



Peace Research

The Canadian Journal of Peace and Conflict Studies

Volume 56, No. 1 (2024)

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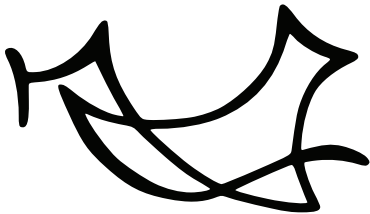
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Peace Research

The Canadian Journal of Peace and Conflict Studies

Volume 56, No. 1 (2024)

Peace Research: The Canadian Journal of Peace and Conflict Studies (ISSN 0008-4697) is published biannually (two issues per year) by Canadian Mennonite University. Its address is 500 Shaftesbury Boulevard, Winnipeg, Manitoba, Canada, R3P 2N2. Tel: 1-204-487-3300; Fax: 1-204-487-3858; Email: peaceresearch@cmu.ca; Web: www.peaceresearch.ca.

SUBSCRIPTION RATES FOR VOLUME 56, 2024

Canada	Electronic
Individuals	\$65 CAD
Institutions	\$105 CAD
Developed Countries	
Individuals	\$85 CAD
Institutions	\$150 CAD
Developing Countries	
Individuals	\$50 CAD
Institutions	\$85 CAD

Some back issues are available at \$15 each. The subscription year is the calendar year. Payments and renewals are due March 31. Cheques should be made payable to “Peace Research/CMU” and sent to the journal at the above address.

SUBSCRIBER INFORMATION For new orders, renewals, sample copy requests, outstanding claims, changes of address, and all other subscription questions, please email peaceresearch@cmu.ca or visit <https://www.peaceresearch.ca/subscriptions>.

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The Editors and Canadian Mennonite University disclaim any responsibility for statements of fact or opinion made by contributors to Peace Research.

INDEXING AND ARCHIVES Peace Research is indexed in Canadian Periodicals Indexes, Micromedia ProQuest, Violence and Abuse Abstracts, and Peace Research Abstracts. The journal is archived with JSTOR and EBSCO Academic Search Premier.

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INTRODUCTION: RACISM, RIGHTS, AND THE RESPONSIBILITY TO PROTECT REFUGEES

James C. Simeon and Stephanie P. Stobbe

This special issue of the Canadian Journal of Peace and Conflict Studies covers the topic of “Racism, Rights and the Responsibility to Protect (R2P) Refugees,” the theme of the 2023 Canadian Association for Refugee and Forced Migration Studies (CARFMS) conference, co-hosted by Stephanie P. Stobbe (CARFMS President) and James C. Simeon (CARFMS Vice President) at York University. Thank you to the authors who contributed to this issue: James C. Simeon, Maureen Silcoff, Gamze Ovacık, and Sorpong Peou.

The challenge of achieving a “sustainable peace”¹ has been a constant for most of humanity throughout recorded history.² While organized political violence has waxed and waned throughout human history, there is no denying its devastating effect on human society, not only in terms of the numbers of those who have died as a consequence of organized political violence—that is, armed conflicts and/or wars—but also in the destruction of property and its negative effects on our environment.³ By definition, armed conflicts and/or wars are intended, deliberately, to perpetrate death and destruction in order to achieve military victory. And in this lies the supreme motivation for people to flee, in order merely to survive and provide for their families.

THE EVER-ESCALATING NUMBER OF ARMED CONFLICTS

The global situation today is especially grim. The Geneva Academy of International Humanitarian Law and Human Rights’ Rule of Law in Armed Conflict Online Portal (RULAC), which “identifies and classifies all situations of armed violence that amount to an armed conflict under international humanitarian law,”⁴ reports that there are more than 110 armed conflicts in the world today and that many of these are protracted armed

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The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 7-30

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conflicts that have been ongoing for the last fifty or more years.⁵ A further breakdown of these armed conflicts reveals the following:

