

TEMPORARY PROTECTION, DEROGATION AND THE 1951 REFUGEE CONVENTION

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Temporary protection is generally associated with protection of limited duration and standards of treatment lower than those envisaged in the 1951 Convention relating to the Status of Refugees ('1951 Refugee Convention' or 'Convention'). In some mass influx situations, Convention rights have been suspended pending the resolution of the cause of such movement. The United Nations High Commissioner for Refugees has both acknowledged and called for temporary protection in such situations, including in respect of states parties to the 1951 Refugee Convention and thus for persons who would customarily benefit from Convention protection. The Executive Committee of the High Commissioner's Programme recommends it as the minimum protection every asylum seeker should receive. A longstanding question provoked by the granting of temporary protection instead of Convention rights in such situations, which this article seeks to answer, is whether states parties to the 1951 Refugee Convention can justify — as a matter of law rather than pragmatism — suspending Convention rights to asylum seekers and/or refugees in mass influxes? In answering this question, this article examines in particular the technique of derogation. Even though the 1951 Refugee Convention does not include a general derogation clause equivalent to those in international human rights treaties, it is argued that two provisions of the Convention — arts 8 and 9 — nonetheless provide for derogation. In the alternative, it is posited that via subsequent agreement of states parties, implied derogation allowing for temporary protection in mass influx situations is now an accepted feature of the Convention regime. Even in recognising the legal power to derogate from Convention rights in mass influx situations, this article sets out the limits on derogation under international law and argues that these limits equally apply to derogation under the 1951 Refugee Convention.

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I INTRODUCTION

'Temporary protection' has a relatively long history as a concept of international refugee law, yet its meaning and legal basis are far from well defined. Regularly touted as 'an exceptional measure' and 'a pragmatic tool'¹ to respond to the extraordinary circumstances of a mass influx of asylum seekers, its relationship with the *1951 Convention relating to the Status of Refugees* ('*1951 Refugee Convention*' or '*Convention*')² and/or its *Protocol relating to the Status of Refugees* ('*1967 Protocol*')³ has not yet been resolved.

Legal discussions that have taken place have tended to be in the realm of *lex ferenda* rather than *lex lata*. In other words, international discussions on temporary protection have revolved around what such a regime, if it were to be regulated at the level of international law, should ideally entail — who should it apply to, what situations would it cover, what would be the minimum content of rights envisaged and when would status end?⁴ In fact, the international

¹ See United Nations High Commissioner for Refugees, 'UNHCR Summary Observations on the Commission Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx' (Report No COM(2000) 303, 24 May 2000) [3].

² *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*1951 Refugee Convention*').

³ *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*1967 Protocol*').

⁴ Primarily, these discussions examined two different applications of a possible temporary protection regime: the first, in large-scale refugee influxes or other comparable situations and how it ought to be regulated; and the second, to groups of persons who are not covered by the *1951 Refugee Convention* because they would fall outside the definition of a 'refugee'. The International Law Association ('ILA'), for example, studied all these aspects of temporary protection from 1996 until 2002 and sought to elaborate a draft declaration on temporary protection. In May 2002, the ILA adopted its guidelines: International Law Association, 'Resolution 5/2002 on Refugee Procedures' (Guidelines on Temporary Protection, 6 April 2002) ('*ILA Guidelines*').

community embarked on consultations on the meaning and content of temporary refuge/protection on at least three occasions, in 1981,⁵ 1996–97⁶ and in 2001.⁷ Temporary protection was also raised in a number of international expert meetings in 2011 on climate change and displacement and international cooperation and burden-sharing, respectively.⁸ Most recently, in July 2012, the United Nations High Commissioner for Refugees (‘UNHCR’) organised a roundtable on temporary protection, with the stated purpose ‘to discuss the scope and meaning of temporary protection, and to examine what it is or should be, what it does or should guarantee, and in what situations it could apply’.⁹ While each of these consultations and meetings raised the question of the relationship between temporary protection and the *1951 Refugee Convention* and accepted the need for an adequate legal basis for temporary protection under international law, no consensus view was forthcoming.¹⁰ In this article, I do not add to these *lex ferenda* debates,¹¹ rather I focus on the *lex lata*.

Temporary protection schemes are frequently justified by states as extra-treaty measures and falling therefore within their sovereign discretion. And while the sovereign discretion argument works in respect of non-*Convention* states, or in respect of the granting of protection to persons who do not meet the definition of a ‘refugee’ in the *1951 Refugee Convention*, it is an inadequate argument to permit *Convention* states from unilaterally suspending *Convention* rights to *Convention* refugees in mass influx situations. As noted during the *Global Consultations on International Protection* (‘*Global Consultations*’) in 2001, a

⁵ See, eg, United Nations High Commissioner for Refugees, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Geneva, 21–24 April 1981*, UN Doc EC/SCP/16/Add.1 (17 July 1981).

⁶ See, eg, United Nations High Commissioner for Refugees, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, 3rd mtg, UN Doc EC/46/SC/CRP.34 (28 May 1996); United Nations High Commissioner for Refugees, *Progress Report on Informal Consultations on International Protection For All Who Need It*, 8th mtg, UN Doc EC/47/SC/CRP.27 (30 May 1997); United Nations High Commissioner for Refugees, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, UN Doc EC/48/SC/CRP.32 (25 May 1998).

⁷ United Nations High Commissioner for Refugees, *Global Consultations on International Protection: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 1st mtg, UN Doc EC/GC/01/4 (19 February 2001) (‘*Global Consultations*’).

⁸ United Nations High Commissioner for Refugees, ‘Summary of Deliberations on Climate Change and Displacement’ (Summary of Deliberations, 22–25 February 2011) [9], [16]; United Nations High Commissioner for Refugees, ‘Expert Meeting on International Cooperation to Share Burdens and Responsibilities’ (Summary Conclusions, 27–28 June 2011) [9].

⁹ United Nations High Commissioner for Refugees, *Summary Conclusions on Temporary Protection* (Summary Conclusions, 19–20 July 2012) [34], which proposes to include a number of ‘savings clauses’ in any temporary protection arrangement in order to ensure that existing international obligations are not undermined.

¹⁰ See, eg, *ILA Guidelines*, above n 4, Preamble, which took note of the possible conflict of temporary protection and protection under the *1951 Refugee Convention*:

Noting that beneficiaries of temporary protection may be refugees within the meaning of the *1951 Convention* and *1967 Protocol relating to the Status of Refugees* and that therefore, the granting of temporary protection must not prejudice their entitlements under the *Convention* ...

¹¹ See, eg, Erika Feller, ‘The *Refugee Convention* at 60: Still Fit for Its Purpose? Protection Tools for Protection Needs’ (Paper presented at the Workshop on Refugees and the *Refugee Convention* 60 Years On: Protection and Identity, Monash University Prato Centre, Prato, 2 May 2011).

series of consultations to mark the 50th anniversary of the *1951 Refugee Convention*, temporary protection has an ‘unclear relationship’¹² with the *1951 Refugee Convention*, and one that has yet to be answered satisfactorily. Yet, ‘[b]eneficiaries of temporary protection have in fact included both persons who clearly qualify as refugees under the *Convention* and others who might not’.¹³ Moreover, the *Global Consultations* confirmed the ‘need for greater clarity concerning the scope of international protection in mass influx situations’.¹⁴

Ten years on, and following the *1951 Refugee Convention*’s 60th anniversary in 2011, clarity around this issue has hardly progressed. With 148 states parties to either or both the *1951 Refugee Convention* and *1967 Protocol*, the issue is ripe for explanation. The inquiry this article seeks to answer is whether there is a legal basis under the *Convention* to permit the non-application of certain *Convention* provisions in mass influx situations to persons who would ordinarily fall within the *Convention*’s terms. In particular the article examines the technique of derogation, and asks: can states parties derogate from their *Convention* obligations in the specific situation of mass refugee influxes?

There have been limited analyses of whether temporary protection can be justified as a legally permissible derogation from the *1951 Refugee Convention*. Commentaries on derogation and the *Convention* are in fact rare. As noted by Davy in her chapters on arts 8 and 9 of the *Convention* in Zimmermann’s 2011 tome, Goodwin-Gill refrains from any reference to derogation under the *Convention*, while Robinson, Grahl-Madsen and Hathaway give only historical accounts.¹⁵ Likewise, Weis addresses the drafting debates around these provisions and his work, while clearly being instructive, is thus also limited to an historical perspective.¹⁶ Curiously, Durieux and McAdam in their 2004 piece on derogation and *non-refoulement* ‘through time’ call for an explicit amendment to

¹² *Global Consultations*, UN Doc EC/GC/01/4, [13].

¹³ United Nations High Commissioner for Refugees, *Note on International Protection*, 45th sess., UN Doc A/AC.96/830 (7 September 1994) [47] (*‘Note on International Protection 1994’*). For examples of such situations see United Nations High Commissioner for Refugees, Standing Committee, *Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations*, 30th mtg., UN Doc EC/54/SC/CRP.11 (7 June 2004) (*‘Protection and Cooperation in Influx Situations’*); *Report of the United Nations High Commissioner for Refugees*, GA Res 37/195, UN GAOR, 37th sess., 111th plen mtg., Agenda Item 90(a), UN Doc A/RES/37/195 (18 December 1982) para 4; *Office of the United Nations High Commissioner for Refugees*, GA Res 44/137, UN GAOR, 44th sess., 82nd plen mtg., Agenda Item 110, UN Doc A/RES/44/137 (15 December 1989) para 3; *Office of the United Nations High Commissioner for Refugees*, GA Res 49/169, UN GAOR, 49th sess., 94th plen mtg., Agenda Item 99, UN Doc A/RES/49/169 (23 December 1994) para 7.

¹⁴ *Global Consultations*, UN Doc EC/GC/01/4, [1].

¹⁵ Ulrike Davy, ‘Article 8: Exemption from Exceptional Measures’ in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 755, 758; Ulrike Davy, ‘Article 9: Provisional Measures’ in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 781, 784. Davy cites the following authors: Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 448–50 (they do refer to derogation under international human rights law instruments); Nehemiah Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation — A Commentary* (Institute of Jewish Affairs, 1953) 90–1; Atle Grahl-Madsen, *The Status of Refugees in International Law* (A W Sijthoff, 1972) vol 2, 23; James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 270.

¹⁶ Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press, 1995).

the *Convention* in the form of a general derogation clause, which they argue would be preferable to what they see as the non-implementation of *Convention* provisions in large-scale refugee situations, particularly in Africa.¹⁷ They argue that the only ‘legal excuse’ for not granting the benefit of *Convention* provisions to refugees in large-scale situations is through ‘express and lawful reservations’.¹⁸ However, they overlook the fact that derogation is already permitted by the *Convention* and they fail to examine (or even refer to) the relevant derogation clauses — namely arts 8 and 9 — nor do they consider the issue of implied derogation. This article looks at both of these issues in detail. A second difference between Durieux and McAdam’s piece and this article is that as derogation permits only suspension of certain rights during the emergency phase, derogation cannot be used to justify long-term rights deprivations in protracted refugee situations (the main focus of Durieux and McAdam) and so would have limited effect on such situations.

Before turning to discuss derogation in Parts IV, V, VI and VII, this article first canvasses the meaning of temporary protection drawing on various elaborations of the concept, distinguishes it from other forms of protection and settles on a definition for the purposes of this article. The article then examines the shared temporality of asylum as envisaged under the *1951 Refugee Convention* as well as under temporary protection. While noting that there is nothing inconsistent between the *1951 Refugee Convention* and temporary protection in this respect, *Convention* refugees are protected from the premature or arbitrary deprivation of protection via the cessation clauses in art 1C, a safeguard which is also often suspended when states parties resort to temporary protection.

II DEFINING TEMPORARY PROTECTION

Temporary protection has no accepted meaning under international law. In fact, it has acquired multiple and varied meanings depending on the context and country. It is a concept commonly used to describe a short-term emergency response to a ‘mass influx’ of asylum seekers.¹⁹ Temporary protection has also been applied in situations where it is difficult to distinguish between asylum

¹⁷ Jean-François Durieux and Jane McAdam, ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the *Refugee Convention* in Mass Influx Emergencies’ (2004) 16 *International Journal of Refugee Law* 4.

¹⁸ *Ibid* 13. See also Jean-François Durieux and Agnès Hurwitz, ‘How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees’ (2005) 47 *German Yearbook of International Law* 105, 126.

¹⁹ Existing doctrine on temporary protection accepts it as an emergency response to the mass movements of asylum seekers: United Nations High Commissioner for Refugees, *Summary Conclusions on Temporary Protection* (19–20 July 2012) [3]. Ruma Mandal, ‘Protection Mechanisms Outside of the *1951 Convention* (“Complementary Protection”)’ (Legal and Protection Policy Research Series Paper No PPLA/2005/02, United Nations High Commissioner for Refugees, 2 June 2005) 3.

seekers and others moving in mixed flows,²⁰ as well as to broader categories of persons who fall outside the 1951 *Refugee Convention* definition of a ‘refugee’.²¹

The term is often used interchangeably with ‘temporary asylum’, ‘temporary refuge’ and other similar soubriquets. Pointing out that the choice of terminology can be important, Coles, writing in the 1980s, preferred ‘temporary refuge’ to ‘temporary asylum’, largely because he argued it avoids the confusion with ‘asylum’, which he notes is not agreed, while containing the notion of protection.²² He defined ‘temporary refuge’ as ‘that protection characterized by the principle of *non-refoulement* which is accorded a person and which is temporary pending the obtaining of a durable solution’.²³

Likewise, Hartman, also writing about refugee movements in the 1980s, equated ‘temporary refuge’ with ‘the traditional refugee law concept of *nonrefoulement* [sic] in that it consists essentially of a ban on forced repatriation ... of civilian war victims’²⁴ and also notes that ‘[i]ts temporal limits are determined by the duration of the armed conflict, which can persist for extended periods or flare only briefly’.²⁵ She further argued that ‘temporary refuge’ has crystallised into a customary international norm, arguing that the practice of granting sanctuary to civilian war victims is ‘well-documented and is impressive in its consistency and extent’.²⁶ Her focus was however circumscribed around *non-refoulement* obligations, whereas many modern temporary protection arrangements also include some form of rights enjoyment.

