

# States, the Law and Access to Refugee Protection

Fortresses and Fairness

Edited by  
Maria O'Sullivan and Dallah Stevens



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# 1

## *Access to Refugee Protection*

### Key Concepts and Contemporary Challenges

MARIA O'SULLIVAN AND DALLAL STEVENS

#### I. INTRODUCTION

**T**HIS VOLUME SEEKS to address two of the most pertinent current challenges faced by asylum seekers in gaining access to international refugee protection: the obstacles to *physical* access to territory and the barriers to accessing a quality asylum *procedure* (which we have termed 'access to asylum justice')—'Fortresses and Fairness'.

Current figures show that there are 21.3 million refugees worldwide.<sup>1</sup> However, there is a reluctance on the part of many industrialised states to provide protection to such refugees with an increasing tendency of those states to deflect refugee flows. As is widely recognised, developing countries and those neighbouring refugee-producing states bear an unfair share of hosting refugees.<sup>2</sup> Contemporary practices of deflection include physical deterrence such as the erection of border fences, push-backs at sea and offshore processing, as well as procedural deterrence such as limitations on procedural fairness, accelerated procedures, at-sea screening and reductions in legal assistance. In Europe, the various deterrent policies utilised by some countries, such as the erection of fences and the 'push-back' of asylum seekers crossing by sea clearly restrict access to territory.<sup>3</sup> This problem has become particularly acute in recent years due to the Syrian refugee crisis with over 4 million people now displaced

<sup>1</sup> UNHCR, 'Global Trends: Forced Displacement in 2015' (Geneva, UNHCR 2016), 2 [www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html](http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html).

<sup>2</sup> *ibid.*

<sup>3</sup> eg Amnesty International, 'Refugees Endangered and Dying Due to EU's Reliance on Fences and Gatekeepers' (News, Amnesty International, 17 November 2015) [www.amnesty.org.au/news/comments/38426/](http://www.amnesty.org.au/news/comments/38426/).

outside Syria,<sup>4</sup> but with many European states now maintaining a largely 'closed door' policy.<sup>5</sup> In 2015 there was a fracturing of the European Union (EU) Common European Asylum System (CEAS), with Germany seemingly willing to accept large numbers of Syrian refugees while key European border states such as Bulgaria and Hungary elected instead to erect border fences and introduce criminal sanctions for irregular entry to stop the arrival of asylum seekers.<sup>6</sup> In the Middle East, by contrast, the 'fortress' mentality is arguably less pronounced and refugees are able to enter neighbouring countries, but they often have fewer rights and face numerous challenges including lack of security of status and residence.<sup>7</sup> Similarly in South Africa, whilst large numbers of asylum seekers have been able to cross the border and claim asylum in the past,<sup>8</sup> they face long delays in the processing of claims. Recent policy changes have now also established institutional barriers to asylum, including restrictions limiting physical access at the border and at refugee processing centres.<sup>9</sup> In South-East Asia, the United Nations High Commissioner for Refugees (UNHCR) has also reported that some states have introduced increasingly restrictive policies, such as denying safe disembarkation, and have narrowed protection space and access to asylum.<sup>10</sup>

<sup>4</sup> UNHCR, 'Syria Regional Refugee Response—Inter-agency Information Sharing Portal' (UNHCR, 2016) [www.data.unhcr.org/syrianrefugees/regional.php](http://www.data.unhcr.org/syrianrefugees/regional.php). This records the number of registered Syrian refugees as 4.8 million, comprised of 2.1 million Syrians registered by UNHCR in Egypt, Iraq, Jordan and Lebanon; 2.7 million Syrians registered by the Government of Turkey; as well as more than 29,000 Syrian refugees registered in North Africa (figures current as at 2 June 2016).

<sup>5</sup> See A Brasseur, President of the Parliamentary Assembly of the Council of Europe, 'Europe Slamming Its Doors on Refugees: Is This Really What Europe is About?' (Press Release, Council of Europe, 22 January 2016); J Dempsey, 'Merkel's Open-Door Refugee Policy Leaves Her Isolated' (Newsweek, 22 January 2016) [www.newsweek.com/merkels-open-door-refugee-policy-leaves-her-isolated-418446](http://www.newsweek.com/merkels-open-door-refugee-policy-leaves-her-isolated-418446).

<sup>6</sup> Bulgaria has erected a fence along its border with Turkey: see C Mortimer, 'Bulgaria Builds Final Part of Razor Wire Fence to Keep Out Refugees' (London, The Independent, 4 August 2015) [www.independent.co.uk/news/world/europe/bulgaria-builds-final-part-of-razor-wire-fence-to-keep-out-refugees-10437962.html](http://www.independent.co.uk/news/world/europe/bulgaria-builds-final-part-of-razor-wire-fence-to-keep-out-refugees-10437962.html). See discussion of Hungary's practice in Iván, ch 3. Slovenia has also begun construction of a border fence: see The Guardian, 'Slovenia Starts Building Fence to Control Flow of Refugees' (London, The Guardian, 11 November 2015) [www.theguardian.com/world/2015/nov/11/slovenia-fence-refugees-veliki-obrez](http://www.theguardian.com/world/2015/nov/11/slovenia-fence-refugees-veliki-obrez).

<sup>7</sup> See further discussion of the Middle East in Stevens, ch 10. See also D Stevens, 'Shifting Conceptions of Refugee Identity and Protection: European and Middle Eastern Approaches' in S Kneebone, D Stevens and L Baldassar (eds), *Refugee Protection and the Role of Law* (Cambridge, Cambridge University Press, 2014) ch 5; D Stevens, 'Legal Status, Labelling and Protection: the Case of Iraqi "Refugees" in Jordan' (2013) 25 *International Journal of Refugee Law* 1, 1–38.

<sup>8</sup> The numbers of asylum seekers and refugees residing in South Africa is high. As at June 2015, UNHCR reports there were 114,512 recognised refugees and 798,080 asylum seekers: UNHCR, 'Mid Year Trends 2015' (Geneva, UNHCR, 2015) [www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html](http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html).

<sup>9</sup> The position in South Africa is discussed in further detail by Johnson and Carciotto, ch 8.

<sup>10</sup> UNHCR, 'UNHCR Global Appeal 2015 Update—South-East Asia', 2015, [www.unhcr.org/5461e60a558.pdf](http://www.unhcr.org/5461e60a558.pdf).

Access to territory is, of course, no guarantee of fairness or of justice. Many states seek to reduce both the time and costs of refugee status determination, with potentially serious implications for decision-making.<sup>11</sup> For instance, accelerated screening procedures operate in a number of EU countries and have recently been introduced into Australian law. Questions have been raised by the United Kingdom (UK) courts as to the appropriateness of fast tracking applicants and whether they can be afforded a fair opportunity to make an asylum claim.<sup>12</sup> Similarly, concerns arise in relation to the operation of the expedited removal process by United States (US) immigration authorities which is based on an assessment as to whether the person has a ‘credible fear’ of persecution.<sup>13</sup>

Asylum seekers consequently face two main challenges in the current international environment—difficulties in obtaining physical access to state territory to claim asylum and a significant reduction in rights and access to justice upon entry into a state’s territory. These challenges raise the following questions: how can states be persuaded to open their borders to asylum applicants? What are the components of a quality asylum procedure? Is legal advice a prerequisite for asylum access to justice? Can accelerated ‘screening’ procedures suffice? What has been the impact of law on the implementation of refugee protection in practice?

The purpose of this chapter is to outline some of the key concepts analysed in this volume and to bring together the themes discussed by contributors. Section II considers the broad concepts central to the concept of asylum: ‘asylum’ and ‘refugee protection’. Section III then discusses in greater detail the concepts and challenges relating to access to territory, such as ‘states’ and ‘borders’. A focus of this analysis will be on the force of law in defining borders and the right of entry. This is followed by an analysis in Section IV of the concepts of asylum justice and contemporary due process challenges, including discussion of legal assistance, procedural fairness and the implications of the introduction in key asylum states of accelerated procedures.

## II. BACKGROUND: ‘ASYLUM’ AND ‘REFUGEE PROTECTION’

We acknowledge that many of the concepts within the asylum debate are contested—for instance, what does ‘asylum’ now mean and what is the level and quality of protection required to be granted to asylum seekers and refugees? It is generally agreed that ‘asylum’ is a broad term with a

<sup>11</sup> eg the reforms introduced in Australian legislation via the Migration and Maritime Powers (Resolving the Asylum Caseload) Act 2014, discussed by Kirk, ch 11.

