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Journeys in Search of Refuge

1.1 Introduction

The word 'refugee' has its roots not in what people are escaping from, but in what they are seeking: refuge.[1] Today, the number of people searching for sanctuary in foreign lands is the highest ever recorded.[2] However, many of the places to which people flee are sites of refuge only in a nominal sense. They are often unsafe and insecure; provide little access to healthcare, education and employment; and have inadequate sanitation, shelter, food and water. Hathaway laments that 'people guilty of absolutely no crime except for doing what we have said they may do, which is to come seek asylum, find themselves in horrific conditions'.[3] These problems exist in places of so-called refuge in both higher- and lower-income countries. Carens explains that, despite being 'supposedly safe havens', in some refugee camps in the Global South, 'the deprivation and danger appear to be as bad as the conditions from which refugees fled'.[4] Recalling a refugee settlement known as the 'Jungle' in Calais, an Afghani refugee writes that it 'looked as though the world's toilet had been flushed and the mess washed up here'.[5] The conditions in some locales in which people seek refuge are so grim that many wish to return to the place from which they had initially fled.[6]

In response to these dangerous and bleak conditions of refuge, asylum seekers and refugees adopt various strategies. As Ramsay explains, '[e]ven in contexts of uncertainty, refugees ... imagine, and actively work toward, new futures'.[7] Some move from camp environments to urban areas due to the prospect of greater security, better living conditions and employment opportunities. Others are able to make much longer expeditions across one or a number of international borders in search of sanctuary. These voyages are often

[1] 'Refugee' derives from the Old French word réfugié, meaning 'gone in search of refuge': Glynnis Chantrill (ed), *The Oxford Dictionary of Word Histories* (Oxford University Press, 2002) 424.
[2] UNHCR, *Global Trends: Forced Displacement in 2019* (18 June 2020) 2 <www.unhcr.org/en-au/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html>.
[3] James Hathaway, 'The UN's "Comprehensive Refugee Response Framework": Actually a "Contingent Refugee Assistance Project"' (speech delivered at the Refugee Law Initiative Eighth International Refugee Law Seminar Series, 21 May 2018).
[4] Joseph Carens, 'Refugees and the Limits of Obligations' (1992) 6(1) *Public Affairs Quarterly* 31, 40.
[5] Gulwali Passarlay and Nadene Ghouri, *The Lightless Sky: An Afghan Refugee Boy's Journey of Escape to a New Life* (Atlantic Books, 2015) 292.
[6] Amnesty International, *EU: Asylum-Seekers Must Be Moved from Appalling Conditions* (14 December 2016) <www.amnesty.org.au/eu-asylum-seekers-must-be-moved-from-appalling-conditions/>; Georgina Ramsay, 'Benevolent Cruelty: Forced Child Removal, African Refugee Settlers, and the State Mandate of Child Protection' (2017) 40(2) *Political and Legal Anthropology Review* 245, 255.
[7] Georgina Ramsay, 'Incommensurable Futures and Displaced Lives: Sovereignty as Control over Time' (2017) 29(3) *Public Culture* 515, 516.

hindered by various mechanisms states use to constrain refugees' movements.[8] Factors such as age, gender, care responsibilities and disability increase the challenges refugees face in their quests for refuge. As a result, these journeys are rarely linear, but are instead 'fragmented'.[9] For example, those in need of protection sometimes become trapped in certain places, unable to travel onwards or return home. In other situations, refugees who feel they have found a place of refuge are forced to leave and must find ways to stay or return.

While there are studies of these fragmented journeys in fields such as anthropology, sociology and criminology,[10] there is little consideration of the role litigation plays. This is despite people in need of international protection increasingly turning to courts or other adjudicative bodies to continue their journeys in search of sanctuary. For example, a refugee may seek a court order granting them permission to leave the confines of a camp, or an asylum seeker living in the Jungle in Calais may initiate court proceedings in the UK seeking relocation there.

