative

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<sup>52</sup> Ibid para 65

<sup>53</sup> Zimmermann, Dörschner and Machts (n 13) 358 See also Hathaway (n 6) 129.

<sup>54</sup> Ibid 359.

<sup>55</sup> *Bundesverwaltungsgericht* (Federal Administrative Court, Germany), I C 33.71, 29 November 1977

<sup>56</sup> Article 7(2)(g) Rome Statute of the International Criminal Court

<sup>57</sup> Zimmerman (n13) 350.

<sup>58</sup> Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (2002/C 51 E/17) Article 11(2)(a) codified in *Directive 2011/95/EU of the European Parliament 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 (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU

(IFA), or Internal Protection Alternative(IPA), (whereby a State may refuse refugee status if the individual would have been safe from persecution in another area of their CoO than from the one of habitual residence) are not applicable to exclude protection by the CoA when the persecution comes directly from the government of the CoO.<sup>59</sup> It is considered worse that persecution comes directly from the CoO rather than from its incapacity to protect and presumes it will continue into the future unless a substantial change of circumstances occurs. As such, while the source of the persecution does not affect refugee status, it is the factual existence of persecution that is important, it does prevent the CoA from excluding protection. This demonstrates that the 1951 Convention does not explicitly condemn the persecution, but it acknowledges its existence and is interested in its source in order to provide adequate protection.

c) *'Unable and unwilling'*

The specific mention of the failure of State protection within the refugee definition is an important aspect to understanding the object and purpose of the 1951 Convention. Article 1(A)(2) stipulates, that owing to a Convention reason an individual must be 'unable' or 'unwilling' to avail themselves the protection of their CoO. This demonstrates that the intention of the drafters was not to protect persons from all forms of persecution, but very specifically to people who were being persecuted *and* whose CoO was no longer able or willing to protect them.<sup>60</sup> This focus on fulfilling the duty of the CoO, when they have failed to do so, is a core tenet of the 1951 Convention. There is an assessment of the failure of the CoO in deciding whether protection is required.

'Unwilling' covers people who will not accept the protection of their CoO government.<sup>61</sup> This is due to fear of persecution, and it is because of this fear that the individual is unwilling to return to their CoO. J Kirby found that the State is most commonly 'unwilling' when it is the perpetrator of the persecution.<sup>62</sup> Similarly, in *Baballah* the US Court of Appeals argued that, "when the government is responsible for persecution, the [persecutory actor] prong of our asylum inquiry is satisfied without further analysis."<sup>63</sup> As such, a State that is unwilling to provide protection is found to be directly responsible for the persecution.<sup>64</sup>

'Unable' refers to Stateless refugees and those people who have been refused passports or the protection of their government even though they possess legal nationality.<sup>65</sup> Such an individual would be *de facto* unable to seek protection from their government from persecution. The finding of an inability to provide protection is equally critical of the CoO. While the Convention in this instance does not find the CoO the perpetrator of the persecution it assumes that the State is not able to provide this protection from, for example, insurgent groups, local criminal gangs, or members of a family, clan,

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<sup>59</sup> Schultz J, *The Internal Flight Alternative in Norway: the law and practice with respect to Afghan families and unaccompanied asylum-seeking children* (UNHCR, Chr. Michelsen Institute, 2017)

<sup>60</sup> Hathaway (n 34) 184. See also A. Shacknove, "Who Is a Refugee?" (1985) 95 *Ethics* 274, at 277, while Goodwin-Gill has long taken the view that "the degree of protection normally to be expected of the government is either lacking or denied": G. S. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers," (1986) 26(4) *Virginia J. Intl. L.* 897, at 901

<sup>61</sup> *Ibid.*

<sup>62</sup> Kirby J. 'the most obvious failure of State protection will arise when the State and its agencies and officials are the actual perpetrators of serious harm' in *Respondents S152/2003* (Aus. HC, 2004) 35 [101].

<sup>63</sup> *Baballah v. Ashcroft* (2003) 335 F.3d 981 (USCA, 9th Cir., Jul. 11, 2003), at 1078.

<sup>64</sup> See *De Calles v. Canada* (Minister of Employment and Immigration), [1993] FCJ 478 (Can. FCTD, May 4, 1993)

<sup>65</sup> Ad Hoc Committee on Stateless and Related Problems, UN Docs. E/618 and E/AC.32.5 (1950) p.39

or tribe.<sup>66</sup> Courts often require an applicant to establish that the CoO has failed to protect them, whether through the State's admission or through objective proof.<sup>67</sup>

From an analysis of the text of the 1951 Convention, the ordinary meaning of Article 1(A)(2) aims at shielding the persons seeking refugee status from persecution,<sup>68</sup> whether that be from the CoO or because the CoO is unable to provide protection from another source. Thus, its object and purpose is concerned with when and how such protection can be provided where the CoO has failed to do so. What is implicit in the refugee definition is that CoO persecution or lack of protection causes refugeehood, which in turn is considered an anomaly in international law, as it is a severing of the citizenship bond between CoO and the individual fleeing.<sup>69</sup> Ascertaining that an individual does have a 'well-founded fear of persecution' and is 'unable or unwilling to avail themselves of the protection of their CoO' does include a factual assessment of the CoO but that is made in regards to the provision of protection.