The language of temporary protection emerged in the 1990s. The shift in language from ‘refuge’ to ‘protection’ appears to have coincided with the transition in the meaning of ‘international protection’ that also took place at this time. This latter transition saw a shift from a focus on ‘diplomatic protection’ to a broader concept of international protection, the latter invoking human rights or surrogate protection.²⁷ Similarly, temporary protection appeared to move beyond Coles’ or Hartman’s *non-refoulement* obligation to other, limited human rights.

The UNHCR’s 1994 *Note on International Protection* described ‘temporary protection’ as

a means, in situations of mass outflow, for providing refuge to groups or categories of persons recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determination. It includes

²⁰ See, eg, United Nations High Commissioner for Refugees, *Protection Considerations with Regard to People Fleeing From Libya — UNHCR’s Recommendations* (25 February 2011); United Nations High Commissioner for Refugees, *Protection Considerations with regard to People Fleeing From Libya — UNHCR’s Recommendations, Update No 1* (29 March 2011).

²¹ See, eg, United Nations High Commissioner for Refugees, *Guidelines relating to the Eligibility of Iraqi Asylum Seekers* (3 October 2005) [22].

²² G J L Coles, ‘Temporary Refuge and the Large Scale Influx of Refugees’ (1978–80) 8 *Australian Year Book of International Law* 189, 201–2.

²³ *Ibid* 199.

²⁴ Joan Fitzpatrick Hartman, ‘The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict’ in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s — The Ninth Sokol Colloquium on International Law* (Martinus Nijhoff, 1988) 87, 87, 89.

²⁵ *Ibid* 91.

²⁶ *Ibid* 87.

²⁷ See Alice Edwards, ‘Human Rights, Refugees, and the Right “To Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 293. See also *Note on International Protection 1994*, UN Doc A/AC.96/830.

respect for basic human rights but, since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights and benefits offered in the initial stage than would customarily be accorded to refugees granted asylum under the *1951 Convention* and the *1967 Protocol*.²⁸

This description captures not only the ‘temporary’ nature of the sanctuary to be provided, but also the more limited standards of treatment such emergency responses necessarily entail in practice. The reference to the ‘outflow’, rather than the ‘influx’, is however problematic. It is the latter which is relevant to whether a receiving state can justify, under principles of derogation, applying lesser standards of treatment for refugees than would customarily apply. While the ‘outflow’ and the ‘inflow’ in a given situation might well be equivalent — for example where the movement is across a shared frontier — it is the impact on the receiving country that is at issue. In 2001, the UNHCR refocused on the influx and reiterated its view of temporary protection as

best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx. Its value in ensuring protection from *refoulement* and basic minimum treatment in accordance with human rights without overburdening individual status determination procedures has been demonstrated.²⁹

In this description, the UNHCR acknowledged that temporary protection can be applied to *Convention* refugees in emergency situations, and it also permitted the suspension of both status determination procedures and the full range of *Convention* rights. The UNHCR has never, however, elaborated the legal — rather than the practical/humanitarian — basis for such suspension.

The European Union temporary protection Directive, *Council Directive 2001/55/EC* (‘*EU TP Directive*’), which provides for temporary protection in ‘mass influx situations’, defines temporary protection as

a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.³⁰

²⁸ *Note on International Protection 1994*, UN Doc A/AC.96/830, [46]. The next sentence in this paragraph states further that ‘[i]n many respects it is a variation of the admission and temporary refuge based on prima facie or group determinations of the need for international protection that have been used frequently to deal with mass flows of refugees in other parts of the world’. In my view, this mischaracterises the nature of prima facie or group recognition of refugee status as an evidentiary or procedural shortcut to recognition of refugee status, and which does not or should not affect the range of rights or entitlements of those benefiting from this status as refugees. This is not least because prima facie or group recognition have been applied under the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, so the processes remain regulated by an international treaty, rather than outside it: *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (‘*OAU Refugee Convention*’).

²⁹ *Global Consultations*, UN Doc EC/GC/01/4, [13].

³⁰ *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212/12, art 2(a) (‘*EU TP Directive*’).

The *EU TP Directive* indicates that it is primarily concerned with groups of persons not generally considered to fall within the *1951 Refugee Convention*, even while acknowledging the overlap between *Convention* refugees and the broader class of ‘displaced persons’ described therein.³¹

None of the above descriptions of temporary protection, whether those of the UNHCR or within the *EU TP Directive*, address the legal basis for this form of protection. At best the *EU TP Directive* clarifies that the rules laid down in respect of temporary protection should be compatible with the member states’ international obligations, including the *1951 Refugee Convention*, as well as the *Treaty Establishing the European Community*.³² Recital 10 further provides that temporary protection ‘must not prejudice recognition of refugee status under the *Geneva Convention*’.³³ Despite these caveats, the *EU TP Directive* was set up in reality to suspend — and in some instances to not apply³⁴ — not only procedures for the determination of refugee status but also *Convention* obligations to refugees, including the cessation clauses.³⁵

For the purposes of this article, temporary protection is therefore understood to refer to protection of limited duration composed of admission to safety, protection against *refoulement*, respect for basic human rights and safe return (or another solution) when conditions permit to the country of origin.³⁶ Temporary protection is thus associated not only with a stay of limited duration but also with a reduced or variable set of rights from those normally applicable under the *1951 Refugee Convention*. In many situations, *Convention* rights are suspended, being replaced by basic levels of humanitarian assistance. Furthermore, the cessation clauses (elaborated below) are considered not to be applicable, and instead persons are and can be returned as soon as the triggering event has been

³¹ Ibid art 2(c), which provides that the *EU TP Directive* applies to
in particular:

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

³² Ibid Preamble paras 10–11, 18.

³³ Ibid Preamble para 10.

³⁴ For example, in relation to the temporary protection schemes applied to persons fleeing the former Yugoslavia in the 1990s, access to refugee status determination under the *1951 Refugee Convention* was largely denied: see Erik Roxström and Mark Gibney, ‘The Legal and Ethical Obligations of UNHCR: The Case of Temporary Protection in Western Europe’ in Niklaus Steiner, Mark Gibney and Gil Loescher (eds), *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge, 2003) 37.

³⁵ Instead of the cessation clauses, the termination of temporary protection status under the *EU TP Directive* [2001] OJ L 212/12 occurs, under art 6(1):

- (a) when the maximum duration has been reached [ie 3 years]; or
- (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission.

³⁶ The best elaboration of the rights that should apply in mass influx of asylum seekers are contained in Executive Committee of the High Commissioner’s Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx: No 22 (XXXII)*, 32nd sess (21–24 April 1981) (‘*ExCom Conclusion 22*’). See also Executive Committee of the High Commissioner’s Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 74 (XLV)*, 45th sess (1994) [r] (‘*ExCom Conclusion 74*’). Nonetheless, the range of rights that are available in a given situation will vary significantly.

resolved, regardless of whether more durable and fundamental changes in the country of origin have taken place.³⁷ Because the protection granted is regulated at the level of national law (with the exception of the *EU TP Directive*),³⁸ there is also a wide variation in state practice.

A *Mass Influx*

This article focuses on temporary protection as a response to mass influx situations involving *Convention* refugees. While ‘mass influx’ is not a term of art, it is generally understood to entail

considerable numbers of persons arriving over an international border; a rapid rate of arrival; inadequate absorption or response capacity in host states, particularly during the emergency phase; and individual asylum procedures, where they exist, are unable to deal with the assessment of such large numbers.³⁹

There is neither a minimum number, nor speed of arrival, for a ‘mass influx’.⁴⁰

The last element — the absorption capacity of national asylum systems — has been said to add ‘an important qualitative dimension, making it impossible — and indeed undesirable — to establish in precise quantitative terms how large, or sudden, a refugee flow must be in order to be characterised as a “mass influx”’.⁴¹ While this is an important observation, it is also true that owing to the malleable (and perhaps subjective) nature of the term, states have

³⁷ 1951 *Refugee Convention* art 1C(5) provides:

He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality ...

At art 1C(6):

Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

³⁸ It should be noted that even with the agreement of an European Union-wide temporary protection instrument, varying temporary protection arrangements continue to exist in the EU. Even member states retain forms of temporary protection not covered by, or additional to, the *EU TP Directive* [2001] OJ L 212/12.

³⁹ Executive Committee of the High Commissioner’s Programme, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations: No 100 (LV)*, 55th sess (2004) [a] (*‘ExCom Conclusion 100’*). See also *Protection and Cooperation in Mass Influx Situations*, UN Doc EC/54/SC/CRP.11, [3].

⁴⁰ United Nations High Commissioner for Refugees, *UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx* (15 September 2000) [3]; *ExCom Conclusion 100*, above n 39, [a]. *EU TP Directive* [2001] OJ L 212/12, art 2(d) defines ‘mass influx’ as the ‘arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme’.

⁴¹ Durieux and Hurwitz, above n 18, 106–7.

been able to call a particular situation a mass influx and to adopt special arrangements for refugees in response, when objectively it may be clear that the situation is not (and, in some cases, is far from being) a mass influx. In fact, while mass influx has been the most common reason given by states for resorting to temporary protection, the size and scale of a movement of refugees is not the decisive criterion as to whether a state is empowered to delay or suspend the application of the *1951 Refugee Convention's* provisions. As will become clear in the later sections of this paper, the decisive criterion is rather whether the mass influx presents a threat to national security within the specific context of war or other grave and exceptional circumstance; it is thus not enough for a state to declare a particular refugee movement as a 'mass influx' to circumvent *Convention* obligations.⁴²

The UNHCR has clarified that a special response is not required in every mass influx, especially if the state can continue to process asylum seekers in the normal way including through group (*prima facie*) determination.⁴³ In other words, there are other techniques available to cope with such events instead of temporary protection and the correlative suspension of *Convention* rights.

B *Temporary Protection and Complementary Forms of Protection*

Temporary protection needs to be distinguished from 'complementary' or 'subsidiary' forms of protection, the legal basis for which is rooted in human rights obligations of *non-refoulement*. Unlike temporary protection, complementary or subsidiary forms of protection are not normally emergency or provisional in nature and are applied on an individual case basis, rather than to mass movements of persons.⁴⁴ Complementary protection usually also implies that the person is already in the territory of the asylum state and thus does not give rise to questions of admission. Accepted grounds for complementary forms of protection have so far involved prohibitions on return to the risk of torture or cruel, inhuman or degrading treatment or punishment, unfair trial or arbitrary deprivation of life.⁴⁵

Furthermore, some national temporary protection schemes should not be confused with 'temporary protection' as this term is used in the context of mass influx of refugees as a means to suspend *Convention* obligations, which is the focus of this article. Temporary protection under national laws can be a legal category and/or a discretionary exercise of executive power, which have typically been used to extend protection to broader categories of persons in need of some form of international protection other than *Convention* refugees,

⁴² See below Part V.

⁴³ *Global Consultations*, UN Doc EC/GC/01/4, [18].

⁴⁴ Mandal, above n 19, 3. Jane McAdam indicates that the word 'complementary' in its broadest application 'signif[ies] protection that falls outside the dominant international refugee instrument': Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 2.

⁴⁵ See C W Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009).

although this is not always the case.⁴⁶ Also, some national temporary protection visas do not cover admission to the territory but rather apply to those already in the territory and who cannot be returned in the short-term.⁴⁷

C *Temporary Protection and Prima Facie Recognition of Refugee Status*

Temporary protection also needs to be distinguished from the granting of refugee status on a prima facie basis or, in other words ‘on the basis of readily apparent, objective circumstances in the country of origin giving rise to exodus’.⁴⁸ Prima facie recognition is typically associated with the broader definition of a ‘refugee’ contained in the Organization of African Unity’s (now African Union) 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa* (‘*OAU Refugee Convention*’),⁴⁹ although there is nothing to suggest that *Convention* refugees could not also be granted status on a prima facie basis.⁵⁰ Prima facie recognition does not denote a subsidiary category of refugee, but is rather an evidentiary shortcut to recognition as a refugee.⁵¹ As refugees, they benefit from the rights attached to that status, with their status

⁴⁶ A distinction needs to be made between temporary protection regimes for non-*Convention* protection categories on the one hand and, on the other hand, practices of granting temporary visas to recognised refugees. In the early 2000s, the Australian Government, for example, introduced Temporary Protection Visas (‘TPVs’) for recognised refugees under the 1951 *Refugee Convention* who had been processed through an individual procedure. The TPVs were not created to apply to ‘mass influx’ situations. They were widely criticised for carrying substandard levels of treatment including the denial of some basic rights, such as family unity, ordinarily applicable to 1951 *Refugee Convention* refugees: see, eg, Alice Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *International Journal of Refugee Law* 192. The TPVs were abolished in 2008 and replaced by permanent visas.

