Amicus curiae … sed curia amica est?
UNHCR and Courts

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1. Introduction

The relationship between courts and the law in domestic systems, no matter which family of law one considers, is quite clear, with constitutionally established hierarchies and relatively straightforward questions concerning legal personality and *locus standi*. The same is far from true for the international community. The horizontal character of international society, even if there are several different planes of legal and jurisdictional geometry meshing much like a drawing by Escher,[1] renders analysis of the interface between different courts and different international actors much more complex. This article considers how the Office of the United Nations High Commissioner for Refugees (UNHCR) interacts with courts and other quasi-judicial bodies in international law, in domestic law, under international and regional human rights regimes, under other regional mechanisms, and how far the judicialisation of international refugee law promotes or hinders the mandate of providing international protection.

A. The Several Legal Contexts and the Development of International Refugee Law

The 1951 Convention relating to the Status of Refugees provides the principal legal regime for the protection of refugees.[2] Parallel thereto is the 1950 Statute of UNHCR.[3] Combined, they provide various avenues for UNHCR to engage with the law in a judicial context and otherwise. In addition, various international human rights law regimes add a further range of means by which the organisation can seek to promote refugee protection through the courts. And all of that is before one looks at the domestic law routes to involvement in a courtroom setting, not discounting the organization's own processes for refugee status determination (RSD) in states that cannot do this for themselves. However, to discuss only the interaction between UNHCR and courts is to oversimplify the means by which the development of international refugee law takes place. Alongside the courts, international refugee law progresses through practice in the field.

2. The Mandate for Casework

Both the Statute and the 1951 Convention provide the basis for UNHCR to engage in judicial proceedings as part of its mandate. The Convention does not establish an international refugee court akin to the quasi-judicial function accorded to the Human Rights Committee

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[1]See, for example, *Relativity*, 1953. The image can be found at this website, published by the M.C. Escher Foundation and The M.C. Escher Company B.V. in Baarn, the Netherlands. Version 5.0 - Last updated: December 31, 2013 <http://www.mcescher.com/gallery/back-in-holland/relativity/>.

[2]Convention relating to the Status of Refugees 1951, 189 UNTS 150, in force 22 April 1954. See also the 1967 Protocol, 606 UNTS 267, in force 4 October 1967.

[3]Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res.428(V) Annex, UN GAOR Supp. (No.20) 46, UN Doc. A/1775, 14 December 1950.

under the International Covenant on Civil and Political Rights.[4] Nevertheless, one can justify intervention in legal proceedings dealing with refugees under the Statutory mandate in Paragraph 1 - UNHCR is to provide "international protection … to refugees" and to seek "permanent solutions to the problems of refugees by assisting Governments".[5] Part of "protection", as set out in Paragraph 8 of the Statute, is supervising the application of international conventions for the protection of refugees. Article 35 of the 1951 Convention provides in similar terms:

> 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, …, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.[6]

That said, the dispute resolution mechanism before the International Court of Justice (ICJ) laid down by the Convention in Article 38 cannot be utilised by UNHCR since it is not a party to the Convention.[7] However, as will be discussed below, that does not mean that the ICJ could not play a role with respect to UNHCR's supervisory function, given that certain institutional steps were to be taken.

3. The Role of the ICJ and UNHCR's Role under its Statute and the Convention

As indicated, the Convention provides that the ICJ shall hear disputes regarding the application or interpretation thereof as between contracting parties. To date, no such case has ever been brought. As Kälin has noted, relying on Article 35 UNHCR could ask a contracting state to bring a case against another contracting state under Article 38 as part of the former's undertaking to co-operate with UNHCR in the supervision of the Convention if the latter were perceived to be failing to implement its 1951 Convention obligations,[8] but the likelihood of this happening seems very remote. At present, the best that UNHCR could achieve, were Article 38 proceedings ever to be initiated, would be to make its views known to the ICJ in the case, either of its own volition,[9] or in response to a request by the ICJ under Articles 34 or 66 to furnish it with information on the question.

Nevertheless, there is one circumstance that might trigger a case before the ICJ concerning cross-border displacement, although it may be separate from the Article 38 regime and it does require both the receiving and refugee-generating states to have recognized the compulsory jurisdiction of the Court. Whenever a case is commenced before it, the ICJ has the power to indicate provisional measures under Article 41 of its Statute.[10] Such measures are designed to

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[4] International Covenant on Civil and Political Rights, UNGA Res.2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171, in force 23 March 1976, at Article 28.

[5] Above, note 3.

