

Asylum vs. sovereignty in the 21st Century: How nation-state's breach international law to block access to asylum

Abstract:

Asylum was created by the international community in the 20th century to provide legal protection to individuals fleeing persecution by nation states; but the ability to secure asylum has been fundamentally reshaped by sovereign national interests in the 21st century. This paper has two objectives. First it explores the various ways in which nation-states have adopted policies and pursued agendas which prevent asylum seekers from gaining access to countries of asylum, which criminalize many who enter a country of asylum and which frustrate their ability to obtain asylum. When state signatories breach their legal obligations to the Refugee Convention, the UNHCR has the authority to exercise its 'supervisory role' to bring states' back into compliance. I examine two UNHCR interventions in the United Kingdom which have failed. The paper concludes by discussing how and why it is necessary to radically rethink national asylum and migration policies.

KEYWORDS: sovereignty, asylum, access to asylum, Europe, UNHCR

Main text

Asylum was created by the international community in the twentieth century to provide legal protection to individuals fleeing persecution by nation-states, but the ability to realize it has been fundamentally reshaped by sovereign national interests in the twenty-first century. As Arendt (1948) observed, by the end of the nineteenth century racism, imperialism and totalitarianism became so deeply embedded in Europe that they established the foundation for World War which in turn created tens of millions of refugees, displaced persons and stateless persons. Perhaps the first major flow of refugees was produced by the Russian Revolution of 1917 which saw 1.5 million Russians flee. Between 1915 and 1923 one million Armenians fled Turkey to escape persecution and genocide. In 1947 Partition between India and Pakistan saw eighteen million Hindus and Muslims flee their country of origin and in 1949, following the establishment of the People's Republic of China, two million Chinese fled to Taiwan and Hong Kong.

One of the first acts of the United Nations was to bring into force The Refugee Convention (1951) which endorsed a single definition of the term "refugee" as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion" (Art. 1A.2). The Convention is underpinned by a number of "fundamental principles" which include the right not to be discriminated against (Art. 3), the right of access to a court (Art.16), the right not to be penalized for illegal entry or stay (Art.31) and the right not to be expelled or returned (*refouler*) where s/he fears a threat to

their life or freedom (Art. 33). Nation-states which sign the Convention are required to create a Refugee Status Determination system (RSD) and adopt policies which meet “minimum basic standards” for the treatment of refugees.

Currently 144 countries have signed The Refugee Convention (some of whom have established their own refugee procedures and policies); UNHCR operates RSD in 75 countries. Problematically the countries which conduct RSD use very different procedures and laws which accounts for huge differences in “due process” – i.e. the right to a fair hearing and the right to be treated fairly and reasonably – and in the manner in which asylum decisions are taken. Not only is there is a lack of transparency regarding asylum procedures and asylum decision-making, there are also serious questions about legal and procedural fairness.

The Refugee Convention has been superseded by political events and evolving national policies. Among the political events which have profoundly shaped asylum policy are the effect of “Cold War” politics on asylum policy (Helton 1983-84), the impact of military dictatorship (e.g. Chile 1973-1990; Myanmar 1990-2011), war (e.g. in the Horn of Africa, 1974-1991), military occupation (e.g. East Timor, 1975-1999; Palestine, 1948-present) and genocide (e.g. Rwanda, 1994) which continue to create millions of refugees.

The institution mandated to oversee implementation of The Refugee Convention is the United Nations High Commission for Refugees (UNHCR) which is also required to find durable solutions – i.e. resettlement overseas, local integration or voluntary repatriation – for displaced persons and refugees in the Global South. In 2014 approximately 50 million people are living in “refugee-like” situations, a level that has not been seen since World War II.¹ The expansion in the number of refugees together with the extent of conflict-related population displacement has placed increased demands upon UNHCR to provide protection, however the international community is increasingly refusing to provide the necessary funds (Vayrynen 2001).² Donor “fatigue” has also reduced the ability and willingness of states in the South to shelter and integrate refugees. The net effect is that growing numbers of refugees/displaced persons are at risk of persecution because: (a) they reside in “permanent” refugee camps with little hope of resettlement/integration; (b) they fail to register as refugees and live outside refugee camps; and/or (c) they (illegally) transit the South in search of refuge.

Western states are failing in their responsibilities under the Refugee Convention. First, given the evolution of asylum policy, the strategic focus on humanitarian and human

rights protection for refugees has been rejected by most states (Hathaway 1990). Second the universal approach to refugee protection reflected in the Convention has been “defeated by a Euro-centric legal mandate derived from a highly selective definition of burden sharing” (p. 144). Finally states with their own RSD procedures have quite variable recognition rates and offer increasingly limited forms of protection (Eurostat 2013).