Middle East and North Africa	more than forty-five armed conflicts
Africa	more than thirty-five armed conflicts
Asia	twenty-one armed conflicts
Europe	seven armed conflicts
Latin America	six armed conflicts (Mexico and Colombia, three each) ⁶

The vast majority of these armed conflicts are non-international armed conflicts. However, the Russia–Ukraine War, ongoing since 24 February 2022, is an international armed conflict, along with two in Asia (India and Pakistan; India and China), three in the Middle East and North Africa (the Israel and Hamas/Palestinian conflict; the war in Syria; and the conflict in Yemen).⁷

The Peace Research Institute of Oslo (PRIO) reported that there were some fifty-nine conflicts taking place in the world at the end of 2023.⁸ At that time, PRIO pointed out,

Africa remained the region with the most state-based conflicts per year (28), followed by Asia (17), the Middle East (10), Europe (3) and the Americas (1). The number of conflicts in Africa nearly doubled compared with ten years ago, from 15 in 2013. In the past three years, Africa has seen more than 330,000 battle-related deaths.⁹

PRIO also noted that violence is at an all-time high in the world since the end of the Cold War.¹⁰

This observation is reinforced by the Institute for Economics and Peace (IEP) Global Peace Index 2024, which counts fifty-six conflicts in the world today, the most since the end of the Second World War.¹¹ They also note that “the world is at a crossroads. Without concerted effort, there is a risk of a surge in major conflicts.”¹²

While there are different ways of defining and operationalizing armed conflicts and/or wars,¹³ as illustrated in the examples noted above, it is clear there has been a substantial increase in the number of armed conflicts in the world today and that the leading regions with the most conflicts are Africa, the Middle East, and Asia, with the least number of conflicts having taken place in Europe and the Americas. According to the Stockholm International Peace Research Institute (SIPRI), it is important to note that 73 percent of global arms exports between 2020 and 2024 come from five countries in the North—United States, France, Russia, China, and Germany—compared to 2015–19, when 61 percent came from these countries. The top five importers are Ukraine, India, Qatar, Saudi Arabia, and Pakistan, which received 35 percent of global arms imports between 2020 and 2024.¹⁴

THE INTIMATE RELATIONSHIP BETWEEN ARMED CONFLICT AND FORCED DISPLACEMENT

At the same time as global conflict is on the rise, the number of those who are being forcibly displaced has also been on the rise for more than the last decade.¹⁵ The United Nations High Commissioner for Refugees (UNHCR) estimated that the total number of those forcibly displaced would be 122.6 million as of June 2024, and that this figure will continue to increase for the remainder of the year.¹⁶ Moreover, two-thirds of the world's forcibly displaced come from only ten countries: Afghanistan, Colombia, the Democratic Republic of the Congo, Somalia, State of Palestine, Sudan, Syria, Ukraine, Venezuela, and Yemen.¹⁷ Each of these countries has been embroiled in protracted armed conflict for years, save for Venezuela, which is a special case that is plagued by economic, social, and political upheaval.¹⁸ Indeed, the UNHCR notes that 86 percent of all refugees under its mandate and other people in need of international protection originate from only ten countries.¹⁹ There is no question, of course, that armed conflict and war account for the overwhelming number of the world's forcibly displaced.²⁰ Accordingly, as the number of armed conflicts increase so too will the numbers of those who are forcibly displaced.

The relationship between armed conflict and forced displacement is a direct and an obvious one that is fully supported by the relevant statistics and through direct observations during any armed conflict or war.²¹ It has been pointed out that the more intense the combat in an armed conflict, the

greater the forced displacement.²² Moreover, it is important to keep in mind that forced displacement can be used as a weapon in an armed conflict or war.²³ Detestable as it is, not to mention that it constitutes a war crime, forcibly displacing people to further military victory is more common than most are willing to acknowledge.²⁴ According to Amnesty International, Israel is committing a crime of apartheid that includes forcible transfers and displacements of Palestinians.²⁵ Indeed, the Israel– Hamas War is a stark example of the worst elements and consequences of protracted armed conflict. The United Nations has estimated that “most of the 2.3 million population [in Gaza] have been forced from their homes and that there are ‘catastrophic’ levels of food insecurity.”²⁶ It is essential to appreciate fully the relationship between and among armed conflict or war and asylum.