[6] Above, note 2. And see Kälin, W., 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond", in Feller, E., Türk, V. and Nicholson, F. *Refugee Protection in International Law*, CUP 2003, p.611.

[7] Article 38, 1951 Convention.

> Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

[8] Kälin, above, note 6, at p.653.

[9] *Eg*. In the *Legality of Nuclear Weapons Case*, Advisory Opinion, General List No.95, 8 July 1996, the ICRC sent a letter direct to the President of the Court giving its views on the matter.

[10] For fuller details, see Goodwin-Gill, G. and McAdam, J. *The Refugee in International Law*, (OUP 3rd ed., 2007) at pp.434-36.

preserve the respective rights of the parties pending a final decision.[11] Provisional measures are possible even where the jurisdiction of the ICJ is in dispute with regard to the instant contentious case,[12] and nor does it matter that to preserve the rights of the parties, directions are given to only one party.[13] Moreover, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[14] despite the fact that no finding of fact had been made as to whether genocide had in fact occurred, the ICJ ordered both parties in the provisional measures to do all in their power to prevent any *further* violations.[15] As with genocide,[16] the General Assembly has recognized the seriousness of mass refugee flows.[17] Thus, where a mass cross-border influx is imminent or has occurred, it is arguable that the receiving State could seek provisional measures from the ICJ on the ground that its sovereignty has been or would be violated as a consequence of the actions of the refugee-generating state.[18] In those circumstances, UNHCR ought to make its views known to the ICJ even where it has not sought them under Article 34.2 of its Statute.

That, though, does not exhaust the possibilities for UNHCR to utilise the ICJ if it so wished. The Court also has an Advisory Opinion regime under Chapter IV of its Statute.[19] Although UNHCR has no right of audience before the ICJ to seek an Advisory Opinion, as an Article 22 subsidiary organ, the General Assembly could seek one on its behalf.[20] Were UNHCR to be given the capacity to seek Advisory Opinions in its own right, then it could legitimately assert its supervisory role under Article 35 of the 1951 Convention with regard to state practice relating to refugee protection.[21] Pursuant to the findings in the *Reparation* case,[22] UNHCR has such personality as is essential for the performance of its duties. Given that UNHCR has an express duty to provide international protection to refugees, and given also that such persons, by definition, lack the diplomatic protection of their country of nationality or habitual residence, it is arguable that UNHCR would have the right to seek an Advisory Opinion for their benefit.[23] It is also possible for the Advisory Opinion procedure to be expedited akin to seeking provisional measures under Article 41.[24] However, all the above is dependent, first, on UNHCR being given the right to seek an Advisory Opinion from the ICJ, and, secondly, whether UNHCR would ever want Advisory Opinions from the ICJ. That is an issue to be explored further below.

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[11] *Nuclear Tests Case (Interim Protection)*, [1973] ICJ Rep. pp.99 and 135, at para.20.

[12] *Anglo-Iranian Oil Co. Case*, [1951] ICJ Rep. p.89.

[13] *US Diplomatic and Consular Staff in Teheran Case*, [1979] ICJ Rep. p.7.

[14] [1993] ICJ Rep. p.3; 32 ILM 888 (1993).

[15] Above, note 14, at para.45.

[16] Above, note 14, para.49.

[17] Office of the United Nations High Commissioner for Refugees, UNGA Res.48/116, UN Doc. A/48/49 (1993).

[18] On the obligations owed to the receiving State, see ExCom Conclusion No.22 (XXXII) 1981, §IV(6).

[19] See generally, Higgins, R., *Problems and Process: International Law and How We Use it*, OUP 1994, pp. 198-201; Klabbers, J. *An Introduction to International Institutional Law*, CUP 2nd ed. 231-34.

[20] See Article 65, Statute of the ICJ, and Article 96, UN Charter. Given that no inter-state case has ever been brought under Article 38 of the 1951 Convention, what is the likelihood that the states in the General Assembly would seek such an Advisory Opinion, even though it is much less confrontational than an Article 34 action under the Statute?

[21] *Voting Procedures Case*, [1955] ICJ Rep. p.67; 22 ILR 651.

[22] *Reparation for Injuries Suffered in the Service of the United Nations* Case, Advisory Opinion, 1949 ICJ Rep. p.174.

[23] Although the findings of the ICJ in an Advisory Opinion are not binding on states, they carry very great weight and it is difficult to see how a state could assert the Court's opinion did not reflect the current state of international law.

[24] See *UN Headquarters Agreement Case* [1988] ICJ Rep. p.12.