States have also adopted a wide range of policies to prevent foreigners, including individuals fleeing persecution, from gaining access to their territory where they can claim asylum. State policies of this type include:

- exporting/externalizing “immigration controls” to foreign countries (Boswell 2003);
- placing responsibility on non-state actors (i.e. airlines, shipping companies, etc) to prevent illegal entry;
- establishing off-shore asylum processing to prevent individuals from physically entering a country (e.g. Australia’s “Pacific solution”, 2001-onwards; US processing of Haitians at Guantanamo, Cuba (1981-1993);
- interdicting refugees at sea (US efforts to prevent Haitians arriving in the US, 1982-2011; Australian interdiction, 2001, 2011-onwards; European Union/Italian interdiction and/or “push backs” from 1997-onwards);
- accelerated/expedited decision-making and detention procedures to process asylum claims, especially claims deemed to be fraudulent (U.K. 2006-onwards (Detention Action 2011), Canada 2012; Central America 2014);
- policies and procedures which block valid claims from being made by asylum applicants legally present in a country (e.g. reducing appeal rights, criminalizing “illegal” entry, introducing visa restrictions, adopting a heightened burden of proof, etc.; Kerwin 2011);
- blocking access to the courts by preventing asylum claims from being filed and/or issuing temporary forms of protection (as in Israel; Campbell, Yaron & Hashimshony Yaffe 2013);
- “readmission” agreements with migrant transit countries which allows the West to return (illegal) immigrants (Trauner and Kruse 2008); finally
- migration “partnerships” with migration-transit countries to prevent/manage migration to Europe (Betts 2010).

Vandvik (2008: 28) summarizes the direction of European Union policy in the following way:

With barely any legal migration routes into the EU from third countries, refugees and migrants are being forced into irregular means of travelling. The response of EU governments to these mixed flows of people has been characterized by an overriding effort to prevent migrants, including persons fleeing persecution, from reaching their frontiers and accessing asylum. In pursuing this goal, control policies have also become increasingly sophisticated. The EU borders have been “de-territorialized” and are now virtual borders, monitored through the use of advanced identification technologies and database.

In 2004 the EU created Frontex to police and monitor Europe’s external borders, including the Mediterranean. Frontex has been at the forefront of externalizing EU border controls and has intercepted and “pushed back” individuals seeking to enter the EU in eastern Europe and an unknown number of individuals crossing the Mediterranean whose protection needs were not considered (Perkowski 2013). Considering its power and the resources placed at its disposal, Frontex has not stopped illegal entry: in 2012 it detected 72,000 illegal entries, a 49% decrease from 2010 (Frontex 2013: 19).

EU states have ignored the growing number of migrant deaths in the Mediterranean in recent years – 3,072 persons are estimated to have died crossing the Mediterranean between January to September 2014³ – and until recently they have pursued policies to ensure that refugees/migrants do not reach Europe. For many years EU states have deported individuals on the boats which successfully navigated the Mediterranean to Italy, back to Libya. For its part Libya deported these individuals to their country of origin or it detained them to extort money for their release (Fortress Europe 2007). The indifference of Europe to the death of migrants who have drowned crossing the Mediterranean seemingly changed in October 2013 when, in sight of Lampedusa, a boatload of migrants sank killing all 366 human beings on board.

The incident at Lampedusa provoked Pope Francis I to declare the incident a ‘disgrace’ which in turn led the Italian Prime Minister to launch *Mare Nostrum*⁴ (Our Sea, latin) using the Italian Navy to intercept and bring to shore migrants attempting to cross the Mediterranean. Since its inception in October 2013 approximately 150,000 individuals

(estimates vary) have been ‘rescued’, brought to shore and ‘processed’. An estimated 80% of the individuals assessed by June 2013 reportedly qualified for asylum.⁵

However *Mare Nostrum*, which has come at a high financial and political price, has not been backed by effective action to protect the individuals who are rescued. Turning to the financial costs first, the operation costs Italy €9.1 million (\$US 12.4 million) per month to finance the operation; money it claims it cannot afford. Bearing in mind the collapse of Italian asylum procedures which prevented other EU states from returning asylum seekers there under Dublin II,⁶ the EU Commissioner for Home Affairs fended off requests to fund *Mare Nostrum*. Specifically the Commission said that (a) the EU will ‘not commit new funds to migration’, (b) ‘We don’t have the money’ and (c) that additional EU funding for Frontex – which appears to play no role at all in this exercise – is not possible.⁷ In response Italy said that it would stop the operation and help migrants leave for Europe – indeed tens of thousands have entered Europe⁸ – if financial assistance was not forthcoming.⁹

The political cost of *Mare Nostrum* is equally worrying. Within Italy cross-party political support for the policy, and the government, is collapsing; the Northern League has accused the prime minister ‘of letting in migrants who spread diseases’.¹⁰ And within Europe there is prevarication and a refusal to address the issue due to indifference to what is happening in the Mediterranean and because of parochial political concerns about anti-immigrant and Eurosceptic political parties which achieved electoral advances in the May 2013 EU-wide elections.

