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The Syrian Crisis and the Principle of *Non-Refoulement*

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I. FACTUAL BACKGROUND

On April 25, 2011, the Syrian military entered Daraa with a force of up to 5,000 men and seven T-55 tanks and began an operation to suppress the political opposition there.¹ The southern city of Daraa first became the focus of political opposition to the Assad regime in March 2011 when some 15 local school children were arrested for painting anti-government slogans on the walls of a school.² Protests spread quickly across the country to Jassem,³ Da'el,⁴ Sanamein,⁵ Inkhil⁶ and then Damascus.⁷ Government security

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1. *Syrian Army Attacks Protest City of Daraa*, BBC NEWS (Apr. 25, 2011), <http://www.bbc.co.uk/news/world-middle-east-13185185>.

2. Joe Sterling, *Daraa: The spark that Lit the Syrian Flame*, CNN (Mar. 1, 2012), <http://edition.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/index.html>.

3. *Thousands March in Syria, as Fresh Wave of Protests Erupts*, THE TELEGRAPH (Mar. 21, 2011), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/8395679/Thousands-march-in-Syria-as-fresh-wave-of-protests-erupts.html>.

4. *Syrian Security Forces Fire on Protestors; Eight Killed*, CNN (May 28, 2011), <http://edition.cnn.com/2011/WORLD/meast/05/27/syria.unrest/index.html>.

forces had already responded with the wide-spread detention and torture of protesters and, in some cases, live fire.⁸ Heavy armor was first used on April 25, 2011,⁹ marking the descent into civil war.¹⁰

The ensuing humanitarian consequences for the people of Syria have been dreadful.¹¹ Estimates by the United Nations High Commissioner for Human Rights (OHCHR) place the number now killed at upwards of 100,000 people.¹² Over five million have been internally displaced¹³ and more than two million people have sought refuge abroad.¹⁴ While the intensity of violence has driven some Syrians to seek refuge further afield,¹⁵

5. Khaled Yacoub Oweis, *Protests Spread Against Assad Rule in Syria* REUTERS (Mar. 25, 2011), <http://www.reuters.com/article/2011/03/25/us-syria-idUSTRE72N2MC20110325>.

6. Katherine Marsh, *Syria: Four Killed in Deraa as Protests Spread Across South*, THE GUARDIAN (Mar. 22, 2011), <http://www.theguardian.com/world/2011/mar/22/syrian-protests-troops-kill-deraa>.

7. *The Revolution Reaches Damascus*, FOREIGN POLICY (Mar. 18, 2011), http://www.foreignpolicy.com/articles/2011/03/18/the_revolution_reaches_damascus.

8. For a narrative timeline of the initial stages of the anti-Assad protest movement see HUMAN RIGHTS WATCH, “WE’VE NEVER SEEN SUCH HORROR”, CRIMES AGAINST HUMANITY BY SYRIAN SECURITY FORCES 8–13 (2011), <http://www.hrw.org/sites/default/files/reports/syria0611webwcover.pdf>.

9. *Syrian Army Attacks Protest City of Daraa*, *supra* note 1.

10. *Syrian Arab Republic*, in 2012 ANNUAL REPORT 443 (ICRC, 2012), <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-syria.pdf> (last visited Oct. 1, 2013) [hereinafter ICRC 2012 Annual Report] (“What had started out as localized clashes between the Syrian government and armed groups in 2011 gradually evolved into a non-international armed conflict in 2012.”).

11. Regular humanitarian bulletins on the situation in Syria are prepared by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and may be found on their *Syria Crisis* site: <http://www.unocha.org/crisis/syria> (last visited Oct. 1, 2013).

12. *Syria Death Toll Now Above 100,000, Says UN Chief Ban*, BBC NEWS (July 25, 2013), <http://www.bbc.co.uk/news/world-middle-east-23455760>.

13. The most recent statistics on internal displacement in Syria are available at the Syria page of the Internal Displacement Monitoring Centre (IDMC), [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountries\)/9F19CC00280C471C802570A7004CE12F?OpenDocument](http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/9F19CC00280C471C802570A7004CE12F?OpenDocument) (last visited Oct. 1, 2013).

14. Up to date statistics on “persons of concern” to the United Nations High Commissioner for Refugees (UNHCR) seeking refuge abroad are available at the Syria Regional Refugee Response Inter-agency Information Sharing Portal, <http://data.unhcr.org/syrian-refugees/regional.php> (last visited Oct. 1, 2013).

15. Boris Cheshirkov, *Bulgaria’s Asylum Centres Bursting at the Seams as Syrian Refugees Enter Europe*, UNHCR (Sept. 17, 2003), <http://www.refworld.org/docid/52396d074.html>. OCHA estimates that a further 28,000 people have now fled to various countries in Europe, see *Syria* 34 OCHA HUMANITARIAN BULLETIN 9 (Sept. 10–23, 2013),

the vast majority of Syrians remain in the five key countries of refuge surrounding Syria: Egypt, Iraq, Jordan, Lebanon and Turkey.¹⁶ Each country has responded to the recent influx of civilians fleeing the violence in Syria with outstanding generosity. Lebanon, in particular, has consistently maintained an open-door policy towards those seeking refuge from the Syrian violence.¹⁷ The resulting impact on Lebanese society has been marked.¹⁸ As of October 3, 2013, UNHCR estimates that there are now 779,038 Syrians seeking protection in Lebanon, up from some 20,000 in May 2012.¹⁹ This is in addition to the 425,000 Palestinian refugees registered in Lebanon prior to the war in Syria and the further 50,000 Palestinian refugees who arrived in Lebanon following their displacement from refugee camps in Syria.²⁰ To put this in some perspective, with the overall Lebanese population estimated at 4.2 million,²¹ the number of refugees in Lebanon now amounts to almost a quarter of the total Lebanese population.²²

In these circumstances it would be naïve to expect such generosity to persist indefinitely. Egypt, Iraq, Jordan and Turkey have begun to actively limit the number of Syrians permitted to seek refuge on their territory by imposing quotas on those allowed to cross the border from Syria each day, refusing entry to particular classes as defined in relation to gender and/or age or by closing the border altogether.²³ Those Syrians prevented from

<http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20Humanitarian%20Bulletin%20No%2034.pdf> (last visited Oct. 1, 2013).