4. Indirect Individual Interventions

If the ICJ offers UNHCR the opportunity to address systemic problems that arise in acute crises that have led to mass displacements, then this section looks at how UNHCR can intervene indirectly in, by and large, individual cases pertaining to refugee protection.

A. Domestic Courts

This section considers how UNHCR might engage with domestic cases dealing with the interpretation of the 1951 Convention where it is at one remove: the state will have determined the case and the refugee will be independently challenging the refusal of refugee status. UNHCR may be able to submit an *amicus curiae* brief or may be confined to sitting on the sidelines as a very interested observer.[25] However, this section does not consider those situations where UNHCR carries out refugee status determination on behalf of a state and the appeals structure built into that system: while that is clearly part of UNHCR's protection mandate, it is of a very different nature to the type of engagement with courts that is under consideration here where UNHCR is not interacting directly with the refugee but rather the court in its deliberative function *vis-a-vis* the interpretation of the 1951 Convention.

Lord Steyn may or may not be right that:

> [in] practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. *And there can only be one true meaning [of the Convention]*.[26]

Regardless, this has not prevented differing interpretations of the Convention to emerge from courts in different countries … which, in all likelihood, each court deems to be the "one true meaning".[27] Even where the national court has flagrantly disregarded the expert analysis of UNHCR in an *amicus curiae* brief based on research from across the world,[28] though, ultimately it is simply the interpretation of a single court in one particular country. If UNHCR disagree with that interpretation, it is deniable, the court has simply erred and that particular 'battle' can always be fought again in another jurisdiction at a better time.[29] This reflects the

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[25]Although not considered here because of limitations of space, the interaction of UNHCR in Colombia with the Constitutional Court and the government with respect to the protection of IDPs is a significant example of the interplay of judicial interventions with diplomatic negotiations. Article 1 of the Colombian Constitution of 1991 refers to *estado social de derecho*, a phrase that has allowed the Constitutional Court to promote a progressive understanding of, *inter alia*, the rights of IDPs in Colombia with which UNHCR has actively engaged. See Republic of Colombia Constitutional Court, Third Review Chamber, *Decision T-025* of 2004 Bogotá, D.C., 22 January 2004. A fuller consideration of UNHCR's engagement with domestic laws for the benefit of IDPs is to be found in Gilbert, G. and Rüsch, A.M., *Rule of Law: Engagement for Solutions*, confidential report to UNHCR, February 2015, held by the author.

[26]*R v Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001] 2 AC 477 at 517 (emphasis added), available at http://www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd001219/adan-1.htm.

[27]See Goodwin-Gill, 'The Search for the One, True Meaning ….', in Goodwin-Gill, GS and Lambert, H (eds) *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the EU* (CUP, 2010) pp.204-41.

[28]For example, see *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68.

[29]In *Sepet and Bulbul v SSHD* [2003] UKHL 15, the House of Lords rejected Professor Goodwin-Gill's arguments in a report on the right to conscientious objection for the appeal of Sepet against denial of refugee status before the Court of Appeal. In the light of the decision of the European Court of Human Rights in *Bayatan v Armenia* Application No. 23459/03 (European Court of Human Rights, Grand Chamber), 7 July 2011, then the scope of persecution for the purposes of refugee status should now be broader and in line with Professor Goodwin-Gill's prescient views.

very nature of judicial interpretation within any legal system. The "one true meaning" of the Convention is to be derived from various court cases across the world over time - it is dynamic. One easy way to reveal this approach is to consider the development of the law reflected in the cases of *Gurung* and *JS (Sri Lanka)*.[30] Although the later case clearly overruled *Gurung* as regards simple reliance on membership and the nature of the group,[31] there are other aspects of *Gurung* on which would want to continue to rely - for example, at paragraph 151, that

> 1. Bearing in mind the need to adopt a purposive approach to the interpretation of the Exclusion Clauses, they are to be applied restrictively. …
> 2. In any case in which an adjudicator intends to apply the Exclusion Clauses, he should avoid equating Art 1F with a simple anti-terrorism provision.

UNHCR will undoubtedly draw from case law from around the world those elements that best allow it to argue for the broadest understanding of the international protection of refugees. In the same way that domestic courts develop the understanding of the law within their own jurisdiction, UNHCR can utilise the best understanding and analysis from all court hearings that deal with the 1951 Convention. In keeping with the view of Professor Goodwin-Gill as set out in his silver jubilee editorial for the *International Journal of Refugee Law*,[32] international refugee law is developed through continual interaction between the courts and those arguing for the asylum-seeker.