When refugees and asylum seekers bring these legal claims, they are seeking protection, not from persecution in their home country, but from a place of ostensible refuge. They want rescue from a place that raises serious protection concerns, but which is, notionally at least, serving as a place of refuge to hundreds or thousands of others. I refer to these actions as 'protection from refuge' claims and they are the focus of this book. While there are myriad studies of how courts interpret refugee definitions, in this first global and comparative study of protection from refuge jurisprudence, I examine how judges approach the remedy: refuge. I provide an account of how adjudicative decision-makers conceptualise refuge through a variety of legal prisms and arbitrate the clash between the search for sanctuary and the different ways states constrain refugees' mobility. I also consider whether these judicial approaches to protection from refuge claims assist or hinder refugees' (or particular refugees') journeys towards a safe haven with a particular focus on gender but also other factors such as youth, disability, sexuality and parenthood.

I outline, in Section 1.2, the 'protection from refuge' conundrum in more detail and discuss the frictions inherent in these legal claims. In Section 1.3, I identify where along a refugee journey these legal challenges can manifest, starting from what may be the first country of asylum to litigation that occurs farther afield. In Section 1.4, I highlight how bringing together what have traditionally been viewed as disparate areas of jurisprudence under the 'protection from refuge' rubric and adopting comparative and feminist methods of analysis provides unique insights on refugee law and the international protection regime more broadly. Finally, Section 1.5 outlines the scope of the work and how the protection from refuge framework developed in the book can inform future research.

[8] Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452, 458.

[9] Michael Collyer, 'Stranded Migrants and the Fragmented Journey' (2010) 23(3) *Journal of Refugee Studies* 273, 275.

[10] See, e.g., Richard Black, 'Breaking the Convention: Researching the "Illegal" Migration of Refugees to Europe' (2003) 35(1) *Antipode: A Radical Journal of Geography* 34; Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States and Canada* (University of California Press, 2006); Mariana Nardone and Ignacio Correa-Velez, 'Unpredictability, Invisibility and Vulnerability: Unaccompanied Asylum-Seeking Minors' Journeys to Australia' (2016) 29(3) *Journal of Refugee Studies* 295; Susan Zimmermann, 'Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge' (2009) 22(1) *Journal of Refugee Studies* 74.

1.2 Protection from Refuge: Tensions and Queries

Protection from refuge claims are a burgeoning trend. They started to emerge in the early 2000s, but have increased in number over the first two decades of the twenty-first century and have arisen in Africa, Europe, North America, the Middle East and the Asia-Pacific region.[11] The majority of these claims are instigated in domestic courts and adjudicative tribunals, while others have been brought before supranational courts and UN treaty bodies. I include in the 'protection from refuge' rubric cases determined by an adjudicative decision-making body in which an asylum seeker or refugee is either resisting being sent to an alternative place of refuge or petitioning to be transferred from their current place of refuge to another. My definition of 'refugee' includes anyone recognised as a refugee under the Refugee Convention or a regional refugee instrument,[12] given complementary protection[13] or qualifying as a Palestinian refugee according to UNRWA.[14] While refugee status is declaratory as opposed to constitutive,[15] I use the term 'asylum seeker' to refer to a person who is seeking international protection, but whose status has not been confirmed. This book examines protection from refuge decisions handed down between 1 January 2000 and 31 December 2020.[16]

Protection from refuge claims are grounded in different aspects of international, regional and domestic law, which I outline in Section 1.3. What unites them is that all of the asylum seeker and refugee litigants are seeking the same outcome: to continue their journey in search of a place of genuine refuge. Despite differences in the ways protection from refuge cases are framed, they raise similar quandaries for decision-makers that have implications for the international protection regime more broadly. These tensions are reflected in the phrase 'protection from refuge', which may, at first, appear to be paradoxical. The term 'refuge' is associated with notions of safety and well-being. Why would a person seek protection from a place intended to provide security and shelter? The apparent contradiction arises because the word 'refuge' is used to refer to both the idea of providing a safe haven (refuge as a concept) and the site at which that sanctuary may be provided (refuge as a place).[17] In protection from refuge challenges, the ideal and the actuality of refuge both

[11] I discuss claims made in all of these regions, with the exception of the Middle East. The only relevant claim made in this region occurred in Israel but was withdrawn before final judgment – see note 85.

[12] For example, the Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45, in force 20 June 1974.

[13] Complementary protection is protection given to those who are 'fleeing serious harm but who do not fall within the technical legal definition of a "refugee"': Jane McAdam, *Complementary Protection in International Law* (Oxford University Press, 2007) 1.

[14] UNRWA's definition of a Palestinian refugee is outlined in Section 1.3.