16. A detailed statistical breakdown of the caseload in each country can be found on the Inter-agency Information Sharing Portal, *supra* note 14. As of October 3, 2013 there were 127,411 Syrian persons of concern in Egypt, 195,068 in Iraq, 536,405 in Jordan, 779,038 in Lebanon and 502,827 in Turkey.

17. *Inter-agency Regional Response for Syrian Refugees*, UNHCR, 1 (Sept. 19–25, 2013), <http://www.refworld.org/docid/52452f244.html>.

18. See *Lebanon: Economic and Social Impact Assessment of the Syrian Conflict*, WORLD BANK (Report No. 81098, Sept. 20, 2013), <http://documents.worldbank.org/curated/en/2013/09/18292074/lebanon-economic-social-impact-assessment-syrian-conflict>.

19. Inter-agency Information Sharing Portal, *supra* note 14.

20. *Id.*; Caroline Abu Sa'Da and Michaela Serafini, *Humanitarian and Medical Challenges of Assisting New Refugees in Lebanon and Iraq*, 44 FORCED MIGRATION REVIEW 70 (2013).

21. *Country Profile Lebanon*, UNDATA <http://data.un.org/CountryProfile.aspx?crName=LEBANON> (last visited Oct. 1, 2013).

22. It will, in fact, be a somewhat lower proportion as the most recent estimate of the Lebanese population has not yet been corrected to reflect the current influx. Nevertheless, the proportion remains extraordinarily high.

23. *Egypt: Do Not Return Asylum Seekers to Syria*, HUMAN RIGHTS WATCH (July 10, 2013), <http://www.hrw.org/news/2013/07/10/egypt-do-not-return-asylum-seekers-syria>:

crossing are left exposed to the worst effects of the conflict and, in particular, the depredations of the Syrian military, which now seems increasingly inclined to directly attack border areas.²⁴ However, States must, nonetheless, seek to comply with the legal requirements pertaining to refugees within the limits of their capacity. It is therefore, of the first importance to identify public international law resources that bind States experiencing a refugee influx.

Any discussion concerning refugees must begin with the right against forced return or *non-refoulement* found in the 1951 Refugee Geneva Convention.²⁵ This article therefore first examines the terms of the 1951 Refugee Convention and its application in the surrounding States of Egypt, Lebanon and Turkey (Section II). Particular attention is given to the new (2013) Turkish Law on Foreigners,²⁶ which transposes many of the most im-

Without prior warning, on July 8, the Egyptian government changed its entry policy for Syrians arriving in Egypt by requiring them to obtain a visa and security clearance before arriving in the country. According to media reports, on the same day Egypt denied entry to 276 people arriving from Syria, including a plane with Syrian nationals on board, who were then flown back to the Syrian town of Latakia.

Jordan: Obama Should Press King on Asylum Seeker Pushbacks, HUMAN RIGHTS WATCH (Mar. 21, 2013), <http://www.hrw.org/news/2013/03/21/jordan-obama-should-press-king-asylum-seeker-pushbacks> (“Jordan is routinely and unlawfully rejecting Palestinian refugees, single males, and undocumented people seeking asylum at its border with Syria, said Human Rights Watch and Harvard Law School’s International Human Rights Clinic (the Harvard Clinic) today.”); Tom Peter, *Egypt, Jordan, Iraq Seek to Stem Syrian Refugee Flood*, CHRISTIAN SCIENCE MONITOR (July 14, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0714/Egypt-Jordan-Iraq-seek-to-stem-Syrian-refugee-flood>:

While the International Rescue Committee commends Syria’s neighbours for maintaining an open borders policy, we are increasingly concerned about reports of Syrians having difficulty entering Turkey, Jordan and Iraq. The international community should strongly encourage hosting governments and the Syrian regime to respect the right of all refugees fleeing Syria to ‘seek and enjoy asylum’ and discourage policies – including the closure of borders – that prevent civilians from leaving Syria,” says Ned Colt, regional communications manager for the International Rescue Committee.

Syria, in WORLD REPORT 2013, 609, 612 (Human Rights Watch, 2013), available at <http://www.hrw.org/world-report/2013/country-chapters/syria>; Abu Sa’Da and Serafini, *supra* note 20, at 70.

24. *Syrian Warplane Attacks Lebanese Border Area*, AL-JAZEERA (Aug. 3, 2013), <http://www.aljazeera.com/news/middleeast/2013/08/20138313050777721.html>.

25. Convention Relating to the Status of Refugees art. 33, Apr. 22, 1954, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

26. Law on Foreigners and International Protection Law, 2013, No. 6458 (Turk.) [hereinafter Law on Foreigners]. An unofficial English translation of this law prepared by UNHCR is available at <http://www.refworld.org/docid/5167fbb20.html> (last visited Oct. 8, 2013).

portant elements of the 1951 Refugee Convention into Turkish domestic law. The section then turns its focus to the so-called “nexus requirement” found in the 1951 Convention,²⁷ examining the role this limitation might have in the Syrian context. The latter half of the article moves beyond the terms of the 1951 Convention to discuss parallel sources of protection, including prospects for a regional protection instrument (Section III), the principle of *non-refoulement* in general international human rights law (Section IV), customary international law (section V) and international humanitarian law (Section VI).

Only a minority of the States surrounding Syria are party to either the 1951 Convention or the 1967 Protocol to the Convention²⁸ or have passed domestic asylum/refugee laws implementing anything like the provisions of the Convention in respect of *non-refoulement*. Even where States are parties to one of the treaties the obligations either remain unimplemented or, where relevant domestic legislation has been passed, ineffective for the protection of refugees. Nevertheless, reference to both general international human rights and humanitarian law discloses an extensive set of legal norms which, if used effectively, will support a very comprehensive right of *non-refoulement* for individuals displaced from Syria to the surrounding States.

II. THE 1951 REFUGEE CONVENTION AND DOMESTIC LAW IN THE SURROUNDING STATES

The basic legal instruments for the protection of refugees are the 1951 Refugee Convention and the 1967 Protocol to the Convention. Read together they define the concept of a refugee for the purposes of international law and set forth the rights attendant to refugee status. A refugee is defined in Article 1(A)2 of the Convention as a person who,

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country. . . .

27. 1951 Refugee Convention, *supra* note 25, art. 1(A)(2).

28. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

The Convention limits application of the term “refugee” to those fleeing due to “events occurring before 1 January 1951” and provides an option to States parties of further limiting the definition to those fleeing due to “events occurring in Europe.”²⁹ A similar definition, although not restricted to events occurring in Europe or before 1951, is incorporated into the Statute of the Office of the United Nations High Commission for Refugees (UNHCR Statute).³⁰ Rather than creating a new definition, the 1967 Protocol commits States parties to implementing Article 1(A)2 of the 1951 Refugee Convention without the chronological (events occurring prior to 1951) or geographic (events occurring in Europe) restrictions,³¹ save where the geographic limitation is explicitly preserved by States parties to the Protocol.³²

The principle of *non-refoulement*, or the prohibition on forced return, found in 1951 Refugee Convention is integral to any discussion of entry for those fleeing persecution:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion;
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.³³

29. 1951 Refugee Convention, *supra* note 25, art. 1(B)(1):

For the purposes of this Convention, the words “events occurring before 1 January 1951” in article 1, section A, shall be understood to mean either (a) “events occurring in Europe before 1 January 1951”; or (b) “events occurring in Europe or elsewhere before 1 January 1951”; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

30. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), art. 6(A)(ii), U.N. GAOR, 5th Sess., Supp. No. 20, at 46 U.N. Doc. A/1775 (Dec. 14, 1950) [hereinafter UNHCR Statute], art. 6(B); for a concise explanation of the differences between the UNHCR Statute and the 1951 Refugee Convention see JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 12 n. 56 (1991).

31. 1967 Protocol, *supra* note 28, art. 1(2).

32. *Id.*, art. 1(3).

33. 1951 Refugee Convention, *supra* note 25, art. 33.

As an injunction framed in “negative terms,”³⁴ the *non-refoulement* provisions of the 1951 Convention do not provide a right of entry *per se*. However, insofar as admission to the territory of the asylum State will, in practice, often be the only way to avoid returning an asylum-seeker to the “frontiers of territories where his life or freedom would be threatened,”³⁵ this will frequently amount to a *de facto* right of admission.³⁶

However, of the five key reception States surrounding Syria, only Egypt and Turkey are States parties to either the 1951 Refugee Convention or the 1967 Protocol to the Convention³⁷ and only Lebanon and Turkey have passed domestic laws governing the definition and protection of asylum-seekers and refugees.³⁸ Although there are now 144 States parties to the 1951 Refugee Convention and 145 to the 1967 Protocol, countries in the Middle East and North Africa (MENA) region continue to have a very low rate of accession to either treaty. In large part this is due to the continuing concern among Arab States with the issue of Palestinian refugees.

In fact, Arab States supported the exclusion of Palestinian refugees from the terms of the 1951 Refugee Convention and the UNHCR Statute.³⁹ These States were concerned that if Palestinian refugees were included in the terms of either document they “would become submerged [with other categories of refugees] and would be relegated to a position of minor importance.”⁴⁰ The 1951 Refugee Convention establishes a model of protection in displacement based on the fundamental right of *non-refoulement*. In contrast with the fear of persecution and the right of *non-refoulement* that

34. *Applicant M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCR 131, ¶ 39 (Austl.).

35. 1951 Refugee Convention, *supra* note 25, art. 33.

36. James C. Hathaway, *Refugees and Asylum*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 177, 193 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath, eds., 2012).

37. UNHCR *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, as of Apr. 1, 2011, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

38. Law on Foreigners, *supra* note 26; *Loi réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie de ce pays* (Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (Law of Entry and Exit) Bulletin de Législation Libanaise (Journal Officiel), 1962, No. 28-1962, art. 26 (Leb.).

39. OROUB EL-ABED, UNPROTECTED: PALESTINIANS IN EGYPT SINCE 1948 163 (2009); 1951 Refugee Convention, *supra* note 25, art. 1(d); UNHCR Statute, *supra* note 32, art. 7(c).

40. LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 66 (1998).

concerns many asylum-seekers, Palestinian refugees demand a right to return to Palestine in line with the terms of General Assembly Resolution 194.⁴¹ Arab States have been hesitant to accede to the Convention as, in part, it fails to present a model of protection relevant to the needs of Palestinians.⁴²

A. Egypt and Lebanon

Although Egypt is a party to both the 1951 Refugee Convention and the 1967 Protocol, it has not yet promulgated relevant domestic asylum law or developed the procedures or institutions necessary to comply with their obligations under the Convention.⁴³ In accordance with a memorandum of understanding signed with the UNHCR in 1954 the government has devolved virtually all aspects of refugee protection, including the provision of social welfare and status determination, to the UNHCR.⁴⁴

The provisions of the 1962 Lebanese law are restricted quite specifically to granting political asylum only⁴⁵ and so would most likely exclude any claims made by the Syrians fleeing civil disorder and violence in their own country. However, this remains a matter of speculation as no steps have been taken to implement these provisions through either the promulgation of regulations or the development of State institutions for the determina-

41. G.A. Res. 194 (III), ¶ 11 U.N. Doc. A/RES/194 (III) (Dec. 11, 1948):

Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.

See also Ben Lynfield, *As Peace Talks Pick Up, Palestinians Demand a Return to Villages Fled Long Ago*, CHRISTIAN SCIENCE MONITOR (Aug. 18, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0818/As-peace-talks-pick-up-Palestinians-demand-a-return-to-villages-fled-long-ago>.

42. Jaber Suleiman, *Trapped Refugees: the Case of Palestinians in Lebanon*, in NO REFUGEE: PALESTINIANS IN LEBANON 11 (Refugee Studies Centre, Working Paper Series No. 64, 2010), http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper64.pdf.

43. *Global Report 2012: Egypt*, UNHCR, <http://www.refworld.org/docid/4e52379612.html> (last visited Oct. 8, 2013).

44. Michael Kagan, "We Live in a Country of UNHCR": *The UN Surrogate State and Refugee Policy in the Middle East*, (UNHCR, New Issues in Refugee Research, Research Paper No. 201, Feb. 2011), <http://www.refworld.org/docid/4d8876db2.html>.