Italian expenditure on its woefully inadequate reception and asylum process and reception centres is estimated at a mere €200 million per year (this includes €44 million per year from the EU). The result is that reception centres, already inadequate and unable to cope with arrivals who arrived prior to the Lampedusa tragedy, are unable to cope with the arrival of newly rescued individuals. While rescued migrants may have been registered with the authorities, most are not accommodated in adequate facilities and are instead left to live in abandoned buildings, near train stations or in markets (Bethke & Bender 2011). Indeed as many as 3,000 unaccompanied children have ‘vanished from foster homes and government shelters’ and are presumed to have become victims of forced labour and sexual exploitation, a situation which neither local authorities or the government have regulated or investigated.¹¹

In October 2014, shortly before the Italian deadline for ending ‘*Mare Nostrum*’, the EU reluctantly established ‘Operation Triton’ which is to be operated by Frontex.¹² However

it is clear that Triton will be a more limited operation: it has one-third the budget of Mare Nostrum and will focus on border-control not rescue operations. What is not clear, however, is how new EU rules on maritime surveillance and migrant rights aimed at ensuring that migrants are rescued and provided with legal ‘protection’ will be rolled out and operationalized in practice (Peers 2014). While ‘push-backs’ are clearly outlawed, there are many ambiguities in the new rules which raise problems of accountability for Frontex and participating EU states. The UK’s initial response to Italian demands was to oppose any funding for migrant rescue operations which it said constituted a ‘pull factor’ that exacerbated the situation. However in the face of EU-wide criticism it has backed away from this position.¹³ Elsewhere in the EU member states are adopting equally problematic, and quite possibly illegal, responses to the arrival of growing numbers of migrants.¹⁴

The United States has also sought to deter the entry of foreigners/asylum applicants (Kerwin 2011). Thus in addition to US Coast Guard interdiction of over 236,000 individuals between 1982-2011, the US has adopted security-related measures which have made it more difficult for individuals to access US territory, it has instituted expedited removal procedures for all persons who arrive without documentation and it has tightened eligibility criteria defining who qualifies for asylum. In addition there are specific laws which seriously disadvantage individuals who manage to legally enter and make an asylum claim. As Kerwin (2011: 1) has argued,

... The one-year filing deadline, a heightened burden of proof, new corroboration requirements, and a more exclusive definition of social group membership have prevented large numbers of bona fide asylum seekers from prevailing in and even making their claims. Terrorism-related grounds of inadmissibility have led to exclusion of thousands of refugees and denials and delays in hundreds of asylum cases ... The availability of legal counsel, detention, and the judge assigned to a removal case often influence case outcomes more than the strength of the underlying claim.

The United States has also “militarized” its border with Mexico which has contributed to an estimated 2,238 migrants deaths between 1990 and 2012.¹⁵ Despite spending \$US90 billion to prevent Latin Americans from entering, the US has failed to block entry and it has failed to apprehend the majority of illegal aliens: the number of illegal immigrants who are apprehended declined from 1.4 million individuals in 2001 to 500,000 in 2011 (PBS 2011;

Carriquiry & Majmundar 2012: 10). Between 2005 and 2011, during when the US detained 3 million illegal immigrants, the cost of immigration detention doubled to \$US1.7 billion per annum.

One measure of the extent to which EU member states have adopted policies and laws that deliberately target and criminalise the refugees/migrants who manage to reach their territory is partially reflected in UNHCR's efforts to exercise its 'supervisory' role over state signatories to the Refugee Convention, as defined in Art. 35 of the Refugee Convention:

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) The condition of refugees,

(b) The implementation of this Convention, and

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

UNHCR exercises its supervisory role¹⁶ in various ways including: (a) publicly advising/lobbying governments about whether its policies provide 'fair and efficient asylum procedures'; (b) engaging in 'diplomatic' discussions on government policies; (c) bringing diplomatic pressure to bear on a state to bring its policies into line with its international legal obligations; and (d) engaging in litigation in the courts to 'safeguard the rights and well being of refugees'.

An examination of how UNHCR exercises its supervisory role is well beyond the scope of this paper, instead I look at two strands of its work in the United Kingdom, namely policy advocacy and litigation.¹⁷ These tasks involve substantial coordination between UNHCR-London, the regional and Europe offices in Brussels and UNHCR's Division of International Protection in Geneva. While UNHCR-London staff do their best to monitor national policy and asylum-related litigation, about 500 'concerns' come to their attention each year which potentially require action.

For instance following a series of public statements that the UK government would ‘rewrite Britain's commitment to the 1951 Geneva convention on refugees in an attempt to reduce the number of unfounded asylum seekers reaching Britain’,¹⁸ the UN High Commissioner for Refugees, Ruud Lubbers, met with the British Prime Minister and Home Secretary in 2003. At this meeting he reminded them that the government’s obligations under the Refugee Convention were non-negotiable and that UNHCR was concerned that British asylum policy was not ‘fair and efficient’.