THE UNITED NATION’S RESPONSIBILITY TO PROTECT DOCTRINE

International humanitarian law or the laws of war are there to protect civilian non-combatants and all those combatants who have laid down their weapons and are no longer engaged in the hostilities, including, of course, prisoners of war.²⁷ This also includes those civilian non-combatants who are fleeing the armed conflict or, more specifically, a war zone.

In 2005, the UN General Assembly adopted the World Summit Outcome Document outlining the Responsibility to Protect (R2P) doctrine, which says that states have a responsibility to protect their people and to prevent and punish the most serious international crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁸ The pertinent paragraphs (138 and 139) say, essentially, that states have a responsibility to protect their populations from the “atrocities crimes” (war crimes, crimes against humanity, genocide, and ethnic cleansing) and that the international community has a responsibility to help states in doing so. If a state fails to protect its citizens, then the international community has a duty to intervene through the UN Security Council. Further, the UN has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, under Chapters VII and VIII of the UN Charter, to protect populations from the atrocity crimes.²⁹ And to take a proactive, preventive stance, the UN would develop an early warning capability in its R2P doctrine.³⁰ This would also entail helping to build state capacity to protect their populations from the atrocity crimes.

A pertinent question, in terms of this special issue of *Peace Research*, is whether the R2P doctrine also encompasses the obligations of states and the international community, through the UN, to protect those who have been forcibly displaced. The answer would be an unequivocal and resounding “yes.” Those who flee armed conflicts and/or wars because their lives, liberty, and security of person are under grave danger undoubtedly have a well-founded fear of persecution, whoever the agents of persecution may be; that is, irrespective of the opposing forces and those engaged in the armed conflict, whether state or non-state combatants.

NON-DISCRIMINATION BASED ON RACE: A FUNDAMENTAL HUMAN RIGHT

It is relevant and significant that the UN is premised on the principles of equality and non-discrimination. Patrick Thornberry points out that the UN Charter’s preamble sets out that the peoples of the UN “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”³¹ Article 1(3) of the UN Charter of the Purposes of the United Nations, states that these purposes include the promotion and encouragement of respect for human rights and fundamental freedoms for all, “without distinction as to race, sex, language, or religion.”³² This phrase is repeated in Articles 13, 55, and 76.³³ This leads to Thornberry’s conclusion that the “achievement of human rights on a non-discriminatory basis is one of the principal aims of the United Nations, as these multiple references in the UN Charter demonstrate.”³⁴

In addition, there are many international human rights instruments that are intended to combat various forms of discrimination, including racial discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination is a case in point, obligating all states to eradicate racism.³⁵ Indeed, the International Bill of Human Rights, comprising the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants on Political and Civil Rights, and on Economic, Social and Cultural Rights, along with the 2018 Global Compact for Safe, Orderly and Regular Migration, and the 2018 Global Compact on Refugees reinforce the principles of human rights and non-discrimination on any grounds, including race.³⁶

Accordingly, there is a direct relationship between human rights, non-discrimination on racial grounds, the UN Responsibility to Protect doctrine, and refugees, which forms the focus of this special issue of the Journal. The articles in this issue examine these four terms and concepts from a variety of theoretical perspectives and draw attention to their different elements. What follows is a brief synopsis of the main arguments presented in each article.