### 2.2.1. *Prohibition of non-refoulement*

The ban on refoulement, as found in Article 32 and 33, highlights the refugee-centred, protection-based approach of the Convention, which does not have the evaluation of the CoO responsibility at its heart, but rather the protection of the individual. Non-refoulement dictates that no one can be sent to a country where they could be at risk of torture, inhumane or degrading treatment.<sup>70</sup> The 1951 Convention is the first iteration of this ban which has been expanded by subsequent Human Rights Conventions<sup>71</sup> and is considered customary international law.<sup>72</sup> Article 33 explains that:

*'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion...'*<sup>73</sup>

This further demonstrates that protection of refugees from persecution in the CoO is at the centre of the 1951 Convention. In finding a person at risk of refoulement, an assessment must be made that their life would be in danger should they be returned.<sup>74</sup> Therefore, a factual assessment of conditions in the CoO is intrinsic to a claim under the non-refoulement principle. These provisions, and the whole of the framework of the 1951 Convention, focus on defining who is owed protection and the substance

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<sup>66</sup> Hathaway (n 34) 303.

<sup>67</sup> *Ward* (Can. SC, 1993), at 723. See also *Howard-Dejo v. Canada* (Minister of Citizenship and Immigration), [1995] FCJ 176 (Can. FCTD, Feb. 2, 1995), at [3], [7]; and *Garcia v. Attorney General*, (2011) 665 F.3d 496 (USCA, 3rd Cir., Nov. 28, 2011); *Mlle A*, 487336 (Fr. CRR [French Refugee Appeals Commission], Jul. 29, 2005), at 3 (unofficial translation). *Zalzali* (Can. FCA, 1991), at 614

<sup>68</sup> Zimmermann, Dörschner and Machts (n 22) 444.

<sup>69</sup> Andrew E. Shacknove, "Who Is a Refugee?," *Ethics* 95, no. 2 (Jan., 1985): 274-284.

<sup>70</sup> 1951 Convention, (n1) Article 32: The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order...

<sup>71</sup> The principle is codified in Article 3 of the UN Convention Against Torture (1984): 'refoulement is not allowed if substantial grounds for believing there is a danger to exposure to torture' and is considered a core tenant of the ban on torture in Article 7 of the ICCPR (1966)

<sup>72</sup> UN High Commissioner for Refugees (UNHCR), *Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html> p.3

<sup>73</sup> *Ibid*, Article 33

<sup>74</sup> See *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989

of the protection; it does not focus on preventing the causes of displacement or on establishing responsibility for these causes.

### 3. Historical context

The current legal framework for IRL developed in the mid-20<sup>th</sup> Century but the principles upon which the 1951 Convention was built had been developing for a century prior to that. Early theorists proposed a there was a natural right to seek ‘hospitality’ from injustice or oppression.<sup>75</sup> The movement of persons across borders and the granting of asylum has been commonplace throughout history, but it was not a concern of international law.<sup>76</sup> People fleeing political repression had not been recognised as a phenomenon separate from people fleeing criminal prosecution until fairly recently.<sup>77</sup> There was a lack of regard for the cause of movement; no distinction was necessary between a State illegitimately persecuting an individual for their belief or opinions, and legitimately punishing them for crimes committed.<sup>78</sup> However, due to the breaking up of Empires, the increased control over movement, and the scale of refugee flows<sup>79</sup>, in the 20<sup>th</sup> Century cross-border movement became ‘an important problem of international politics, seriously affecting relations between states.’<sup>80</sup> IRL developed, not through any rational course, but ‘represented an ad hoc method of defining key principles<sup>81</sup>’ to regulate and facilitate the movement of people fleeing persecution, whilst maintaining the State sovereign right to control who entered and resided in their territory.<sup>82</sup> The development of the rules surrounding refugee status met a need that was developing in the aftermath of the World Wars and the displacement that was occurring as a result.