The UK government subsequently issued a statement saying that it would honour its commitment to the Refugee Convention¹⁹ and it established a joint initiative with UNHCR to monitor how the Home Office processed and decided initial asylum claims (the ‘Quality Initiative’ or QI). The QI consisted of a small team of UNHCR staff who monitor/audit the work of Home Office case owners. The team’s reports²⁰ are first forwarded privately to the Home Secretary for discussion and are used to agree acceptable standards and procedures which Home Office case owners are expected to implement.

Over the years many departments in the Home Office – case workers, the Country of Origin Information Service, the Central Interpreters Unit, the complaints unit, the detained fast track process at Yarlswood and Harmondsworth Immigration Centres, the Solihul ‘pilot’ project – have been observed and staff decisions have been audited. The QI identified the following problems:

- the problematic assessment of, and decisions on, initial asylum applications;
- the misapplication of the law – especially the Refugee Convention – in deciding claims;
- a failure to read/understand country of origin information;
- a failure to consider the European Convention on Human Rights or the UK’s Human Rights Act when deciding claims;
- case owners place unreasonable expectations on asylum applicants to produce ‘evidence’ to support their claim;
- case owners fail to apply the benefit of the doubt where this is appropriate in assessing a claim; and
- there is a consistent problem with the manner in which case owners assess the ‘credibility’ of applicants to establish the facts of a claim;

Many of the above problems have also been observed in the detained fast track, in Home Office decision-making on family claims as part of the UK's Family Returns Process and elsewhere.

Despite documenting extensive problems and inconsistent practices over a ten year period, and having secured an agreement with Ministers that case owners would adopt the standards agreed with UNHCR, Home Office staff have persistently failed to implement appropriate standards. The consistent failure of the Home Office to implement agreed standards and procedures is understood to arise from an apparent lack of engagement by government ministers with the issues identified by the QI which requires a rethink of Home Office policy and processes rather than the adhoc adoption of UNHCR recommendations.

A second way in which UNHCR exercises its supervisory role is through intervening (filing a legal brief or *amicus curae*) in asylum cases being decided in British courts; since 1987 approximately 31 interventions have been made. Given its limited capacity to monitor the voluminous amount of asylum-related litigation in the UK's legal system, much less intervene in more than a few cases every year, UNHCR has taken the position that interventions should reflect important policy issues and focus on cases in the Court of Appeal, the Court of Sessions or the House of Lords/Supreme Court. Successful interventions should establish a legal precedent in the UK and in the British Commonwealth and in common-law countries.²¹

Two observations can be drawn about UNHCR litigation.²² First the focus of litigation is narrow considering the many possible issues and cases in which UNHCR could intervene. Second it appears that UNHCR lacks the capacity to monitor how its interventions impact on subsequent asylum litigation, i.e. whether and how successful litigation subsequently effects subsequent litigation.

All that it is possible to do here is to look briefly at one case. The 2008 case '*Regina and Asfaw*' which was heard in the House of Lords raised concerns about the UK's failure to honor Art. 31 (1) of the Refugee Convention. Art. 31(1) states that,

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Illegal entry into the UK, Europe and North America became an issue in the early 1990s when legislation introduced ‘carrier sanctions’ on transport operators who brought passengers lacking a valid visa into a country where a visa was required. Carriers were made to pay heavy fines, and individuals without visas were subject to criminal prosecution. Between 1993 and 1996 approximately 555 individuals were prosecuted in the UK; many of those convicted were attempting to flee persecution and who did not possess a national passport or an entry visa (Dunstan 1998). These individuals, including persons who were subsequently granted asylum, were convicted of illegal entry and sentenced to varying periods of imprisonment. The first appeal against conviction to reach the appeal courts occurred in 1998 – *R v. Uxbridge Magistrates Court and Another, ex Parte Adimi* [1999] EWHC Admin 765 – which allowed the appeals. The Lord Justices noted the inequities of current arrangements and stated that ‘both of us express a strong preference for what may be called the Secretary of State solution, we should expect the Respondents [the Secretary of State for the Home Department and the Crown Prosecution Service] to give careful consideration as to how they propose now to give effect to Article 31’ (¶104). The result was the creation of an ‘Art. 31 defence’ which was incorporated into Sec. 31 of the 1999 Immigration and Asylum Act and which was supposed to ensure that the UK was not in breach of its obligations under the Refugee Convention. However individuals fleeing persecution and who illegally enter the UK continued to be prosecuted and convicted.