45. Law Regulating the Entry and Stay of Foreigners, *supra* note 40, art. 26.

tion of refugee claims and/or the protection of asylum-seekers. As such, the Lebanese State continues to treat all asylum-seekers as, in essence, illegal immigrants and extends its protection to them on a wholly discretionary basis.⁴⁶

B. The New Turkish Law on Foreigners

While Turkey has acceded to the 1967 Protocol it continues to limit its protection obligations to those persons fleeing persecution as a result of “events occurring in Europe.”⁴⁷ This restriction, reflected in the new Turkish law, excludes those fleeing the Syrian conflict.⁴⁸ However, the new law introduces an, admittedly discretionary, provision for the temporary protection of individuals in the context of mass influx.⁴⁹ There is also provision for the subsidiary protection of individuals who do not come within

46. HUMAN RIGHTS WATCH, ROT HERE OR DIE THERE: BLEAK CHOICES FOR IRAQI REFUGEES IN LEBANON 16 (2007), <http://www.hrw.org/sites/default/files/reports/lebanon1207.pdf>:

Lebanon treats people who enter illegally to seek asylum, or who enter legally but then overstay their visas for the same purpose, as illegal immigrants who are subject to imprisonment, fines, and deportation. The situation improved significantly with the September 2003 Memorandum of Understanding (MOU) between Lebanon’s General Security and UNHCR. While the MOU declares that “Lebanon does not consider itself as an asylum country” and that “the only viable durable solution for refugees recognized under the mandate of UNHCR is resettlement in a third country,” the MOU seeks to provide “temporary humanitarian solutions for the problems of people entering clandestinely, residing unlawfully in Lebanon and submitting asylum applications at UNHCR.

47. 1967 Protocol, *supra* note 28, art. 1(3); States Parties, *supra* note 39, at 5; JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 97 (2005); Dilek Latif, *Refugee Policy of the Turkish Republic*, 33 TURKISH YEARBOOK OF INTERNATIONAL RELATIONS 1 (2002).

48. Law on Foreigners, *supra* note 26, art. 61:

A person who as a result of events occurring in European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it shall be recognized as a refugee following the refugee status determination procedures.

49. *Id.*, art. 91(1) (“Temporary protection *may be provided* to foreigners who, having been forced to leave their country and cannot return to the country they left, have arrived at or crossed the borders of Turkey in masses seeking emergency and temporary protection.”) (emphasis added).

the terms of the domestic refugee definition. Individuals who may face “the death penalty or execution,”⁵⁰ torture or inhuman or degrading treatment or punishment⁵¹ or a “serious threat to his or her person by reason of indiscriminate violence”⁵² upon return to his or her country of origin, are protected by the law.

Like the 1951 Refugee Convention itself, the Turkish law has a stand-alone *non-refoulement* provision. Unfortunately, however, it is framed in a manner so inconsistent with the other elements of the law as to be virtually inscrutable. Article 4 of the new law forbids return “to a place where he or she may be subject to torture, inhuman or degrading punishment or treatment, or where his or her life or freedom may be under threat.”⁵³ However, while Article 4 purports to extend this guarantee to all individuals who fall “under the scope of this Law,”⁵⁴ it goes on to limit the actual effect of the *non-refoulement* provision to those individuals whose “life or freedom may be under threat on account of [their] race, religion, nationality, membership of a particular social group or political opinion.”⁵⁵ This clause appears to restrict the provision’s application to those defined as refugees in Article 61 of the law, thereby excluding individuals granted subsidiary protection pursuant to Article 63 or temporary protection pursuant to Article 91 from its gamut. As will be recalled, the refugee definition in Article 61 is itself limited to those fleeing “events occurring in Europe,” but this restriction is not reflected in Article 4. The end result is that the Article 4 *non-refoulement* provision is in some way inconsistent with each of the new law’s qualification provisions.

It is difficult to understand at this stage whether the terms of the new law reflect a considered legislative scheme or is merely the result of poor and inconsistent drafting. One possibility is that the *non-refoulement* provision (insofar as it excludes the “geographical limitation”) is intended to be

50. *Id.*, art. 63(1)(a).

51. *Id.*, art. 63(1)(b); *cf* Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

52. Law on Foreigners, *supra* note 26, art. 63(1)(c); *cf* Council Directive 2011/95/EU on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 15, 2011 O.J. (L 337); C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R. I-00921 [hereinafter EU Qualification Directive].

53. Law on Foreigners, *supra* note 26, art. 4.

54. *Id.*

55. *Id.*

broader in scope than the Article 61 qualification provision. However, in that case it is hard to see what advantage there is in retaining this limitation in respect of the qualification provision itself. Moreover, there seems little point in adding further grounds for subsidiary protection in Articles 63 and 91 if those in receipt of such protection do not benefit from the guarantee against *non-refoulement*.

Until this law is implemented by the Turkish State its practical effect will remain a matter of speculation. However, the process of implementation bears careful scrutiny, particularly in respect to those seeking protection due to a “serious threat to [their] person by reason of indiscriminate violence.”⁵⁶ Should Article 4, as implemented, give protection from *refoulement* to those entitled to subsidiary protection within the meaning of this article (and, by extension, a *de facto* right of entry), this will mark the development of a key resource for the protection of individuals fleeing civil disorder in the Middle East.

C. The “Nexus Requirement”

Any regime for the protection of individuals fleeing the violence in Syria premised on either the 1951 Convention or the domestic law of the key receiving States suffers from two key protection gaps. First, as noted, only two out of the five States (Egypt and Turkey) are States parties to the two key international refugee protection instruments; neither of which has, as yet, begun to implement the instruments in a comprehensive manner. Second, even where the provisions of these instruments bind the receiving States, it remains unclear whether Syrians seeking protection in these States will have refugee claims consistent with the requirements of Article 1(A)2 of the 1951 Convention.⁵⁷ This latter issue warrants further discussion, particularly in light of the UNHCR’s recent approach with respect to those fleeing the Syrian conflict.

In order to qualify for refugee status under the Article 1(A)2 definition, the “well-founded fear of persecution” must be “for reasons of race, religion, nationality, membership of a particular social group or political opinion.” The persecution feared must be causally related to one of the grounds

56. *Id.*, art. 63(1)(c).

57. 1951 Refugee Convention, *supra* note 25, art. 1(A)(2). See discussion at section II.

enumerated in Article 1(A)2.⁵⁸ This is commonly referred to as the “causal nexus.”⁵⁹ While some Syrians have certainly fled their country due to a well-founded fear of persecution for reasons of religion⁶⁰ or political opinion,⁶¹ in accordance with Article 1(A)2 of the Refugee Convention, many will have fled due to their fear of generalized violence and civil disorder unrelated to a Convention ground. The question is, can this “causal nexus” be established as a result of generalized violence?