[15] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (1979, re-edited 1992) [28]; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 11 (see also James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2nd ed, 2021)).

[16] The only exception to this is in Chapter 5, where I discuss *The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness v The Canadian Council for Refugees et al* [2021] FCA 72. This judgment was handed down on 15 April 2021 shortly before this book went to press and was an appeal of a decision by the Federal Court of Canada handed down on 22 July 2020.

[17] The *Oxford English Dictionary* defines 'refuge' as meaning both 'shelter from pursuit or danger or trouble' and 'a person or place etc. offering this': RE Allen (ed), *The Concise Oxford Dictionary of Current English* (Clarendon Press, 8th ed, 1990) 1009. Grahl-Madsen makes the same point with the word 'asylum': Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume 2* (AW Sijthoff-Leyden, 1966) 3.

enter the judicial arena. When refugees make these claims, they draw attention to the disparities between ideas of what refuge is supposed to be with the material reality of the place in which they are or will be located. In other words, they highlight the incongruities between refuge as a concept and as a place. In arbitrating these disputes, decision-makers have the opportunity to draw on frameworks available in international, regional and domestic law to elucidate the concept of refuge. For example, they may understand refuge as allowing refugees to thrive or merely survive. They could posit refuge as a legally binding obligation or as a discretionary act. Decision-makers must then determine the extent to which they can use these notions of refuge to cast judgment on spaces of refuge within or outside their borders.

Another conundrum inherent in these cases and reflected in this book's title is why a person must seek protection from a place of refuge. If a person does not feel secure in their current location, why can they not simply find alternative places of sanctuary? The reason why refugees often need to resort to legal processes to obtain protection from such places is due to the operation of containment mechanisms. Containment mechanisms are laws, policies or agreements that aim or are used to prevent refugees from moving within and across borders and restrict them to particular places of ostensible refuge.[18] They have been increasingly employed over the past three decades,[19] with wealthier states in particular having 'a near-obsession with migration control, spending billions of dollars each year in the hope of securing their borders'.[20] Some containment mechanisms, such as encampment policies, aim to reduce refugee mobility within a state's borders and prevent refugees living in local communities. There are also policies and practices that externalise migration control beyond a state's borders – they aim to prevent asylum seekers arriving or staying in a state's territory[21] and can exert 'control over the entire length of the journey'.[22] Examples of these transnational and cooperative forms of containment mechanisms are offshore processing, international agreements determining which state has responsibility for a refugee and joint surveillance, interception and policing practices.[23] Some scholars argue that the Refugee Convention is a containment mechanism because it only responds to a fraction of people in need of protection and it is sometimes applied in a restrictive manner.[24]

When refugees bring protection from refuge claims, they initiate a contest between their entitlement to refuge and states' interests in constraining refugees' ability to move within

[18] Andrew Shacknove, 'From Asylum to Containment' (1993) 5(4) *International Journal of Refugee Law* 516, 521–3.
[19] Thomas Gammeltoft-Hansen, 'International Refugee Law and Policy: The Case of Deterrence Policies' (2014) 27(4) *Journal of Refugee Studies* 574, 576.
[20] Thomas Gammeltoft-Hansen and James Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235, 236.
[21] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 2.
[22] Ibid 6.
[23] Azedeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 *Human Rights Law Review* 435, 436; Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights' (2013) 54(2) *Harvard International Law Journal* 315, 334–5, 344.
[24] See, e.g., B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350, 356; Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press, 1996) 69–71.

and across borders. The 'dissonance' between refugees' 'human needs and desires and generalised policies of migration control'[25] is what adjudicative decision-makers must arbitrate. Decision-makers' determinations of these conflicts will either disrupt or cement containment mechanisms. In this book I examine whether these judicial responses impede or facilitate refugees' journeys in search of refuge. I also consider if they assist or create additional hurdles for those who face the greatest difficulties in travelling in search of refuge, such as unaccompanied minors, refugees with disabilities and single female-headed families. I ask these questions against the background of how scholars, UN actors and refugees understand refuge, and I turn to this in the next section.