⁴⁷ For example, the US Temporary Protected Status (‘TPS’) scheme applies to such persons, including Haitians located in the US after the earthquake in 2010: United States Homeland Security, ‘Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status (TPS) for Haitian Nationals’ (Media Release, 15 January 2010) <http://www.dhs.gov/ynews/releases/pr_1263595952516.shtm>. TPS has most recently been applied to Syrians in the US: United States Homeland Security, ‘Statement from Homeland Security Secretary Janet Napolitano on Temporary Protection Status (TPS) for Syrian Refugees’ (Media Release, 23 March 2012) <<http://www.dhs.gov/ynews/releases/20120323-napolitano-statement-syria-tps.shtm>>.

⁴⁸ Bonaventure Rutinwa, ‘Prima Facie Status and Refugee Protection’ (Working Paper No 69, United Nations High Commissioner for Refugees, October 2002) 1.

⁴⁹ *OAU Refugee Convention* art I(2) definition provides:

The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The UNHCR has stated that where the *OAU Refugee Convention* applies, the preference should be for granting refugee status on a group or prima facie basis, rather than through temporary protection mechanisms: *Note on International Protection 1994*, UN Doc A/AC.96/830, [47].

⁵⁰ See Alice Edwards, ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 228. See also Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff, 1999); Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (Lawyers Committee for Human Rights, 1995) 22; Durieux and Hurwitz, above n 18, 116–17.

⁵¹ Jean-François Durieux, ‘The Many Faces of “Prima Facie”’: Group-Based Evidence in Refugee Status Determination’ (2008) 25(2) *Refugee* 151, 154–5.

ending only with the invocation of the cessation clauses in arts I(4)(a)–(e) of the *OAU Refugee Convention*. This is one of the key distinctions between prima facie recognition and temporary protection, both applied in large-scale situations; the latter is heralded by states as of particular value precisely because the cessation clauses can be avoided. This is explored further in the next section.

III TEMPORALITY, TEMPORARY PROTECTION AND THE 1951 REFUGEE CONVENTION

There is no obligation in the *1951 Refugee Convention*, or under international law more generally, to grant asylum on a permanent basis⁵² in the sense of granting permanent residency. There are four main arguments that have been put forward to support this view.

First, the best elaboration of the *Convention's* non-permanent orientation is the existence of the 'cessation clauses' in art 1C, which stipulate both individual and general conditions under which refugee status comes to an end. In art 1C, sub-clauses (1)–(4) outline the circumstances in which individual action triggers the cessation of status, such as voluntary re-establishment in one's country of origin. Sub-clauses (5)–(6), by contrast, cease the status of a refugee where fundamental and durable changes in the country of origin indicate that protection is no longer needed.⁵³ In relation to the latter, general cessation has been declared 27 times on a group basis between 1973 and 2008,⁵⁴ meanwhile 3 more cessation declarations will take effect between 2012 and 2013.⁵⁵

Most states provide for the application of the cessation clauses on an individual basis in national laws, although they are rarely systematised.⁵⁶ Instead, very few industrialised states invoke the cessation clauses, not least because access to permanent residence or nationality (the so-called 'exilic bias'⁵⁷ of international refugee law) has become the norm. This is to be contrasted to

⁵² See also Manuel Angel Castillo and James C Hathaway, 'Temporary Protection' in James C Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997) 1, 2.

⁵³ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (The 'Ceased Circumstances' Clauses)*, UN Doc HCR/GIP/03/03 (10 February 2003) [6]–[16]. There are exceptions to cessation for those with continuing need for international protection or owing to compelling reasons of previous persecution cannot be expected to return, which are addressed in the same document: at [19]–[21]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 53.

⁵⁴ Yasmeen Siddiqui, 'Reviewing the Application of the Cessation Clause of the *1951 Refugee Convention relating to the Status of Refugees* in Africa' (Working Paper No 76, Refugee Studies Centre, University of Oxford, August 2011) annex 1, 52. Added to the 25 situations documented in Siddiqui's paper, cessation has been declared by the respective governments in respect of the Republic of Congo refugees residing in Gabon and Burundian refugees residing in the Mtabila Camp, Tanzania in 2011 and 2012.

⁵⁵ These three situations include Angolan, Liberian and pre-1999 Rwandan refugees: see United Nations High Commissioner for Refugees, *UNHCR Working to Help Conclude Three African Refugee Situations* (Media Release, 7 February 2012) <<http://www.unhcr.org/4f3125cc9.html>>.

⁵⁶ See generally Joan Fitzpatrick and Rafael Bonoan, 'Cessation of Refugee Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 491.

⁵⁷ Gervase Coles, 'Approaching the Refugee Problem Today' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (Oxford University Press, 1990) 373.

asylum in developing countries, in which an expectation of return governs state practice, with very few examples of the granting of citizenship even for long staying refugees.⁵⁸ Paradoxically, however, asylum in the developing world is often long-term and can hardly be described as temporary de facto.

The *1951 Refugee Convention* is thus fundamentally a protection instrument; rather than an instrument of permanent migration.⁵⁹ In terms of any rights to nationality, art 34 of the *Convention* provides only a discretionary encouragement for states parties to ‘facilitate the assimilation and naturalization of refugees’.⁶⁰

Secondly, the notion that asylum is temporary has also been linked to the view that there is no obligation to ‘grant’ asylum under international law. There have long been questions raised about the scope of and limits to — and even the definition of — asylum. While some legal scholars continue to assert the lack of an obligation to permit entry⁶¹ or to grant asylum,⁶² these views are increasingly being challenged and are outdated.⁶³ Such traditional views of asylum are largely based on the fact that the drafting discussions on art 14 of the *Universal Declaration of Human Rights* (‘UDHR’) failed to endorse language of an obligation to ‘grant’ asylum, and secured only the language of ‘to seek and to enjoy’.⁶⁴ Commentators also draw on the fact that any explicit right to asylum was not included in the *1951 Refugee Convention*⁶⁵ and they further refer to the failure to agree upon a binding treaty on territorial asylum in the 1960s.⁶⁶ Article 3(3) of the 1967 *Declaration on Territorial Asylum*, for example, asks states to consider granting admission on a temporary basis, while pending an opportunity of going to another state.⁶⁷

⁵⁸ Tanzania is often cited as an exception to the general rule in which 162 000 Burundian refugees benefited from Tanzanian citizenship as part of a comprehensive solutions strategy: *UNHCR Welcomes Tanzania’s Decision to Naturalize Tens of Thousands of Burundian Refugees* (16 April 2010) <<http://www.unhcr.org/4bc833f16.html>>. As at 2012, however, problems with the full implementation of the citizenship process remain.

⁵⁹ Matthew J Gibney, ‘Between Control and Humanitarianism: Temporary Protection in Contemporary Europe’ (2000) 14 *Georgetown Immigration Law Journal* 689, 692. Gibney argues that temporary protection only has appeal as long as it does not become an ‘extended pathway to permanent migration’.

⁶⁰ *1951 Refugee Convention* art 34.

⁶¹ Hathaway, above n 15, 301.

⁶² Goodwin-Gill and McAdam, above n 15, 359.

⁶³ See *MSS v Belgium and Greece* (2011) 53 EHRR 28, 263 [220]–[230].

⁶⁴ Goodwin-Gill and McAdam, above n 15, 358. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14 (‘UDHR’) provides:

- (1) Everyone has the right to seek and enjoy in other countries asylum from persecution;
- (2) This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

⁶⁵ Goodwin-Gill and McAdam, above n 15, 362.

⁶⁶ Atle Grahl-Madsen, ‘Refugees and Refugee Law in a World in Transition’ (1982) 3 *Michigan Yearbook of International Legal Studies* 65, 68–9; G J L Coles, above n 22, 196; Goodwin-Gill and McAdam, above n 15, 362 n 45.

⁶⁷ *Declaration on Territorial Asylum*, GA Res 2312(XXII), UN GAOR, 22nd sess, 1631st plen mtg, Agenda Item 89, Supp No 16, UN Doc A/RES/2312(XXII) (14 December 1967) art 3(3) provides:

I have argued elsewhere that the right to asylum is implicit in the *1951 Refugee Convention* as soon as the conditions for refugee status stipulated therein are met.⁶⁸ Moreover, later regional human rights treaties go further than art 14 of the *UDHR* in recognising rights to ‘obtain’ or ‘receive’ asylum⁶⁹ and a large number of national constitutions recognise a right to asylum.⁷⁰

An obligation to ‘grant’ asylum under the *1951 Refugee Convention* was also recently acknowledged by the Grand Chamber of the European Court of Human Rights (‘ECtHR’) in *MSS v Belgium and Greece* (‘*MSS*’), holding:

Belgium and Greece have ratified the *1951 Geneva Convention relating to the Status of Refugees* ... which defines the circumstances in which a State *must grant* refugee status to those who request it, as well as the rights and duties of such persons.⁷¹

Should a state decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another state.

⁶⁸ Edwards, ‘Human Rights, Refugees, and the Right “To Enjoy” Asylum’, above n 27. This is supported by the United Nations High Commissioner for Refugees, *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*, UN Doc HCR/IP/4/ENG/REV.3 (December 2011) [28] (which stipulates that refugee status is declaratory and not determinative).

⁶⁹ See, eg, *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948) art XXVII: ‘Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements’; *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 12(3); ‘Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions’; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 22(7): ‘Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes’; *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 18: ‘The right to asylum shall be guaranteed with due respect for the rules of the *Geneva Convention* of 28 July 1951 and the *Protocol* of 31 January 1967 relating to the status of refugees and in accordance with the *Treaty establishing the European Community*’.

⁷⁰ See, eg, Cuba: *Constitución de 1976* [Constitution of 1976] art 13; Costa Rica: *Constitución de 1949* [Constitution of 1949] art 31; Columbia: *Constitución de 1991 con reformas hasta 2005* [Constitution of 1991 (as amended to 2005)] art 36; Brazil: *Constituição do 1988* [Constitution of 1988] art 4(x); El Salvador: *Constituciones de 1983* [Constitution of 1983] art 28; Ecuador: *Constitución de 2008* [Constitution of 2008] art 41; Bolivia: *República del Bolivia Constitución de 2009* [Republic of Bolivia Constitution of 2009] art 29; Dominican Republic: *Constitución de 2010* [Constitution of 2010] art 46(2); Guatemala: *Constitución de 1985* [Constitution of 1985] art 27; Honduras: *Constituciones de Honduras* [Constitution of Honduras] art 101; Italy: *Costituzione di 1947* [Constitution of 1947] art 10; Mexico: *Constitución de 1917* [Constitution of 1917] art 11; Nicaragua: *Constitución de 2007* [Constitution of 2007] art 42; Peru: *Constitución Política del Perú 1993 con reformas hasta 2005* [Political Constitution of Peru 1993 (as amended to 2005)] art 36; Paraguay: *Constitución de la República del Paraguay — Sancionada y promulgada el 20 de junio 1992* [Constitution of the Republic of Paraguay — Sanctioned and Promulgated on 20 June 1992] art 36; Venezuela: *República Bolivariana de Venezuela Constitución de 1999* [Bolivarian Republic of Venezuela Constitution of 1999] art 69; France: *La Constitution du 4 octobre 1958* [Constitution of 4 October 1958] art 53.1; Germany: *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 23(3).

⁷¹ *MSS v Belgium and Greece* (2011) 53 EHRR 28, 263 [54] (emphasis added).

There was, however, no express recognition by the ECtHR of an obligation to grant asylum on a permanent basis.

Relying in part on *MSS*, the Court of Justice of the European Union in *NS v Secretary of State for the Home Department*⁷² also addressed, inter alia, the question of the content of the right to asylum as contained in art 18 of the *European Charter of Fundamental Rights* and as elaborated in the asylum *acquis*. The decision did not dispute that art 18 confers a fundamental right to asylum. In the judgment, it was clarified that there is an obligation to process and receive asylum seekers, and to provide asylum, including if they have moved on from a country of first asylum where there are ‘systemic flaws’ in the asylum system such that their return would violate obligations to prohibit inhuman or degrading treatment.⁷³

Today, the modern right to ‘asylum’ is perhaps, therefore, best defined as the granting of protection against return to threats to life or freedom *for as long as those threats exist*, coupled with the rights and duties stipulated in relevant instruments. There remains, however, no clear definition of ‘asylum’ under international law and no obligation on states to grant permanent residency.

At the regional level, the *OAU Refugee Convention* is structured similarly to the *1951 Refugee Convention*. While it could be seen as solutions-oriented in so far as it calls on states to ‘use their best endeavours ... to secure the settlement’ of refugees (although it does not define ‘settlement’)⁷⁴ — it also recognises that states are only required to provide temporary residence pending these other arrangements. Article II(5) provides:

Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.⁷⁵

This paragraph is regularly referred to as support for the view of a ‘temporary protection’ regime operating in Africa.⁷⁶ Rutinwa suggests, for example,

⁷² (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011).

⁷³ Ibid [86], [114]. See also United Nations High Commissioner for Refugees, ‘Written Observations of the United Nations High Commissioner for Refugees’, Submission in *NS v Secretary of State for the Home Department*, Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011, 1 February 2011.

⁷⁴ *OAU Refugee Convention* art II(1) provides:

Member states of the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

⁷⁵ Ibid art II(5).