THE ARTICLES IN THIS SPECIAL ISSUE

James C. Simeon's article, "Armed Conflict, War, the Responsibility to Protect, the Human Right to Peace, and the Forcibly Displaced," begins by pointing out that the number of persons who have been forcibly displaced has increased each year for the last dozen years. One in sixty-nine people in the world are now forcibly displaced, nearly double the one in 125 people who were displaced a decade ago. What accounts for the continuously escalating numbers? Simeon notes that three-quarters of those who are forcibly displaced today come from situations of protracted armed conflict and/or war. The International Committee of the Red Cross reported that there were more than 120 armed conflicts taking place in the world at the end of 2024.³⁷ Among the many solutions offered to address the ever-rising displacement numbers, Simeon argues, the most promising is to "prevent and to resolve conflicts." This raises the fundamental question: Is it finally time to eradicate armed conflict and war?

Simeon takes the position that what is essential is to tackle the "root causes" of forced displacement and not merely its symptoms, the principal root cause being armed conflict or war. Solutions that have been presented by several well-known and highly respected humanitarian organizations are sensible and reasonable, yet premised on addressing the symptoms of refugeehood rather than its root causes. Simeon further notes that the ever-increasing numbers of forcibly displaced persons has fuelled the emergence of right-wing populist governments that espouse highly anti-migrant policies. Indeed, right-wing populist leaders and political parties deliberately employ anti-migrant rhetoric and policies to mobilize electoral support to gain public office and to exercise political power.³⁸ Simeon argues that even though armed conflict and war are acknowledged as a principal cause of forced displacement, little attention is paid to root causes in addressing the

problem, especially, within the field of refugee and forced migration studies. (The field of peace and conflict studies goes further in examining the root causes of armed conflict and war.)

What is truly remarkable is that the international community fully understands the sheer critical significance of ending armed conflict and war, evidenced by the fact that the only legal and legitimate use of force requires the authorization of the UN Security Council and that war was outlawed by the Kellogg-Briand Pact (Paris Peace Pact).³⁹ Awareness is also evident in the United Nation's R2P doctrine that sets out the proposition that no state can commit atrocity crimes against its own population, and that together, all states have a responsibility to protect people from the atrocity crimes. This means that with the authorization of the UN Security Council, states can intervene to protect people from atrocity crimes.

Notably, atrocity crimes are most likely to take place in situations of armed conflict or war. Moreover, most refugees who flee war zones are doing so because of the war crimes, crimes against humanity, genocide, and ethnic cleansing that are taking place in these war zones. The relevance of the R2P doctrine with respect to the forcibly displaced is obvious. If states are obligated to protect people from the atrocity crimes, and since most of those who are fleeing conflict or war zones are escaping from the conditions of armed conflict or war, then it follows that states are obligated to protect refugees who are fleeing atrocity crimes. Simeon argues that since under the principle of non-refoulement, a peremptory norm under international law, states cannot return anyone to a situation where they can face persecution. Moreover, given that the atrocity crimes are persecutory on their face, then anyone who has a well-founded fear of persecution on the basis of any of the atrocity crimes, and meets all of the other conditions of the 1951 Convention relating to the Status of Refugees, would be eligible for Convention refugee status.

Simeon draws upon the work of a number of researchers who have made the connection between refugee protection and the R2P doctrine. Some are of the view that "refugee protection is the essential instrument for the implementation of R2P."⁴⁰ Simeon further makes the connection between the R2P and the "human right to peace," which has been acknowledged and upheld by the United Nations on a number of occasions.⁴¹ The violation of a person's fundamental human right to peace can be persecutory in and of

itself. Since the atrocity crimes are perpetrated within the context of armed conflict or war, the R2P doctrine is an acknowledgement that a person's life, liberty, and security are at risk because of the violation of their fundamental human right to peace in such settings. All those who flee armed conflict and/or war ought to be granted refugee protection, as is the case under the 1969 Organization for African Unity (OAU) Convention and the 1984 Cartagena Declaration.⁴²

Simeon concludes by making the case that those persons whose fundamental human right to peace is violated should have the right to claim asylum, as do those in Africa who are covered by the OAU Convention and those in Latin America who fall under the Cartagena Declaration. Accepting such principles, Simeon argues, will bring us closer to our ultimate goal of eradicating the armed conflicts and wars that generate the vast number of the world's forcibly displaced.