<sup>12</sup> Discussed by Kirk, ch 11.

<sup>13</sup> Discussed by Morgan and Anker, ch 6.

number of definitions.<sup>14</sup> At a minimum, it may be interpreted as a state of refuge that gives protection from immediate harm.<sup>15</sup> Likewise, the term 'protection' is interpreted differently across jurisdictions and varies according to context.<sup>16</sup> At one end of the spectrum, asylum comprises full protection pursuant to the obligations set out in the the 1951 United Nations Convention relating to the Status of Refugees<sup>17</sup> (Refugee Convention), including *non-refoulement* and refugee associated rights such as the right to work and social security.<sup>18</sup> At the other end, it can also mean lesser forms of protection such as temporary protection and 'tolerated' stay or forms of temporary humanitarian sanctuary which offer little more than a right of 'non-return'.<sup>19</sup> This raises the question as to whether non-return is becoming the cornerstone of asylum and at what stage it requires additional rights such as some form of integration into the host state. On this issue, Alexander Betts has pointed out that:

[A]n important element of protection is the access of refugees to a timely resolution (durable solution) to their predicament; that is, rather than refugees remaining indefinitely in a state of limbo without citizenship or residency, they should be fully reintegrated into a state.<sup>20</sup>

Whether states are willing to meet such obligations is addressed in this collection.

<sup>14</sup> 'The term "asylum" has no clear or agreed meaning': A Grahl-Madsen, *Territorial Asylum* (Stockholm, Almqvist and Wiksell International, 1980) 50. See for a discussion of asylum in international law, M-T Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 *International Journal of Refugee Law* 1, 3–28. For an ethical analysis of asylum, see J-F Durieux, 'Three Asylum Paradigms' (2013) 20 *International Journal on Minority and Group Rights* 147.

<sup>15</sup> As Roman Boed notes, 'Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer': R Boed, 'The State of The Right of Asylum In International Law' (1994) 5(1) *Duke Journal of Comparative and International Law* 1, 2.

<sup>16</sup> See for discussion of the concept of 'protection', D Stevens, 'What Do We Mean by Protection?' (2013) 20 *International Journal on Minority and Group Rights* 233.

<sup>17</sup> 189 United Nations Treaty Series 150, supplemented by the 1967 Protocol relating to the Status of Refugees, 606 United Nations Treaty Series 267 (Refugee Convention). Art 39(2)–(3) provides that signature and accession to the Convention is open only to states (specifically, those states who participated in the Convention drafting process or who are Member States of the UN).

<sup>18</sup> Refugee Convention, above n 17, Arts 17, 24. Some states offer temporary residence permits which have restricted work rights, eg Finland where temporary residence is granted for a period of one year at a time and holders of such permits have a restricted right to employment pursuant to the Aliens Act: European Migration Network (EMN), 'Ad-hoc Query on Implementing Tolerated-Stay Requested by EE EMN NCP on 8th April 2014' (EMN, 3 July 2014) [www.ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/illegal-immigration/549\\_emn\\_ahq\\_on\\_implementing\\_tolerated\\_stay\\_03072014\\_en.pdf](http://www.ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/illegal-immigration/549_emn_ahq_on_implementing_tolerated_stay_03072014_en.pdf).

<sup>19</sup> See I Máximo Pestana, "'Tolerated Stay': What Protection Does It Give?' (2012) 40 *Forced Migration Review* 38, [www.fmreview.org/en/young-and-out-of-place/pestana.pdf](http://www.fmreview.org/en/young-and-out-of-place/pestana.pdf); EMN (2014) above n 18.

<sup>20</sup> A Betts, *Protection by Persuasion* (Ithaca, Cornell University Press, 2009) 6.

## A. Meaning of Asylum

A number of writers have sought to explain the meaning and contours of asylum. In 1950, the Institute of International Law defined asylum as ‘the protection that a State grants on its territory or in some other place under the control of its organs to a person who comes to seek it’.<sup>21</sup> Guy Goodwin-Gill and Jane McAdam describe asylum as the ‘protection granted to foreign national against the exercise of jurisdiction by another state’ but also recognise that a more contemporary interpretation regards asylum as ‘protection against harm, specifically violations of fundamental human rights’.<sup>22</sup> Matthew Price, in his book *Rethinking Asylum: History, Purpose and Limits*, traces the development of the concept of asylum from the early Grecian period to the present day, thereby providing a critical historical perspective to sanctuary seeking. He concludes that ‘asylum should be reserved for those exposed to serious harm because they *lack political membership*’ (emphasis in original),<sup>23</sup> and distinguishes temporary protection from asylum by noting that ‘[a]sylum confers a *political good—membership*’ whereas recipients of temporary protection are simply given permission to remain in the country for a period of time.<sup>24</sup> This is of interest given the increasing use of temporary protection, temporary residence permits and ‘humanitarian protection/right to remain’ by asylum host states which may give only limited rights of protection. For instance, as Dallal Stevens discusses in Chapter 10, in the Middle East refugees are able to enter neighbouring countries, but they often have fewer rights and face numerous challenges including lack of security of status and residence due, in part, to the fact that many countries in the region have resisted signing the Refugee Convention.<sup>25</sup> Turkey has sought to address the Syrian refugee influx (at 2.7 million as at mid-2016)<sup>26</sup> by introducing a temporary protection regime, but its effectiveness is questionable.<sup>27</sup>

In discussing the concept of asylum, one must also consider the confluence made by states between immigration and asylum. As Nadine

<sup>21</sup> Institute of International Law, ‘Asylum in Public International Law’ (Bath Session, 5th Commission, September 1950) art 1.

<sup>22</sup> GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford, Oxford University Press, 2007) 356.

<sup>23</sup> *ibid* 431.

<sup>24</sup> ME Price, ‘Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People’ (2006) 47 *Harvard International Law Journal* 413, 431.

<sup>25</sup> Note that Turkey is an exception and is party to the Refugee Convention but applies the geographical limitation to Europe. However, Turkey has recently introduced a new law—Law on Foreigners and International Protection, Law No 6458, 4 April 2013 and Regulation 29153 on Temporary Protection—which spell out a new approach and rights for Syrian refugees in Turkey. This is discussed further by Soykan in ch 4.

<sup>26</sup> UNHCR (2016) above n 4.

<sup>27</sup> See Soykan, ch 4.

El-Enany discusses in Chapter 2, the emergence of administrative immigration regimes, both in the UK and at the EU level, has led to asylum becoming imbricated in immigration law. Restrictive immigration and border control, both in the UK and at the EU level, has grown in strength and substance over recent decades. As El-Enany notes, the result has been the gradual attenuation, even subversion, of the protective potential of asylum. This is a problem recognised also by writers in other texts. For instance, in the US, Rebecca Hamlin notes that 'asylum is eclipsed by the much larger and politically contentious issue of undocumented migration, mostly from Mexico'.<sup>28</sup>

## B. Right to Seek Asylum

In terms of access to asylum, there are questions about a right to seek asylum, the protections provided by the principle of *non-refoulement* and the right to seek asylum in a country of one's own choosing. Under international human rights principles, asylum seekers have the right to seek asylum: Article 14 of the Universal Declaration of Human Rights (UDHR) provides that '[e]veryone has the right to seek and to enjoy asylum from persecution in other countries'.<sup>29</sup> However, the UDHR is generally regarded as a non-binding instrument. Thus, many commentators acknowledge that there is no recognised right under international refugee law to seek and obtain asylum.<sup>30</sup> The Refugee Convention also obliges states not to return refugees back to a place of harm under the *non-refoulement* principle.<sup>31</sup> Due to these provisions, it is arguable that asylum seekers have a right to seek asylum. However, the notion that there is a right to seek asylum in a country of one's *choosing* is contested.<sup>32</sup>

<sup>28</sup> R Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (Oxford, Oxford University Press, 2014) 8.

<sup>29</sup> UDHR, art 14 provides that '[e]veryone has the right to seek and to enjoy asylum from persecution in other countries': UNGA Res 217A (III), 10 December 1948.