‘*Regina and Asfaw*’ concerned an Ethiopian national who had been imprisoned, tortured and raped on account of her alleged political opinions. With the help of an agent she fled Ethiopia by air using a false passport and arrived in the UK in an effort to transit to the US where she intended to claim asylum. In transit at Heathrow airport her false passport was detected; she was arrested, charged with two criminal counts, found guilty and sentenced to nine months imprisonment even though shortly after her trial the Home Secretary recognized her as a refugee. She appealed against the court’s decision on one point of law, namely

If a defendant is charged with an offence not specified in sec. 31 (1) of the Immigration and Asylum Act 1999, to what extent is he entitled to rely on the

protections afforded by article 31 of the 1951 United Nations Convention Relating to the Status of Refugees?²³

The House of Lords held that Sec. 31 should not be read as limited to offences attributable to a refugee's illegal entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit'.²⁴ The decision was a narrower interpretation of Art. 31(1) than UNHCR had argued for, nevertheless it should have changed the way that the British authorities processed claims by refugees entering the UK on false identity papers.

However the Home Office has continued to arrest individuals arriving with false papers, and the Crown Prosecution Service has continued to prosecute and convict these individuals. Between 2009 and 2012 there have been 19,160 convictions for an estimated 11,000 individuals who entered the UK illegally, though it is not clear how many of the individuals convicted were refugees/asylum seekers.²⁵ The most recent case is that of Suhir Mohamed, an Eritrean who entered the UK using false identity papers in February 2014 and who, despite having filed an asylum claim, was convicted on 10th June 2014 in Chelmsford Crown Court under Sec. 31(1) of the Immigration and Asylum Act 1999 and was sentenced to 18 months.²⁶

What is clear is that despite the decision in *Regina and Asfaw*, the Home Office and the Crown Prosecution Service fail to co-operate on these cases, that the Crown Prosecution Services does not use the Art. 31 defence and that large numbers of refugees entering the UK on false identity papers are convicted of a criminal offence. In short *Regina and Asfaw*, which should have set a legal precedent, has had no impact on the way that the British authorities deal with cases that raise Art. 31. It is also clear that this situation is not limited to the UK.²⁷

Many states – Australia, Belgium, New Zealand, Germany, Britain, The Netherlands, Sweden and Switzerland – have adopted other policies to restrict/block asylum claims by individuals who have legally entered their territory. One such policy is to screen asylum claims to assess the applicant's spoken language. Referred to as "Language Analysis for the Purpose of Determining an Applicants Country of Origin", this policy purports to use "expert knowledge" to assess the spoken language of an applicant. However in Britain, and undoubtedly elsewhere, "the language of science operates as an illusion ... to obfuscate

flawed assumptions about language use and capricious bureaucratic practices” in order to refuse asylum claims (Campbell 2013a: 686).²⁸ Britain has also attempted to use isotope and genetic testing to determine the country of origin of an asylum applicant in a clear effort to block asylum applications; fortunately this policy – which has no scientific basis – has temporarily been thwarted (Nature 2009).

Selective and ineffective enforcement of asylum and immigration policies, together with the adoption of procedures which process asylum applications with a minimum of judicial deliberation – as evidenced by questionable judicial decision-making in the US and Canada (Gorlick 2005; Ramji-Nogales et.al. 2007; Rehaag 2008) – have created a growing population of “failed asylum seekers” whose fate converges with that of illegal immigrants “in a revolving door policy, whereby mass deportations are concurrent with an overall, large scale, of more or less permanent importation” of cheap migrant labor (De Genova 2002: 433).

Though states are unsure about the size of the clandestine population of illegals resident in their territory, they have adopted policies to prevent such persons from working and which subject these individuals to arrest and deportation. In the European Union it is estimated that the clandestine population declined to between 1.9 and 3.8 million persons (European Commission 2009). In contrast it is estimated that the number of illegal Hispanic immigrants in the US is 11.1 million. The clandestine population is composed of failed asylum seekers, a large number of visa-over stayers (Bigo 2009: 586) and illegal immigrants attracted by neo-liberal economic policies.

Rather than address the problematic nature of asylum and immigration policies, states give the police wide latitude to control the presence of illegals which in turn has given rise to the development of hugely expensive deportation regimes. In Europe this policy has seen the construction of detention centres rise from 324 in 1999 to 473 in 2011 (Migroun 2013); in 2012 an estimated 269,000 third-country nationals were subject to an obligation to leave the EU (a 17% increase on 2011; Frontex 2013: 44). In the US illegal immigrants are detained at 961 sites (in 2007), and in 2010 the US “removed” 387,242 illegal migrants.

Looking forward?

The right to claim asylum has been eroded by nation-states whose policies, laws and procedures have made a nonsense of the supposedly “fundamental principles” of The Refugee Convention. Thus not only are growing numbers of individuals fleeing persecution

unable to find protection in the Global South, they are unable to flee elsewhere to obtain asylum. In effect asylum applicants are subjected to extensive forms of social and legal discrimination, they are increasingly denied access to asylum procedures and to the courts, they are heavily penalized for illegally entering a country to seek asylum, valid asylum claims are blocked and/or prevented from being filed and they are removed to a country where their life may be at risk.