This is not to suggest, however, that there is a requirement to show a differential impact on those fleeing civil situations of conflict of large-scale civil disorder or that such a finding is limited to any particular number of individuals.⁶² There is no basis in the text of the 1951 Convention to impose a higher or differential burden on claimants seeking to make out a claim to refugee status in the context of armed conflict.⁶³ Moreover, while the Convention ground must contribute meaningfully to the cause of the persecution feared, it need not be the sole or even the predominant cause of that persecution.⁶⁴

58. James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 211, 213, ¶ 1 (2002) [hereinafter Michigan Guidelines].

59. *Id.*, at 219, ¶ 17.

60. Patrick Cockburn, *Persecution of the Christians: Syrian Minority Fear the End of Fighting More than War Itself*, THE INDEPENDENT (Dec. 17, 2012), <http://www.independent.co.uk/news/world/middle-east/persecution-of-the-Christians-syrian-minority-fear-the-end-of-fighting-more-than-war-itself-8422977.html>; Clarissa Ward, *Syria's Christians Fearing Religious Persecution*, CBS NEWS (Feb. 21, 2013), <http://www.cbsnews.com/video/watch/?id=50141509n>.

61. *Syria: Political Detainees Tortured, Killed*, HUMAN RIGHTS WATCH (Oct. 3, 2013), <http://www.hrw.org/news/2013/10/03/syria-political-detainees-tortured-killed>.

62. UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* 133 (2007), <http://www.refworld.org/docid/46deb05557.html> (“Whole communities may risk or suffer persecution for Convention reasons. The fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim.”); Michigan Guidelines, *supra* note 60, at 218, ¶ 16; Michael Kagan and William P. Johnson, *Persecution in the Fog of War: The House of Lords' Decision in Adan*, 23(2) MICHIGAN JOURNAL OF INTERNATIONAL LAW 247 (2002).

63. Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, UNHCR Division of International Protection Legal and Protection Policy Research Series 16, PPLA/2012/05 (Sept. 2012) <http://www.unhcr.org/504748069.pdf>.

64. Michigan Guidelines, *supra* note 60, at 218, ¶ 13; Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23(2) MICHIGAN JOURNAL OF INTERNATIONAL LAW 265 (2002).

The significance of a particular ground is to be judged subjectively by reference to the perspective of the persecutor (rather than the refugee).⁶⁵ It is the views of the persecutor that are relevant for establishing the causal nexus and determining the reasons that motivate particular conduct (i.e., acts of persecution).⁶⁶ This follows from the wording of Article 1(A)2, which requires the persecution to be “for reasons of” a Convention ground. It is irrelevant for the purposes of establishing the nexus whether the particular ground is true or has merely been imputed to the refugee (rightly or wrongly) or, indeed, whether the ground of persecution is known to the refugee at all.⁶⁷ If a persecutor acts on a belief related to an enumerated Convention ground then this suffices to establish the causal nexus regardless of whether that belief is mistaken or, indeed, implausible.⁶⁸

Finally, it must be emphasized that the standards relevant to the determination of the causal nexus are general and no particular or special requirements apply where the refugees originate from a country in which there is widespread violence or civil disorder. While asylum-seekers from a country in this position are not automatically refugees, they are entitled to recognition on the same terms as any asylum-seeker where they meet the requirements of Article 1(A)2.⁶⁹ Indeed, in the view of UNHCR,

most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees, since they will have a well-founded fear of persecution linked to one of the Convention

65. Andreas Zimmermann and Claudia Mahler, *Art. 1 A para. 2, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 281, ¶ 426 (Andreas Zimmerman, ed., 2011); *Attorney General v. Ward* [1993] 2 S.C.R. 689, 747 (Can.).

66. Zimmerman and Mahler, *supra* note 67, ¶ 427.

67. GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 87 (2007); U.N. High Comm’r for Refugees, *Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶¶ 22–23, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, ¶ 31, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004); U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶¶ 46–47, U.N. Doc. HCR/GIP/09/08 (Sept. 22, 2009).

68. Zimmerman and Mahler, *supra* note 67, ¶ 428.

69. Michigan Guidelines, *supra* note 60, at 219, ¶ 17.

grounds. For many civilians who have fled Syria, the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict.⁷⁰

If one takes the subjectivity of the Convention grounds seriously it will admit of the sweeping and even erratic imputation of particular grounds to broad sections of a community. The question is not whether such imputations are accurate or even plausible but whether they serve to motivate the conduct of the persecutors. As UNHCR explains in reference to Syria,

parties to the conflict reportedly employ broad interpretations of whom they may consider as being associated with the other party, including based on an individual's family links, religious or ethnic background or mere presence in an area considered as being "pro-" or "anti-Government." This is illustrated by the methods and tactics of warfare that have been documented in Syria and include, *inter alia*, the systematic besieging, bombarding, raiding, pillaging and destruction of residences and other civilian infrastructure in whole neighbourhoods, purportedly for reason of real or perceived support to the other conflict party.⁷¹

This account is both plausible and laudably sensitive to the particular conditions of the Syrian conflict. It is consistent with the subjectivity of the Convention grounds to admit of their attribution on even very general terms. Certainly this would include the grounds provided by the UNHCR, of "family links, religious or ethnic background or mere presence in an area." In any case, there is not yet a settled body of case law in respect of their refugee status. As such, any conclusions as to the correct application of the causal nexus in this context must remain somewhat speculative.

III. NO REGIONAL PROTECTION INSTRUMENT

The protection situation is aggravated by the absence of a regional refugee instrument akin to the European Union (EU) Qualification Directive⁷² or the Organization of African Unity (OAU) Refugee Convention.⁷³ These

70. U.N. High Comm'r for Refugees, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update II*, ¶ 14 (Oct. 22, 2013), www.refworld.org/docid/5265184f4.html.

71. International Protection Considerations Syria, *supra* note 72, at 8, n.56.

72. EU Qualification Directive, *supra* note 54.

73. Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

both make specific provision for the protection of individuals fleeing large-scale violence or civil disorder, albeit in somewhat different terms.⁷⁴ There is, in fact, a draft Arab League Refugee Convention⁷⁵ which makes provision for the protection of individuals displaced “. . . because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order.”⁷⁶ However, this Convention has never enjoyed significant political support in the Arab world and no State has yet ratified it.⁷⁷ As such, it remains in draft form with little prospect of change in the foreseeable future.