Maureen Silcoff's article, "Public Policy Programs: Canada's Bypass to Refugee Protection Restrictions," begins by noting that the 1951 UN Convention Relating to the Status of Refugees offers a limited definition of who is a refugee. For instance, those fleeing war or armed conflict do not fall under the Refugee Convention. Canada's 2001 Immigration and Refugee Protection Act (IRPA) includes inland refugee protection claims and resettlement for refugees who are overseas. Yet, Silcoff observes, "Canada's overseas refugee programs are limited in their recognition of circumstances beyond the refugee definition and leave a gap in protection for certain types of refugees, including those who are fleeing war." She notes that the R2P doctrine provides the means for states to recognize those refugees who are fleeing war, and that Canada has developed discretionary public policies that provide refugee protection to those who fall outside IRPA. For instance, there are humanitarian and compassionate (H&C) provisions that may offer protection, in exceptional circumstances, to those not determined to be Convention refugees. The Canadian Charter of Rights and Freedoms may also be drawn upon to broaden the definition of who is a refugee.

There are two classes of refugees as outlined by the Canadian Immigration and Refugee Protection Regulations (IRPR): Convention Refugees Abroad, and Country of Asylum refugees. Those who fall under the Country of Asylum class face several obstacles, including being subject to private sponsorship criteria, lengthy wait times, and being outside their country of nationality.

Silcoff also considers sections 96 and 97 of the IRPA and concludes that those refugees who are fleeing war are generally not included in the definition of Convention refugee (section 96), and for persons in need of protection because of a “risk to their life or to cruel and unusual treatment or punishment” (section 97) there are two limiting factors. First, the person must be in Canada; and second, the person must not face a risk that others generally face. Consequently, those who flee war and claim refugee protection in Canada must demonstrate that they are being “personally targeted.”

Section 25 of IRPA provides an opportunity for a person to apply for humanitarian and compassionate considerations to remain in Canada. Failed refugee claimants are barred from doing so for twelve months after their last refugee determination. Further, H&C applications do not stop removal to the person’s country of origin or provide temporary status while their application is being determined. Silcoff notes that such applications can take up to two years to process. For those outside of Canada, section 24 of IRPA provides for the issuance of a temporary residence permit, but such applications are at the discretion of immigration officials, could take months or years to process, and granted only in “exceptional circumstances.”

The provisions of the IRPA require that it be interpreted in accordance with its objectives, one of which is “to fulfill Canada’s international legal obligations with respect to refugees,” and to interpret its provisions in a manner that “complies with international human rights instruments to which Canada is a signatory.” Further, the IRPA must be interpreted in accordance with the Canadian Charter of Rights and Freedoms.

For the purposes of her article, Silcoff takes the position that the R2P doctrine confers a responsibility to protect refugees who are fleeing war within the second pillar of the doctrine, which calls upon the international community to help states and to protect refugees who are fleeing war. However, she argues that Canada is remiss in fulfilling its obligations under the R2P, and the only way that it can do so is through “discretionary public policy.” Here she refers to section 25.2(1) of IRPA, which grants the Minister of Immigration, Refugees, and Citizenship broad discretionary authority to remedy legislative gaps by creating public policy exemptions for individuals or groups that otherwise would not receive protection under IRPA. This is one way in which Canada could meet its obligations under R2P. However, such public policy measures are unreliable for a number of reasons that Silcoff outlines in detail.

The Safe Third Country Agreement between Canada and the United States is also considered. While it initially only applied to ports of entry, in 2023 it was changed to cover the entire Canada–US land border. This resulted in a surge of refugee claims made at airports but these required obtaining a visa for Canada, making it a viable option for only a fraction of the world's refugees.