Much more could be said about the problems and difficulties confronting individuals fleeing persecution and who seek access to asylum. For instance I have not dealt with recent efforts by UNHCR to eliminate statelessness and ensure that state signatories to the two Statelessness Conventions put into place procedures and policies that will recognize stateless persons residing in their territory and legalize their status (e.g. Campbell 2013b, chap. 5).²⁹

If we in the North cannot hermaneutically seal off and protect our part of the world from changes occurring elsewhere, then we had better find ways of re-engaging with the world. A first step is to realize that investing in ‘border management’ and other deterrance measures will not prevent or manage the flow of refugees and migrants seeking to enter Europe and the America’s: the only solution lies in sustained investment to create prosperity in the South. Second we need to rethink asylum and migration policies. Thus the problematic distinction between ‘good’ refugees and ‘bad’ economic migrants needs to be reconceptualized to include not merely climate-induced refugees but also the provision of temporary forms of admission and humanitarian assistance arising from the scale of migrant flows to the North. It is equally important to acknowledge the contradictory effects of pursuing neo-liberal economic policies in the North which simultaneously rely upon attracting skilled manpower and cheap, disposable/deportable migrant labour from the Global South.

New asylum and migration policies are required that will make a real difference in the lives of the world’s poor and which will make it possible for states to support – politically and financially – common policies of benefit to refugees and migrants and assist the countries which provide them refuge. Among the steps which need to be taken include adopting asylum and migration policies which meet ‘minimum basic standards’ which will ensure that all individuals are treated fairly and reasonably, putting into place mechanisms for agreeing equitable ways of ‘burden sharing’, repealing policies which restrict entry to countries of asylum and which prevent and criminalize asylum seeking, reconceptualizing and properly

funding 'migration partnerships' to better manage migration from the global south and which contribute to development there. While the above issues will not be easy to address, a failure to address them in good time will result in a massive, uncontrollable movement of refugees and migrants into northern states. The policy architecture is already in place for this move, what is needed is the political will.

References:

Arendt, H. [1948] 1968. *The Origins of Totalitarianism*. New York: Harcourt.

Bethke, M. & D. Bender. 2011. *The Living Conditions of Refugees in Italy*. Pro Asyl: Frankfurt.

Betts, A. 2010. "The refugee regime complex." *Refugee Survey Quarterly* 29(1): 12-37.

Bigo, D. 2009. "Immigration controls and free movement in Europe." *International Review of the Red Cross* 91(875): 579-591.

Boswell, C. 2003. "The 'external dimension' of EU immigration and asylum policy." *International Affairs* 79(3): 619-638.

Campbell, J. 2013a. "Language analysis in the United Kingdom's refugee status determination system: seeing through policy claims about 'expert knowledge', *Ethnic & Racial Studies* 36(4): 670-690.

Campbell, J. 2013b. *Nationalism, Law and Statelessness. Grand Illusions in the Horn of Africa*. Oxford: Routledge.

Campbell, J., H. Yaron, and N. Hashimshony Yaffe. 2013. "'Infiltrators' or refugees? An analysis of Israel's policies toward African asylum-seekers." *International Migration* 51(4): 144-157.

Canada. 2012. "Canada's New Asylum system." See: <http://www.cic.gc.ca/english/refugees/reform.asp>

Carriquiry, A., and M. Majmundar. 2012. *Estimating Illegal Entries at the U.S.-Mexico Border*. National Research Council. Washington, DC: The National Academies Press.

De Genova, N. 2002. "Migrant 'illegality' and Deportability in everyday life." *Annual Review of Anthropology* 31: 419-447.

Detention Action. 2011. *Fast Track to Despair: The unnecessary detention of asylum seekers*. London.

Dunstan, R. 1998. 'United Kingdom: Breaches of Art. 31 of the 1951 Refugee Convention', *Int. Jo. of Refugee Law* 10, 1/2: 205-213

European Commission. 2009. Size and Development of Irregular Migration to the EU. Clandestino Research Project. Counting the Uncountable: Data and Trends across Europe. Comparative Policy Brief - Size of Irregular Migration, October.

Eurostat. 2013. Asylum decisions in the EU27. EU Member States granted protection to more than 100 000 asylum seekers in 2012. At: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-18062013-AP/EN/3-18062013-AP-EN.PDF (downloaded on 11 July 2014).

Fortress Europe. 2007. "Escape from Tripoli. Report on the conditions of migrants in transit in Libya" (October). at: <http://fortresseurope.blogspot.com>

Frontex. 2013. *Annual Risk Analysis 2012*. Warsaw, Poland.

Goodwin-Gill, G. 2003. 'Art. 32 of the 1951 Convention Relating to the status of Refugees: non-penalization, detention and protection', in Erika Feller, Volker Türk and Frances Nicholson (eds). *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge: University Press.