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<sup>75</sup> Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 337. See also de Vitoria, *Reflectiones Theologicae* XII, Section 53 (1557), Nys (ed.), (Carnegie Endowment transl., 1917); Grotius, *De Jure Belli ac Pacis Libri Tres*, Book II, ch 2 (1625), (Carnegie Endowment transl., 1925); Kant, *Perpetual Peace*, (transl. O’Brien, Sweet and Maxwell, 1927); E D Vattel, *The Law of Nations* [1758] (Carnegie Institute 1916) bk 1, ch 21, para 231

<sup>76</sup> María-Teresa Gil-Bazo, ‘Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship’ (2015) 34 *Refugee Survey Quarterly* 11, 12; See also María-Teresa Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27 *International Journal of Refugee Law* 3.

<sup>77</sup> Michael Robert Marrus, *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press 1985) 9. See also: Nafziger ‘The General Admission of Aliens under International Law (1983) 77 *AJIL* 804; Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’ (2004) 67 *The Modern Law Review* 588. Goodwin-Gill G, *International Law and the Movement of Persons between States* (Oxford University Press (29 April 1978)

<sup>78</sup> See the 1928 Havana Convention on Asylum for more detail. It explores the granting of asylum for people who are accused of crimes or have deserted from the armed forces, or seek asylum on army bases, ships etc. The Convention discusses the possibility of extradition, acknowledges if individual is convicted of crimes or to ensure the person gets to safety. It does not discuss the obligations of the States they fled from, or provide a foundation for condemnation of forcing people to flee.

<sup>79</sup> Gil-Bazo, ‘Refugee Protection under International Human Rights Law’ (n 76) 12. See also Aga Khan S, *Legal Problems Relating to Refugees and Displaced Persons*, *Recueil des Cours de l’Academie de Droit International de la Haye*, 149, 1976, 287-352; Reale E, *Le Droit d’asile*, *Recueil des Cours de l’Academie de Droit International de la Haye*, 63, 1938, 469-602; Riphagen W., *The impact of foreign regulation of international movement on the legal position of the individual within the domestic legal system*, in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law 131, 1970;

<sup>80</sup> Marrus (n 77) 3.

<sup>81</sup> Skran, *Historical Development of International Refugee Law*, in Zimmermann, Dörschner and Machts (n 22) 6.

<sup>82</sup> Gil-Bazo, ‘Asylum as a General Principle of International Law’ (n 76) 12.

The *Arrangement Relating to the Issue of Identity certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements*,<sup>83</sup> was the first formal articulation of IRL. According to the first explicit definition of a refugee, found in the *1926 Arrangement Relating to the Issue of Identity certificates to Russian and Armenian Refugees*,<sup>84</sup> the essential element of refugee status was a lack of diplomatic protection from home government.<sup>85</sup> Refugees at this time represented a problem, as they were not responsible to any State and no State was responsible for them.<sup>86</sup> The focus of these arrangements is thus on bringing the refugee back within the responsibility of a State to ensure their protection.

Nansen's initiative to provide access to travel documents, and the ability move and reside to refugees took forward these early developments.<sup>87</sup> These arrangements focused on clarifying the legal status of refugees, providing a mechanism for them to be recognised in a country of refuge through identity documents and ultimately to 'recommend the individual refugee to the competent authority, particularly with a view to obtaining visas, permits to reside in the country, admission to schools, libraries, etc.'<sup>88</sup> Nansen recommended that to be a refugee one must be 1) outside their country of origin and 2) have lost the protection of their home government.<sup>89</sup> In finding a person to be a refugee, there is an acknowledgement that the individual is no longer protected by their State. When an individual was found to be outside of their State's protection, this was established elsewhere.

The *1933 Convention Relating to International Status of Refugees* was intended by the League of Nations to regularise the arrangements relating to German, Russian and Armenian Refugees<sup>90</sup>. It supplemented and consolidated the work done by the League of Nations on behalf of the refugees<sup>91</sup> and was '...desirous that refugees shall be ensured the enjoyment of civil rights...'<sup>92</sup> As a result, it outlines use of Nansen certificates for Russian, Armenian and assimilated refugees.<sup>93</sup> It focuses on according these groups access to rights and responsibilities<sup>94</sup>, and outlines an obligation on States to provide entry.<sup>95</sup> While there is evidence of the right to leave one's CoO, a corresponding right to protection had not yet developed.<sup>96</sup> The immediate consequence of these provisions is not to

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<sup>83</sup> Marrus (n 77) 10.

<sup>84</sup> Arrangement Relating to the Issue of Identity certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements Dated July 5<sup>th</sup>, 1922, and May 31<sup>st</sup>, 1924.

<sup>85</sup> Zimmermann, Dörschner and Machts (n 22) 9.

<sup>86</sup> *ibid* 254.

<sup>87</sup> Paul Weis, 'Development of Refugee Law Transnational Legal Problems of Refugees: Part 1: Refugees in International Law and Organization' (1982) 3 Michigan Yearbook of International Legal Studies 27, 28. See also Zimmermann, Dörschner and Machts (n 22) 7–8.