1.3 What Is Refuge and What Are the Different Types of Protection from Refuge Claims?

The word 'refuge' is widely used in refugee and forced migration scholarship,[26] but it is 'rarely distinctly defined'.[27] This book provides the first detailed study of how adjudicative decision-makers conceptualise refuge. In particular, I identify how they understand the objectives, nature, threshold and scope of refuge. In Chapter 2, I outline how scholars from a variety of disciplines, UN institutions and refugees envision these aspects of refuge (in order to highlight refugees' perspectives I draw on memoirs written by people with lived experience of displacement). This provides the background against which I examine how adjudicative decision-makers approach refuge and address the discrepancies between ideas of refuge and the reality.

The analysis in Chapter 2 indicates that there are commonalities across scholarship from different disciplines with respect to the starting points for elucidating what refuge is or should be. The literature on refuge also indicates that the concept is a robust one. Scholarship, UN materials and refugee memoirs provide sophisticated accounts of what refuge is intended to achieve beyond the 'absolute priority on "saving lives"'.[28] There are also well-developed understandings of the nature of refuge as a remedy, legal status, duty, right and process. Scholars, UN institutions and refugees understand refuge to have a broad scope, encompassing a wide range of needs, desires and hopes. The standard of what is deemed to be adequate refuge is usually a high one, surpassing the basic duties of guaranteeing safety and providing essentials for the sustenance of life. Furthermore, the conceptualisation of refuge presented in the literature is dynamic in the sense that there are

[25] Gammeltoft-Hansen and Hathaway (n 20) 237.

[26] See, e.g., Catherine Besteman, *Making Refuge: Somali Bantu Refugees and Lewiston, Maine* (Duke University Press, 2016); Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017); Elena Fiddian-Qasmiyeh (ed), *Refuge in a Moving World: Tracing Refugee and Migrant Journeys Across Disciplines* (UCL Press, 2020) 1; Daniel Ghezelback, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Klaus Neumann, *Refuge Australia: Australia's Humanitarian Record* (UNSW Press, 2005); Silvia Pasquetti and Romola Sanyal (eds), *Displacement: Global Conversations on Refuge* (Manchester University Press, 2020); David Scott Fitzgerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press, 2019).

[27] Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018) 156.

[28] Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20(2) *International Journal on Minority and Group Rights* 147, 162.

considerations of the ways it may differ for people of different genders, sexualities and ages, as well as those with disabilities and care responsibilities. To highlight the discrepancies between refuge as a concept and as a place, in Chapter 2 I also discuss literature that examines the conditions in which many refugees live. I focus in particular on the places of ostensible refuge that are the subject of the protection from refuge claims examined in this book.

I explore how decision-makers respond to the disjunctures between ideas and actualities of refuge in Chapters 3–7, in which I survey protection from refuge claims made at different points in a refugee journey. I start in Chapter 3 with legal challenges that arise in what may be a first country of asylum or a place of refuge relatively close to home. This chapter examines forced encampment litigation. I focus on Kenya, which is where most forced encampment litigation has occurred. These cases have been initiated by refugees living in urban areas resisting being forcibly sent to a refugee camp, as well as refugees living in camps seeking permission to leave. They are grounded in domestic, regional and international human rights and refugee law. I examine how Kenyan judges use these legal frameworks as prisms to articulate the functions and nature of refuge. I show that Kenyan courts have understood refuge as a process as well as a human rights remedy that must allow refugees to live a liveable life in the present, have hope for the future and heal from past trauma. This extends understandings of refuge when compared to the academic literature. Judges arrive at these sophisticated understandings of refuge when they identify and reflect on irreducible aspects of refugeehood.

However, in more recent cases, Kenyan judges have moved away from this approach and instead focus on the uniqueness of the protection from refuge litigants. This results in conceptualising refuge as a limited commodity that, akin to welfare, must be given to those most in need or most deserving. Nevertheless, in line with adopting feminist methods of analysis (which I describe in Section 1.4), I highlight that, in identifying the anomalous refugee, Kenyan courts have addressed protection concerns relating to gender, age and disability in a sensitive and nuanced manner.

I continue my examination of the use of human rights arguments to secure protection from a place of refuge in Chapter 4, where I look to Europe. Most of these protection from refuge claims are brought by those who have made longer, often transcontinental journeys. They are using human rights law to request or challenge a transfer made pursuant to the EU's Dublin System[29] or other containment practice. These cases are brought before the European Court of Human Rights or domestic adjudicative decision-making bodies pursuant to the ECHR. They have also been brought before UN treaty bodies. While these cases do not directly call into question the validity of European containment practices, they have potential to set precedents that jeopardise their continued operation.