Various examples of public policy measures are examined, such as temporary status for those who are fleeing war, as in the case of the Ukraine program for those fleeing the Russia–Ukraine War. The Canada-Ukraine Authorization for Emergency Travel program approved close to one million applications from 17 March 2022 to 28 November 2023. Subsequently, the program was changed to offer applicants permanent rather than temporary status, which permitted some 200,000 Ukrainians to remain in Canada. However, Silcoff points out, it did not go unnoticed that this program created an easily accessible pathway for white European nationals.

Another public policy that removed visa requirements was the “Temporary Public Policy for Foreign Nationals Who Are Family Members of Canadian Citizens and Permanent Residents Who Left Israel or the Palestinian Territories on or After October 7, 2023.” A second public policy for those affected by the war between Israel and Hamas is the “Temporary Public Policy to Facilitate Temporary Resident Visas for Certain Extended Family Affected by the Crisis in Gaza.” These two policies complement each other, with the latter granting temporary entry to Canada to those who cannot meet the definition of dependent found in IRPA and for those who are extended family members of Canadian citizens and permanent residents. What makes this public policy problematic with respect to Canada's R2P obligations is the cap of one thousand applicants and the need for a family anchor in Canada, requirements that are not found in the public policy for Ukrainians.

Silcoff examines a number of other public policies for different groups fleeing war, including groups from Syria, Iraq, and Afghanistan. She also considers the Economic Mobilities Pathways Pilot (EMPP) that was initiated in 2018 and is still operational. This public policy is focused on Canada's labour market needs, which keeps it out of reach for most refugees fleeing wars. But on the other hand, it is an example of how public policies can be developed to assist a segment of the population that may be in need of international protection.

Silcoff concludes by noting that “the use of public policies is an effective way for Canada to meet its international legal obligations embodied in the UN’s Responsibility to Protect resolution.” Furthermore, the current public policy regime may offer broader protection to those fleeing war. Public policies can be used to respond quickly to international crises where refugee laws would be inapplicable and ineffective in providing protection. Nonetheless, they are dependent on political discretion of the government of the day and efficient processing. Both temporary and permanent programs fill the gaps of Canadian refugee laws. Realistically, given the ever-escalating numbers of refugees and global forced displacement at an all-time high, the ability of Canada or any other country to meet the needs of refugees fleeing war is limited. Given the highly politicized nature of migration at this time, the determining factor will undoubtedly be whether the Canadian government will provide protection measures for refugees fleeing war.⁴³

Gamze Ovacık’s article, “The Right to Seek Asylum as a Manifestation of Responsibility to Protect Refugees,” begins by considering the overlapping traits between the R2P doctrine and refugee protection. Their common motivation, Ovacık notes, is to contain the impact of conflicts so that they do not threaten international peace and security. Additionally, both the R2P doctrine and refugee protection are designed to guard people from the severest violations of their most fundamental human rights: the R2P protects persons from the atrocity crimes, and refugee protection helps to ensure that people do not experience persecution. When people flee atrocity crimes to seek refugee protection, the appropriate response measure, Ovacık states, is to ensure the fulfillment of their right to access asylum. Given the nature of the overlap between R2P and refugee protection, Ovacık takes the view that there is a right to seek asylum and the provision of refugee protection is an appropriate response. The right to seek asylum is therefore a tool for implementing R2P.

Ovacık argues that the principle of non-refoulement, which is the basis of the international refugee protection regime, can be a way for states to implement the R2P doctrine. Judicial practice with respect to the principle of non-refoulement is relevant and important in assessing whether a state is fulfilling its obligations under the R2P and refugee protection. Accordingly, Ovacık examines three problematic legal issues in Turkish jurisprudence on asylum. These issues have significant ramifications given that Turkey is

the second top refugee hosting country in the world, and the bottleneck between Europe and the countries of origin for refugees from the Middle East, Africa, and Asia.