<sup>88</sup> Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees League of Nations Treaty Series, Vol. LXXXIX, No. 2005. See also Torpey J, *The Invention of the Passport: Surveillance, Citizenship and the State* (2000) Cambridge Studies in Law and Society; Zolberg A, *A Nation by Design: immigration policy in the fashioning of America* (2006) Harvard University Press

<sup>89</sup> League of Nations, Memorandum by the High Commissioner for Refugees, LNOJ Special Suppl. No. 59, Appendix V, p13-14

<sup>90</sup> Marrus (n 77) 10; See also Zimmermann, Dörschner and Machts (n 22) 14.

<sup>91</sup> Convention of 28 October, 1933 relating to the International Status of Refugees League of Nations, Treaty Series Vol. CLIX No. 3663. Para 5

<sup>92</sup> *Ibid*, Para 6

<sup>93</sup> *Ibid*, article 1 and 2

<sup>94</sup> *Ibid*, preamble and articles 7-14

<sup>95</sup> *Ibid*, Article 3

<sup>96</sup> Moreno-Lax (n 75) Ch.9.

condemn the CoO, but there is an implicit understanding that persecution or lack of protection is contrary to the purpose of these early manifestations of IRL that seek to provide protection to refugees. If this persecution did not exist and State's fulfilled their duty to protect their citizens, then international protection would not be necessary. Where the CoO has severed the citizenship and protection bonds with an individual, IRL developed to provide a substitute.

The 1936 and 1938 Convention's concerning the Status of Refugees from Germany responded to the outflow of people from Germany as a result of the rise of National Socialism. The Convention's object and purpose is similar to the 1933 Convention.<sup>97</sup> A 'refugee from Germany' is someone who has 'proved not to enjoy, in law or in fact, the protection of the German Government.'<sup>98</sup> Furthermore, an Intergovernmental Committee on Refugees was set up to implement the Convention's primary objective; to 'facilitate involuntary emigration from Germany.'<sup>99</sup> This convention furthered the rights and protection afforded to German's fleeing the Nazi government, it was not its role to hold the perpetrators of the persecution to account. When the Nazi atrocities were committed, the Nuremberg trials passed judgment on the holocaust.<sup>100</sup> While International Criminal Law (ICL) took care of personal liability, there was also an enormous amount of reparations for Germany to pay as a result of their actions.<sup>101</sup> In this early context, there was recognition of refugees as victims of persecution— and if there is a victim, there is also a perpetrator. However, the role of IRL is to afford these individuals protection based upon this finding. Other branches of law, as happened with ICL in Nuremberg, step in to hold the State accountable for the persecution.

Robinson's 1952 commentary on the 1951 Convention highlights the focus on protection that was representative of the era in which he wrote. Robinson claims that even following WWI 'the only real problem involved in the question of political refugees was that of refuge or asylum as they were foreigners without the protection of their CoO.'<sup>102</sup> Robinson focuses on the establishment of protection as the concern of the international community in the endeavour to write the Convention. He makes no mention on the 'forced' nature of the displacement as the foundation of the challenge they were seeking to address. While there was widespread acknowledgement in the drafting process that refugee flows at the time were caused by the breakdown of societies, the rise of Nazism in Germany and Communism in Russia,<sup>103</sup> it was not IRL that was utilised to hold States accountable for this displacement.<sup>104</sup> IRL developed to facilitate the protection and movement of individuals forcibly displaced while it was the role of other branches of international law to hold the displacing State accountable. Robinson evidences the fact that 'the most pressing question on an international level, was that of identity documents and travel documents' with the fact that the first three arrangements

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<sup>97</sup> League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, League of Nations Treaty Series, Vol. CXCLII, No. 4461 para 5

<sup>98</sup> Ibid, article 1(a)

<sup>99</sup> Goodwin Gill, *The Refugee in International Law* (Oxford University Press 1996) 5.

<sup>100</sup> See George A Finch, 'The Nuremberg Trial and International Law' (1947) 41 *American Journal of International Law* 20.

<sup>101</sup> Ibid.

<sup>102</sup> Nehemiah Robinson, *Convention Relating to the Status of Refugees :Its History, Significance and Contents*. (New York : 1952) 1.

<sup>103</sup> Ibid.

<sup>104</sup> For example, the Nuremberg Trials utilised Public International Law to hold individuals accountable for the genocide and huge displacement that happened as a result. The following chapters will explore the development of IHL and ICL as a mechanism to hold states accountable for displacement and persecution.

made in relation to refugees, all related to provision of these documents.<sup>105</sup> No mention was made in these early agreements to not cause displacement from one's State, as this was not the focus of these arrangements, or of the law that would develop.