Unlike Kenya's forced encampment litigation, which has received scant scholarly attention, there are numerous studies of this jurisprudence. Most analyses are written from the perspective of how it develops (or, with respect to UN treaty body jurisprudence, compares to) European human rights law, especially regarding migrants' rights.[30] In Chapter 4,

[29] The Dublin System determines the EU member-state responsible for hearing an asylum claim. It was adopted in 2003 and recast in 2013. There was a proposal for its reform in 2016. However, in 2020 the European Commission announced that the Dublin System would be abolished and the proposal for its reform was withdrawn. At the time of writing, the Dublin System was still in force.

[30] Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press, 2019); Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21

I depart from the existing scholarship by opening a different line of enquiry. I examine how the case law develops judicial understandings of refuge and what it says, through the prism of different areas of human rights law, about international refugee law and the remedy it offers. My analysis is also unique in that I critically examine the jurisprudence from a gender perspective. The leading legal and sociolegal examinations of this case law do not take a feminist or intersectional approach. Briddick notes that women are 'conspicuously absent or underrepresented' in Dublin System cases[31] and that 'consideration of gender has been noticeably absent from debates on Europe's re-bordering'.[32]

The human rights arguments available to refugee and asylum seeker litigants to plead in the European context are more limited than in Kenya. Most protection from refuge claims are based on the right to be free from torture and inhuman and degrading treatment, the right to family life, the right to an effective remedy and the right against collective expulsion: rights not in the Refugee Convention and rights that would be considered far below the standard of adequate protection when compared to the legal literature on refugee protection (outlined in Chapter 2). I deepen the analysis made in Chapter 3 by highlighting that, in initial and early European protection from refuge claims, decision-makers identified common aspects of refugeehood and used the above-noted rights to engage with the functions and nature of refuge. Similar to Kenyan case law, there was an understanding that refuge is a remedy that must address present, future and past vicissitudes of displacement, but decision-makers now search for the 'good' or 'peculiarly vulnerable' refugee. This has resulted in decision-makers approaching refuge as a scarce commodity and one stripped down to the barest minimum of protections. Unlike their Kenyan counterparts, in searching for the exceptional refugee, most decision-makers approach questions of gender, age and disability in a nominal manner.

In Chapter 5, I continue with the journeys of refugees who have travelled beyond what may be their first country of asylum in search of sanctuary farther afield, but I examine cases they have initiated that directly challenge regional containment instruments. This has occurred in four parts of the world: North America (an agreement between the US and Canada), Asia-Pacific (agreements between Australia and Malaysia, Australia and Papua New Guinea and Australia and Nauru), Europe (the Dublin System and an agreement between Europe and Turkey) and Libya (an agreement between Libya and Italy).[33] Human rights arguments are present in these cases, but they are less central. The arguments pleaded traverse many areas of domestic, regional and international law. In

(3) *German Law Review* 355; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).

[31] Catherine Briddick, 'Some Other(ed) "Refugees"?: Women Seeking Asylum under Refugee and Human Rights Law' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 281, 287.

[32] Ibid 284.

[33] With respect to the EU, I examine cases before the Court of Justice of the European Union that directly challenge the validity and operation of the Dublin System such as *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ECR I-13905. These cases are different from the cases discussed in Chapter 4, most of which are challenges made before the European Court of Human Rights under the ECHR. Unlike the cases discussed in Chapter 5, the cases in Chapter 4 do not directly call into question the Dublin System's validity, and the European Court of Human Rights does not have jurisdiction to make such a determination: Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) *Human Rights Law Review* 287, 307.

deciding these cases, judges must determine the extent to which they will take regional law, international law or foreign jurisprudence into account in setting the threshold for adequate refuge. Another contentious issue is whether these legal frameworks permit them to pass judgment on other states' laws and policies. Therefore, the main theme in Chapter 5 is the role that cartographic and juridical borders play in protection from refuge challenges. I examine the ways decision-makers position and manoeuvre juridical borders in constructing ideas of refuge and determining the legality of states' attempts to prevent refugees crossing international borders in search of refuge. I observe that, when courts consider the significance of refugeehood and expand their juridical borders to permit assessment of sites of refuge in other states, they set high thresholds for refuge and characterise it as a duty owed by states. These powerful conceptualisations of refuge disrupt the continuation of containment agreements.