Gorlick, B. 2005. "Improving decision-making in asylum determination." Working Paper No. 119. New Issues in Refugee Research. Evaluation and Policy Analysis Unit. UNHCR. Geneva.

Hathaway, J. 1990. "A reconsideration of the underlying premise of Refugee Law." *Harvard Int. Law Journal* 31(winter): 129-183.

Helton, A. 1983-84. "Political asylum under the 1980 Refugee Act: An unfulfilled promise." *University of Michigan Journal of Law Reform* 17(2): 243-65.

Kerwin, D. 2011. *The faltering US refugee protection system: Legal and policy responses to refugees, asylum seekers, and others in need of protection*. Migration Policy Institute.

Migroup. 2013. "Fifth edition of the Maps of Camps" at: <http://www.migreurop.org/article2215.html?lang=fr>.

NBC (News). 2011. "US border security – expensive with mixed results" (26 June) at: http://www.nbcnews.com/id/43539092/ns/us_news-security/t/us-border-security-expensive-mixed-results/.

Nature. 2009. "Editorial: Genetics without borders." *Nature* 461: 697.

Perkowski, N. 2013. "An introduction to Frontex: Frequent Criticisms." FAHAMU Refugee and Legal Aid Newsletter, December 1, 2012. Available at: <http://frlan.tumblr.com/post/36946082241/an-introduction-to-frontex-frequent-criticism>

Peers, S. 2014. 'EU Immigration and Asylum law in 2012: The hear of living ineffectually'. Statewatch. December. At: <http://www.statewatch.org/analyses/no-210-immigration-asylum-12.pdf>

Pew Research Hispanic Centre. 2013. "A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized." Pew Research Hispanic Centre, January 29 at: <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/>

PBS (Public Broadcasting System). 2011. "Map: the US Immigration Detention Boom." 18 October at: <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>

Ramji-Nogales, J., A. Schoenholtz, and P. Schrag. 2007. "Refugee roulette: Disparities in asylum adjudication." *Stanford Law Review* 60(2): 295-411.

Rehaag, S. 2008. "Troubling Patterns in Canadian Refugee Adjudication." *Ottawa Law Review* 39: 335-365.

Trauner, F. and I. Kruse. 2008. "EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?" *European Journal of Migration and Law* 10(4): 411-38.

UNHCR. 2011. *A Year of Crisis*. UNHCR Global Trends 2011. Geneva.

UNHCR. 2011. UNHCR Oral submissions in Joined Cases of NS (C-411/10) and ME and others (C-493/10'. Hearing of the Court of Justice of the EU. Luxembourg. (28 June). At: <http://www.refworld.org/pdfid/4e1b10bc2.pdf>

Vandvik, B. 2008. "Extra-territorial border controls and responsibility to protect: A view from ECRE." *Amsterdam Law Forum* 1(1): 27-35.

Vayrynen, V. 2001. "Funding dilemmas in refugee assistance: Political interests and refugee reforms in UNHCR." *International Migration Review* 35(1): 143-167.

¹ See: World Refugee Day: Global forced displacement tops 50 million for the first time in post-World War II era' (20 June 2104) at: <http://www.unhcr.org/53a155bc6.html>

² The growing gap between UNHCR's operational costs and donor funding can be assessed at: <http://www.unhcr.org/pages/49c3646c119.html>.

³ See: 'IOM releases new data on migrant fatalities worldwide: Almost 40,000 since 2000' (29 Sept. 2014) at: <http://www.iom.int/cms/en/sites/iom/home/news-and-views/news-releases/news-listing/iom-releases-new-data-on-migrant.html>.

⁴ See: 'Tidal Wave: Italy's illegal migrants' in *The Economist* 5 June 2014; C. McDonald-Gibson 'Italian navy pleads for help saving migrant boats, saying it 'does not want a sea of death' (*Independent*, 6 July 2014) at: <http://www.independent.co.uk/news/world/europe/italian-navy-pleads-for-help-saving-migrant-boats-saying-it-does-not-want-a-sea-of-death-9587170.html>.

⁵ See: Nando Sigona 'Whose sea? Mare Nostrum and the politics of migration in the Med' (30 June 2014) at: <http://nandosigona.wordpress.com/2014/06/30/whose-sea-mare-nostrum-and-the-politics-of-migration-in-the-med/>.

⁶ The European Court of Justice and the UK Supreme Court, respectively, found that asylum procedures and reception conditions in Greece and Italy were inadequate and that asylum

seekers could not be returned there for a decision on their asylum claim. See: ‘The Joined cases of NS (c-411/10) and ME and others (C-493/10), June 2011 and ‘R on the application of EM (Eritrea) v SSHD (Respondent) [2014] UKSC 12’.