The first issue is the removal of refugees and asylum seekers based on their threat to public order and security relative to their right to seek asylum. The second legal issue is the non-specification of the country of removal in removal orders, which could result in the violation of the principle of non-refoulement. The third legal issue concerns judicial appeals of asylum decisions where judges rule out risk on removal without the full knowledge of relevant facts and in conflict with their duty to impartiality. What is common across these three legal issues in Turkey is the removal of asylum seekers and refugees, that could potentially violate the principle of non-refoulement, and, consequently, the failure of Turkey to fulfill its R2P obligations. Ovacık examines each of these three issues in turn, drawing on seventy-five judgements of the Turkish courts across the country that involve the principle of non-refoulement. These judgements are compared to the human rights standards in the removal practices embodied in the case law of the European Court of Human Rights (ECtHR), which the Turkish judiciary is bound to follow.

The removal of asylum seekers and refugees on the grounds that they are a risk to public order and security is a key consideration and was expanded legislatively in Turkey following ISIS terrorist attacks and the 2015 attempted military coup. The removal of individuals for reasons of national security can stem from their association with terrorist organizations and/or their threat to public order, security, and health. However, what constitutes a connection to a terrorist organization and a threat to public order, security, or health is not defined in legislation, leaving wide variation both administratively and through judicial interpretation.

The Turkish jurisprudence examined by Ovacık reveals the approval of removal orders to the detriment of applicants. The judgements often did not include a comprehensive analysis of the risk of refoulement and/or did not recognize the asylum claim or the status of the applicant. Ovacık indicates that the courts in Turkey grant excessive discretion to the administrative authorities. Also considered is key relevant jurisprudence of the ECtHR, which clearly requires removal orders be set aside pending the outcome of the applicant's judicial appeal. This was followed by the Turkish

Constitutional Court's 2019 judgement that the automatic suspensive effect of removal orders pending the outcome of the judicial appeal ensured the right to effective remedy. Nevertheless, the expulsion of an asylum seeker on the grounds that they are a threat to public order, security, or health is still in effect, irrespective of whether the person is determined in need of refugee protection or that the refugee protection determination has yet to be decided. This jeopardizes the principle of non-refoulement.

The second issue considered by Ovacık, the non-specification of the country of removal in removal orders, is problematic to say the least. This makes it impossible to do a risk assessment to determine whether there will be a violation of the non-refoulement principle. Indeed, Turkish law prohibits the issuance of removal orders to countries where the person would be subject to the death penalty, torture, or inhuman or degrading unusual treatment or punishment. Ovacık states that removal orders typically do not include a country of removal. The ECtHR has found that the non-specification of a country of removal does not fulfill the requirement of legal certainty and the right to an effective remedy. The ECtHR has called on countries for legislative amendments and administrative and judicial measures so that the country of removal is always listed. The judicial practice in Turkey appears rather grim, leading Ovacık to conclude that the non-specification of country of removal appears to have no effective legal remedy.

The final legal issue examined by Ovacık is the lawfulness of a removal during the judicial appeal of an asylum decision. When removal is approved by the court before a refugee determination has been made, this clearly breaches the applicant's right to access asylum. Under Turkish law an application for asylum can be implicitly withdrawn when the asylum seeker fails to comply with various procedural duties (such as attending interviews) and cannot reasonably explain such failures. On judicial appeals of decisions to withdraw these asylum applications, the courts sometimes go beyond the scope of the appeals. For instance, the courts may decide as to the merits of the claim and whether the asylum applicant would face any risk of persecution upon their removal to their country of nationality or former habitual residence. Ovacık makes the point that a premature assessment by the courts on a risk of return before the asylum application is decided on its merits creates a barrier to the right to access asylum.

Ovacık's conclusion is that these three legal issues make asylum applicants

prone to arbitrary expulsion, and, consequently, demonstrate Turkey's non-adherence to international standards for the fulfillment of its obligations to provide access to asylum, with a possible breach to the *jus cogens* principle of non-refoulement and its responsibility to protect people from the atrocity crimes.