IV. INTERNATIONAL HUMAN RIGHTS LAW

The available protection regime can be significantly enhanced by reference to general standards of international human rights law. Of particular importance in this context are the International Covenant on Civil and Political Rights (ICCPR)⁷⁸ and the Convention against Torture (CAT).⁷⁹ All of the five key receiving States are parties to both conventions.⁸⁰ The conven-

74. EU Qualification Directive, *supra* note 54, art. 15(c):

Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

OAU Refugee Convention, *supra* note 75, art. 1(2):

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.

75. League of Arab States, *Arab Convention on Regulating Status of Refugees in the Arab Countries* 1994, <http://www.refworld.org/docid/4dd5123f2.html> (last visited Oct. 9, 2013).

76. *Id.*, art. 1.

77. Suleiman, *supra* note 44, at 16.

78. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

79. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter CAT].

80. A complete list of States party to the CAT and the ICCPR can be found on the website of the United Nations Treaty Collection, at <http://treaties.un.org> (last visited Oct. 9, 2013).

tions contain absolute and non-derogable⁸¹ rights against torture⁸² and, in the case of the ICCPR, the arbitrary deprivation of life.⁸³ Significantly, the CAT includes an explicit right against *non-refoulement* in Article 3(1):

No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Moreover, the Human Rights Committee has found a guarantee against *refoulement* to be implicit in the meaning of Article 7 of the ICCPR.⁸⁴

The guarantees contained in both the ICCPR and the CAT go considerably beyond torture *per se* to address a broader variety and degree of ill-treatment. This is important to note in the context of forced displacement, as both conventions extend the assurances against *refoulement* to situations where ill-treatment is feared. The (non-derogable) Article 1 guarantee

81. CAT, *supra* note 81, art. 2(2); ICCPR, *supra* note 80, art. 4(2). *See also* Committee against Torture General Comment 2: Implementation of Article 2 by States Parties U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4, ¶ 5 (2007):

Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances, a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international.

82. CAT, *supra* note 81, arts. 1, 2; ICCPR, *supra* note 80, art. 7.

83. ICCPR, *supra* note 80, art. 6.

84. U.N. Human Rights Committee General Comment 20: Article 7 (44th Sess.), U.N. Doc. HRI/GEN/1/Rev.1 at 30, ¶ 9 (1992):

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.

U.N. Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (80th Sess.) U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 12 (1994):

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

against torture⁸⁵ in the CAT is supplemented by the broader (albeit, derogable) Article 16 guarantees against “cruel, inhuman or degrading treatment,”⁸⁶ while Article 7 of the ICCPR incorporates both elements into a non-derogable guarantee against ill-treatment.⁸⁷ The Committee against Torture⁸⁸ and the Committee on Human Rights⁸⁹ have sought to minimize any potential distinctions among the various categories of ill-treatment. The Committee against Torture, in particular, has emphasized that the obligation to prevent all forms of ill-treatment addressed by the CAT are interdependent, indivisible and interrelated.⁹⁰ As explained in its General Comment 2,

. . . the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.⁹¹

85. CAT, *supra* note 81, art. 1:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official.

86. CAT, *supra* note 81, art. 16:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

87. ICCPR, *supra* note 80, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

88. Committee against Torture General Comment 2, *supra* note 83, ¶ 3.

89. U.N. Human Rights Committee General Comment 20, *supra* note 86, ¶ 4:

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

90. Committee against Torture General Comment 2, *supra* note 83, ¶ 3.

91. *Id.*, ¶ 3.

The guarantee against the arbitrary deprivation of life found in Article 6 of the ICCPR is equally broad in scope. While Article 6 itself refers to both the death penalty⁹² and the crime of genocide,⁹³ the Committee on Human Rights has evinced particular concern with the threat to life posed by armed conflict. As the Committee explains in its General Comment 6,

The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year . . . The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.⁹⁴

The relevance of these provisions as interpreted to the current situation in Syria is plain given the widespread allegations of human rights abuses.⁹⁵ Both conventions contain guarantees against *refoulement* to situations where ill-treatment is feared. However, and as distinct from the 1951 Refugee Convention, there is no requirement to establish a causal nexus between the ill-treatment feared and the particular grounds or reasons for that ill-treatment. The guarantees against ill-treatment in both the CAT and the ICCPR, including the rights of *non-refoulement*, are absolute and unrelated to

92. ICCPR, *supra* note 80, art. 6(2).

93. *Id.*, art. 6(3).

94. U.N. Human Rights Committee General Comment 6: Article 6 (16th Sess.) U.N. Doc. HRI/GEN/1/Rev.1, ¶¶ 1–2 (1982).

95. HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE, AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011 (2012): <http://www.hrw.org/sites/default/files/reports/syria0712webwcover.pdf>; Stephanie Nebehay, *Syrian Forces Responsible for Baniyas Massacres: UN Report*, REUTERS (Sept. 11, 2013), <http://www.reuters.com/article/2013/09/11/us-syria-crisis-warcrimes-idUSBRE98A0D5 20130911>.

any particular grounds or causes. The breadth of these guarantees makes them especially valuable in situations of armed conflict where assessing the reasons or motivations relevant to the causal nexus can be particularly difficult.

V. A PARALLEL CUSTOMARY INTERNATIONAL NORM

Running alongside these conventional norms is a broad customary international norm of *non-refoulement*.⁹⁶ This will continue to bind States even after they accede to a treaty that to some degree reflects the customary international norm.⁹⁷ In this case the norms run in parallel to one another and, assuming they are not inconsistent,⁹⁸ may be applied in the alternative.⁹⁹ Inevitably the two categories of norms will be closely related, with conventional norms serving as the clearest possible evidence of the *opinio juris* of States.¹⁰⁰ As calculated by Bethlehem and Lauterpacht, “170 of the 189 members of the UN, or around 90 per cent of the membership, are party to one or more conventions which include *non-refoulement* as an essential

96. As early as 1977 the UN Executive Committee (ExComm) on the International Protection of Refugees noted that “. . . the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.” U.N. ExComm Conclusion No. 6 (XXVIII) Non-Refoulement (28th Sess.) ¶ (a) (1977). In 1981 ExComm concluded, in the context of a “large-scale influx,” that “[i]n all cases the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed.” U.N. ExComm Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large Scale Influx (32d Sess.) ¶ II(A)2 (1981). By 1982 ExComm stated that the principle of non-refoulement “. . . was progressively acquiring the character of a peremptory rule of international law.” U.N. ExComm Conclusion No. 25 (XXXIII) General (33d Sess.) ¶ (b). (1982).