⁷ See: E. Salyers, M. Stevis & L. Moloney ‘Italy seeks EU funds as Migrant flood rises’ (25 June 2014, *Wall Street Journal*) at: <http://online.wsj.com/articles/italy-seeks-eu-funds-as-migrant-flood-rises-1403733552>.

⁸ See: ‘100,000 undocumented migrants into France from Italy’ (30 October 2014) at: <http://www.blazingcatfur.ca/2014/10/14/100000-undocumented-migrants-crossed-into-france-from-italy-in-one-year/>.

⁹ See: M. Stevis ‘Illegal Migration into Europe Soars’ (14 May 2014, *Wall Street Journal*) at: <http://online.wsj.com/news/articles/SB30001424052702304547704579561402484152042>.

¹⁰ See endnote 5.

¹¹ See: ‘Thousands of African child migrants feared in thrall to Italian traffickers’ (*The Guardian*, 17 October 2014) at: <http://www.theguardian.com/global-development/2014/oct/17/african-child-migrants-italian-traffickers-forced-labour-sexual-exploitation>.

¹² See: ‘Triton Operation set to replace Mare Nostrum’ (30 October 2014) at: http://www.ansa.it/english/news/2014/10/30/triton-operation-set-to-replace-mare-nostrum_69e5c9a8-c8c3-4bbd-ab13-23af90d1dddc.html.

¹³ See: ‘UK opposes future migrant rescue operations in Mediterranean’ (*BBC News*, 28 October 2014) at: <http://www.bbc.co.uk/news/uk-29799473>.

¹⁴ E.g. ‘UN warns Spain over ‘on the spot’ deportations’ (*RTE News*, 28 October 2014) at: <http://www.rte.ie/news/2014/10/28/655245-migration/>.

¹⁵ N. Caplan-Bricker ‘The crackdown on the US-Mexican border is causing more migrants to die’ (1 April 2014) at: <http://www.newrepublic.com/article/117222/us-mexico-border-security-crackdown-causing-rise-migrant-deaths>.

¹⁶ This information derives in part from interviews with Mr Rolland Schilling, the UNHCR representative in London and Mr. Peter Grady, Legal Protection Officer, London on July 2nd and 17th, respectively.

¹⁷ UNHCR is only allowed to ‘intervene’ in asylum related litigation in the European Court of Human Rights if they have previously intervened in the same case in the UK or Republic of Ireland.

¹⁸ The first statement was in 2001, see: Alan Travis ‘Home office to rewrite Geneva refugee agreement’ (*The Guardian*, 5 October 2002) at: <http://www.theguardian.com/uk/2002/oct/05/immigration.immigrationandpublicservices>.

¹⁹ See: Patrick Wintour ‘Quitting UN agreement on refugees ‘not feasible’ (*The Guardian*, 26 January 2005) at: <http://www.theguardian.com/society/2005/jan/26/asylum.immigrationasylumandrefugees>.

²⁰ The QI reports can be found at: <http://www.unhcr.org/pages/4e1188886.html> and at: http://unhcr.org.uk/?id=68#_ga=1.105021443.108792674.1404381701.

²¹ The emphasis of each intervention is to re-state ‘the correct legal position’ rather than support a specific asylum claimant; thus securing a precedent in a case may not necessarily mean that the asylum claim is successful.

²² I have examined UNHCR litigation reported on Reflaw and spoken to staff at UNHCR-London.

²³ See: ¶1 of the House of Lords ‘Regina v Fregenet Asfaw’ [2008 UKHL 31] at: <http://www.refworld.org/docid/4835401f2.html>.

²⁴ I have relied upon a summary of the decision which can be found at: <http://webcache.googleusercontent.com/search?q=cache:http://swarb.co.uk/regina-v-fregenet-asfaw-hl-21-may-2008/>.

²⁵ The information comes from a Freedom of Information Act 2000 Request to the UK Crown Prosecution Service; Question: what is the number of people prosecuted for entering the UK using a false passport between 2009 and 2012. Disclosure request Ref. 09/2013.

²⁶ I attended the trial as a country expert to provide information relevant to her asylum claim.

²⁷ See for instance: Goodwin-Gill 2003, and ‘Judgement I.M. v France (9152/09): order to deport asylum seeker to Sudan despite his appeal: violation of Art. 13 and 31’ at: <http://echrnews.wordpress.com/2012/02/08/im/>.

²⁸ Earlier this year the UK Supreme Court found that the procedures used by the Swedish firm to assess language were flawed, which meant that the Home Office had wrongly deported hundreds of asylum seekers (see: House of Lords, Secretary of State for Home Department (Appellant) v MN and KY (Respondents) (Scotland) [2014] UKSC 30. At: http://supremecourt.uk/decided-cases/docs/UKSC_2013_0202_Judgment.pdf.

²⁹ See, for instance: <http://www.unhcr.org/pages/53174c306.html>.