It is evident from exploring the international instruments relating to refugees, that their object and purpose was focused upon regulating movement of refugees and ensuring their protection. The instruments do not make explicit mention of the legality, or otherwise, of the actions that led these people to flee and while providing protection acknowledges there is something to be protected from, it was not the framework of IRL that addressed this.

### 3.2. Subsequent developments

Context is not static and since the 1951 Convention was affirmed, one of the most substantial developments that has affected IRL is the evolution of International Human Rights Law (IHRL).<sup>106</sup> The 1951 Convention predates the establishment of the international legal human rights regime. However, in light of the development of IHRL, the IRL framework is often interpreted as a human rights treaty, derived from Article 14 UDHR, with international protection of refugee's rights at its core.<sup>107</sup> The Convention established practical but universal standards<sup>108</sup> for the rights of refugees that went beyond the lowest common denominator, 'since a convention would hardly be useful if it contained only the minimum acceptable to everyone.'<sup>109</sup> The 'result is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR and ICESCR' in ensuring the protection of refugees and that their dignity is fulfilled.<sup>110</sup> The 1951 Convention outlines the link between these two bodies of law.<sup>111</sup> The UNHCR has explained that the language used in the Convention preamble demonstrates 'the aim of the drafters to incorporate human rights values in the identification and treatment of refugees.'<sup>112</sup>

Since the drafting of the 1951 Convention, IHRL has become one of the strongest legal tools at the international level with almost universal ratification of the two covenants on human rights.<sup>113</sup> These

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<sup>105</sup> Robinson (n 102) 2.

<sup>106</sup> VCLT (n2) Art. 31(3)(c) requires interpreters of the Refugee Convention to take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties." See also Chetail V, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law* (September 17, 2012). Human Rights and Immigration, Collected Courses of the Academy of European Law, pp. 19-72

<sup>107</sup> Jane McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection, Jane McAdam' (UNHCR); See also María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *Refugee Survey Quarterly* 11.

<sup>108</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 'Summary Record of the 2nd Meeting' (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 18 (High Commissioner)

<sup>109</sup> Ad Hoc Committee on Statelessness and Related Problems, First Session 'Summary Record of the 25th Meeting' (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68]

<sup>110</sup> J Patrnoic 'International Protection of Refugees in Armed Conflicts' (reprinted by UNHCR Protection Division from *Annales de Droit International Médical* (July 1981)) section 4.

<sup>111</sup> 1951 Convention (n1) Preamble, at para. 1 notes "that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination," and para. 2 recalls "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms."

<sup>112</sup> UNHCR, "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees," (2001) 20(3) *Ref. Survey Q.* 77, at 78

<sup>113</sup> As of 6 November 2017 169 countries had ratified the ICCPR, 166 had ratified the ICESCR. Available at: OHCHR indicators website <http://indicators.ohchr.org>; See also Hathaway (n 34) 9.

Covenants demonstrate the commitment to core human rights values: dignity, equality, justice and non-discrimination, of the international community and to the protection of the individual. Given the clear acknowledgement of the intrinsic link with human rights, the adoption of these instruments must serve as evidence of the intention of States. IHRL protects the individual against State sovereign actions that challenge an individual's sovereignty, ensures their dignity and access to justice should this be undermined.<sup>114</sup> By acknowledging this link in the preamble, the 1951 Convention makes explicit that its focus is upon the protection of individuals. The intrinsic human rights link demonstrates a focus on protection but does not prevent a factual assessment of the conditions in the displacing State to be found. While IHRL protects the individual, it also has the capacity, through the accountability frameworks in the Optional Protocols and Universal Periodic Reviews,<sup>115</sup> to hold the State to account for breaching human rights.

### 3.3. Institutional Developments

Alongside these legal developments, international organisations were set up to facilitate the protection owed to refugees as outlined in the law. The International Refugee Organization (IRO) was an intergovernmental organisation founded in April 1946 to deal with the refugee situation created by World War II<sup>116</sup>. The IRO assumed the responsibilities for the legal protection and resettlement of refugees previously carried out by the UNRRA.<sup>117</sup> Among the services supplied by the IRO were 'the repatriation; identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment'<sup>118</sup> of refugees. The 1946 constitution specified the organisation's field of operations. It's preamble highlights that 'the main task to be performed is to encourage and assist in every way possible early return to CoO'<sup>119</sup> and that 'genuine refugees and displaced persons...should be protected in their rights and legitimate interests.'<sup>120</sup> There is a focus on international protection and ensuring repatriation or return where possible. However, the final paragraph of the preamble does provide for some focus on responsibility as it highlights 'that the expenses of repatriation to the extent practicable should be charged to

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<sup>114</sup> James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113, 113