⁷⁶ See, eg, Rutinwa, above n 48, 16, quoting Refugee Research Unit, Centre for Refugee Studies, York University, ‘The Temporary Protection of Refugees: A Solution-Oriented and Rights Regarding Approach’ (Discussion Paper, 17 July 1996) 22:

The debate about temporary versus permanent refugee protection has no real currency in the South, where protection has almost always been assumed to be temporary, even if it lasted for a long time. Protection has usually been provided by neighbouring countries with the clear understanding that the refugees would eventually return home. In fact, in Africa, temporary protection is not only common practice, it is given prominence in the Organ[iz]ation of African Unity’s 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Article II(5) ...

that art II(5)

applies to persons who have been recognised as refugees but for one reason or another have not been granted the right of residence for any duration at all. It is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum.⁷⁷

According to Rutinwa, therefore, it is the ‘duration of sojourn in the first country of asylum ... not the protection’ which is temporary.⁷⁸ This provision could also be interpreted to suggest that the *OAU Refugee Convention* requires temporary admission and protection pending more permanent settlement. Within this framework, the obligation to provide such settlement does not appear to fall on the first country of asylum.⁷⁹ In other words, the *OAU Refugee Convention* recognises an obligation to grant asylum for which the duration is temporary. Where a state is unable to provide residence for whatever reason, principles of international solidarity and burden sharing are to guide the resettlement of that refugee elsewhere. Like the *1951 Refugee Convention*, further evidence that the *OAU Refugee Convention* is an instrument of temporary asylum is the inclusion of cessation clauses,⁸⁰ while art V specifically identifies voluntary repatriation as an appropriate solution for refugees.

In addition to the *OAU Refugee Convention*, the *Principles concerning the Treatment of Refugees*, adopted by the Asian–African Legal Consultative Committee in 1966, restated by its successor, the Asian–African Legal Consultative Organization in 2001, provide that before taking measures contrary to the principle of *non-refoulement*, the state in question should enable the person concerned to seek asylum in another country.⁸¹ Again, this points to a general obligation to grant asylum of limited duration until settlement is secured elsewhere. Meanwhile, the Executive Committee of the High Commissioner’s Programme (‘ExCom’) has referred to temporary protection on multiple occasions since 1977 and has stated in particular that ‘[i]n cases of large-scale

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *OAU Refugee Convention* art II(5) needs to be read in the context of art II as a whole, as well as in relation to art II(4), which provides:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member states and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member state granting asylum.

⁸⁰ Ibid art I(4).

⁸¹ Asian–African Legal Consultative Committee, *Bangkok Principles on the Status and Treatment of Refugees* (31 December 1966) arts II(4), III(2); Asian–African Legal Consultative Organization, *1966 Bangkok Principles on Status and Treatment of Refugees* (Declaration adopted by the Asian–African Legal Consultative Organization, 40th sess, New Delhi, 24 June 2001) arts II(4), III(2).

influx, persons seeking asylum should always receive at least temporary refuge'.⁸²

National courts too have confirmed the temporary nature of asylum for refugees under the *1951 Refugee Convention*. The United Kingdom's House of Lords has indicated that '[r]efugee status is a temporary status for as long as the risk of persecution remains'.⁸³ Likewise, the Australian High Court has held that the *Convention* does not impose an obligation upon states parties 'to grant asylum or a right to settle in those States to refugees arriving at their borders'.⁸⁴

A third argument which has been posited for why the *1951 Refugee Convention* can be seen as endorsing only the temporary character of protection is found in art 31.⁸⁵ Article 31 is usually characterised as the non-penalisation clause, guaranteeing that penalties are not imposed on refugees on account of their illegal entry or stay provided they have come directly and have good cause for their illegal entry or stay. However, the second paragraph notes that restrictions on the movement of such refugees (that is, those who have arrived in an irregular way) should not be applied except for those that are necessary and where such restrictions are applied, they should remain only 'until their status is regularized or they obtain admission into another country'.⁸⁶ Coles argues that the reference to internal regularisation implies an end to the phase of 'temporary refuge'.⁸⁷ In a similar way, arts 31(2)–(3) foresee the granting of temporary refuge pending admission into another country, along the same lines as those

⁸² Executive Committee of the High Commissioner's Programme, *Refugees without an Asylum Country: No 15 (XXX)*, 30th sess (1979) [f] ('*ExCom Conclusion 15*'). See also Executive Committee of the High Commissioner's Programme, *Asylum: No 5 (XXVIII)*, 28th sess (1977) ('*ExCom Conclusion 5*'); Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 11 (XXIX)*, 29th sess (1978) ('*ExCom Conclusion 11*'); Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 14 (XXX)*, 30th sess (1979) ('*ExCom Conclusion 14*'); Executive Committee of the High Commissioner's Programme, *Temporary Refugee: No 19 (XXXI)*, 31st sess (1980) ('*ExCom Conclusion 19*'); Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 21 (XXXII)*, 32nd sess (1981) ('*ExCom Conclusion 21*'); *ExCom Conclusion 22*, above n 36; Executive Committee of the High Commissioner's Programme, *Problems related to the Rescue of Asylum-Seekers in Distress at Sea: No 23 (XXXII)*, 32nd sess (1981) ('*ExCom Conclusion 23*'); Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 68 (XLIII)*, 43rd sess (1992) ('*ExCom Conclusion 68*'); Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 71 (XLIV)*, 44th sess (1993) ('*ExCom Conclusion 71*'); *ExCom Conclusion 74*, above n 36; *ExCom Conclusion 100*, above n 39; Executive Committee of the High Commissioner's Programme, *Conclusions on the Provision on International Provision including through Complementary Forms of Protection: No 103 (LVI)*, 56th sess (2005) ('*ExCom Conclusion 103*').

⁸³ *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, 954 [106] (Lord Scott).

⁸⁴ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 15 (McHugh and Gummow JJ).

⁸⁵ G J L Coles, above n 22, 203.

⁸⁶ *1951 Refugee Convention* art 31(2).

⁸⁷ G J L Coles, above n 22, 203.

outlined above in relation to art II(5) of the *OAU Refugee Convention*.⁸⁸ Furthermore, it appears that art 31 simply reiterates the general understanding at international law that there is no obligation to ‘grant’ permanent asylum/settlement.

Fourthly and finally, the three durable solutions designed to bring an end to refugee status do not include the idea of permanent asylum.⁸⁹ As being a refugee is still considered an anomaly to normal citizen–state relations in the state-based international system,⁹⁰ asylum is not and should not be considered a durable solution. Only the reattachment to a state — either through repatriation, local integration/naturalisation or third country resettlement — would be seen as leading to an end to refugee status. By implication, asylum or protection is intended to be temporary in nature, even though in reality it can be protracted.

The above section explained that the right to asylum provided on at least a temporary basis is an underlying principle of the *1951 Refugee Convention*, even as it was hoped that refugees would benefit from longer term stay and durable solutions. Thus, imposing temporal limits on the stay of refugees, which is widely practised by states is not antithetical to the *Convention*. That said, asylum must continue for as long as it is necessary. There is thus no general inconsistency in theory between the temporality of asylum under the *1951 Refugee Convention* and temporary protection. Both are focused on forms of asylum of limited duration without any obligation on the asylum state to offer permanent residency. Yet this analysis has also highlighted a fundamental difference between the two forms of protection — the *Convention* sets out the rights and duties of *Convention* refugees and protects them against the premature or arbitrary withdrawal of protection via the cessation clauses in art 1C. In contrast, formalised cessation rules are not always available or expected under temporary protection schemes, with a focus on speedy return as soon as the cause of flight has dissipated, at times regulated merely by administrative discretion; while rights enjoyed under temporary protection can be variable.

Apart from stay of limited duration however, temporary protection has involved the de jure or de facto suspension of *Convention* rights. The next sections will examine whether derogation provides a legal basis for such suspension. I start with a general overview of the current state of international law relating to derogation, followed by derogation as it was previewed under the *1951 Refugee Convention*. The view that derogation is permitted by the *Convention* relies on two main arguments. First, through an interpretation of arts 8 and 9 in the *Convention*, derogation was accepted as being permissible under the *Convention*. Acknowledging that arts 8 and 9 set limits on that principle, it is argued that they nonetheless permit derogation in specifically defined circumstances. Secondly, if the first argument is not considered wholly

⁸⁸ *1951 Refugee Convention* art 31(2) provides: ‘The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country’.

⁸⁹ The three durable solutions are voluntary repatriation, local integration or resettlement to a third country: *International Assistance to Refugees within the Mandate of the United Nations High Commissioner for Refugees*, GA Res 1166 (XII), UN GAOR, 12th sess, 723rd plen mtg, Agenda Item 30, UN Doc A/3805 (26 November 1957).

⁹⁰ Hannah Arendt, *The Origins of Totalitarianism* (André Deutsch, first published 1951, 1986 ed) 281–4.

persuasive, the article turns to argue that derogation allowing for temporary protection is an implied term of the *Convention* via the subsequent agreement of states parties. Finally, drawing on developments in international law, especially international human rights law, the limits on permissible derogations are examined.

IV DEROGATION AND INTERNATIONAL LAW

According to Orakhelashvili to derogate means

to repeal or abrogate in part, to destroy and impair the force and effect of, to lessen the authority of, take away or detract from, deteriorate, diminish, depreciate; it also means to curtail or deprive a person of any part of his rights. Derogation is a partial abrogation or repeal of a law, contract, treaty, legal right etc.⁹¹

Under international law, derogation is a method of putting other states ‘on notice’ that the notifying state intends to suspend or curtail specific norms or obligations that would apply in ordinary circumstances, owing to a war or other comparable emergency making it impossible for the state in question to comply fully.⁹² Derogation is thus ‘the legally mandated authority of states to allow suspension of certain individual rights in exceptional circumstances of emergency or war’.⁹³ It sends a message that the suspension of rights is ‘necessary, temporary, and lawful’.⁹⁴ Rooted in the doctrine of state necessity (or self-preservation), states can draw from a variety of techniques to accommodate such states of emergency.⁹⁵ While clawback and other limitation clauses are

⁹¹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 73.

⁹² See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 257; Rosalyn Higgins, ‘Derogations under Human Rights Treaties’ (1976) 48 *British Year Book of International Law* 281, 281.

⁹³ Gross and Aoláin, above n 92, 257.

⁹⁴ Emilie M Hafner-Burton, Laurence R Helfer and Christopher J Fariss, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65 *International Organization* 673, 675.

⁹⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘VCLT’) offers several options of accommodation to its signatory states: reservation (art 19), amendment (art 40), modification (art 41), termination, denunciation or withdrawal (art 54), suspension (art 58), supervening of impossibility of performance (art 61) or to invoke a fundamental change of circumstances (art 62). See also Jaime Oraá, ‘The Protection of Human Rights in Emergency Situations under Customary International Law’ in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999) 413, 435; Gross and Aoláin, above n 92, 17. These other techniques include clawback clauses, escape clauses or waivers. For more on the ‘customary law doctrine of necessity’, see Joan F Hartman, ‘Derogation from Human Rights Treaties in Public Emergencies — A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations’ (1981) 22 *Harvard International Law Journal* 1. Hartman notes that

the customary doctrine of necessity ... excuses a breach of international law when (1) a necessity exists and threatens the preservation of the state, and when (2) the danger is ‘so imminent and overwhelming that time and opportunity are lacking in which to provide other and adequate means of defense’.

At 12–13, quoting Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press, 1928) 119–20.

generally available, including in non-crisis situations,⁹⁶ derogation is reserved for exceptional situations that are temporary in nature. As summarised by Gross and Aoláin: ‘This compromise ... enables continued adherence to the principle of the rule of law and faithfulness to fundamental democratic values, while providing the state with adequate measures to withstand the storm wrought by the crisis’.⁹⁷

Derogation or the authority to curtail the rights of individuals — nationals or aliens — in war or other comparable situations has a reasonably long history as a general principle of international law, derived from consistent municipal rules.⁹⁸ Cheng, in his seminal work *General Principles of Law as Applied by International Courts and Tribunals*,⁹⁹ lists among the principles recognised as general principles of international law, the principles that ‘what is not forbidden is allowed’ as well as the right of self-preservation. In relation to the latter, he provides:

The well-known maxim *Salus populi suprema lex* may thus properly be regarded as one of the general principles of law recognised by civilised nations, within the contemplation of Article 38 I (c) of the *Statute of the [International Court of Justice]* ...¹⁰⁰

which

permits the welfare and security of the nation as a whole to override the rights and interests of individuals, national or alien, subject to the State’s authority; and, in the latter case, it empowers the State to take all necessary measures to protect the nation against external danger and hostility, and, under very exceptional circumstances, even to disregard a minor right of another State or its nationals to preserve its existence. In view, however, of the frequent abuses of the principle of

For more on state necessity as customary international law and in respect of state responsibility, see Robert D Sloane, ‘On the Use and Abuse of Necessity in the Law on State Responsibility’ (2012) 106 *American Journal of International Law* 447. It is important to note that Sloan clarifies his enquiry, at 454:

A fourth category of precedents [on state necessity] could be adduced from (probably hundreds of) treaties that include provisions for derogation or limitation based on exigent circumstances. ... The question is whether diverse primary rule conceptions of necessity exist throughout international law. They clearly do and long have. The question is whether necessity — as a generally applicable, uniform secondary rule, which offers states a potential defense to responsibility for the violation of primary rules in almost any field — is general international law, as custom or otherwise. Treaties that prescribe necessity or a cognate principle as a primary rule do not speak to this issue.

See also International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 194–206 (‘*ILC Report 2001*’).

⁹⁶ See generally Higgins, above n 92, 315.

⁹⁷ Gross and Aoláin, above n 92, 17.

⁹⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2nd revised ed, 2005) 84:

Most constitutions contain emergency clauses that empower the Head of State or Government to take exceptional measures, including restrictions on or suspension of fundamental rights, with or without the consent of Parliament during war or other catastrophic situations.

⁹⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953).