B. The Interface with International Human Rights Law

International human rights treaty bodies, at the international and regional levels, also play a significant role with respect to the development of international refugee law. Although treaty bodies, by definition, apply the pertinent treaty law, the concept of what constitutes a violation for the purposes of international human rights law is dynamic and will undoubtedly influence the understanding of persecution as it is interpreted in domestic courts.[33] Thus,

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[30] *Gurung v SSHD* [2002]UKIAT04870, 15 October 2002; *R (on the application of JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15.

[31] *JS*, above note 30, at paragraphs 33 *et seq*.

[32] 'The Dynamic of International Refugee Law', 25 *IJRL* 651 at p.657 (2013).

> No, what is required (though we will likely be told the resources are just not available...), is greater support for those daily engaged in directly representing the interests of asylum seekers in the front lines, challenging detention, presenting claims, intervening to ensure *non-refoulement*; what is needed is more funding for the legal work, political and material support for practitioners and non-governmental organisations, and more strategic litigation at national and regional level.

[33] An example of this can be seen in the UK Supreme Court's decision in *HJ and HT v SSHD* [2010] UKSC 31.

> 14. The reference in the preamble to the Universal Declaration of Human Rights of 1948 shows that counteracting discrimination was a fundamental purpose of the Convention. Article 2 states:
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> > "Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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."
>
> Lord Steyn emphasised this point in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 639. He also drew attention to the first preamble to the Declaration, which proclaimed the inherent dignity and the equal and inalienable rights of all members of the human family. No mention is made of sexual orientation in the preamble or any of its articles, nor is sexual orientation mentioned in article 1A(2) of the Convention. But coupled with an increasing recognition of the rights of gay people since the early 1960s has come an appreciation of the fundamental importance of their not being discriminated against in any respect that affects their core identity as homosexuals. They are as much entitled to freedom of association with others of the same sexual

there is this indirect interaction between international human rights treaty bodies and the international protection of refugees.[34]

Alongside the interaction between international human rights law and international refugee law, there is direct and indirect UNHCR involvement in some cases before treaty bodies. Probably the most direct engagement of UNHCR in a case before a human rights treaty body occurred in *l'Affaire D et autres c Turquie*,[35] where the organisation, carrying out status determination on behalf of the state, reached the conclusion that it was safe for the family to return to Iran even though they faced receiving a sentence of 100 lashes. The European Court of Human Rights decided it would be a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[36] (ECHR) to return them. It should be noted that although on the facts this case concerns refugee status determination by UNHCR under the 1951 Convention, the decision of the European Court of Human Rights turned on Turkey's obligations under the ECHR.

More usually, UNHCR is engages with treaty bodies to ensure that the relevant convention is interpreted in a way that is sensitive to the protection of refugees. Within UNHCR's Division of International Protection, one of the roles of the Human Rights Liaison Unit is to liaise with treaty bodies. Clearly, given the language of Article 3 of the Convention against Torture,[37] with its explicit reference to *non-refoulement*, there is scope for intervention in cases before the Committee dealing with that specific right, but all the various human rights treaties allow for their indirect application to claims to protection from *refoulement* and apply just as much to refugees and asylum seekers as anyone else.[38] For example, the decision of the African Commission of Human and Peoples' Rights in *Mouvement des Réfugiés Mauritaniens au Sénégal v Sénégal*,[39] where the delivery of rights by the state to refugees was in question, is an example of how UNHCR can engage indirectly through cases brought by refugees and asylum seekers with the jurisprudential development of the understanding of the rights set out in Articles 2 to 30 of the 1951 Convention, something which is otherwise next to impossible before domestic courts. Before the Inter-American Commission of Human Rights in the case

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orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight.

[34]It is worth noting in this context how UNHCR utilized the international human rights duty not to engage in mass expulsion when responding to the EU plan to agree that all newly arrived undocumented irregular migrants from Turkey could be returned there (see Article 4, Protocol 4 to the ECHR, Strasbourg, 16.IX.1963, ETS 46). It is not that international refugee law could not equally have formed the basis for criticising the plan, but that both regimes could be brought into play to provide international protection. See generally, 'Migrant crisis: UN Legal Concerns over EU–Turkey plan' available at <http://www.bbc.co.uk/news/world-europe-35754738>.

[35]*Requête n° 24245/03*, European Court of Human Rights (Third Section), 22 June 2006 (only available in French).

[36]ETS 5 (1950).

[37]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984). For example, see *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005).

[38]See Article 2 ICCPR, above note 4:

Art.2.1 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 present 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. (Emphasis added).