<sup>30</sup> The Refugee Convention does not contain a specific right to seek asylum. As Goodwin-Gill notes: 'The principle of *non-refoulement*—the obligation on states not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm—may not immediately correlate with the right of every one to seek asylum, but it does clearly place limits on what states may lawfully do': G Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 *International Journal of Refugee Law* 443, 444. See also R Boed, 'The State of the Right of Asylum in International Law' (1994) 5(1) *Duke Journal of Comparative and International Law* 1, 8–9.

<sup>31</sup> Refugee Convention, above n 17, art 33.

<sup>32</sup> S Kneebone, 'The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept' in J McAdam (ed), *Moving On: Forced Migration and Human Rights* (Oxford, Hart Publishing, 2008) 139–40; M Gibney, 'Forced Migration, Engineered Regionalism and Justice Between States' in S Kneebone and F Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (New York, Berghahn, 2007) 71–72.



As Kneebone notes, the right to seek asylum has tended to be interpreted by states as ‘conferring an obligation to do so in the first “safe” place of asylum’.<sup>33</sup> Interestingly, a recent study commissioned by the EU Parliamentary Committee on Civil Liberties, Justice and Home Affairs notes that whilst asylum seekers may not necessarily choose their preferred country of destination, they should be given due process rights to explain *why* they have chosen that particular country for asylum:

In making explicit the principled commitment to avoid unnecessary coercion, we do not endorse the notion that asylum seekers should have ‘free choice’ as to their country of destination in all instances. But rather, the law, properly interpreted, requires that *they should be heard* as regards the reasons for their choice of destination, and if there are strong reasons, such as kin or connections, access to that country of asylum should be facilitated [emphasis added].<sup>34</sup>

### C. ‘Refugee Protection’

Interestingly, despite its centrality to the refugee law framework and its widespread usage, the concept of ‘protection’ has received relatively academic analysis.<sup>35</sup> As Stevens discusses elsewhere, ‘protection’ can have different meanings for the individual, the state, UNHCR or humanitarian organisations. And the duty of protection owed by a state to its citizens can vary between states.<sup>36</sup> At times, there is an overlap with ‘asylum’.<sup>37</sup> Protection can have active and passive qualities—that is actively protecting from harm or avoiding an action which leads to harm. For many refugee lawyers, though, the Refugee Convention is the source of obligations owed by the state to the refugee, broadly regarded as ‘rights’ or ‘protection’. The granting of ‘protection’ by a state can range from integration and the full set of acquired rights set out in Articles 2–34 of the Refugee Convention to only basic protection from return (Article 33 prohibition of *refoulement*) with none of the associated rights given to refugees formally recognised as such under the Refugee Convention. In terms of temporality, we also note the trend away from permanent forms of refugee protection to the increasing use by some states of temporary protection in situations of mass influx, humanitarian/subsidiary/complementary protection for

<sup>33</sup> Kneebone, above n 32, 141.

<sup>34</sup> EU Directorate General for Internal Policies, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection* (Doc no PE509.989, Study for the LIBE Committee, European Parliament, Publications Office, 2014) [www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU\(2014\)509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf), 17.

<sup>35</sup> See Stevens, above n 16.

<sup>36</sup> J Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991) 105–06.

<sup>37</sup> See discussion above at Section II(A).

those not seen as falling within the strict definition of 'refugee', and time-limited visas/temporary residence permits for recognised refugees. For the purposes of this volume, we understand 'protection' as encompassing these various forms of protection, whilst noting that they vary in quality and durability.

### III. STATES, ACCESS TO TERRITORY AND THE LAW

#### A. 'The State' (or States) and 'Borders'

As this volume argues, there are two fundamental principles underlying asylum: access to territory and, once within territory, access to asylum justice in relation to refugee status determination.<sup>38</sup> The title of this volume refers to 'States' and 'the Law' in the context of refugee protection. This is because, despite the importance of non-state organisations in providing humanitarian assistance to refugees, the act of granting refugee status and refugee protection remains dependent on the acts of *states*: states are parties to international treaties such as the Refugee Convention, and are defined as having special attributes and responsibilities, including the responsibility to protect their citizens.<sup>39</sup> In particular, the existence of state protection is a key element of the definition of refugee status under Article 1A(2) of the Refugee Convention.<sup>40</sup> State responsibility is also a key legal concept which has been used in litigation to attempt to render states accountable for their actions in relation to asylum seekers, even when that occurs outside national boundaries. We will analyse these key concepts in this section.

##### (i) *Territory, Borders and the Law*

The notions of '*territory*' and '*border*' have particular significance in the refugee law context. Article 1A(2) requires that a forced migrant must have crossed a state border (either that of his country of nationality or country of former habitual residence for those without nationality).

<sup>38</sup> Robert Thomas has noted, 'this right to seek asylum cuts across one of the defining features of the modern state: its ability to control entry into its physical territory': R Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Oxford, Hart Publishing, 2011) 16.

<sup>39</sup> See eg the UK House of Lords in *Horvath v SSHD* [2000] UKHL 37, [2001] 1 AC 489, 499–500 (per Hope LJ); M Gibney, 'Liberal Democratic States and Responsibilities to Refugees' (1999) 93 *American Political Science Review* 169, 175; A Shacknove, 'Who is a Refugee?' (1985) 95 *Ethics* 274, 275.

<sup>40</sup> Refugee Convention, Art 1A(2) refers to an applicant's willingness to avail himself of the protection of the 'country of his nationality'.

However, many people who flee persecution, armed conflict and other harm are unable to cross a state border, but instead seek refuge within their own country. This volume is not focused on such 'internally displaced people' (IDP), but rather on those that leave their country of origin to seek asylum elsewhere.<sup>41</sup>

The concepts of 'territory' and 'border' are contested and may be understood differently under international as opposed to regional or domestic law of some asylum-host countries.<sup>42</sup> The relaxation of border controls within the EU Schengen area has facilitated the ability to travel across the EU territory but has resulted in increased fortification of external borders of the EU. Recent events in the Mediterranean and in Eastern Europe with burgeoning numbers of people seeking entry to Europe through irregular means and by boat are testing the EU's ability to manage its external frontiers and raising difficult legal and practical questions, many of which are related to access.

The Dublin Regulation III, which allows for return to the first country of arrival in the EU, has been intermittently suspended by a number of EU states during 2015. Member States in the Schengen area (in which there is passport-free movement between participating countries) also started to reintroduce border controls as a reaction to the rising inward migration and apparent ease of inter-state travel. Finally, in December 2015, the EU Commission proposed major amendments to the Schengen Borders Code.<sup>43</sup>

Challenges to gaining *access to asylum territory* are, arguably, not new: there is a general reluctance by the major asylum host states in the developed north to be deemed 'soft' on asylum seekers ('pull factor') and the creation of mechanisms to deter asylum flows (strict visa requirements; airline liaison officers; carrier sanctions; criminalisation of irregular entry;

<sup>41</sup> That is not to dilute/ignore the humanitarian need of such persons, which is significant. Many commentators have emphasised the complex humanitarian and protection needs of IDPs eg R Cohen: 'Often [the internally displaced] are caught up in internal conflicts between their governments and opposing forces. Some of the highest mortality rates ever recorded during humanitarian emergencies have come from situations involving internally displaced persons.' R Cohen, 'Refugee and Internally Displaced Women: A Development Perspective' (1995) cited in J Mertus, *The State and The Post-Cold War Refugee Regime: New Models, New Questions* (1998–1999) 20 *Michigan Journal of International Law* 59, 67.

<sup>42</sup> For instance, excision of certain territory in Australia from the migration zone means that for the purposes of international law, such territory is part of Australia, but under domestic law, it is not part of the migration zone. In practice, this means asylum seekers who reach Australian territory by boat are not permitted to make a valid application for a protection visa under the Migration Act 1958 (Cth) (MA) unless the Minister for Immigration permits them to do so (MA, s 46A).