97. Vienna Convention on the Law of Treaties art. 38, Jan. 27, 1980, 1155 U.N.T.S. 331 (“Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”).

98. *Id.*, art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

99. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 73 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 174–79 (July 27); North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, ¶¶ 64, 70–74 (Feb. 20).

100. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8–10 (7th ed. 2008).

component.”¹⁰¹ Significantly, these calculations include the wide variety of conventions such as the European Convention on Human Rights¹⁰², the OAU Refugee Convention,¹⁰³ the American Convention on Human Rights¹⁰⁴ and the Banjul Charter¹⁰⁵ that make provision for *non-refoulement* (either explicitly or as interpreted) outside the strict definition of refugee in the 1951 Refugee Convention and in respect of torture and threats to life.

As such,

the evidence points overwhelmingly to a broad formulation of the prohibition as including torture or cruel, inhuman or degrading treatment or punishment. With the exception of the Torture Convention, these elements all appear in human rights instruments of both a binding and a non-binding nature as features of a single prohibition.¹⁰⁶

So, and in parallel to the right of *non-refoulement* as found in both the ICCPR and CAT, the customary norm does not require a causal nexus to be established between the ill-treatment feared and the motivations of the persecuting actor. Correspondingly, the customary right is considerably broader than the right of *non-refoulement* found in Article 33 of the 1951 Refugee Convention. This is significant in the present case as it appears that both the right to protection against torture,¹⁰⁷ and *non-refoulement* more generally,¹⁰⁸ have now attained the status of preemptory/*ius cogens* norms of

101. Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 147 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

102. ECHR, *supra* note 53.

103. OAU Refugee Convention, *supra* note 75.

104. American Convention on Human Rights, O.A. S. Treaty Series No. 36, 1144 U.N.T.S. 123, OEA/Ser.L/V/II.23, doc. 21 rev. 2 (July 18, 1978).

105. Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

106. Lauterpacht and Bethlehem, *supra* note 103, at 152.

107. *Al-Adsani v. United Kingdom* (No.2), ¶ 61, App. No. 35763/97, Eur. Ct. H.R. (2001); *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ¶¶ 155–57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). Erica De Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 97 (2004).

108. U.N. ExComm Conclusion No. 79 (XLVII) General (47th Sess.) ¶ (i) (1996) (“the principle of non-refoulement is not subject to derogation.”); U.N. ExComm Con-

public international law. In addition to being generally applicable as norms of customary international law, these are also now supervening norms to which no derogation is permitted.

VI. INTERNATIONAL HUMANITARIAN LAW

A. *An International Armed Conflict*

There is one further resource for the protection of persons displaced from Syria, which although somewhat more remote from conventional human rights and refugee discourse, must also be taken into account. Both the Third¹⁰⁹ and Fourth¹¹⁰ Geneva Conventions contain explicit prohibitions of *refoulement*. All of the five key receiving countries are parties to all four Geneva Conventions.¹¹¹ In addition, all four conventions are now widely accepted to have passed in their entirety into customary international law.¹¹² Article 12 of the Third Geneva Convention provides in part that,

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention¹¹³

Article 45 of the Fourth Geneva Convention provides that,

Protected persons shall not be transferred to a Power which is not a party to the Convention

clusion No. 25, *supra* note 98, ¶ (b); Jean Allain, *The Ius Cogens Nature of Non-Refoulement* 13(4) INTERNATIONAL JOURNAL OF REFUGEE LAW 533 (2001).

109. Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

110. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

111. A complete list of the State parties to the main international humanitarian law treaties is maintained by the ICRC and may be found at, [http://www.icrc.org/ihl/%28SPF%29/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/ihl/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited Oct. 1, 2013).

112. David Turns, *The Law of Armed Conflict (International Humanitarian Law)*, in INTERNATIONAL LAW 814, 816 (Malcom D. Evans ed., 3d ed. 2010); Partial Award on Prisoners of War, Eritrea's Claim (Eri. v. Eth.) 42 I.L.M. 1056, 1083 (Eri.-Eth. Claims Comm'n 2003).

113. Third Geneva Convention, *supra* note 111, art. 12.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs¹¹⁴

While Article 12 of the Third Geneva Convention applies only to prisoners of war,¹¹⁵ Article 45 of the Fourth Geneva Convention applies to State party nationals that find themselves under the control of either a “party to the conflict or occupying power of which they are not nationals.”¹¹⁶ As distinct from the more limited guarantees against *refoulement* found in general asylum and human rights law, the protections in these articles extend to all situations in which the transferee power is *not willing and able to apply the terms of the conventions as a whole*. Furthermore, in respect of the Fourth Geneva Convention only, the protections apply to situations in which the protected person might have reason to fear persecution on political or religious grounds. This last provision thus serves to import a condition similar to the “nexus requirement” in international refugee law.¹¹⁷

Of course, the terms of Geneva Conventions III and IV, with the exception of Common Article 3, apply only in the context of an international armed conflict or following a “partial or total occupation of the territory of a High Contracting Party. . . .”¹¹⁸ There is no suggestion that Syria or, indeed, any of the five key receiving States, is the subject of either an international armed conflict as defined in Common Article 2 or a continuing oc-

114. Fourth Geneva Convention, *supra* note 112, art. 45.

115. Third Geneva Convention, *supra* note 111, art. 4.

116. Fourth Geneva Convention, *supra* note 112, art. 4:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

117. See discussion at section II(C).

118. Third Geneva Convention, *supra* note 111, art. 2; Fourth Geneva Convention, *supra* note 112, art. 2.

cupation. However, should, as has been widely discussed in recent months,¹¹⁹ a foreign State intervene to oppose Syrian government forces, the conflict will become “internationalised” within the meaning of Common Article 2. States that become parties to the conflict will then be bound to apply the *non-refoulement* provisions of the conventions in respect of both POWs and State party nationals under their control.