<sup>115</sup> The Optional Protocols introduces three new mechanisms: an individual complaints procedure, an inquiry procedure and an inter-State complaints procedure. See UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117 and UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>116</sup> Cite founding document

<sup>117</sup> Encyclopaedia Britannica, International Refugee Organisation: <https://www.britannica.com/topic/International-Refugee-Organization-historical-UN-agency>, last accessed on 23 August 2017. UNRRA was the first UN effort to assist refugees and its organisational focus was on providing relief and repatriation assistance. The organisation helped the oversees repatriation of millions of displaced persons in 1945, employees cared for hundreds of thousands of displaced civilians, it put doctors and nurses in camps and coordinated voluntary activities. See also Marrus (n56) 320; Qafisheh MO, An Ongoing Anomaly: Pre- and Post-Second World War Palestinian Refugees (*International Journal of Refugee Law* March 2015) 52–74; Akram SM, UNWRA and Palestinian Refugees (June 20, 2014) in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Fiddian-Qasimiyeh, et al (Oxford University Press, June 2014)

<sup>118</sup> United Nations, Constitution of the International Refugee Organization, 15 December 1946, United Nations, Treaty Series, vol. 18, Article 2(1)

<sup>119</sup> *Ibid*, para 2

<sup>120</sup> *Ibid*, para 5

Germany and Japan for persons displaced by those Powers from countries occupied by them...<sup>121</sup> As such, while the focus of the IRO's work remains on international protection, the allocation of 'expenses' to the powers causing the displacement does entail a link between the IRL regime and the need to assume responsibility for causing forcible displacement. This highlights a complementarity of the Nuremberg trials results between ICL and IRL, catering for different aspects of the causes and consequences of the holocaust. There is an implicit assertion that persecution is an anomaly under international law, but without establishing a concrete obligation not to cause forced displacement leaves the matter of legal responsibility unaddressed.

Following the establishment of the 1951 Convention, the IRO was succeeded by the Office of the United Nations High Commissioner for Refugees (UNHCR) whose remit was expanded and solidified.<sup>122</sup> The task of the High Commissioner on Refugees in the legal field is "the legal and political protection of refugees."<sup>123</sup> UNHCR is responsible for finding solutions and in providing international protection to refugees. This special mandate was entrusted to UNHCR in relatively unambiguous terms in 1951.<sup>124</sup> The UNHCR Statute was established by the General Assembly to provide 'international protection' and to seek 'permanent solutions for the problem of refugees.'<sup>125</sup> Loescher highlights that 'the definition contained in the 1951 Convention remains important as a statement of legal responsibility and international commitment to protect refugees.'<sup>126</sup> As a result, the mandate of the organisation continues to be about protection, not condemnation.

Within the 1951 Convention, the UNHCR Statute and subsequent 1967 Optional Protocol there is no treaty body or specialised court with compensatory jurisdiction for complaints brought by individuals to the international level to adjudicate directly on the 1951 Convention, although they can appeal to regional or domestic courts. Furthermore, UNHCR is not given the authority to find any such responsibility through its own mechanisms. Discussions regarding the mandate of the UNHCR continue to focus on the fundamental questions of who to protect and how to protect. The UNHCR Guidelines published in 1979 and then updated in 2011<sup>127</sup> aid in determining refugee status and outline the role UNHCR plays as the guardian of the 1951 Convention. Under Article 31(3)(b) of the VCLT the guidelines may be considered to constitute evidence of State practise and demonstrable of the agreement of the international community.<sup>128</sup> They demonstrate the focus of UNHCR competence is upon the provision of protection as well as outlining the supervisory role the UNHCR holds over

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<sup>121</sup> Ibid, para 6

<sup>122</sup> See Aga Khan, Sadruddin, "UNHCR its functions and development of relevant law", in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law (149, 1976)

<sup>123</sup> LEAGUE OF NATIONS O.J., Spec. Supp. 183, at 137 (1938). See LEAGUE OF NATIONS O.J., Spec. Supp. 75, at 145-46 (1929); LEAGUE OF NATIONS O.J., Spec. Supp. 84, at 157-58 (1930).

<sup>124</sup> Goodwin Gill & McAdam (n 99) viii.

<sup>125</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V)

<sup>126</sup> Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press 1993) 6.

<sup>127</sup> UNHCR, *Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (2011)

<sup>128</sup> See *R v Secretary of State for the Home Department, ex parte Sivakumarann (UNHCR Intervening)* [1988] 1 AC 958, 981. However, subsequent cases have warned against 'expanding the limits which the language of the treaty itself has set for it' through focussing on the 'aspiration and exhortation' of the UNHCR guidelines: see *R (Hoxha) v Special Adjudicator, R(B) v Immigration Appeal Tribunal* [2003] 1 WLR 241, [2205] UKHL para 16-19, 76-79

fulfilment of the refugee definition and ensuring proper application by State parties. Unlike other UN treaty bodies, UNHCR does not produce State reports, General Comments or hear individual complaints. There is nothing within the UNHCR's mandate that relates to condemnation of States who cause refugees.<sup>129</sup> As such, the traditional mandate of UNHCR, like its predecessors, remained on supporting the provision of protection by States.