<sup>43</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Amending Regulation No 562/2006 (EC) as Regards the Reinforcement of Checks Against Relevant Databases at External Borders (Strasbourg, COM(2015) 670 final, 15 December 2015).

externalisation of immigration control). EU Member States have long been guilty of adopting such mechanisms to deter entry. While these might be described as somewhat subtler preventive measures, events in 2015 clearly indicated that some Member States were prepared to adopt much more aggressive strategies for excluding access to territory:

- The erection of fences across borders: for instance, Bulgaria has constructed a 33 km long fence at its south-eastern border with Turkey;<sup>44</sup> Hungary hurriedly built fences on its borders with Serbia and Croatia;<sup>45</sup> Slovenia started its razor-wire fence in mid-November 2015,<sup>46</sup> while Macedonia commenced the erection of a metal fence on its southern border with Greece in late November 2015.<sup>47</sup>
- 'Push backs' by border guards (some of whom do not let asylum seekers cross borders).<sup>48</sup>
- Push backs by states: those between Libya and Italy have halted as a consequence of case law of the European Court of Human Rights (ECtHR)<sup>49</sup> but they are still being practised elsewhere, particularly in Australia and SE Asia.<sup>50</sup>
- Policies of containment: this includes the granting of large sums of aid/funding by developed countries to developing countries neighbouring the source of refugee flows in substitution for physical and legal refugee protection (see Stevens, Chapter 10). For instance, in response to calls by the UNHCR for states to offer more resettlement

<sup>44</sup> A Krasimirov, 'Bulgaria may Extend Turkish Border Fence to Bar Syrian, Iraqi Refugees' (Reuters, 20 August 2014) [www.uk.reuters.com/article/2014/08/20/uk-bulgaria-turkey-fence-idUKKBN0GK1IK20140820](http://www.uk.reuters.com/article/2014/08/20/uk-bulgaria-turkey-fence-idUKKBN0GK1IK20140820).

<sup>45</sup> M Feher, 'Hungary Completes Croatia Border Fence to Keep Migrants Out' (The Wall Street Journal, 15 October 2015) [www.wsj.com/articles/hungary-completes-croatia-border-fence-to-keep-migrants-out-1444927774](http://www.wsj.com/articles/hungary-completes-croatia-border-fence-to-keep-migrants-out-1444927774).

<sup>46</sup> M Feher, 'Slovenia Erects Razor-Wire Fence to Control Migrant Flow' (The Wall Street Journal, 11 November 2015) [www.wsj.com/articles/slovenia-starts-building-border-fence-to-control-migrant-flow-1447237240](http://www.wsj.com/articles/slovenia-starts-building-border-fence-to-control-migrant-flow-1447237240).

<sup>47</sup> Y Behrakis and K Casule, 'FYROM Army Starts Building Fence on Greek Border' (Ekathimerini, 28 November 2015) [www.ekathimerini.com/203874/article/ekathimerini/news/fyrom-army-starts-building-fence-on-greek-border](http://www.ekathimerini.com/203874/article/ekathimerini/news/fyrom-army-starts-building-fence-on-greek-border).

<sup>48</sup> On this, Maryellen Fullerton notes that the 'snap decisions of border guards and airline personnel are virtually unreviewable'. She raises due process concerns notes: 'the lack of an adequate record of the initial decision, the inability to obtain legal assistance, and the time pressures that prevent gathering evidence to support further the asylum seeker's claim ensure that any appeal that is permitted fails to provide a meaningful opportunity for review... Such inadequate and unfair procedures necessarily will result in a number of erroneous decisions': M Fullerton, 'Restricting the Flow of Asylum Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights' (1988) 29 *Virginia Journal of International Law* 33, 113–14.

<sup>49</sup> See Iván, ch 3 and Pollet, ch 7.

<sup>50</sup> See O'Sullivan, ch 5.

places, the UK allocated further funding to the UNHCR and implementing partners to assist with the needs of refugees forced from Syria to neighbouring countries, bringing the total committed by the UK to the Syrian crisis to £1.1 billion.<sup>51</sup> In contrast, the UK Government has been criticised for being slow to offer resettlement places to Syrian refugees. For instance, although it established a 'Syrian Vulnerable Person Resettlement (VPR) Programme' in January 2014, it had only offered 187 people places in this scheme by March 2015, and had resettled only 252 by September 2015 (of the 20,000 resettlement places offered from September 2015–20).<sup>52</sup> Although more recent statistics show that this number has risen, with a total of 1,602 people having now been resettled in the UK,<sup>53</sup> its response to the refugee crisis has been criticised.<sup>54</sup>

Access to territory by sea raises particular legal and humanitarian issues. We note here that the maritime environment involves complex questions of territory which are not applicable to land: for instance, defining jurisdiction requires consideration of the international law of the sea,<sup>55</sup> and demarcation of rescue zones under the Search and Rescue Convention.<sup>56</sup> Thus, access to territory via the sea requires special considerations of key concepts such as (a) jurisdiction; (b) state responsibility for search and rescue; and (c) the meaning of 'safe disembarkation' that are not required in relation to land borders/territory. Similarly, due to the shared

<sup>51</sup> UK Department for International Development (DFID), 'Syria Crisis Response Summary' (DFID, 4 January 2016) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/489691/DFID\\_Syria\\_Crisis\\_Response\\_Summary\\_2016.01.04\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489691/DFID_Syria_Crisis_Response_Summary_2016.01.04_.pdf).

<sup>52</sup> See M Gower and B Politowski, 'Syrian Refugees and the UK Response' (House of Commons Library Briefing Paper No 06805, 10 June 2015).

<sup>53</sup> M Gower and B Politowski, 'Syrian Refugees and the UK Response' (House of Commons Library Briefing Paper No 06805, 10 June 2016).

<sup>54</sup> H Lambert, 'The Government's Shameful Response to the Refugee Crisis in Four Charts', *The Independent*, 19 January 2016, [www.independent.co.uk/news/world/politics/the-government-s-shameful-response-to-the-refugee-crisis-in-four-charts-a6814391.html](http://www.independent.co.uk/news/world/politics/the-government-s-shameful-response-to-the-refugee-crisis-in-four-charts-a6814391.html).

<sup>55</sup> eg under the International Law of the Sea, no state has 'jurisdiction' on the high seas. Art 87(1) of the UN Convention on the Law of the Sea (opened for signature 10 December 1982, 1833 United Nations Treaty Series 3) (UNCLOS), states that the high seas shall not be subjected to the sovereignty of any state: 'The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas ... comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation'. See also UNCLOS, art 89: 'No State may validly purport to subject any part of the high seas to its sovereignty' and art 92(1): 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas': UNCLOS, 1833 United Nations Treaty Series 3 (entered into force 16 November 1994).

<sup>56</sup> UNCLOS, above n 55, art 98(1)(a) provides that every state shall require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost. The International Convention on Maritime Search and Rescue also requires the responsible state party to ensure that rescued persons are delivered to a place of safety: International Convention on Maritime Search and Rescue, 1405 United Nations Treaty Series 119 (entered into force 22 June 1985).

responsibility of search and rescue, there tends to be greater sharing of border control and a blurring of state responsibility, as illustrated by the operation of Frontex in the context of the EU.<sup>57</sup>

The act of fleeing across the sea poses particular dangers to the lives of asylum seekers, as the significant fatalities in the Mediterranean starkly illustrate.<sup>58</sup> Some states have exploited these events to support restrictions on acceptance of boat arrivals and criminalisation of 'people smugglers'. This is best demonstrated by the policies of Australia which has prosecuted a significant number of persons under domestic people smuggling provisions. In some circumstances, domestic law may erect 'borders' for exclusion purposes. Australia again provides a salient example: the 'migration borders' of Australia have been defined under Australian migration legislation in such a way that asylum seekers arriving by boat into Australian territory are not seen as arriving in the Australian 'migration zone' and are therefore denied important legal rights.<sup>59</sup> Thus, Australian law assigns separate identities to different asylum seekers depending on their mode of arrival and excludes and penalises those that are compelled to come to Australia by boat to seek protection.

The significant dangers of sea crossings also means that states dealing with asylum flows via the sea are inclined to classify assistance as humanitarian in nature, rather than as responding to a refugee situation—so the response is one of aid rather than necessarily channelling persons into a refugee status determination procedure.

<sup>57</sup> For instance, Guy Goodwin-Gill, writing on interception in Europe, has commented that 'it helps to think about the geographical context in which interception operations by the EU and Member States take place. Here we find states operating, nominally in the management of the EU's external borders, but actually in a physical domain where borders, as we commonly understand them, simply do not exist—at sea, on the high seas, or even in the contiguous zone or territorial waters of other states, in fact, at notional or virtual borders reconstituted on the basis of national and regional interest': Goodwin-Gill, above n 30, 446–47.