B. A Non-International Armed Conflict

Common Article 3 applies in the context of a non-international armed conflict¹²⁰ and there seems little question that the conflict in Syria has now reached the level of a civil war.¹²¹ Although this Article does not contain an explicit prohibition of *non-refoulement* it does feature a broad variety of guarantees against ill-treatment, including in part,

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment¹²²

There is an obvious analogy with the breadth of the protections found in Articles 6¹²³ and 7¹²⁴ of the ICCPR as interpreted by the Human Rights Committee in their General Comment 20.¹²⁵ Further, the language adopted by each convention with respect to the general duties of State parties is largely identical. Both Article 2 of the ICCPR¹²⁶ and Common Article 2 of

119. Mark Landler, *Obama Threatens Force Against Syria* NEW YORK TIMES (Aug. 20, 2013), http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html?_r=0.

120. Third Geneva Convention, *supra* note 111, art. 3; Fourth Geneva Convention, *supra* note 112, art. 3.

121. ICRC 2012 Annual Report, *supra* note 10.

122. Third Geneva Convention, *supra* note 111, art. 3; Fourth Geneva Convention, *supra* note 112, art. 3.

123. ICCPR, *supra* note 80, art. 6.

124. *Id.*, art. 7.

125. U.N. Human Rights Committee General Comment 20, *supra* note 86, ¶ 9.

126. ICCPR, *supra* note 80, art. 2:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the pre-

the Geneva Conventions¹²⁷ require States to “respect and ensure” the rights recognized in each convention. This formula provides the basis for the *non-refoulement* obligation in Articles 6 and 7 of the ICCPR as explained by the Human Rights Committee in their General Comment 31.¹²⁸ The ICCPR and Common Article 3 feature absolute and non-derogable prohibitions of torture and ill-treatment and the corollary State duties to “respect and ensure” these rights are found in both documents in similar terms. As such, there is every reason to find an identical *non-refoulement* obligation in respect of Common Article 3.¹²⁹ This obligation will apply to all State parties involved in the Syrian conflict.

It is likely that this obligation already applies in respect of Iran. As has been widely reported, the Iranian Quds Force is now actively involved in the Syrian conflict.¹³⁰ As a result, a duty of *non-refoulement* according to the terms of Common Article 3 now lies against the Iranian State in respect of any Syrian nationals in their control. The same obligation will arise against other States as a corollary of their military involvement in Syria. As States involve themselves in the on-going military conflict in Syria an obligation of *non-refoulement* will arise in respect of any Syrian nationals in their control.

VII. CONCLUSION

At first blush, there might seem to be inadequate resources for the effective legal protection of Syrians displaced to its surrounding States. Few of the key receiving States are parties to either the 1951 Geneva Convention or the 1967 Protocol and none have a functioning domestic asylum system. Where asylum-seekers are registered and claims are determined, this is generally done by UNHCR staff on the basis of an agreement with the host

sent Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

127. Third Geneva Convention, *supra* note 111, art. 1; Fourth Geneva Convention, *supra* note 112, art. 1 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”).

128. U.N. Human Rights Committee General Comment 31, *supra* note 86, ¶ 12.

129. Cordula Droege, *Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 669, 675 (2008).

130. Dexter Filkins, *The Shadow Commander*, THE NEW YORKER, 42, 44 (Sept. 30, 2013) http://www.newyorker.com/reporting/2013/09/30/130930fa_fact_filkins; *Footage Claims to Show Iranians in Syria*, BBC NEWS (Sept. 15, 2013), <http://www.bbc.co.uk/news/world-middle-east-24103801>.

State.¹³¹ Although Turkey has now passed a comprehensive asylum law it remains, as of yet, unimplemented.¹³² As such, any effect it will have on the domestic protection regime for those fleeing the violence in Syria must remain largely a matter of speculation.

Nevertheless, further examination of the international human rights and humanitarian law related to the principle of *non-refoulement* discloses a series of key resources for the protection of Syrians displaced abroad. This includes the absolute and non-derogable guarantees against ill-treatment found in the CAT and the ICCPR together with the corollary State duty of *non-refoulement* explicit in Article 3 of the CAT and, as interpreted, in Articles 6 and 7 of the ICCPR by the Committee on Human Rights.¹³³ The explicit guarantees against *non-refoulement* found in Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention also provide guarantees. While these provisions will be relevant only to an internationalized armed conflict they deserve particular attention given the continuing prospect of military intervention in Syria against the Assad regime by key Western States.¹³⁴

Immediately relevant, however, is Common Article 3, as interpreted by analogy with the reasoning of the Human Rights Committee in respect of Articles 2, 6 and 7 of the ICCPR, to include the right of *non-refoulement*. All of the key receiving States are parties to the four Geneva Conventions and there is little doubt that Syria is now in a state of non-international armed conflict. Indeed, as the Geneva Conventions have passed as a whole into international customary law, their terms will bind any State that seeks to intervene in the Syrian conflict, regardless of whether they are a party to the conventions.

Taken together, the standards found in general international human rights and humanitarian law provide the foundation for an aggressive campaign of advocacy to both receiving States and those States now exploring prospects for military intervention in Syria. As a result of its military involvement in Syria, Iran is already bound by the *non-refoulement* duties implicit in Common Article 3. Other States must understand that, should they

131. This continues to be the case in Lebanon, see *Global Report 2012: Lebanon*, UNHCR, <http://www.refworld.org/docid/51c017e919.html> (last visited Oct. 13, 2013).

132. See the discussion in section II(B).

133. See the discussion in section IV.

134. Robert Winnett and Peter Dominiczak, *Pressure on Cameron for New Vote on Syria Strikes*, THE TELEGRAPH (Sept. 1, 2013), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10279620/Pressure-on-Cameron-for-new-vote-on-Syria-strikes.html>.

choose to involve themselves in the Syrian conflict, they will assume a *non-refoulement* obligation pursuant to both conventional and customary international humanitarian law in respect of Syrian nationals under their control. This is in addition to the basic right of *non-refoulement* at international human rights and refugee law.

Of course, any program of advocacy will be more effective when it combines practical assistance with exhortation. Recent violations of the right of *non-refoulement*, although troubling, should not distract attention from the extraordinary continuing burden on key receiving States and the challenges this poses authorities at all levels in delivering assistance and protection to the displaced. It is only common sense that, for States caught in the middle of the Syrian crisis, good advice will be welcomed only when it comes together with a helping hand.