¹⁰⁰ *Ibid* 25.

self-preservation, it may be emphasised at the outset that a proper knowledge of the limits and conditions of its application is just as important as knowledge of the existence of the principle itself.¹⁰¹

Meron has also cautioned that the absence of a non-derogation clause in a particular treaty may well infer that the treaty allows for the excuse or justification of necessity for derogating from the obligations the treaty enshrines.¹⁰² As noted, too, by the UK in 1947 in the drafting discussions to the derogation clause included in the human rights covenants: ‘under general principles of international law, in time of war states were not strictly bound by conventional obligations unless the conventions contained provisions to the contrary’.¹⁰³ Derogation as generally expressed in international human rights treaties is thought an exceptional measure, and is not available in relation to all treaties; notably it is not permissible to derogate from peremptory norms.¹⁰⁴

Derogation is not a ‘model of accommodation’¹⁰⁵ explicitly mentioned in the 1969 *Vienna Convention on the Law of Treaties* (‘*VCLT*’), although the *VCLT* does permit the suspension of conventional obligations ‘in conformity with the provisions of the treaty’.¹⁰⁶ This express omission may be explained by reference to the scope of the *VCLT*, as a treaty on the interpretation of treaties, rather than on the application of other sources of international law, namely international custom and general principles of international law. The *VCLT* also seems to point to a shift away from the principle of ‘what is not forbidden is allowed’ as a general principle of international law, to a requirement that derogation be expressly contained in the treaty itself, not least in light of the growth of human rights treaties and the associated limits on State sovereignty in this regard. Derogation is not completely ignored by the *VCLT*, however; arts 41(1)(b)(ii) and 53 each refer to non-derogable rights, thus accepting that treaties may provide for derogation to other rights. Because of this omission in the *VCLT*, it is now generally considered that if there is no provision in a treaty providing for a possibility of derogation, it can only be understood as an amendment to a treaty,¹⁰⁷ subject to agreement by all parties to a treaty.¹⁰⁸ Derogation from the rules of a treaty not based on a norm allowing it or without the agreement of all parties to the derogation is thus now generally viewed as constituting a violation

¹⁰¹ Ibid 31. On the application of the principle of self-preservation in respect of aliens, in particular around expulsion and exclusion, see at 32–68. Cheng further states, at 74:

If, after every conceivable legal means of self-preservation has first been exhausted, the very existence of the State is still in danger, and if there exists only one single means of escaping such danger, the State is justified in having recourse to that means in self-preservation, even though it may otherwise be unlawful.

¹⁰² Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989) 218–19.

¹⁰³ Working Group on Convention on Human Rights, Commission on Human Rights, *Summary Record of the Eighth Meeting*, UN ESCOR, 2nd sess, UN Doc E/CN.4/AC.3/SR/8 (10 December 1947) 10.

¹⁰⁴ *VCLT* art 53.

¹⁰⁵ See Gross and Aoláin, above n 92, 17 (referring to ‘models of accommodation’).

¹⁰⁶ *VCLT* art 57.

¹⁰⁷ Ibid art 41.

¹⁰⁸ See below Part VI.

and consequently annuls or suspends the treaty in respect of that state.¹⁰⁹ The international law of treaties, therefore, provides that in the absence of a right of a state to derogate, the relevant treaty must be implemented in line with its object and purpose, in good faith, and throughout the entire territory of a state party.¹¹⁰ Where a treaty exists, a close examination of the treaty in question is thus required. For the purposes of this article, it should be noted that the *1951 Refugee Convention* is not silent as to derogation but rather contains two derogation clauses, which require interpretation.¹¹¹

In international law the principle of derogation is most common in the field of human rights. Article 29(2) of the *UDHR* has been classed as the first kind of derogation clause in an international legal document.¹¹² Derogation clauses are also found in many of the main international and regional human rights instruments.¹¹³ Derogation is also known in EU law, which includes the principle

¹⁰⁹ *VCLT* art 60(3) requires a material breach. Treaties enshrining human rights are excluded: at art 60(5): see, eg, *Media Rights Agenda v Nigeria* [2000] African Human Rights Law Reports 200, 208–9, stating that derogation is not permissible under the *African Charter on Human and Peoples' Rights* because it is silent on derogation.

¹¹⁰ *VCLT* arts 29, 31.

¹¹¹ See below Part V.

¹¹² *UDHR* art 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

See also Myres S McDougal, 'Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies' (1974) 14 *Virginia Journal of International Law* 387, 391; Gudmunder Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999), 636.

¹¹³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 3 March 1976) art 4 ('*ICCPR*') provides:

- (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present *Covenant* may take measures derogating from their obligations under the present *Covenant* to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
- (2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
- (3) Any State Party to the present *Covenant* availing itself of the right of derogation shall immediately inform the other States Parties to the present *Covenant*, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

European Convention on Human Rights art 15, titled 'Derogation in Time of Emergency', provides:

- (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this *Convention* to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

in art 64(1) of the *Treaty Establishing the European Community*.¹¹⁴ According to this provision, member states are allowed to derogate from the provisions of the treaty, ‘with regard to the maintenance of law and order and the safeguarding of internal security’. Higgins has identified two types of derogation clauses — *stricto sensu* and general.¹¹⁵ *Stricto sensu* clauses allow derogation in the case of a threat to ‘national security’ or ‘public order’ (also known as ‘limited’ or ‘qualified rights’),¹¹⁶ while general derogation clauses specifically apply in the case of a ‘public emergency’.¹¹⁷ It is the latter which is at issue in this article with its focus on mass influx.

Under international human rights treaties, general derogation clauses are usually included expressly in the treaty itself.¹¹⁸ They are generally subject to five principles: exceptional threat; non-derogability of fundamental rights;

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- (2) No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
 - (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the *Convention* are again being fully executed.

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) (*European Convention on Human Rights*). *American Convention on Human Rights* art 27, titled ‘Suspension of Guarantees’, provides:

- (1) In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present *Convention* to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
- (2) The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
- (3) Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

¹¹⁴ *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 321 E/37 (entered into force 1 November 1993) art 64(1).

¹¹⁵ Higgins, above n 92, 281.

¹¹⁶ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed, 2004) 31–2: examples of limited or qualified rights in the *ICCPR* include arts 12(1)–(2), 13, part of arts 14(1), 18(1), 19(2), 21 and 22.

¹¹⁷ Higgins, above n 92, 281–6.

¹¹⁸ *Ibid.*

proportionality (including temporariness); non-discrimination; and proclamation and notification.¹¹⁹ ‘Temporariness’ has either been seen as an autonomous principle,¹²⁰ or subsumed within the concept of proportionality.¹²¹ It has been posited that (at least some of) these principles are emerging as general principles of international law.¹²²

V DEROGATION AND THE 1951 REFUGEE CONVENTION

A *Derogation, the 1951 Refugee Convention and the Travaux Préparatoires*

The *1951 Refugee Convention* has no general derogation clause equivalent to those in human rights treaties. Hathaway has explained this omission by stating that ‘the drafters of the *Convention* considered, but rejected, an all-embracing power of derogation in time of national crisis’.¹²³ His argument is based on the non-adoption of the UK alternative clause [A], which read as follows: ‘[a] contracting state may at a time of national crisis derogate from any particular provision of this *Convention* to such extent only as is necessary in the interest of national security’.¹²⁴ In fact, this proposal never came to a vote and was therefore never formally rejected nor adopted; rather it was revised in the process of the preparatory works.¹²⁵ The concept of derogation as a general principle of international law was accepted by the drafting conference, while the need for some form of permissible deviations from *Convention* obligations in times of emergency received wide support. In essence, derogation as a concept was not at issue during the drafting debates. Rather, states had differing views on the permissible limits and scope of any derogation clause.

The debate about whether to add a ‘derogation clause’ to the draft convention was based on the already adopted prohibition of exceptional measures on the basis of nationality alone in then art 5 (later renumbered as art 8) and took place mainly in the Ad Hoc Committee on Refugees and Stateless Persons (‘Ad Hoc Committee’).¹²⁶ The UK feared that the prohibition in art 5 would prevent signatory states from taking measures in times of crisis to protect national interest and thereby limit the discretion of states.¹²⁷ It was acknowledged that art 5 was not designed only for times of emergency, and hence calls were made for a

¹¹⁹ Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, 72nd sess, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) (‘*General Comment 29*’); Oraá, above n 95, 416–7; Gross and Aoláin, above n 92, 258–62; Hafner-Burton, Helfer and Fariss, above n 94, 676–7.

¹²⁰ Oraá, above n 95, 416.

¹²¹ See Durieux and McAdam, above n 17, 20.

¹²² Oraá, above n 95, 416.

¹²³ Hathaway, above n 15, 261.

¹²⁴ Ad Hoc Committee on Refugees and Stateless Persons, *United Kingdom: Amendments to Draft Convention relating to the Status of Refugees (E/1618)*, UN ESCOR, 2nd sess, UN Doc E/AC.32/L.41 (15 August 1950) [A] (‘*Proposed UK Amendments*’).

¹²⁵ Davy, ‘Article 9’, above n 15, 784–5.

¹²⁶ For the whole discussion, see Weis, above n 16, 60–75. See also Davy, ‘Article 9’, above n 15, 787.

¹²⁷ Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Thirty-Fourth Meeting*, 11th sess, 34th mtg, UN Doc E/AC.32/SR.34 (14 August 1950) 17; Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Fortieth Meeting*, 2nd sess, 40th mtg, UN Doc E/AC.32/SR.40 (22 August 1950) 36.

specific paragraph to cover the particular case of emergency.¹²⁸ Many delegates at the Ad Hoc Committee, including Belgium, Canada, China, France, Turkey, the US and Venezuela, supported the need for an explicit derogation norm.¹²⁹ A particular concern was that if a derogation clause would not be included, signatory states might limit unilaterally the scope of art 5 by entering reservations to it.¹³⁰ On the other hand, the derogation clause as proposed by the UK was perceived as being too wide and the need for a more precisely defined clause was expressed.¹³¹

The drafting negotiations then moved to consider the UK's second alternative amendment [B] to art 5, which states:

Provided however that at a time of national crisis a Contracting State may apply provisionally any such measure to a refugee on account of his nationality until it is determined that the measure is no longer necessary in the interests of national security.¹³²

The accepted alternative was consequently redrafted by the Drafting Committee and then opened for further discussion, proposed as a second paragraph to art 5, which later became a separate article (art 9).¹³³ Discussions covered two specific issues: first, the articles to which derogation would apply and secondly, the situations in which derogation would be permissible.

On the first issue, states appeared to want the scope of a derogation clause to be applicable to all articles of the *1951 Refugee Convention*.¹³⁴ The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ('Conference of Plenipotentiaries') endorsed the UK's intention to make the derogation clause applicable to all rights enshrined in the *Convention*,¹³⁵ reflected by the wording of art 9 in the *Convention* as: 'Nothing in this *Convention*'.¹³⁶

With this agreement in hand, the discussions then turned to focus on the second issue, that of the circumstances in which a signatory state may apply provisional measures to limit its obligations under the *1951 Refugee Convention*. A proposal to have a general 'national security' basis for derogation was regarded as too wide and open to abuse;¹³⁷ to incorporate 'time of grave tension,

¹²⁸ Weis, above n 16, 64.

¹²⁹ Ibid 66.

¹³⁰ Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting*, 2nd sess, 35th mtg, UN Doc E/AC.32/SR.35 (1950) 6.

¹³¹ Ibid. See also Weis, above n 16, 65.

¹³² *Proposed UK Amendments*, UN Doc E/AC.32/L.41, [B].

¹³³ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-Fourth Meeting*, UN GAOR, 34th mtg, UN Doc A/CONF.2/SR.34 (30 November 1951) 23.

¹³⁴ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Draft Convention relating to the Status of Refugees*, UN GAOR, Agenda Item 6, UN Doc A/CONF.2/16 (3 July 1951).

¹³⁵ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixth Meeting*, UN GAOR, 6th mtg, UN Doc A/CONF.2/SR.6 (20 November 1951) 13 ('*Conference of Plenipotentiaries Sixth Meeting*').

¹³⁶ Davy, 'Article 9', above n 15, 791. Modern limits on derogation and alternative arguments to this approach are discussed later in this paper: see below Part VII.

¹³⁷ Australia's proposal was rejected by Canada, France, Israel, UK, Switzerland and the Netherlands: *Conference of Plenipotentiaries Sixth Meeting*, UN Doc A/CONF.2/SR.6, 14.

national or international' was also rejected;¹³⁸ while the Netherlands' more tightly crafted wording — '[war or] other grave and exceptional circumstances' — was finally settled upon and adopted by 16 votes to none, with 4 abstentions.¹³⁹ The UK amendment [B], with this change included, was then adopted.¹⁴⁰ It can be seen that there was thus an intention to keep the situations in which derogation were permissible to specific situations, not every threat to national security, yet the concept of derogation was accepted nonetheless. This article now turns to look at these two so-called derogation clauses in more detail.

B Article 8 of the 1951 Refugee Convention

Article 8 ('Exemption from Exceptional Measures') of the *1951 Refugee Convention* provides:

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign state, the Contracting States shall not apply such measures to a refugee who is formally a national of the said state solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 8 reflects the state of international law at the time of drafting, which permitted derogations from international obligations (based on consistent municipal law) generally in situations of armed conflict, crisis or other similar emergencies, as well as on the basis of nationality.¹⁴¹ The entry phrase to art 8 reads: 'With regard to exceptional measures which may be taken',¹⁴² pointing to a general acceptance of such derogation as inherent in the *Convention*. In other words, the *Convention* did not intend to alter the general position at international law by art 8, except as far as discrimination on the basis of nationality was at issue.

The 'model provision'¹⁴³ for art 8 of the *1951 Refugee Convention* was art 44 of the 1949 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*,¹⁴⁴ which provides an exception to treatment permitted in times of war against enemy aliens to bona fide refugees who do not enjoy the protection of any government.¹⁴⁵ The 'exceptional measures' (or derogations) contemplated

¹³⁸ Ibid 16. This proposal, also put forward by Australia, was rejected by seven votes to three, with nine abstentions: Weis, above n 16, 68–9.