There has not been any recognition that the lack of an accountability mechanism within the 1951 Convention, 1967 Optional Protocol or UNHCR's mandate is a limiting factor to the regime. Any acknowledged limitations of IRL is only insofar as it can provide protection. Through the application of Article 1(A)2 within the 1951 Convention, some people seeking protection may be denied it because they do not meet the specific criteria it lays down; for example, people fleeing climate change, natural disasters or generalised violence.<sup>130</sup> While the fact that the 1951 Convention does not provide a complete regime is acknowledged, this is only because 'refugees and asylum seekers may still be denied even temporary protection'<sup>131</sup> not in regard to lack of accountability for causing refugees. This is demonstrable of the Convention's purpose as on protection, not accountability.

### 3.4. *Institute of asylum and international friendship*

The right of asylum, which literally means 'what cannot be seized'<sup>132</sup>, differs from refugee status, as the former constitutes the institution for protection while the latter is one of the groups of individuals who benefit from this protection.<sup>133</sup> Asylum is not mentioned in the 1951 Convention, and only a right to *seek* asylum can be found in Article 14(1) UDHR, instead the right of asylum is held by the State who has the power to decide on the entry, stay and expulsion of foreigners.<sup>134</sup> However, it has been argued that there is a *de facto* right to asylum in the operationalisation of the right to leave, the right to seek asylum and the principle of non-refoulement as the denial of asylum to a refugee fleeing persecution would breach related legally binding obligations.<sup>135</sup> If understood as local integration, in the language of UNHCR, the granting of asylum is one of the three durable solutions for refugees.<sup>136</sup> This section argues that there is no condemnation of the CoO in providing asylum to refugees or others, only

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<sup>129</sup> Alexander Betts, *UNHCR: The Politics and Practice of Refugee Protection* (2 edition, Routledge 2011).

<sup>130</sup> See Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978); Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention Special Feature' (2001) 23 Michigan Journal of International Law 265; Helene Lambert, 'International Refugee Law: Dominant and Emerging Approaches' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1334667 <<https://papers.ssrn.com/abstract=1334667>> accessed 20 December 2016; Andrew E Shacknove, 'Who Is a Refugee?' (1985) 95 Ethics 274.

<sup>131</sup> Goodwin Gill, *The Refugee in International Law* (Oxford University Press 1996) v

<sup>132</sup> Gorman, 'Poets, Playwrights and the Politics of Exile and Asylum in Ancient Greece and Rome' (1994) 6 IJRL 402 cited in Moreno-Lax (n 75) 337.

<sup>133</sup> Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] ECR I-10979. See Gil-Bazo, 'Asylum as a General Principle of International Law' (n 76) 4.; A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980); E Reale '*Le droit d'asile*' (1938) 63 *Recueil des Cours de l'Académie de Droit International de La Haye* 473.

<sup>134</sup> Moreno-Lax (n 75) 338. See, for instance, the Havana Convention on Asylum (adopted 20 Feb 1928); the Montevideo Convention on Political Asylum (adopted 26 Dec 1933); the Convention on Diplomatic Asylum (adopted 28 Mar 1954); and the Convention on Territorial Asylum (adopted 28 Mar 1954).

<sup>135</sup> *ibid* 349.

<sup>136</sup> UNHCR promotes three durable solutions for refugees as part of its core mandate: voluntary repatriation; local integration; and resettlement. See more at: <http://www.unhcr.org/uk/solutions.html>

implicit acknowledgment of the actions that cause the displacement. Territorial asylum is a peaceful act and welcoming refugees is not an act of war.<sup>137</sup>

The preamble to the Declaration on Territorial Asylum<sup>138</sup> explicitly says that to provide asylum is a peaceful act; there is no declaration of war in doing so. Here the General Assembly recognizes 'that the grant of asylum by a State to person entitled to invoke Article 14 of the UDHR is a peaceful and humanitarian act, and that as such, it cannot be regarded as an unfriendly by any other State.'<sup>139</sup> A grant of asylum should not be considered a breach of the principles of non-intervention in the internal affairs of a sovereign State.<sup>140</sup> Goodwin-Gill discusses that the intention of this clause was that the CoO may not claim to own its citizens or take aggressive measures against the CoA.<sup>141</sup> As a result, the granting of asylum must be respected by all States (i.e. there is no cause for any government to act to end the asylum, in any way).<sup>142</sup> The granting of asylum cannot be interpreted as a judgment or pronouncement of ill faith towards the CoO, it is a granting of protection to an individual. Granting asylum is the sovereign right of States, and the individual has the 'right to seek and enjoy asylum.'<sup>143</sup> While implicit condemnation may exist by providing protection it does not have any legal or political affect upon the CoO. Asylum passes no explicit judgement on the State, its focus is on protecting the individual. Any correlative judgment is only insofar as the need for asylum exists, it is outside the remit of the CoA to hold a State accountable.