<sup>58</sup> eg UNHCR estimate that 2,500 refugees and migrants died or went missing trying to reach Europe via the Mediterranean Sea during 2015: UNHCR, 'Crossings of Mediterranean Sea Exceed 300,000, Including 200,000 to Greece' (Press Release, 28 August 2015) [www.unhcr.org/55e06a5b6.html](http://www.unhcr.org/55e06a5b6.html).

<sup>59</sup> In 2001, all outlying territories belonging to Australia were 'excised' from the Australian migration zone. This had the effect that asylum seekers intercepted and held on these territories (eg Christmas Island) were not permitted to lodge a protection visa application under mainstream Australian law but were processed separately: Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth). In May 2013, the MA was again amended which effectively excises the Australian mainland from the Australian migration zone. Following this amendment, all those who arrive by boat, including those who actually land on Australia's shores, are now barred from lodging a valid application for a visa. See further O'Sullivan, ch 5.

Finally, in addition to the above differences, the laws and practices pertaining to access to territory via land and sea also have similarities. In both situations, access is often dependent on the discretion of border personnel. In the land environment, border guards may not permit entry of asylum seekers or subject them to a cursory screening process. In the maritime environment, naval personnel may be instructed to turn boats back to their place of embarkation or may also subject asylum seekers to a screening process.<sup>60</sup>

Linked to the importance of states is the operation of *the law* in defining state responsibility and the contours of borders and territory. The force of law is important to consider in this context because, increasingly, there is a tendency by major industrialised countries to subvert key aspects of the Refugee Convention<sup>61</sup> or to fail to accord fully with judicial rulings such as those of the ECtHR.<sup>62</sup> The 'law' also refers to the existence of an independent judiciary, willing and capable of reviewing executive power in relation to asylum decisions, and the lawful functioning of administrative agencies which undertake refugee status determinations—key components of asylum justice.<sup>63</sup> The operation of the law by these institutions can sometimes be limited due to cost and efficiency rationalisations (which may, for instance, lead to limitations on procedural justice).<sup>64</sup>

The force of law in defining borders and the right of entry is particularly strong in preventing both access to territory and access to justice. In Australia, for instance, the notion of lawful arrival is defined in such a way that boat arrivals are deemed to be 'illegal' and processed extraterritorially (in Nauru and Papua New Guinea). Serious concerns have been raised about the quality of refugee status determination in these extraterritorial locations.<sup>65</sup> This has the effect that the legal definition of asylum seekers leads to both territorial exclusion and due process limitations. This is of significant contemporary relevance internationally, given that

<sup>60</sup> See O'Sullivan, ch 5.

<sup>61</sup> eg via 'push backs' at sea by Australia on the basis that this does not represent *non-refoulement*. See also the erection of fences at key EU borders, eg Greece has erected a 12.5 km wall at a critical section of the Greece–Turkish border near the town of Orestiada; Bulgaria has constructed a 33 km long fence at its south-eastern border with Turkey.

<sup>62</sup> See ch 3 on the application of the *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) in Hungary.

<sup>63</sup> See Hamlin, above n 28, 10 who discusses the differing levels of insulation of bodies from the 'exclusionary politics of deterrence': 'When administrative agencies are insulated, they can weather political storms more easily, and policy is more stable over time. However, when RSD tends to be driven by administrative concerns for efficiency and cost saving, there is less room for drawn out vetting of individual cases.'

<sup>64</sup> eg the introduction of accelerated procedures discussed by Kirk, ch 11.

<sup>65</sup> UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013' (UNHCR Regional Representation Canberra, 26 November 2013) 7–10.

the EU Commission may be willing to reconsider the introduction of similar 'offshore' reception centres in Africa.<sup>66</sup>

The interpretation of 'border' by states is heavily influenced by notions of security. For instance, Australian discourse of asylum is largely connected to 'border security', to the extent that boat arrivals have been classified as a 'national emergency'. There is a similar 'crisis' occurring in the EU in terms of the Mediterranean crossings and with regard to 'the jungle'—where an estimated 5,000 refugees and migrants have gathered at Sangatte near Calais and attempt to get into the tunnel on a nightly basis. More recently, the outflow of Syrian asylum seekers to Europe has illustrated the polarised nature of EU Member States' refugee policies, with Germany opening its borders and accepting a significant number of Syrian asylum seekers,<sup>67</sup> while others refused to participate in a mandatory relocation scheme or closed their borders, despite the very serious consequences for other EU states and for refugees and asylum seekers. Attempts to adopt a harmonised approach to the issue, which occupied the EU throughout 2015, appeared to flounder in November 2015, when the German Chancellor, Angela Merkel, held a mini-summit of nine EU states prepared to accept the majority of refugees from the Middle East—named 'the coalition of the willing'—thereby acknowledging a fundamental split in the EU.<sup>68</sup> The 2015 Syrian 'crisis' illustrates starkly the key themes of 'fortresses' and 'fairness' of this collection: state attempts to create a fortress through the physical erection of fences and closure of borders, together with several aspects of fairness in the asylum system—the fair provision of access to territory for the claiming of refugee protection and due process for asylum claims (individual fairness) and the 'fair' allocation of protection places across asylum host states (communal fairness).

We now turn to consider these notions of state responsibility in relation to the fairness of so-called 'burden sharing'.

### (ii) *State 'Responsibility'*

State responsibility is an important concept for addressing access to territory for asylum seekers and refugees. As a result, a number of chapters

<sup>66</sup> I Traynor, 'Brussels Plans Migration Centres Outside EU to Process Asylum Applications' (London, *The Guardian*, 5 March 2015) [www.theguardian.com/world/2015/mar/05/european-commission-third-country-immigrant-processing-centres](http://www.theguardian.com/world/2015/mar/05/european-commission-third-country-immigrant-processing-centres).

<sup>67</sup> eg in the third quarter of 2015, Germany made 54,335 first instance decisions and granted refugee status to 18,135 Syrians: Eurostat, 'First Time Asylum Applicants and First Instance Decisions on Asylum Applications: Third Quarter 2015' (Eurostat Asylum Quarterly Report, 3 March 2016). [www.ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q3+2015.pdf/b265b920-3027-4e69-95cf-63f8fb8c80ed](http://www.ec.europa.eu/eurostat/documents/6049358/7005580/Asylum+quarterly+report+-+Q3+2015.pdf/b265b920-3027-4e69-95cf-63f8fb8c80ed).

<sup>68</sup> I Traynor, 'Europe Split Over Refugee Deal as Germany Leads Breakaway Coalition' (London, *The Guardian*, 30 November 2015) [www.theguardian.com/world/2015/nov/29/germanys-plan-to-strike-eu-wide-refugee-sharing-deal-stalls](http://www.theguardian.com/world/2015/nov/29/germanys-plan-to-strike-eu-wide-refugee-sharing-deal-stalls).



in this volume consider the responsibility of states towards refugees. This concept is particularly relevant given the increasing trend by key asylum host states to 'outsource' or 'contain' asylum flows to certain regions in exchange for funding. This has been done for many years by Australia via its 'Pacific Solution',<sup>69</sup> and more recently by the EU via its controversial asylum agreement with Turkey.<sup>70</sup>

State responsibility under international and regional human rights law is particularly important for asylum seekers who are not yet recognised as refugees (or who may be excluded from refugee status) and who may be able to argue that states are responsible for harm that may occur to them if returned to their country of origin or another country where they may face relevant harm.<sup>71</sup> The concept of state responsibility means that the existence of adequate refugee status determination procedures, including asylum claim recognition at the border, is an important part of access to justice for refugees. As Júlia Iván notes in Chapter 3 and Cavidan Soykan in Chapter 4, in practice, the access of an asylum seeker to territory is often dependent on a border guard understanding and properly registering an asylum claim. In discussing Hungary, Iván analyses the findings of the border monitoring programme of the Hungarian Helsinki Committee and concludes that, despite the favourable ruling of the ECtHR in *Hirsi Jamaa and Others v Italy*<sup>72</sup> (which emphasised the positive obligation on the state to identify asylum seekers and to offer them a fair and individual status determination procedure), it is impossible to utilise the judgment to protect the rights of asylum seekers unless individual border procedures are properly conducted prior to removing a particular refugee. Similarly, in Chapter 4 on Turkey, Soykan considers returns and raises concerns that untrained police officers and gendarmerie hold significant discretionary power in deterring asylum seekers at the borders.