[39]African Commission on Human and Peoples' Rights, Communication Nos. 162/97 (1997) and 254/02 (2002).

of *García Lucero et al*,[40] the applicant's argument was accepted that the reparations to the victim should incorporate the consequences of his exile from Chile. As for utilizing international human rights treaties in *non-refoulement* cases where the 1951 Convention cannot be engaged, for example where the exclusion clauses apply or where the state has not ratified the 1951 Convention or 1967 Protocol, there is a wealth of jurisprudence before international and regional bodies.[41] Thus, not only can treaty bodies, international and regional, help progress refugee protection and solutions in the state of refuge, but they can also provide an alternative means to guarantee respect for the principle of *non-refoulement*, alongside influencing the understanding of the 1951 Convention when that treaty is itself under consideration before domestic courts.

C. The Court of Justice of the European Union and International Refugee Law[42]

The 1951 Convention did not establish some sort of international refugee court,[43] and human rights treaty bodies when dealing with refugee issues have to base their decision on their constitutive treaty. The decision of any domestic court can only be binding in its own arena of jurisdictional competence. The Court of Justice of the European Union (CJEU), on the other hand, when interpreting the European Union Qualification Directive[44] that is based, in part, on the 1951 Convention, is making a decision binding on the member states.[45] While the CJEU is a sub-regional court, its interpretation of the transposed articles of the 1951 Convention, with the various glosses added in the drafting, is significant because of its reach in the development of international refugee jurisprudence. In addition, the consequence of the Qualification Directive also providing for subsidiary protection[46] entails that there is a secondary form of protection, but it also risks undermining the full application of the 1951 Convention.[47]

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[40]See Merits Report No. 23/11, *Case 12,519, García Lucero and his next of kin*, March 23, 2011 (file of annexes to the Merits Report, tome I, folios 12 to 43). Not proceeded with before the Court: *Case of García Lucero et al. v Chile*, Preliminary Objection, Merits and Reparations. Judgment of August 28, 2013. Series C No. 267.

[41]See *Mohammed Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006; *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* Inter-American Court of Human Rights, Judgment of November 25, 2013, Series C No. 272; *Chahal v United Kingdom*, 70/1995/576/662, European Court of Human Rights (Grand Chamber), 25 October 1996, and *Jabari v Turkey*, Application no. 40035/98, European Court of Human Rights (Fourth Section), 11 July 2000, both available at <http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["JUDGMENTS","DECISIONS","ADVISORYOPINIONS"]}>.

[42]See generally, Costello, C., *The Human Rights of Migrants and Refugees in European Law*, OUP 2016.

[43]See North, AM. and Chia, J. 'Towards Convergence in the Interpretation of the Refugee Convention: a Proposal for the Establishment of an International Judicial Commission for Refugees', in McAdam, J. (ed.) *Forced Migration, Human Rights and Security*, Hart, 2008, p.225.

[44]Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), OJ L 337/9. (Hereinafter, Qualification Directive - the original Qualification Directive was promulgated in 2004).

[45]NB. Denmark opted out of the Qualification Directive regime and the UK has not adopted the 2011 recast, only the original 2004 directive.

[46]See Articles 2 and 15 and the definition of serious harm, above note 44.

[47]For example, see below at note 50. See also, Costello, above note 42; and, UNHCR, Asylum in the European Union a Study of the Implementation of the Qualification Directive, November 2007, and UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009).

Cases relating to the Qualification Directive are referred to the CJEU by national courts. At its simplest, the reference for a Preliminary Ruling procedure allows any national court to refer a question of EU law to the CJEU where there is a lack of clarity for a decision on interpretation that is then sent back to the domestic court to be applied within the national legal system.[48] Thus, a domestic court in an EU member state hearing a case under the Qualification Directive can refer any question of interpretation to the CJEU and such decisions are then binding within the member states. There have already been several references for rulings,[49] dealing either with refugee status or the lesser subsidiary protection, although the latter can cover cases where domestic courts within the member states have been unwilling to grant refugee status and where protection under international human rights law may not be so obviously available.[50]