However, in most cases examined in Chapter 5, courts ignore the salience of refugee status and retract their juridical borders. This means that there is no minimum standard of refuge set in these protection from refuge cases and refuge morphs from an obligation to a discretion. Refugees become trapped in the resisted place of refuge, unable to continue their journey except in exceptional or extraordinary circumstances. What is considered exceptional is highly gendered with the narrow frameworks developed sidelining experiences of male and also many female refugees. The extraordinary circumstances needed to trigger these legal frameworks also have significant gendered consequences, placing both men and women at significant and different forms of risk.

In Chapters 6 and 7, I examine protection from refuge claims that arise under the Refugee Convention. These claims are also brought by those who have made long journeys to countries in the Global North. However, instead of being sent to or trapped in a nearby country within the region, these litigants face the prospect of being returned to a place of ostensible refuge in the Global South. Human rights arguments are present in these claims, and the role of borders is significant, but another factor at play is Global North states' concerns that potentially significant numbers of people may use the Refugee Convention to transfer their place of refuge from a lower- to a higher-income country.[34] To assist a dissection of decision-makers' approaches to these claims, I draw on literature written from third-world approaches to international law, critical race and postcolonial perspectives that position the Refugee Convention as a containment mechanism.

I embark on this line of investigation in Chapter 6, in which I examine cases that are instigated by Palestinian refugees. Palestinians are the only group of refugees who do not come within the UNHCR's mandate and instead have their own UN body that provides protection and assistance – UNRWA. The history behind the different treatment of Palestinian refugees is discussed in Chapter 6. UNRWA defines Palestinian refugees as those whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict, as well as descendants of men who meet this criteria.[35] UNRWA is also mandated to provide protection and assistance to other displaced persons, including those displaced as

[34] Chimni (n 24) 351; Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 189, 206.

[35] UNRWA, *Consolidated Eligibility and Registration Instructions (CERI)* (May 2006) 2 <www.unrwa.org/sites/default/files/ceri_24_may_2006_final.pdf>.

a result of the 1967 Israel–Arab conflict and subsequent hostilities.[36] UNRWA uses the term 'Palestinian refugee' to encompass the groups it is mandated to protect and assist as well as those who come within UNRWA's definition of a Palestinian refugee.[37]

Some Palestinian refugees leave an UNRWA area of operation (Jordan, Lebanon, Syria, the Gaza strip, East Jerusalem or the West Bank) and seek refugee protection elsewhere. In making these journeys, they confront article 1D of the Refugee Convention, which applies only to Palestinian refugees and is described as an exclusion[38] or 'contingent inclusion' clause.[39] Article 1D provides that Palestinian refugees are excluded from protection under the Refugee Convention unless their UN protection or assistance has ceased for any reason. I explain in detail article 1D and the debates on its interpretations in Chapter 6. Decision-makers' approach to these claims determines whether Palestinian refugees should return to an UNRWA region to receive international protection or be entitled to remain in the country where they made the article 1D claim and receive protection as Convention refugees.

When decision-makers reflect on the nature of Palestinian refugeehood and expand their juridical borders, they come close to setting a broad scope of refuge for Palestinian refugees and characterising refuge as a right, duty and act of international solidarity. In particular, a 2019 Aotearoa/New Zealand decision may open the door to a protection-sensitive approach to article 1D, at least for those Palestinian refugees who travel to the Antipodes. However, most decision-makers determine these claims in a way that truncates the scope of refuge for Palestinian refugees, positions refuge not as a right but as an act of benevolence and entrenches article 1D as a containment mechanism. This inhibits Palestinian refugees' ability to find a place of refuge outside the UNRWA region unless their circumstances are deemed exceptional in some way. A feminist analysis of the case law indicates that the approach to exceptionality in article 1D jurisprudence creates additional barriers for female Palestinian refugees. This is because it prioritises those who have been specifically targeted with a form of harm manifesting in the public sphere but disregards harms most likely to occur behind closed doors.