<sup>69</sup> See S Taylor, 'Australia's Pacific Solution Mark II: The Lessons to be Learned' (2007) 9 *UTS Law Review* 106.

<sup>70</sup> European Council, 'EU–Turkey Statement 18 March 2016' (Press Release, 18 March 2016) [www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/).

<sup>71</sup> Note that the principle of *non-refoulement* in art 33 of the Refugee Convention not only prohibits states from returning asylum seekers to the country in which they fear persecution, but also any other country where they may face relevant harm or which might return them to such harm; see discussion in 'UNHCR Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and Ors v Italy and Greece (Application No 16643/09)' (UNHCR, October 2009) [2.1]. Relevant harm includes that referred to in art 33, as well as certain provisions of the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) and the ECHR; see discussion in E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, UNHCR 2003) 121–28.

<sup>72</sup> *Hirsi Jamaa and Others v Italy*, above n 62.

## 'Burden' or 'Responsibility' Sharing

The idea of co-operation or sharing responsibility for refugees has a long history and is a key recommendation of the Refugee Convention.<sup>73</sup> The term 'responsibility' is often invoked by the UNHCR and some states to encourage a fairer distribution of the 'burden' of dealing with refugee flows, that is, 'responsibility sharing'. The UNHCR refers to state responsibility and co-operation to persuade states to take refugees directly from source areas via resettlement or directly. In this way, international institutions are attempting to hold states 'responsible' under international law—that is, through either the spirit or the 'force of law'—for two types of refugees: (a) those in source areas (eg Syria, or neighbouring countries), whom asylum host states have a humanitarian obligation to assist, and (b) those who enter asylum host state territory (thereby raising legal responsibility pursuant to the Refugee Convention or other domestic/regional laws).

In theory, the notion of responsibility-sharing is designed to counteract the 'fortress' mentality assumed by many states in the industrialised world (which has been assumed despite the commitment to co-operation expressed by the Conference of Plenipotentiaries convened to draft the Refugee Convention). As Hathaway and Gammeltoft-Hansen have recently suggested:

Contemporary understandings of jurisdiction, shared responsibility, and aiding or assisting—taken together—can and should be invoked in aid of the dismantling of the non-entrée regime.<sup>74</sup>

In the EU, during the migration events of 2015, the discussion on responsibility-sharing was articulated in terms of 'solidarity', a relatively long standing principle of EU law and policy and widely employed in discussions on asylum and migration.<sup>75</sup> However, as clearly evidenced in recent times, even this 'thicker' notion of mutual support provided by the *rule of*

<sup>73</sup> UN General Assembly, 'Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (Geneva, 28 July 1951) Recommendation D: 'THE CONFERENCE, CONSIDERING that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position, RECOMMENDS that Governments continue to receive refugees in their territories and that the concert true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.'

<sup>74</sup> JC Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (University of Michigan Law School, Law & Economics Working Papers, 2014) 8.

<sup>75</sup> Treaty on the Functioning of the European Union (TFEU), art 80 states: 'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.'

'solidarity' has failed to deliver in the context of asylum. Furthermore, as Noll has noted, 'article 80 TFEU concerns solidarity ... between Member States only, and not solidarity between Member States and refugees, or Member States and other recipient states in crisis regions'.<sup>76</sup> The failure to share responsibility in a truly meaningful way is revealed in Chapters 4 and 10, in which Soykan and Stevens explore the consequences and pressures on Turkey and Lebanon of mass influx.

### Extraterritorial Responsibility

This issue is complicated by the application of state responsibility to situations of 'outsourcing' or 'contracting out' of protection, detention and refugee status determination (RSD) services to other countries—for example, Australia's use of companies such as G4S/Transfield to operate detention facilities both in Australia and in the Pacific (Nauru, Papua New Guinea). Although nominally these companies are 'responsible' for providing services in each centre under the terms of their contracts with the Australian Government, we would argue that state responsibility lies with the Australian Government under international law.<sup>77</sup> In the EU, the 2014 Regulation on Maritime Border Surveillance in the Framework of Frontex-led Joint Operations at Sea prohibits Member States from handing over any third country national to the authorities of a country where there is a serious risk of persecution, torture or ill-treatment or from where there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*. Though this might suggest a heightened level of protection which, together with the Charter of Fundamental Rights and the European Convention on Human Rights (ECHR), should ensure that asylum seekers have an opportunity to access refugee determination procedures, many states or state agents are ignoring or side-stepping their *non-refoulement* responsibilities which the contributions in this volume highlight (see eg Iván, Chapter 3; Soykan, Chapter 4; Pollet, Chapter 7; Stevens, Chapter 10).

<sup>76</sup> G Noll, 'Why the EU Gets in the Way of Refugee Solidarity' (London School of Economics Blog, 16 October 2015) [www.blogs.lse.ac.uk/eurocrisispress/2015/10/16/why-the-eu-gets-in-the-way-of-refugee-solidarity/](http://www.blogs.lse.ac.uk/eurocrisispress/2015/10/16/why-the-eu-gets-in-the-way-of-refugee-solidarity/).

<sup>77</sup> Indeed, the exercise of effective control via such contacts was recognised by one of the judges of the Australian High Court in a recent landmark judgment on the legality of the Nauruan Regional Processing Centre. In this case, Bell J recognised that Australia exercised 'effective control' over the detention of the transferees through the contractual obligations it imposed on Transfield (*Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors* [2016] HCA 1, 3 February 2016, [93] Bell J).

IV. 'ASYLUM JUSTICE' AND CONTEMPORARY  
DUE PROCESS CHALLENGES

## A. The Concept of Access to Justice

Part II of this volume seeks to analyse the provision by states to access to justice, by which we mean access to due process. This topic has obvious links to the material addressed in Part I (Access to Territory) in that access to a state's refugee status determination process requires first that the asylum seeker is able to cross a border. The contributions in Part II of the volume will examine issues arising from reductions in legal assistance, and limitations on procedural fairness posed by screening and accelerated procedures.

What then does access to justice mean in an asylum context? The notion of access to justice may be interpreted as including the ability to seek redress for wrongdoing, procedural protections, access to both judicial and non-judicial procedures (eg a tribunal hearing and judicial review), and the provision of legal assistance. As non-citizens/non-residents, asylum seekers tend to face significant obstacles in gaining access to justice. This is particularly so for those excluded from the territories of states. This includes, for instance, those interdicted by states on the high seas and returned to their country of disembarkation, and those removed under accelerated procedures without being afforded an opportunity to apply for asylum.

One of the problems which many commentators have noted is that there is no agreed mechanism for determination of refugee status.<sup>78</sup> Certainly, there is nothing in the Refugee Convention which *requires* a certain procedure to be followed in assessing refugee claims. Despite this, many states have developed sophisticated RSD processes comprising protections of natural justice and review mechanisms which suggest there is some agreement amongst State Parties to the Convention as to a minimum notion of 'asylum justice'.

Certain due process rights are set out in the Refugee Convention and international human rights treaties. For instance, the Refugee Convention provides in Article 16 a right to free access to courts on the territory of all Contracting States. A State Party is not permitted to make a reservation to Article 16(1). However, this provision has rarely been utilised in litigation and is often overlooked in academic commentary.<sup>79</sup> Article 14 of the International Covenant on Civil and Political Rights (ICCPR) also

<sup>78</sup> eg JC Hathaway and RA Neve, 'Fundamental Justice and the Deflection of Refugees from Canada' (1996) 34(2) *Osgoode Hall Law Journal* 213, 215.