The reference procedure prioritises states. Article 267 of the Treaty on the Functioning of the European Union (TFEU)[51] is based on a national court referring a question to the CJEU, but that does not lead to non-parties to the domestic case, other than other EU member states, having a right of audience. Thus, unless the national court joins UNHCR in the reference, it has no direct route by which to make its interpretation of the 1951 Convention (as it has been assimilated within the Qualification Directive) known to the CJEU - and the ability to submit an *amicus curiae* brief is not available in every state. In such cases, its best hope is to make a public statement upon which the CJEU can draw. Member states of the EU can make their views known to the CJEU as it deliberates on the Preliminary Ruling. That is hardly optimal for a refugee-focused understanding where the CJEU is effectively trying to determine the substantive meaning of the 1951 Convention for the member states. Strategically, too, there are questions to be asked about whether UNHCR should engage in a debate as to the interpretation of the 1951 Convention where a supranational court could decide to reject its arguments and that decision is then binding within the EU.[52] It is even more the case that

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[48]Article 267, Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ 2012/C 326/01, 26 October 2012, pp. 47–390. For a comprehensive analysis of EU procedures in this regard, see Peers, S. *EU Justice and Home Affairs Law* (OUP, 3rd ed.2012).

[49]See generally, Costello, above note 42.

[50]Subsidiary protection should be understood as a discrete means for guaranteeing respect for the principle of *non-refoulement*, separate from refugee status and international human rights law. However, this presents potential problems, procedural, strategic and substantive, for UNHCR in its approach to the CJEU, even when it is in a position to play a direct role. Contrast, for example, the broad understanding by the CJEU in *Elgafaji v Staatssecreteris van Justitie* [2009] ECR I-921 when dealing with subsidiary protection under Article 15c of the Qualification Directive (Serious harm consists of: … (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), with the narrow stance of the European Court of Human Rights in *NA v United Kingdom*, dealing with when Article 3 ECHR might offer protection to those being returned to a war zone - Application No. 25904/07, European Court of Human Rights (Fourth Section), 17 July 2008, available at <http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["JUDGMENTS","DECISIONS","ADVISORYOPINIONS"]}>. However, the fact that protection of persons fleeing armed conflicts can fall within Article 1A.2 of the 1951 Convention, as cases such as *Salibian v Minister Employment and Immigration* [1990] 3 FC 250 at 259 (CA) and *Rizkallah v Minister Employment and Immigration* (1992), 156 NR 1 (FCA), make clear, calls into question the perceived generosity of the approach in *Elgafaji* and whether the juxtaposition of refugee status and subsidiary protection in the Qualification Directive has the effect of making courts less progressive when interpreting the scope of Article 1A.2. Should UNHCR engage in subsidiary protection cases in those referrals where it is possible or does that signify that it believes that refugee status would not be available on those facts?

[51]See above, note 48.

[52]For example, the decision in Judgment of the Court (Grand Chamber) of 9 November 2010 (reference for a preliminary ruling from the Bundesverwaltungsgericht — Germany) — *Bundesrepublik Deutschland v B (C-57/09), D (C-101/09)* (Joined Cases C-57/09 and C-101/09), (2011/C 13/07) rejected the argument that exclusion was subject to a proportionality test:

111 The answer to the third question is that the exclusion of a person from refugee status

UNHCR needs to consider the value of intervening where the reference is in relation to subsidiary protection and engagement therewith might be seen to concede that such situations do not give rise to the possibility of refugee status. On the other hand, failure to participate at all might mean that UNHCR's voice is lost in a procedure that already favours states. It is worth noting in this regard that in *JN v Staatssecretaris voor Veiligheid en Justitie*,[53] the Court referred positively to UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.

The longer term effect of the CJEU in decisions on the understanding of the 1951 Convention and wider protection cannot yet be known, but it is different in nature to courts of a single jurisdiction and human rights treaty bodies that simply interpret the scope of their founding instrument. At one level, it is simply a court that sets down how domestic courts in the member states should interpret the Qualification Directive, but given the importance of those states to refugee status determination and their influence beyond the EU, UNHCR's relationship with courts is now of a different character. In practice, it will always be a difficult balancing act because the issues may not have been raised in a way UNHCR would have wished, but that is the situation in which the organisation finds itself, so UNHCR must continue to participate and try to ensure that it is always joined so that its voice is heard - at least it knows that its own interpretation of the Convention through Guidelines and other documents will be considered by the CJEU.

5. Who Needs Courts?

As has been pointed out already, there is no international refugee court before which one can challenge a decision of a national court that its rejection of an application for refugee status under the 1951 Convention was not a correct interpretation. However, there is clearly an institutional body: UNHCR.[54] Like treaty bodies of later United Nations conventions, UNHCR can issue interpretative guidance as to the meaning of the 1951 Convention, in this case in the form of Guidelines.[55] And as for the periodic reports akin to those under Article 40 ICCPR,[56] Article 35 of the 1951 Convention places much greater demands on states parties:

> Article 35 - *Co-operation of the national authorities with the United Nations*
> 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate

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> pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

It is worth noting that UNHCR was not an intervening party in this case, while the German, French, Netherlands and United Kingdom Governments had all submitted arguments against proportionality during the Preliminary Ruling.