¹³⁹ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Seventh Meeting*, UN GAOR, 7th mtg, UN Doc A/CONF.2/SR.7 (20 November 1951) 4 ('*Conference of Plenipotentiaries Seventh Meeting*'); Weis, above n 16, 69.

¹⁴⁰ *Conference of Plenipotentiaries Seventh Meeting*, UN Doc A/CONF.2/SR.7 (16 votes to none, with 4 abstentions).

¹⁴¹ See, eg, the US cases on internment during the Second World War: *Hirabayashi v United States*, 320 US 81 (1943); *Korematsu v United States*, 323 US 214 (1944).
¹⁴² *1951 Refugee Convention* art 8.

¹⁴³ Davy, 'Article 9', above n 15, 758.

¹⁴⁴ *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').

¹⁴⁵ Ibid art 44 provides:

by the drafters of the *1951 Refugee Convention* primarily referred to those taken against 'enemy aliens' in war or other situations of armed conflict, although the drafters also discussed 'national crises or emergencies' as well as 'economic conflicts between states'.¹⁴⁶ According to Davy, the measures that may be taken against the person relate to restrictions on individual rights, including freedom of movement and the right to liberty (internment), the rights of association or to practice one's profession.¹⁴⁷ The measures in relation to property include forfeiture of, or restrictions on, acquisition of rights over all forms of property broadly defined;¹⁴⁸ while the term 'interests' refers to property or other entitlements.¹⁴⁹

In comparison to general derogation clauses, however, art 8 actually carves out an exception to the generally accepted position at international law, based on a growing number of countries during the Second World War having introduced laws exempting such persons from measures taken against enemy aliens.¹⁵⁰ In essence art 8 prohibits the application of 'exceptional measures' that may be taken against any person, property or interests of refugee aliens on the basis of nationality alone. In other words, it is a non-discrimination provision, reemphasising the non-discrimination clause in art 3 and the 'special status' of refugees under international law.¹⁵¹ In addition, it requires states to grant exemptions in favour of refugees where their national laws do not permit general non-discrimination exemptions, although this is loosely worded to apply only in 'appropriate cases'.

In applying the measures of control mentioned in the present *Convention*, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy state, refugees who do not, in fact, enjoy the protection of any government.

See also Jean S Pictet (ed), *Commentary: Geneva Convention relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958) vol 4, 264–5:

The article [art 44] does not give refugees an absolute right to exemption from security measures. It is only an urgent recommendation to belligerents. The status of refugees does not of itself give anyone a right to immunity. It does not prevent the adoption of security measures, internment for example. There may conceivably be among the refugees people whose political convictions or activities represent a danger to the security of the State, which would then be entitled to resort to the necessary control measures to the same extent and subject to the same conditions as for any person protected under the [*Fourth Geneva*] *Convention*.

In view of the complexity of the problem and the variety of cases which may occur in practice, the Conference had to confine itself to laying down general rules of a sufficiently flexible character, leaving a great deal to the discretion of government. In the absence of more detailed rules, which it did not appear either possible or advisable to lay down, it is to be hoped that belligerents will apply this Article in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees.

¹⁴⁶ Davy, 'Article 8', above n 15, 771.

¹⁴⁷ *Ibid* 772.

¹⁴⁸ *Ibid* (indicating that this would include 'land, bonds, equities, currencies, gold, silver, a share in enterprises, artistic property, or the like').

¹⁴⁹ *Ibid*.

¹⁵⁰ Pictet, above n 145, 263.

¹⁵¹ *Ibid* 765.

Article 8 does not, however, exempt entirely refugees from exceptional measures; only if the measures are discriminatory in nature. While much of the implicit acceptance of the permissibility of exceptional measures on nationality grounds has now been overtaken by developments in international human rights law, not least the recognition of the prohibition on race discrimination as a *ius cogens* norm,¹⁵² not every exceptional measure against a refugee would violate non-discrimination principles. Where it can be established that there is an objective and reasonable justification to distinguish between nationals and non-nationals in relation to a particular measure, it would not be prohibited under international law.¹⁵³ Refugees arriving in a mass influx could thus be subjected to exceptional measures (for example, in the form of temporary protection or restrictions on freedom of movement) because of the threat that the influx may pose to state security but not because of their status as refugees per se or their particular nationality.

In summary, art 8 is not a general derogation clause — in the sense that it does not permit derogations from the rights in the *1951 Refugee Convention* generally. Rather, the argument made here is that the provision reflects the general position at international law relating to derogation at the time of drafting such that the drafters accepted derogation as inherent in the *Convention* and thus as being applicable in respect of *Convention* refugees, subject to relevant safeguards. In fact, what art 8 added to the accepted state of international law on derogations was an exception such that ‘exceptional measures’ may not be taken in respect of refugees solely on account of their nationality. Operating as an exception to derogation, it is implicit in the provision that ‘exceptional measures’ may be taken by states parties in certain circumstances. Article 9 elaborates those circumstances.

C Article 9 of the 1951 Refugee Convention

Article 9 (‘Provisional Measures’) is the second ‘derogation’ clause in the *1951 Refugee Convention*. It provides:

Nothing in this *Convention* shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.¹⁵⁴

Like art 8, art 9 is not framed as a ‘general derogation clause’ permitting states parties to suspend or curtail rights across the board in a state of emergency. Rather the derogations must be applied on an individual basis, based on the merits of that case, and they cannot be taken solely on the basis of nationality (per arts 3 and 8).¹⁵⁵ The suspension of rights continues until refugee status is

¹⁵² *South West Africa (Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 293 (Judge Tanaka): ‘We consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law’.

¹⁵³ See, eg, Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (11 October 1989) [13].

¹⁵⁴ *1951 Refugee Convention* art 9.

¹⁵⁵ *Ibid* arts 3, 8. See also Wouters, above n 45, 132.

granted, or if recognised as a refugee, the measures can remain in place as long as they are necessary.¹⁵⁶

As noted above, '[t]he drafters intended to allow States to withhold substantive rights from refugees if faced with a mass influx during wartime or other crises'.¹⁵⁷ Despite the drafters' intentions, the situations in which art 9 applies are imprecise: for example, the provision does not define the measures that may be imposed, except that they must be essential to 'national security'.

In relation to what constitutes a threat to national security for the purposes of art 9, it is generally understood to be broader than armed conflict, and could include threats to overthrow the state by illegal means,¹⁵⁸ terrorism¹⁵⁹ or other serious disturbances to public order.¹⁶⁰ Further, as the United Nations Security Council has noted on a number of occasions that mass displacement can itself constitute a threat to international peace and security,¹⁶¹ it is arguable that such situations could, where evidence is substantiated, qualify as an 'emergency' or 'national security threat' justifying derogation under art 9. In fact, mass influxes were also in the minds of the drafters.

On the question of rights, the *travaux préparatoires* suggests that the main rights at issue were those relating to freedom of movement,¹⁶² although imposing restrictions on the possession of wireless apparatus and confiscated property was also discussed.¹⁶³ Very few rights were in fact mentioned explicitly in the derogation debates and thus it begs the question whether the language of '[n]othing in this *Convention*' (see also above) can be taken to mean that there are no limits on rights fallings within the scope of art 9. Rather, it is argued that the text reflects merely that nothing in the *Convention* prohibits derogation. It does not follow as a consequence that derogation is permissible against *all* of the rights in the *Convention*.

The inclusion of art 8 supports this interpretation, as that provision was designed to ensure that there could be no derogation on discriminatory grounds, thus already highlighting at least one exception to the general rule. Two other clauses — arts 3 (non-discrimination on account of race, religion or country of origin) and 4 (religious freedom) — would equally fall within the non-derogable

¹⁵⁶ Davy, 'Article 9', above n 15, 800, rejecting Hathaway's position that such provisional measures can only apply to asylum seekers until determined to be refugees: Hathaway, above n 15, 261. Davy's approach appears more in line with the *travaux préparatoires*.

¹⁵⁷ Wouters, above n 45, 132. See also Davy, 'Article 9', above n 15, 787.

¹⁵⁸ Hathaway, above n 15, 263.

¹⁵⁹ *A v United Kingdom* (2009) 49 EHRR 29, 263.

¹⁶⁰ See *OAU Refugee Convention* art I(2). See also art III which includes subversive activities.

¹⁶¹ See, eg, SC Res 688, UN SCOR, 46th sess, 2982nd mtg, UN Doc S/RES/688 (5 April 1991) (in respect of Iraq); SC Res 841, UN SCOR, 48th sess, 3238th mtg, UN Doc S/RES/841 (16 June 1993) (in respect of Haiti); SC Res 1199, UN SCOR, 53rd sess, 3930th mtg, UN Doc S/RES/1199 (23 September 1998) (in respect of Kosovo). For more on the interrelationship between security discourse and refugees, see Alice Edwards and Carla Ferstman, 'Humanising Non-Citizens: The Convergence of Human Rights and Human Security' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 3. The Security Council has recognised 'with concern the incidents of humanitarian crises, including mass displacements of population becoming or aggravating threats to international peace and security': *Note by the President of the Security Council*, UN SCOR, 48th sess, UN Doc S/25344 (26 February 1993) 2.

¹⁶² Davy, 'Article 8', above n 15, 787.

¹⁶³ Weis, above n 16, 61.

category both being non-discrimination provisions of similar character. It is thus arguable that other rights — in particular the prohibition on *refoulement* in art 33 — are also non-derogable.¹⁶⁴

The main limitation in art 9 appears to be that it is phrased so as to suggest that restrictions on the enjoyment of *Convention* rights can only apply in respect of specific individuals ('in the case of a particular person') and not more broadly, for example, to groups of refugees.¹⁶⁵ While several commentators adopt this interpretation, it is not necessarily fully supported by the drafting history or context of the *Convention*. First, all of the provisions in the *Convention* are drafted in individualistic terms but this has not prevented them from being applied on a group basis in practice, whether or not the group approach confers a benefit or a disadvantage. Examples of such group application include the recognition of refugees on a prima facie basis under the definition in art 1(A).¹⁶⁶ Similarly, the cessation clauses in art 1C(5) and (6) also use the singular pronoun yet they have been most commonly applied to groups of refugees. Secondly, accepting only an individualistic approach to art 9 defeats its purpose to enable states to respond to large-scale movements of asylum seekers (which is the essence of the drafting debates), including to screen out enemy aliens. While the provision may be applied on a collective basis, the suspension of the *Convention* on a group basis would last only until screening has been completed, such screening taking place on an individual basis.¹⁶⁷ Further, any continuation of provisional measures in respect of a particular refugee would only be permitted if necessary in the interests of national security and continue as long as necessary. This is the better explanation for the inclusion of the language of 'particular person'¹⁶⁸ — as an added safeguard, rather than as a measure to prevent states from relying on the provision on an initial group basis in mass influx situations.

VI IMPLIED DEROGATION BY SUBSEQUENT AGREEMENT OF STATES

The above sections looked at arts 8 and 9 of the *1951 Refugee Convention* as the legal basis for derogation under the *Convention*. If those arguments are not considered wholly persuasive, an alternative accommodation technique worth exploring is that of implied derogation. Implied derogation is a violation of treaty rights emerging by subsequent agreement, which has the effect of varying the treaty. Implied derogation has not been looked at previously in the literature on

¹⁶⁴ *Non-refoulement* is discussed later in this paper: see below Part VII.

¹⁶⁵ Davy, 'Article 9', above n 15, 800.

¹⁶⁶ See *1951 Refugee Convention* art 1(A). See also Jackson, above n 50. While prima facie recognition to groups is usually done in pursuance of the broader definition of a 'refugee' in art 1(2) of the *OAU Refugee Convention* there is nothing in the *1951 Refugee Convention* to prevent a similar approach: Edwards, above n 50.

¹⁶⁷ Weis, above n 16, 75.

¹⁶⁸ *1951 Refugee Convention* art 9.

refugee rights,¹⁶⁹ and references to the concept are hard to find in public international law texts.¹⁷⁰

According to Orakhelashvili, derogation is a violation of a specific character — ‘a violation by conspiracy, by agreement’.¹⁷¹ In this way he acknowledges the existence of implied or informal derogations, ‘where acquiescence or waiver may result in an implicit or informal agreement.’¹⁷² He indicates that the conduct of states can cause an implicit or informal derogation to a treaty. The same limitations on express derogation would apply to implied derogation. Article 41 of the *VCLT* would appear to accept this interpretation and interestingly adds a notification requirement.¹⁷³

In its 1981 Conclusion on *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, for example, the ExCom accepted that mass influx situations may lead to variation in rights for ‘asylum seekers’.¹⁷⁴ According to this Conclusion, at a minimum, ‘asylum seekers’ should be provided with admission to safety, protection from *refoulement*, basic human rights and end of stay as soon as conditions permit.¹⁷⁵ The lack of reference to the *1951 Refugee Convention* has been explained by the fact that the Conclusion was designed primarily to respond to the Indo-Chinese refugees to whom the *Convention* did not apply while they remained in the territories of non-party states.¹⁷⁶ Despite its initial narrower coverage to apply to non-party states, it has been recalled on many subsequent occasions to apply to refugees in the territories of both state and non-party states. In fact there have been at least thirteen ExCom conclusions

¹⁶⁹ See, eg. Davy, ‘Article 8’, above n 15; Goodwin-Gill and McAdam, above n 15; Robinson, above n 15; Grahl-Madsen, above n 15; Hathaway, above n 15; Weis, above n 16; Durieux and McAdam, above n 17.