In Chapter 7, I analyse cases in which decision-makers have to determine whether a person can seek refuge in an IDP camp. These cases arise under article 1A(2) of the Refugee Convention and are made by putative refugees. A putative refugee is a person outside their country of origin or habitual residence, whose circumstances indicate they satisfy one aspect of the refugee definition in the Refugee Convention (a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion), but who have not yet established another part of the definition (that they are unable to avail themselves of the protection of their country of origin or habitual residence). In most jurisdictions, decision-makers will ask whether the putative refugee can relocate to another part of their country of origin or habitual residence in which they will have protection. This is an internal protection alternative ('IPA') enquiry.[40] In some of these cases, the putative refugee has pleaded that, if they internally

[36] Damian Lilly, 'UNRWA's Protection Mandate: Closing the "Protection Gap"' (2018) 30(3) *International Journal of Refugee Law* 444, 446.
[37] Ibid 446.
[38] James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 513, 515.
[39] Guy Goodwin-Gill and Susan Akram, 'Brief *Amicus Curiae* on the Status of Palestinian Refugees under International Law' (2000) 11 *Palestine Yearbook of International Law* 187, 191.
[40] See Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill, 2019) 15–7 for a discussion of other terminologies, including 'internal flight alternative' and 'internal relocation'. I use 'internal

relocate, they would have no option but to live in an IDP camp. Decision-makers must then determine if an IDP camp is an acceptable internal protection alternative. These cases have arisen in the UK and Aotearoa/New Zealand.[41] It is possible to consider all putative refugees facing an IPA assessment as prospective IDPs[42] (IDPs are people who have fled their homes but remain within their state).[43] However, in these particular cases, refuge as a place and concept collide because the putative refugee is resisting the prospect of seeking refuge in an IDP camp, a place intended to provide refuge to significant numbers of people displaced from their homes.[44]

When these claims initially came before courts and tribunals in the early 2000s, decision-makers reflected on the situations of those living in IDP camps. They set a broad scope for adequate refuge and approached decisions with an ethic of international cooperation. But subsequently, there has been a transition in which decision-makers produce rudimentary notions of refuge. They give it a narrow scope – limiting it to bare survival rights – and there is a shift from understanding that refuge involves a nation-state bestowing protection to positioning refuge as something individuals can forge themselves. The understanding that refuge is an act of international solidarity has dissipated from the jurisprudence. Protection from life in an IDP camp will only be granted if the putative refugee can establish that they are exceptionally vulnerable. Feminist methods of analysis highlight that decision-makers' notional approaches to the interactions between gender and vulnerability have resulted in problematic outcomes for refugees of all genders.

In the concluding chapter, I reflect on the patterns in the ways decision-makers across all of these jurisdictions, grappling with different legal instruments and doctrines, approach and determine protection from refuge claims. Across the globe, decision-makers have transitioned from sophisticated to impoverished understandings of refuge, from approaches that disrupt containment mechanisms to those that cement them and from decisions that facilitate to ones that impede refugee journeys. However, some recent jurisprudence indicates that there may be a shift back towards more protection-sensitive decisions.

protection alternative' because it highlights what should be decision-makers' main concern: whether the putative refugee will have *protection* if they relocate.

41 I conducted a search of IPA jurisprudence on LexisNexis, Westlaw and Refworld. The issue of internal relocation to an IDP camp has arisen in some decisions in which the individuals are not entitled to refugee protection. See note 92 for an example. As outlined on page 18, protection from refuge claims made by those whose claims for international protection have been unsuccessful are outside the scope of this book.

42 Schultz (n 40) 7.

43 IDPs are those 'who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border': Guiding Principles on Internal Displacement, UN ESCOR, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998) [2].

44 Principle 12(2) of the Guiding Principles on Internal Displacement (n 43) provides that IDPs 'shall not be interned in or confined to a camp' unless 'absolutely necessary'. However, this 'addresses the use of closed camps which [IPDs] cannot leave, and has to be distinguished from the practice of using camps to host large numbers of such persons': Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (Paper No 32, American Society of International Law Studies in Transnational Legal Policy, 2008) 32. In most contexts, IDP camps are intended to be sites of protection for IDPs and many are staffed by representatives from various international organisations: Brookings Institution, *Protecting Internally Displaced Persons: A Manual for Law and Policy Makers* (October 2008) 63 <www.unhcr.org/50f955599.pdf>.