The CoO must respect the granting of asylum to its nationals, to refrain from 'abductions, acts of violence, intimidation and intelligence operations'<sup>144</sup> against the CoA as this is 'an infringement of the territorial sovereignty of the CoA.'<sup>145</sup> This acknowledges that the threat comes from the CoO that the individual must be protected from.

#### 4. Conclusion

Nowhere in the 1951 Convention is the question of the rightness or wrongness of causing displacement considered. Displacement is instead taken as a given. Central to the international refugee legal regime is the definition of a refugee as found within Article 1(A) of the 1951 Convention and the prohibition of *refoulement* in Article 32 and 33.<sup>146</sup> These provisions, and the whole of the framework of the 1951 Convention, focus on defining who is owed protection and the substance of

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<sup>137</sup> UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII) See also Article 1(1) that granting of asylum 'shall be respected by all other States.'

<sup>138</sup> UN General Assembly, *Declaration on Territorial Asylum* (n126)

<sup>139</sup> *Ibid*, See also Article 1(1) that granting of asylum 'shall be respected by all other States.'

<sup>140</sup> Grahl-Madsen (n 41) 27.

<sup>141</sup> Guy S Goodwin-Gill, 'THE 1967 DECLARATION ON TERRITORIAL ASYLUM' (United Nations Audiovisual Library of International Law Copyright © United Nations, 2012) <[http://legal.un.org/avl/pdf/ha/dta/dta\\_e.pdf](http://legal.un.org/avl/pdf/ha/dta/dta_e.pdf)> accessed 26 July 2017. See also Goran Melander, "Refugees in Orbit" in International Institute of Humanitarian Law (Geneva, UNHCR Doc); Weiss P, *Territorial Asylum* (OV 1966)

<sup>142</sup> Institut de Droit International, *L'asile en droit international public* (1950) Article 2(1); See also *Asylum Case (Colombia vs Peru)* ICJ Reports (1950) and Interpretive Decision (1951), on the difference between asylum and extradition.

<sup>143</sup> UDHR Article 14(1).

<sup>144</sup> Grahl-Madsen (n 41) 188.

<sup>145</sup> *ibid* 193.

<sup>146</sup>

the protection; it does not focus on preventing the causes of displacement or on establishing responsibility for these causes.

The Refugee Convention and its framework is silent on whether forced displacement is prohibited, its purpose is instead focussed on protecting refugees upon arrival in a State of asylum (CoA).<sup>147</sup> There is no legal responsibility emanating from the determination of refugee status and it does not create corresponding rights and duties on the displacing party.<sup>148</sup> This is evidenced from two key points. Firstly, the addressee of 1951 Convention is the CoA, not the CoO. It is focused upon the CoA obligations to protect refugees. Should this protection fail it is the CoA, not the CoO that would be held responsible for breaching their obligations towards refugees. Secondly, a judgement made under the 1951 Convention is based upon a prospective assessment of harm occurring in the future. This is in contrast to the framework outlined within state responsibility rules, and also IHL, ICL and IHRL, where a retrospective judgement is made in regard to harm occurring in the past.

Exploration of the 1951 Convention and subsequent developments highlight the complex role that IRL plays. Its intrinsic focus on human dignity and providing protection to those people fleeing persecution does not ignore the perpetrator of that persecution. However, it is not mandated to condemn States. Its role is to deal with the consequences of displacement. IRL regulates the consequences of an action, not the action itself. The 'wrongness' of the displacement can only be assumed from the factual finding of persecution and the individual's need for protection, but this does not involve a legal condemnation of the State or any State responsibility as a result.

Under IRL a State that causes displacement is not committing an internationally wrongful act. This raises far-reaching normative questions regarding whether this is a satisfactory state of affairs and whether the framework of IRL is failing to respond to the dramatic changes in the causes and scale of displacement since its inception. Maintaining its narrow focus on protection ensures clarity of objective, however, the necessity of seeking to address root causes of displacement render this framework inadequate. Thus, in order to ensure state responsibility and the further-reaching human rights obligations therein, it is necessary to look beyond the scope of IRL to fill the accountability lacuna this research has identified.

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<sup>147</sup> 1951 Refugee Convention, (n4)

<sup>148</sup> Goodwin Gill & McAdam (n 99) vi.