¹⁷⁰ In fact, many major international legal texts do not address the question of derogation: see, eg. Ian Brownlie, *Principles of International Law* (Oxford University Press, 6th ed, 2003); Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005). Some texts on international human rights law also do not refer to derogation: Richard B Lillich et al, *International Human Rights: Problems of Law, Policy and Practice* (Aspen, 4th ed, 2006).

¹⁷¹ Orakhelashvili, above n 91, 73.

¹⁷² *Ibid* 74.

¹⁷³ *VCLT* art 41 provides:

- 1 Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
- 2 Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

¹⁷⁴ *ExCom Conclusion 22*, above n 36.

¹⁷⁵ *Ibid*.

¹⁷⁶ McAdam, above n 44, 247: *ExCom Conclusion 22* ‘filled a gap by identifying existing normative standards for States not bound by the *Convention* or *Protocol*’. See also *ExCom Conclusion 22*, above n 36.

dealing with mass influx situations, since 1977.¹⁷⁷ Reiterating its 1979 Conclusion, the ExCom noted in 2004 ‘that persons who arrive as part of a mass influx seeking international refugee protection should always receive it, at least on a temporary basis’.¹⁷⁸

In the same year, the UNHCR, pursuant to its mandate for supervising the implementation of international treaties associated with refugees,¹⁷⁹ reaffirmed this view, stating that

mass influx might be managed through the device of temporary protection, when, based on certain indicators, the need for international protection is expected to be of reasonably short duration ... such granting of temporary protection neither pronounces on nor compromises eligibility under the *Convention*, but, in the interim term, ensures that immediate international protection needs are met.¹⁸⁰

Explained this way, temporary protection becomes a device to delay or suspend the application of the *1951 Refugee Convention*. The UNHCR did not clarify in the above document what the ‘certain indicators’ would be to justify temporary protection over *Convention* protection in mass influx situations. The internal structure of the *Convention* suggests that such indicators would include the existence of a state of emergency, such as a ‘war, or other grave and exceptional circumstances’.¹⁸¹

In addition to ExCom conclusions, the UN General Assembly (‘UNGA’) has also acknowledged the legitimacy of temporary refuge in situations of large-scale influx.¹⁸² While the relevant resolutions do not reference explicitly the *1951 Refugee Convention*, they do refer to existing obligations of states. Furthermore, while the ExCom and the UNGA are composed of *Convention* as well as non-*Convention* states, temporary protection in mass influx situations has developed as a response mechanism by both, and arguably in some situations — namely to civilian war victims — is a customary norm.¹⁸³

In terms of state practice, there have many situations in which a *Convention* state has resorted to temporary protection and *Convention* rights have been in effect suspended, at least in the preliminary stages of an influx, and this has not

¹⁷⁷ *ExCom Conclusion 5*, above n 82; *ExCom Conclusion 11*, above n 82; *ExCom Conclusion 14*, above n 82; *ExCom Conclusion 15*, above n 82; *ExCom Conclusion 19*, above n 82; *ExCom Conclusion 21*, above n 82; *ExCom Conclusion 22*, above n 36; *ExCom Conclusion 23*, above n 82; *ExCom Conclusion 68*, above n 82; *ExCom Conclusion 71*, above n 82; *ExCom Conclusion 74*, above n 36; *ExCom Conclusion 100*, above n 39; *ExCom Conclusion 103*, above n 36.

¹⁷⁸ *ExCom Conclusion 100*, above n 39, Preamble. See also *ExCom Conclusion 15*, above n 82, [f].

¹⁷⁹ *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UN GAOR, 5th sess, 325th plen mtg, Agenda Item 32, UN Doc A/RES/428(V) (14 December 1950) para 8(a) (‘*Statute of Office of UNHCR*’): ‘Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto’. Read in conjunction with *1951 Refugee Convention* art 35(2); *1967 Protocol* art 2.

¹⁸⁰ *Protection and Cooperation in Mass Influx Situations*, UN Doc EC/54/SC/CRP.11, [6].

¹⁸¹ *Refugee Convention* art 9. See below Part V.

¹⁸² *Report of the United Nations High Commissioner for Refugees*, UN Doc A/RES/37/195, para 4; *Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/44/137, para 3; *Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/49/169, para 7.

¹⁸³ Hartman, ‘The Principle and Practice of Temporary Refuge’, above n 24.

invoked the criticism of other states to suggest that there is a lack of agreement around such practices.¹⁸⁴

Perhaps the most explicit example of such subsequent agreement is the *EU TP Directive*, which is secondary legislation of the EU. All EU member states are party to the *1951 Refugee Convention*. While the *EU TP Directive* indicates that it is without prejudice to *1951 Refugee Convention* obligations,¹⁸⁵ its intent is to suspend or not to apply the *1951 Refugee Convention* in mass influx situations and it provides varied standards of treatment to those admitted on this basis. While some EU member states argued during its elaboration that the groups of persons to whom the *EU TP Directive* applies do not fall within the *1951 Refugee Convention* and thus there is no question to answer, both the European Commission and the UNHCR acknowledged that ‘the persons concerned may well include many refugees within the meaning of the *Geneva Convention*’.¹⁸⁶ While there was considerable objection to the temporary protection regime of the 1990s in respect of persons fleeing the conflicts in the former Yugoslavia by scholars and non-governmental organisations alike, the *EU TP Directive* has not drawn the same level of objection from either EU or non-EU *Convention* states, supporting the argument that temporary protection in mass influx situations is an accepted form of implied derogation via subsequent agreement of states parties to the *Convention*.¹⁸⁷

While further research is needed in this area, the above preliminary review suggests that states parties to the *1951 Refugee Convention* accept that *Convention* rights may be suspended in the event of a mass influx of asylum seekers in certain circumstances. In other words, states parties agree — via

¹⁸⁴ Examples of mixed movements in which temporary forms of protection were applied and the *1951 Refugee Convention/1967 Protocol* was not activated in states parties include Chileans into Argentina in 1975 (Argentina acceded to the *Convention* in 1961 and to the *Protocol* in 1968); Cubans into Costa Rica in 1980 (Costa Rica acceded to the *Convention* in 1978 and the *Protocol* in the same year); Iraqi Kurds into Iran in 1986 and again in 1991 (Iran acceded to both the *Convention* and the *Protocol* in 1976); Haitians into Honduras and Jamaica in 1991–94 (Honduras acceded to both the *Convention* and the *Protocol* in 1992, while Jamaica acceded to *Convention* in 1964 and the *Protocol* in 1980); and most recently, Libyans into Tunisia in 2011 (Tunisia acceded to the *Convention* in 1957 and the *Protocol* in 1968). See United Nations High Commissioner for Refugees, *UNHCR Annual Reports* (2012) <<http://www.unhcr.org/pages/49e455386.html>>.

¹⁸⁵ *EU TP Directive* [2001] OJ L 212/12, Preamble paras 10–11, 18.

¹⁸⁶ Explanatory Memorandum, *Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member State in Receiving Such Persons and Bearing the Consequences Thereof* [2000] OJ C 311 E/251, para 5.6. United Nations High Commissioner for Refugees, ‘Annotated Comments on *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof* (Annotated Comments, 19 May 2003) 5 which provides: ‘beneficiaries of temporary protection are refugees of concern to the Office. This is particularly obvious in relation to sub-para [2]c(ii) since persons fleeing such risks would squarely come within the purview of the *1951 Convention*’.

¹⁸⁷ For critiques, see Roxström and Gibney, above n 34.

subsequent agreement — that the *Convention* impliedly permits the derogation of certain rights in mass influx situations.¹⁸⁸

VII LIMITS ON DEROGATION AND THE 1951 REFUGEE CONVENTION

This article has argued that the *1951 Refugee Convention* provides for derogation. Nonetheless, the ability to derogate from *Convention* rights is not unlimited, whether express or implied. This Part thus argues that any actual or implied existing right to derogate from the *Convention* should be read as limited by principles of derogation in the wider field of international law, especially international human rights law. It does not suggest that international human rights law provides an additional implied right of derogation from the *Convention*.

The general principles that apply to and/or are contained in human rights treaties arguably also reflect the state of international law today and, by extension, apply to the *1951 Refugee Convention* (by virtue of the wording and drafting history of arts 8 and 9). The general wording and the *travaux préparatoires* — recounted above — noted, for example, that arts 8 and 9 were intended to reflect general principles of international law relating to derogation, which would include any limits on derogation established thereunder. In addition, as a human rights treaty and as there is considerable overlap between the states parties to the *Convention* and the main international human rights treaties in which derogation is permitted, it makes sense that derogation under the *Convention* should match the schema developed in the human rights system.¹⁸⁹ The institution of derogation in international human rights law is well accepted, and thus any derogation under the *Convention* should be compatible with its development under international human rights law and international law more generally.

To establish a separate set of rules for derogation under the *1951 Refugee Convention* would lead only to conflict in treaty rules and obligations, which should, as far as possible, be avoided. The International Law Commission ('ILC') in their study on the fragmentation of international law noted that while '[i]n conditions of social complexity, it is pointless to insist on formal unity [of rules]',¹⁹⁰ it nonetheless emphasised that there is a presumption of consistency that ought to apply in international law so that normative conflicts can — as far as possible — be avoided or at least mitigated.¹⁹¹ Oraá has argued, too, that the basic workings of derogation under international human rights law form general

¹⁸⁸ An alternative argument is that states parties consider those arriving within a particular mass influx situation not to be refugees within the meaning of the *1951 Refugee Convention*, rather than admit they have suspended or are not applying the *Convention*. The most commonly cited example is that of the Bosnians entering Europe during the 1991–95 conflict who were granted temporary protection and individual refugee status determination was suspended: see, eg, *ibid*.

¹⁸⁹ The human rights basis of the *1951 Refugee Convention* is evident by the reference in its Preamble to the *UDHR* and as its object and purpose is 'to assure refugees the widest possible exercise of these fundamental rights and freedoms'. See also Edwards, above n 27, 293.

¹⁹⁰ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) [16] ('*Fragmentation of International Law*').

¹⁹¹ *Ibid* [37]–[39].

principles of international law.¹⁹² What, therefore, are the general limits on derogation as applicable to the *Convention*?

First and foremost, derogations must be of an 'exceptional and temporary nature'.¹⁹³ For compatibility with art 4 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),¹⁹⁴ for example, a typical human rights derogation clause, the situation must amount to a public emergency which threatens the life of the nation.¹⁹⁵ While the Security Council has declared that mass influxes of refugees could pose a threat to international peace and security (as noted above), whether a *particular* 'mass influx' constitutes a threat to national security justifying the designation of a state of emergency, it would need to be determined on a case-by-case basis. In other words, not every objectively described 'mass or large-scale influx' would qualify to invoke 'exceptional measures' in art 9 of the *1951 Refugee Convention* or via implied derogation. This is because 'mass influx' is commonly accepted to be determined by the size of the movement of persons, the rate of arrival and the absorption or response capacity in the particular state,¹⁹⁶ rather than the threat to the survival of the state. As described by Coles, the consequences of a mass influx can make settlement in the country of first asylum very difficult, but even in these circumstances, sanctuary on at least a temporary basis is still required.¹⁹⁷ A careful analysis of whether a particular mass influx is a justifiable basis for derogating from rights in the *Convention* must be made in each case and labels such as 'mass influx' should not be used to provide a blanket basis for derogation.

As an 'emergency power',¹⁹⁸ derogation clauses permit suspension of specific rights only in situations necessitating such suspensions. The UN Human Rights Committee ('HRC') has indicated that such emergencies need to be temporary and exceptional,¹⁹⁹ and the suspension 'may only last as long as the life of the nation concerned is threatened'.²⁰⁰ The majority of the ECtHR in *Lawless v Ireland*²⁰¹ held too that a 'public emergency' for the purposes of art 15 of the *European Convention on Human Rights* ('*ECHR*') (that *Convention's* derogation clause) is 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community which composes the state in question'.²⁰² In the *Greek Case*, a majority of the European Commission on Human Rights identified four elements to establish a 'public emergency' under art 15: the emergency must be actual or imminent; its effects must involve the whole nation; the continuance of the organised life of

¹⁹² Oraá, above n 95.

¹⁹³ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11, [2].

¹⁹⁴ *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 3 March 1976).

¹⁹⁵ *Ibid* art 4.

¹⁹⁶ See *ExCom Conclusion 100*, above n 39, [a]. See also the discussion above Part II(A).

¹⁹⁷ G J L Coles, above n 22, 191.

¹⁹⁸ Gross and Aoláin, above n 92, 248.

¹⁹⁹ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11, [2].

²⁰⁰ United Nations Human Rights Committee, *General Comment No 5: Derogation of Rights (Art 4)*, 13th sess, UN Doc HRI/GEN/1/Rev.9 (31 July 1981) [3].

²⁰¹ *Lawless v Ireland (No 3)* (1961) Eur Court HR (ser A).

²⁰² *Ibid* 28.

the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the *ECHR* for the maintenance of public safety, health, and order, are plainly inadequate.²⁰³ In *A v United Kingdom*, in its most recent jurisprudence, the ECtHR accepted that the current context of post-9/11 terrorism constitutes an emergency which would justify derogation per art 5 of the *ECHR*.²⁰⁴

In its advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court of Human Rights likewise provided:

The starting point for any legally sound analysis of art 27 [Suspension of Guarantees] and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely 'in time of war, public danger, or other emergency that threatens the independence or security of a state Party.'