[53]Case C-601/15 PPU, CJEU (Grand Chamber), 15 February 2016, at paragraph 63.

> 63. … It is clear, in particular from points 4.1 and 4.2 of those guidelines, in the version adopted in 2012, that detention may be used only exceptionally and for a legitimate purpose and that there are three reasons which may render detention necessary in an individual case and which are generally in keeping with international law, namely public order, public health or national security. Moreover, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose.

[54]See Kälin, above note 6. Founded under its Statute the year before, above note 3, it acts as a treaty body courtesy of that statute and Article 35 Convention.

[55]See <http://www.refworld.org/rsd.html>. The equivalent would be the Human Rights Committee's General Comments. See, though, Goodwin-Gill, above note 32, at pp.657-61.

[56]Above, note 4.

its duty of supervising the application of the provisions of this Convention.
2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:
(a) The condition of refugees,
(b) The implementation of this Convention, and
(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Therefore, it is clear that the drafters of the 1951 Convention saw states as having firmly established obligations to facilitate UNHCR's protection work, and to report annually regarding the Convention's domestic implementation and application.[57] Indirectly, too, states are obliged to report on their refugee protection record through the Human Rights Council's Universal Periodic Review procedure.[58]

Does the lack of an international refugee court, then, undermine the guarantees set out in the 1951 Convention, if only because the various domestic interpretations inevitably produce a multithreaded (and possibly incomplete) tapestry of authoritative analysis? Or does that question miss the point, especially given the preceding analysis that sets out the various judicial and quasi-judicial options for UNHCR that already exist, and which it can utilize to further the dynamic interpretation of the Convention, separate from some specialised group of judges/ committee members? And in all likelihood, the judges on some international refugee court would never have undertaken RSD in the field in the wake of many thousands having crossed some border in the space of 24 hours, the most common way the 1951 Convention is implemented on a daily basis? Theirs would be a very individualistic, atomised analysis of the 1951 Convention, reflecting approaches devised in the global north,[59] forgetting that most refugee protection occurs in the global south in a different context, and it would not be in keeping with the group-focused protection that has developed.[60] Sixty-five years ago, the lack of an international refugee court was something that could have been rectified, now one looks to the judgments of domestic courts and the like and the authoritative analysis of UNHCR … and it might best suit UNHCR on occasions that there is no such court.

At present, UNHCR can, to a large extent, choose when to engage with courts … and, of course, when not to engage. Strategic litigation is an art form well-understood and, indeed, essential in the field of international human rights protection. Losing a case can set back the

[57]The period is implicit in the requirement that states enable UNHCR to meet its annual reporting obligation to the General Assembly and ECOSOC - Statute of UNHCR, paragraph 11, above note 3.

[58]See UNGA Res. 60/251, 3 April 2006. See also, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

[59]*Cf.* See North and Chia, above note 43, at p.226; Hathaway, J., North, AM. And Pobjoy, J. 'Roundtable on the Future of Refugee Convention Supervision' 26 Journal of Refugee Studies 323-415 (2013).

[60]There is not space here to debate this point, but given the group-centric character of the five grounds for persecution set out in Article 1A.2, race, religion, nationality, membership of a particular social group, and political opinion, the individualised understanding of refugee status that has developed in the courts of the global north is not necessarily the only interpretation or even the most appropriate one based on the plain meaning of the text. See Goodwin-Gill, 'Editorial: Asylum: The Law and Politics of Change' (1995) 7 IJRL 1 at p.14; 'Editorial: Asylum 2001—A Convention and a Purpose' (2001) 13 IJRL 1 at pp.11-12; 'The Challenges to International Refugee Law in the Current Crisis' (Seminar on 'The Single Protection Procedure: Meeting International Obligations', Irish Refugee Council and the European Council on Refugees and Exiles, Dublin, 2 March 2016) 6–7. And see, UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR rev edn 1992, reissued 2011) para 44.

development of the law by decades whilst one waits for the next case that better fits the bill. For human rights campaigners, there is little alternative but to keep one's powder dry, rather than loose off a shot that, for any one of a range of reasons, fails to hit the target and advance the development of the relevant law. And that is before one takes into account the fact that any litigation relies on a sympathetic hearing from the judges concerned. For those cases where UNHCR has to be involved, this problem is not unknown.[61] However, unlike human rights campaigners and advocates, UNHCR can take a policy decision not to engage in litigation and yet still develop an international understanding of the law relating to refugee protection through, as mentioned, guidelines or, possibly, Executive Committee Conclusions,[62] or its annual Note on International Protection.[63]