<sup>79</sup> For a brief commentary, see JC Hathaway, *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005) 643–47.

includes access to justice provisions in the context of criminal charges. For instance, Article 14(1) states that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

However, the case law on this has largely focused on its application to criminal law rather than refugee law—as is reflected in the emphasis given to criminal law issues in the UN Human Rights Committee General Comment on Article 14.<sup>80</sup>

In the ECtHR judgment of *Hirsi*, Judge Albuquerque (in his separate opinion) set out a useful summary of the basic requirements for fairness in refugee status determination procedures:

For the refugee-status determination procedure to be individual, fair and effective, it must necessarily have at least the following features: (1) a reasonable time-limit in which to submit the asylum application; (2) a personal interview with the asylum applicant before the decision on the application is taken; (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application; (4) a fully reasoned written decision by an independent first-instance body, based on the asylum-seeker's individual situation and not solely on a general evaluation of his or her country of origin, the asylum-seeker having the right to rebut the presumption of safety of any country in his or her regard; (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision; (6) full and speedy judicial review of both the factual and legal grounds of the first-instance decision and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to UNHCR or any other organisation working on behalf of UNHCR.<sup>81</sup>

When discussing administrative justice in the asylum context, Robert Thomas has stated that:

Administrative justice concerns the overall system by which administrative decisions affecting individuals are taken, including the procedures and law governing such decisions and the processes for resolving disputes and airing grievances in relation to them.<sup>82</sup>... At its irreducible core, the quality of an administrative-legal process is informed by four values: its propensity to produce accurate decisions; the fairness of the procedures by which decisions are

<sup>80</sup> UN Human Rights Committee, 'General Comment No 13: Article 14 (Administration of Justice)' (Twenty-First Session 1984) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (UN Doc HRI/GEN/1/Rev.1 Vol 1, 27 May 2008) 187 [14].

<sup>81</sup> *Hirsi Jamaa and Others v Italy*, above n 62, 72 (citations omitted).

<sup>82</sup> R Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Oxford, Hart Publishing, 2011) 1.

made; the resources needed to fund the decision process; and the timeliness of decision-making.<sup>83</sup>

Reference can also be made to a 2013 decision of the Inter-American Court of Human Rights, which formulated important guidance concerning due process in asylum proceedings. The Court's contribution is significant since it drew on the Inter-American human rights instruments and jurisprudence, in addition to the Refugee Convention and UNHCR position statements. According to the Court, essential due process elements in RSD include:

- 'necessary facilities' for submission of the claim for asylum (this includes an interpreter and may include legal representation);
- objective consideration of the claim by a 'competent and clearly identified authority', including a personal interview;
- respect for the principles of privacy and confidentiality;
- an appeal (including provisions of a reasonable period to appeal, and information on how to appeal); and
- the suspensive effect of any appeal.<sup>84</sup>

A number of these principles have been recognised by EU law and incorporated in the separate Directives on Procedures and Reception Conditions, both of which have now been recast.<sup>85</sup> As Pollet notes in Chapter 7, some improvements have been made in this process, for instance the recast Procedures Directive establishes a number of safeguards for the proper conduct of a personal interview. However, aspects of these directives also raise problems for effective access to the asylum procedure, due to the vague and unclear wording of some articles or lack of guidance as to the content of key rights.

### *(i) State Interpretation and Implementation of Due Process*

Some positive values of due process are reflected in the EU Procedures Directive.<sup>86</sup> However, these are problematic. However, aspects of the EU asylum directives are problematic, as discussed by Pollet of the European Council on Refugees and Exiles (ECRE) in Chapter 7. In that chapter Pollet examines the obstacles that asylum seekers face in accessing the asylum

<sup>83</sup> *ibid* 12–13.

<sup>84</sup> *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (25 November 2013) Inter-American Court of Human Rights [159] [www.corteidh.or.cr/docs/casos/articulos/seriec\\_272\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf).

<sup>85</sup> Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Recast Procedures Directive); and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Recast Receptions Directive).

<sup>86</sup> Recast Procedures Directive, *ibid*.

procedure and protection in a host EU Member State. In the EU, there are issues related to registration of asylum applications, the organisation of personal interviews at the first instance, the impact of the use of accelerated and admissibility procedures on asylum seekers' access to protection in the EU and access to an effective remedy. He also highlights the obstacles that detention creates in terms of access to information, interpretation and free legal assistance. More generally, the EU situation highlights the pros and cons of practical co-operation between EU Member States within the framework of the European Asylum Support Office (EASO), including new thinking on 'joint' or 'supported processing' from a protection perspective.

In South Africa, by contrast, different access issues arise. In Chapter 8, Corey Johnson and Sergio Carciotto discuss problems arising from the operation of Refugee Reception Offices (RRO) established in urban centres throughout South Africa. They note that access to these facilities is a critical component of the refugee protection framework. They discuss the implications of the closure of urban RROs and their relocation to sparsely populated towns on international land borders.

An interesting development has been changing practices regarding access and the promulgation of asylum laws in emerging asylum host states. One such example is Turkey, which has faced a significant surge in asylum seeker numbers in recent years, particularly from nearby Syria and Iraq.<sup>87</sup> When the first flows of refugees from Syria began arriving in Turkey in 2011, it practised an open border policy and established camps to house the asylum seekers. It also granted the asylum seekers 'temporary protection', since Turkey applies the geographical limitation of the Refugee Convention and defines 'refugees' as only those coming from Europe. However, in the face of rising numbers, and a strain on resources, in the second half of 2012, Turkish authorities began to attempt to limit flows from Syria.<sup>88</sup> In addition, Turkey passed its first piece of legislation on asylum—the Law on Foreigners and International Protection—which

<sup>87</sup> eg between 19–25 September 2014 more than 144,000 Syrian refugees, mainly Kurds, sought refuge in southern Turkey's Sanilurfa province. These people were fleeing conflict and ISIS advances on towns and villages near Kobani (or Ayn al-Arab) in northern Syria: F Markus, 'UNHCR Airlifts Urgent Aid into Turkey to Help Refugees Fleeing ISIS' (UNHCR News, 25 September 2014) [www.unhcr.org/turkey/uploads/root/unhcr\\_airlifts\\_urgent\\_aid\\_into\\_turkey\\_to\\_help\\_refugees\\_fleeing\\_isis\\_25\\_september\\_2014.pdf](http://www.unhcr.org/turkey/uploads/root/unhcr_airlifts_urgent_aid_into_turkey_to_help_refugees_fleeing_isis_25_september_2014.pdf).

<sup>88</sup> O Bahadır Dinçer, V Federici, E Ferris, S Karaca, K Kirişçi and E Özmenek Çarmikli, 'Turkey and Syrian Refugees: The Limits of Hospitality' (Washington, Brookings, November 2013) [www.brookings.edu/~media/research/files/reports/2013/11/18-syria-turkey-refugees/turkey-and-syrian-refugees-the-limits-of-hospitality-\(2014\).pdf](http://www.brookings.edu/~media/research/files/reports/2013/11/18-syria-turkey-refugees/turkey-and-syrian-refugees-the-limits-of-hospitality-(2014).pdf). See also K Kirişçi, 'Syrian Refugees and Turkey's Challenges: Going Beyond Hospitality' (Washington, Brookings, May 2014) [www.brookings.edu/~media/research/files/reports/2014/05/12-turkey-syrian-refugees-kirisci/syrian-refugees-and-turkeys-challenges-may-14-2014.pdf](http://www.brookings.edu/~media/research/files/reports/2014/05/12-turkey-syrian-refugees-kirisci/syrian-refugees-and-turkeys-challenges-may-14-2014.pdf).

became operative in 2014.<sup>89</sup> (The implementation of this law is one of the topics discussed by Soykan in Chapter 4 of this volume.) The intertwining of access to territory, access to protection processes and legal developments is very clear in the Turkish case.

Similar arguments can be made in the case of Lebanon. While not party to the Refugee Convention, it too has had a generous approach to Syrians seeking entry to its territory, until 2015, when it introduced new regulations and made specific demands on the UNHCR, clearly with the intent of stopping the flow. Lebanon provides an example of a state under increasing pressure which has avoided international refugee law, preferring a mixed regime of immigration law, UNHCR involvement, ad hoc policy, humanitarian aid and international diplomacy. The consequences, though, for both state and refugees are depressing (see Stevens, Chapter 10).

Other exemplars of the emerging refugee protection frameworks are those being established in Bosnia-Herzegovina (BiH), Croatia and Serbia. In Chapter 9, Selma Porobić and Drago Župarić-Iljić note that the countries of the Western Balkans (WB) have traditionally been emigration and refugee-producing countries. However, in the last decade the WB has also transformed into a transit route for out-of-regional flows of migrants and asylum seekers attempting to reach Western Europe. Some progress has been made in the development of refugee procedures in the region, largely propelled by EU harmonisation process. For instance, Croatia committed to introducing a new International Protection Act in 2015, which will further align Croatian law with the new EU Reception and Procedure Directives. Yet, as Porobić and Župarić-Iljić note, in practice many refugees remain excluded from society, higher education and the labour market in that country. For instance, there is a lack of integration programmes and sufficient support services in both Bosnia-Herzegovina and Croatia. This illustrates once more one of the broader themes running throughout this book: the provision of national legislation and systems of asylum and refugee protection on the one hand, and the practical limitations faced by asylum seekers and refugees in accessing and benefiting from the rights/provisions of those systems.