And even then, it permits the suspension of certain rights and freedoms only 'to the extent and for the period of time strictly required by the exigencies of the situation.' Such measures must also not violate the state Party's other international legal obligations, nor may they involve 'discrimination on the ground of race, color, sex, language, religion or social origin.'²⁰⁵

The drafting history of art 4 of the *ICCPR* explains that states of emergency would include external war, internal rebellion or unrest and natural disasters, 'so long as the qualitative measure of severity ('threatens the life of the nation') is met'.²⁰⁶ In the case of the *1951 Refugee Convention*, the situation must constitute a 'war or other grave and exceptional circumstances'.²⁰⁷ As the *1951 Refugee Convention* was originally established to respond to the mass movements of refugees from the Second World War, mass movements alone would not be an adequate basis. For derogation from *Convention* obligations in situations of mass influx to be permitted, the mass influx must be within the context of war or otherwise create a situation of grave and exceptional circumstance that threatens national security; or alternatively, the influx itself must threaten the life of the nation.

The second common feature of derogation clauses is that the state party must officially proclaim a state of emergency, including informing in writing the relevant governing committee or court of any derogation pursuant to that proclamation. While art 9 does not provide for any express reporting obligations, notification to the UNHCR would be compatible with the High Commissioner's 'supervisory responsibility' over the implementation of the *1951 Refugee*

²⁰³ *Denmark v Greece* (1969) 31 Eur Comm HR 1, 70 [113] ('*Greek Case*'). The *Greek Case* also involved complaints made by Norway, Sweden and the Netherlands against Greece.

²⁰⁴ *A v United Kingdom* (2009) 49 EHRR 29, 263. See also *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A). For more on the European approach to derogation, see Higgins, above n 92, 288–307.

²⁰⁵ *Habeas Corpus in Emergency Situations (Arts 27(2), 25(1) and 7(6) of the American Convention on Human Rights) (Advisory Opinion)* [1987] Inter-Am Court HR (ser A) No 8, [19].

²⁰⁶ Joan F Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985) 7 *Human Rights Quarterly* 89, 98. Hartman refers to the French draft which made specific reference to 'public disaster': *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and the Proposed Additional Articles*, 6th sess, UN Doc E/CN.4/365 (22 March 1950) 20.

²⁰⁷ *1951 Refugee Convention* art 9.

Convention by states parties. Article 35 expressly includes reporting obligations on states' implementation of *Convention* obligations.²⁰⁸

Thirdly, the measures taken pursuant to a derogation must be limited to the strict exigencies of the situation, such that they are time-bound, necessary and proportionate.²⁰⁹ The HRC has noted in relation to the scope of derogation that '[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a state party derogating from the *Covenant*'.²¹⁰ Derogations cannot be used to justify long-term failures to implement treaty obligations. Thus, while an initial influx of refugees may justify derogation, as the situation stabilises and basic rights and services can be restored, the derogation needs to be lifted.

The fourth limitation on derogation is that measures pursued must not be discriminatory in purpose or effect,²¹¹ which is also explicitly noted in art 8 of the *1951 Refugee Convention* and detailed above.

Fifthly and finally, as already noted, derogation is not permitted to the most fundamental of rights.²¹² While the drafting history of the *1951 Refugee Convention* suggests that the states parties wanted an unfettered right to derogate from any of the *Convention* rights, it is widely accepted that *jus cogens* and other non-derogable norms continue to apply regardless of an emergency. Rights that have taken on the character of peremptory norms of international law include, for example, the prohibitions relating to torture, apartheid, genocide, race discrimination, and slavery.²¹³ As explained by art 53 of the *VCLT*: 'For the purposes of the present *Convention*, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'.²¹⁴ As noted, too, by the International Criminal Tribunal for the Former Yugoslavia:

Because of the importance of the values [such norms] protect ... this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.²¹⁵

Apart from *jus cogens* norms, the ILC has stated that there 'may be other types of general law that may not permit derogation ... [i]n regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding.'²¹⁶

²⁰⁸ Ibid art 35. See also *Statute of Office of UNHCR*, UN Doc A/RES/428(V).

²⁰⁹ *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11, [2]–[4].

²¹⁰ Ibid [1].

²¹¹ Ibid [8].

²¹² Ibid [11].

²¹³ Cassese, above n 170, 203; *ILC Report 2001*, UN Doc A/56/10 (2001), 208.

²¹⁴ *VCLT* art 53.

²¹⁵ *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/I-T, 10 December 1998).

²¹⁶ *Fragmentation of International Law*, UN Doc A/CN.4/L.682, [108], citing, inter alia, *Oscar Chinn (United Kingdom v Belgium)* [1934] PCIJ (ser A/B) No 63, 132–5, 149 (Judges Eysinga and Schücking).

One particular right at issue in the context of large-scale refugee movements is that of *non-refoulement*. While *non-refoulement* is accepted as a principle of customary international law, including non-rejection at the frontier,²¹⁷ the second paragraph in art 33 allows for an exception to the rule. Article 33(2) permits lawful *refoulement* in respect of refugees who pose a threat to national security or, having been convicted of a particularly serious crime, a danger to the community.²¹⁸ Such an exception speaks against art 33 being able to achieve the status of a *jus cogens* norm, against which no derogation is permitted. In other words, art 33 is not an absolute prohibition against *refoulement*. This does mean, however, that a state may derogate from its *non-refoulement* obligations beyond the specific wording of the provision (see further below).

In the context of mass movements of refugees, the Swiss, Dutch and other representatives at the Conference of Plenipotentiaries wanted it recorded that art 28 (the then equivalent to art 33) did not compel states to allow mass migration across its frontiers.²¹⁹ Their concerns were duly placed on the record.²²⁰ However, in spite of this, the final version of art 33, on its plain reading, does not include this exception. In fact, the language of art 33(1) indicates that *refoulement* 'in any manner whatsoever' is not allowed. Secondly, the exceptions to art 33(1) are listed in para 2 and are exhaustive. The *VCLT*, which notes that the drafting history is only of secondary utility where the ordinary meaning does not provide the answer,²²¹ supports a strict interpretation of the norm.²²² Further, the drafting history did not otherwise discuss *refoulement* in the art 9 debates.

Arguments other than my own relating to the nature of the *non-refoulement* obligation have been posited and ought to be addressed. Hathaway, for example, asserts that the obligation of *non-refoulement* in art 33 of the *1951 Refugee Convention* is merely a 'qualified duty'. In short, he argues that it is possible to impliedly limit the principle of *non-refoulement* in mass influx situations where

²¹⁷ United Nations High Commission for Refugees, *Declaration of States Parties to the 1951 Refugee Convention and or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (16 January 2002) Preamble para 4; Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 65 (XLII)*, 42nd sess (1991) [c].

²¹⁸ *1951 Refugee Convention* art 33(2) provides that lawful *refoulement* is permitted if 'there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is' or if the refugee 'having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

²¹⁹ *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, UN GAOR, 16th mtg, UN Doc A/CONF.2/SR.16 (23 November 1951) 6; *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-Fifth Meeting*, UN GAOR, 35th mtg, UN Doc A/CONF.2/SR.35 (3 December 1951) 21 ('*Conference of Plenipotentiaries Thirty-Fifth Meeting*'). See also Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 50–1. The other countries included France, Italy, Sweden, the Netherlands and the Federal Republic of Germany.

²²⁰ *Conference of Plenipotentiaries Thirty-Fifth Meeting*, UN Doc A/CONF.2/SR.35, 21.

²²¹ *VCLT* art 32.

²²² See also Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87.

there is a lack of international cooperation and solidarity.²²³ In other words, he links a state's obligation of *non-refoulement* to the extent that the burden of hosting such refugees is shared with other states. Arriving at such an interpretation however appears to be derived neither from a plain reading of the text (which as indicated above contains a non-exhaustive list of exceptions) nor from the *travaux préparatoires*, which do not link the two issues. It also sets a dangerous precedent unsupported by international law, as although 'international cooperation' is a principle recognised in the Preamble to the *1951 Refugee Convention*,²²⁴ it cannot be used to precondition voluntarily assumed international treaty obligations. What would stop this precondition being applied to the application of other provisions apart from *non-refoulement*?

While arguing that *refoulement* is not justified as a matter of international law 'no matter how debilitating a sudden influx of refugees might be on a State's resources, economy, or political situation', Goodwin-Gill and McAdam have acknowledged that, in practice, the 'trade-off' for the obligation to accept large numbers of refugees is 'a de facto suspension of all but the most immediate and compelling protections provided by the *Convention*'.²²⁵ They do not however provide any legal basis for this 'trade-off' (a gap addressed by this article).

Overall, there is no express or implied exception to the principle of *non-refoulement* in art 33(1) to allow variation in situations of mass influx as a general rule. As the fulcrum of the *1951 Refugee Convention*, and having crystallised into a customary norm, *non-refoulement* cannot be generally limited in mass influx situations and in turn, it would not fall within the class of the derogable rights of the *Convention*. The exceptions to art 33(1) are spelt out in art 33(2) and these would continue to apply as long as the conditions therein are met. It is precisely in mass influx situations in which the duty of *non-refoulement*, in particular the prohibition on rejection at the frontier,²²⁶ takes on its most important dimension. Parallel developments in international human rights law that enforce an absolute prohibition of *refoulement* to torture, regardless of national security considerations, also push for such an interpretation.²²⁷

In mass influx situations, therefore, the balance to be struck is not between permitting exceptions to *non-refoulement* where international solidarity is absent (Hathaway's approach) as such an approach would defeat the purpose of such protection, which is particularly relevant in situations of mass influx. Nor is it

²²³ Hathaway, above n 15, 363. See also Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 *Yale Human Rights and Development Law Journal* 1. Boed argues, relying on the doctrine of necessity, that there will be situations in which a state may be justified in closing its borders to a mass influx of refugees should they threaten 'essential interests' of the state: at 26–37.

²²⁴ *1951 Refugee Convention* Preamble para 4 provides:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation ...

²²⁵ Goodwin-Gill and McAdam, above n 15, 336.

²²⁶ *ExCom Conclusion 15*, above n 82, [f]; *ExCom Conclusion 22*, above n 36, [A.2]; *ExCom Conclusion 100*, above n 39; *ExCom Conclusion 103*, above n 82, [I].

²²⁷ See, eg, *Chahal v United Kingdom* [1996] V Eur Court HR 1831; *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A).

sufficient to accept a 'trade-off' without a legal basis for it.²²⁸ Rather a proper balance and reading of the *Convention* would be achieved by preserving the principle of *non-refoulement*, even in mass influx, while allowing states to derogate in a principled and formalised way from certain other rights in the *Convention* vis-a-vis those entering the territory in a mass influx, subject to the above-outlined limits.

VIII CONCLUSION

Troubled by the unregulated practice of applying forms of temporary protection in mass influx situations, this article has sought to elaborate the *lex lata* basis for the suspension of rights of *1951 Refugee Convention* to refugees and asylum seekers in mass influx situations. While temporary protection has been endorsed by the ExCom and the UNGA on multiple occasions, the legal basis for it in mass influx (or other similar) situations has not been previously articulated. Nor has the relationship between the *Convention* and temporary protection been settled. Even though the granting of temporary stay (as opposed to permanent residence) is not antithetical to the *Convention*, as explained in Part III, temporary protection does not provide the same predictability of rights nor safeguards against the premature or arbitrary withdrawal of protection as found in the cessation clauses of the *Convention*. In fact, the cessation clauses are often circumvented via temporary protection arrangements. In addition, where temporary protection is accompanied by the suspension of the *Convention* and the rights therein, a legal justification for the non-application of those rights must be made out; otherwise the deprivation of rights to refugees and asylum seekers in a mass influx would amount to a breach of *Convention* obligations.

Clearly, explicit derogation clauses make it easier to settle the scope and limits on permissible derogations. As exemplified earlier in the text, they are now common features of most modern human rights instruments. The *1951 Refugee Convention*, in contrast, does not contain a general derogation clause equivalent to those in human rights treaties. Nonetheless, it does contain two provisions — arts 8 and 9 — which reflect the state of general international law at the time of their drafting and which permitted derogation in specific situations, namely 'in time of war or other grave and exceptional circumstances'.²²⁹ The concept of derogation was accepted by the negotiating states to the *Convention* and was duly reflected in arts 8 and 9. It has been posited in this piece that these articles together permit — within limits — derogation in the form of temporary protection in qualifying mass influx situations. Alternatively, if arts 8 and 9 are not accepted as they have been interpreted in this article as providing the legal basis for derogation, it is arguable that an implied derogation clause can be read into the *Convention* via subsequent agreement of states parties. State practice has generally endorsed temporary protection as an appropriate response in the limited circumstances of mass influx of asylum seekers, including where the beneficiaries would otherwise fall within the *Convention*.

Derogation is not, however, without limits. As indicated above, derogation under the *1951 Refugee Convention* is subject to the general rules of international

²²⁸ Cf Goodwin-Gill and McAdam, above n 15.

²²⁹ *1951 Refugee Convention* art 9.

law, namely: it applies only in 'war or other grave and exceptional circumstance'; the measures taken need to be proportionate to the emergency in question and last only as long as the threat exists (and hence they are temporary); it does not apply to the most fundamental of rights, including the principle of *non-refoulement*; and it is subject to notification (logically to the UNHCR) so as to put other states 'on notice' of the derogation. Adding an explicit general derogation clause to the *Convention* for situations of mass influx is, therefore, unnecessary.²³⁰ Nonetheless, improved scrutiny of the non-application or suspension of *Convention* rights in such situations is called for, in order to hold states more faithfully to account for their actions, in line with general principles of international law (and human rights law) and arts 8 and 9 of the *1951 Refugee Convention*.

²³⁰ Cf Durieux and McAdam, above n 17.