Courts are but one route through which to advance the international protection of refugees, the unique mandate accorded to UNHCR under its Statute. Drawing on the jurisprudence of the ICJ in the *South West Africa* cases,[64] the standing of the organization in the international legal order with respect to its authority to pronounce on the meaning and scope of the 1951 Convention is stronger than that of any group of judges or committee members. Given that UNHCR has its statutory mandate to provide international protection to refugees who, by definition, cannot avail themselves of the protection of their country of nationality or, if stateless, country of habitual residence, then it too has a 'sacred trust' placed upon it by the international community to meet this duty towards persons without any other form of protection on the international stage. Therefore, in this regard, *vis-à-vis* the 1951 Convention, UNHCR is akin to the International Committee of the Red Cross, which is seen as the custodian of the 1949 Geneva Conventions.[65] As such, its relationship to the 1951 Convention based on its statutory mandate ought to imbue its pronouncements on its interpretation with greater authority than would ordinarily be accorded to a 'mere' treaty body.[66] Moreover, where one is dealing with an ExCom Conclusion,[67] given that the

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[61]See *Febles*, above note 28.

[62]See <http://www.unhcr.org/pages/49e6e6dd6.html>. See also on the character of Conclusions of the Executive Committee, Türk, V. and Dowd, R. 'Protection Gaps', in Fiddian-Qasmiyeh, E., Loescher, G., Long, K. and Sigona, N. *The Oxford Handbook of Refugee and Forced Migration Studies*, Online Publication Date: Aug 2014, at p.278, available at <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-024?print=pdf>

[63]For example, see the most recent Note of 8 June 2015, EC/66/SC/CRP.10, which focused on how the rule of law ought to be applied in terms of protection and resolving the needs of individuals of concern to UNHCR.

[64]See the *Voting Procedures* case, above note 21, *per* Lauterpacht J. at 676-77 and 687-88, and *International Status of South West Africa* [1950] ICJ Rep. 128, 11 July 1950, at p.132. As regards the League of Nations Mandate system, the ICJ held of paramount importance

> the principle that the well-being and development of such peoples form 'a sacred trust of civilization'.

See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep., 9 July 2004, at paragraph 70.

[65]See Kellenberger, J., 'The Role of the International Committee of the Red Cross' in Clapham, A. and Gaeta, P. *The Oxford Handbook of International Law in Armed Conflict*, OUP 2014, p.20 at p.21:

> Under Article 5 of the Statutes of the International Red Cross and Red Crescent Movement [1986], the ICRC is mandated to work for the faithful application of IHL, to take cognizance of any complaints based on alleged breaches of that law, to work for the understanding and dissemination of knowledge of this body of rules and to prepare any development thereof.

The overlap with UNHCR's mandate in the Statute under Paragraphs 1 and 8, and its Supervisory role under Article 35 of the Convention are striking.

[66]See McAdam, J. 'Interpretation of the 1951 Convention', in Zimmerman, A., Dörschner, J. and Machts, F. *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a Commentary*, OUP, 2011, at p.75.

Executive Committee consists of around half the member states of the United Nations, that they are the states most involved in responding to the needs of refugees and other individuals of concern to UNHCR, the ones that are most affected by migration (in other words, not just contracting parties to the 1951 Convention), and that the Committee reaches its conclusions by consensus, taking all those characteristics together, those soft law conclusions carry great authority.[68] In some ways, therefore, an international refugee court might undermine this status of UNHCR as the custodian of international refugee protection.

6. Conclusion

A range of courts and treaty bodies pronounce in one way or another on the international protection of refugees and other individuals of concern to UNHCR. However, ultimately, even if some judges sitting on the ICJ in The Hague or the CJEU in Luxembourg or any of the treaty bodies, whether international or regional, if they think they know what the 1951 Convention means, nevertheless, UNHCR still retains the mandate to provide international protection to refugees, something which it achieves via courts around the world alongside a whole host of other mechanisms. It is a demanding role, one facilitated over the decades by Guy Goodwin-Gill in his advocacy and in all his writings.

[67] See Türk and Dowd, above note 62.

[68] Related to this, but beyond the scope of this paper, can UNHCR's diplomatic interventions with governments around the world which are receiving, or even producing, refugee flows, lead to state practice that, over time, consolidates into customary international law?