(ii) *Fair Hearing/Procedural Fairness*

One component of access to asylum justice which is provided in many states is the administrative law concept of 'procedural fairness'.<sup>90</sup>

<sup>89</sup> [www.refworld.org/docid/5167fbb20.html](http://www.refworld.org/docid/5167fbb20.html). See also Regulation No 29153 on Temporary Protection of October 2014.

<sup>90</sup> eg the principle is recognised in the UK, Australia and Canada.



This typically requires a decision-maker to assess an application for asylum individually and inform the applicant of any adverse information or allegations they intend to make on the case—therefore giving the applicant a right to have ‘procedural fairness’ accorded in the decision. Another core component of fairness is the right to appeal any negative decision. However, due to state concerns with efficiency and delays in RSD, some of these procedural guarantees are being reduced in countries such as Europe, Australia and Canada. Furthermore, in Australia, key components of procedural fairness are denied to those facing interdiction at sea or transferred to offshore processing locations in the Pacific.

(iii) *Legal Assistance*

The importance of legal assistance in due process is important in the context of RSD where applicants face particular challenges to comprehension of their rights: they are usually unaware of how the national legal system operates and may not speak the national language. Many commentators have highlighted the difference which legal assistance makes in this area. For instance, in the Canadian context, Rehaag conducted empirical work which demonstrated that competent legal counsel was a key factor in driving successful outcomes in refugee claims,<sup>91</sup> while McAdam has argued that:

Legal aid assistance is a crucial element of a fair and efficient justice system founded on the rule of law. It helps to ensure fairness, public confidence in the way that justice is administered, and to eliminate barriers that impair access to justice for those otherwise unable to afford legal representation. The evidence shows that we get better decisions when asylum seekers have early access to properly resourced legal services by specialist lawyers. Refugee lawyers provide an important ‘triage’ service and help to prevent the courts from being flooded with unmeritorious claims. The bottom line is that, without legal assistance, there is a real risk that refugees will be sent back to persecution and other serious forms of harm, such as torture and death.<sup>92</sup>

In the EU, the recast 2013 EU Asylum Procedures Directive<sup>93</sup> does not include an obligation for Member States to provide free legal assistance and representation at the first instance of the asylum procedure. At the

<sup>91</sup> S Rehaag, ‘The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment’ (2011) 49 *Osgoode Hall Law Journal* 71.

<sup>92</sup> J McAdam, ‘Australia and Asylum Seekers’ (2013) 25 *International Journal of Refugee Law* 435, 441–42 (citations omitted).

<sup>93</sup> Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Asylum Procedures Directive (recast)).

appeal stage, although there is an obligation to provide free legal assistance and representation on request, this can be made conditional on the appeal having a tangible prospect of success.<sup>94</sup> Interestingly, Turkey's New Law grants important procedural rights to asylum seekers, including certain entitlements to legal aid, discussed in Chapter 4.

(iv) *Fast Track/Accelerated Procedures*

Accelerated procedures are perhaps best exemplified by the 'detained fast track' (DFT) process introduced in the UK. These are used for those cases assessed as being 'straightforward' and able to be decided quickly. Significantly, applicants subject to this procedure are detained throughout the review of the asylum application. The DFT rules lay down a short timescale for the procedure, requiring that decisions be taken within three days of detention (although in practice it appears this timescale is not adhered to). Fast track detainees are entitled to have a publicly funded legal adviser present at their initial interview. However, legal representation in appeals from the DFT is problematic: for instance, research in 2011 revealed that 60 per cent of asylum seekers were unrepresented at their DFT appeal.<sup>95</sup> There is a very high refusal rate.

In Chapter 11, Linda Kirk addresses the problems associated with the DFT and examines recent ground-breaking judgments of the High Court and Court of Appeal.<sup>96</sup> This chapter also analyses the concept of a 'risk of unfairness' as it relates to both the UK and Australian accelerated procedures, and reflects on some key questions: Do these systems provide a fair opportunity to asylum seekers to put their case? How can any risk of unfairness be mitigated and what role does legal representation need to play in providing that fairness (for instance, is it necessary for legal representation to be provided at both interview and appeal stages)? In addressing these questions, this chapter will interrogate the term 'fairness' to determine how it should be defined in accelerated or screening procedures.

The importance of due process in screening procedures has also been underlined by the practices at the border. For example, at the US–Mexico border, in mid-2014, a 'crisis' emerged due to a large flow of asylum seekers from Central America fleeing what are termed 'third generation'

<sup>94</sup> Asylum Procedures Directive (recast), arts 20 and 20(3).

<sup>95</sup> T Alger and J Phelps (on behalf of Detention Action), *Fast Track to Despair: The Unnecessary Detention of Asylum-seekers*, Detention Action, May 2011, 4.

<sup>96</sup> *Detention Action v SSHD* [2014] EWHC 2245; *Detention Action v SSHD* [2014] EWHC 2525 (Admin); *R (Detention Action) v SSHD* [2014] EWCA Civ 1634; *R (Detention Action) v FTT (Immigration and Asylum Chamber)* [2015] EWHC 1689 (Admin); *R (Detention Action) v FTT (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341.

gangs. Those seeking refuge included thousands of women and children. In 2014, the US Government built detention facilities to deal with this situation, including the Artesia Federal Training Centre in New Mexico. The object of this centre is to detain persons whilst they are quickly processed for removal. Due process protections have been minimal as many asylum seekers in these facilities have been subject to inadequate screening processes while at or near the US border, preventing their access to rights and protections under the Refugee Convention. Chapter 6 by Maggie Morgan and Deborah Anker deals with this important contemporary issue. They argue that this urgent situation calls for a re-examination of the US asylum system.

*(v) Vulnerable Applicants*

Due to the reason for asylum flows, many asylum seekers are vulnerable in some way—either due to past trauma, disability, age or gender. One problem is whether these vulnerabilities are identified by refugee status decision-makers and taken into account in any RSD. For instance, in assessing credibility, it is important to take into account past trauma and its psychological aspect, and its effect on the ability of applicants to clearly tell their ‘story’. This issue is addressed by Nula Frei and Constantin Hruschka in Chapter 12 which focuses on the way in which asylum determination procedures adequately identify and deal with victims of trafficking. Some of the most common problems they identify are that trafficking is seen as a purely criminal law issue rather than a human rights problem, that in asylum procedures self-identification and a coherent account seem to be expected from the victims and that there is no clear distinction between trafficking and smuggling. They also focus on the particular problems raised for dealing properly with trafficking issues in the EU Dublin Procedure. Using a human rights perspective, they argue that Dublin transfers of victims of trafficking should not take place to countries of exploitation, and in other cases only if protection is guaranteed.

## V. CONCLUSION

This volume shows that access to territory and justice are intertwined.<sup>97</sup> For asylum to be meaningful, states must grant both admission to territory and certain ‘rights’ to asylum seekers and refugees once in an asylum host

<sup>97</sup> eg in Australia the ability of the state to interdict asylum seekers at sea not only allows it to deny access to its physical territory but also permits the state to deny the application of the normal protections of the law to those persons, including the right to procedural fairness, see O’Sullivan, ch 5.

country. In many countries, there are developed asylum laws and procedures but significant restrictions on access to the territory of a state in order to avail themselves of that system. In other parts of the world, access to territory is relatively straightforward but there are limited procedural safeguards or opportunities to claim asylum. The contemporary challenge is to ensure both access to territory and to justice.

More broadly, the chapters in this volume illustrate the overriding power of state sovereignty in controlling asylum seekers' access to territory and access to law. A common theme is the increasing tendency for asylum seekers to be placed outside the law's protection. Despite the fact that many courts have handed down strong jurisprudence upholding the rights of asylum seekers, significant problems still exist in the practical implementation of these protections. Another theme across the contributions in this collection is the lack of political will in many industrialised states to adopt a truly equitable concept of burden sharing and a reluctance by states to recognise that the meaning of a 'state' and the responsibility for its actions goes beyond its borders. What follows in this volume is a deeper analysis of these issues as they arise in Europe, Australia, the US, the Middle East and South Africa.