Sorpong Peou makes a compelling case in his article titled "Political Violence, Refugees, and the Near Futility of Global Retributive Justice." The article considers whether "formal trials conducted by international criminal tribunals and courts (ICTs/Cs) effectively help end political violence, thus mitigating global refugee crises, one of today's most pressing international concerns." Peou uses four criteria to measure the positive impacts of ICTs/Cs: accountability, conflict termination, peace building, and crime deterrence in countries where they operate and beyond. Peou first reviews competing academic perspectives on global retributive justice, then assesses the performance of the International Criminal Court (ICC). The remainder of the article employs a comparative analysis in a series of case studies to assess the effectiveness of ICTs/Cs.

Peou argues that the academic literature is divided on the issue of the effectiveness of the ICTs/Cs. Some scholars argue that the atrocity crimes, the most serious international crimes, deserve to be prosecuted and punished. Such justice seeks accountability to end the conflict, promotes peace in war-torn countries and deters atrocity crimes. On the other hand, the critics say that retributive justice lacks tangible benefits and may be counterproductive. Retributivists, those who are critical of political realism, assume that pursuing criminal justice is an effective way to end armed conflicts and war, and that "criminal trials represent the ultimate step toward securing world peace by preventing war."

The methodology for the article is comparative analysis with the use of case studies. The case studies are an evaluation of the impact of each of the ICTs/Cs examined; that is, ICC, ICTY and ICTR, the ECCC and the SPSC. The comparative case study method is essentially the use of qualitative analysis that traces the retributive justice processes. "Process tracing is a comparative analysis method adopted to test retributionist assumptions against empirical evidence, mainly qualitative data," Peou notes, "for regression-oriented research due to its importance in descriptive and causal inference." In effect, Peou considers the formal trials that are held in these ICTs/Cs to determine

whether they had an effect on the dependent variables of accountability; conflict termination; peacebuilding, and crime deterrence. The source of the data used for the analysis comes primarily from secondary sources, reports and academic studies.

In considering the ICC, Peou notes that from 2005 to 2020 the court indicted merely forty-five individuals who allegedly committed one or more of the atrocity crimes, and in the last twenty-five years has indicted only sixty-nine people for serious international crimes. Of these sixty-nine, three have completed their sentences, while seven are still completing their sentences, four have been acquitted, seven have been dismissed, four have been withdrawn, and nine have died before the proceedings have concluded. The ICC has never ended any wars, mass atrocities, or deterred them. Indeed, they have only mounted since 2002, when the ICC came into force. It is clear, as Peou states, that “the ICC has done virtually little to hold alleged criminal suspects accountable and punish them, not to mention helping to end the conflict or promote stability or build peace.”

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were ad hoc international criminal tribunals established by the UN Security Council. The ICTY was established in 1993, but as Peou points out, it was the Dayton Peace Accords that ended the Bosnian War in 1995. And this would not have been possible without the military intervention of NATO’s Operation Deliberate Force. The effect of the ICTY in either ending or deferring the armed conflicts or the atrocity crimes is questionable: “The ICTY played no role in Balkan peacebuilding. The continuation of Balkan peace owes much to the United Nations, the European Union, and NATO.”

Again, the UN Security Council adopted Resolution 955 in 1994 to establish the ICTR, to hold those who instigated and perpetrated the genocide in Rwanda to account. Nevertheless, Peou argues, “the ICTR did not deter serious crimes and armed conflicts in Rwanda and Africa,” nor did it succeed in peacebuilding through the reconciliation of Tutsis and Hutus. In fact, two significant wars broke out after the ICTR was established: the Congo War in 1996, the Second Congo War in 1998, which lasted until 2003. Peou concludes that overall, ad hoc international criminal tribunals are not effective in providing peace and security, justice to victims or defendants, or in fostering national reconciliation.

Peou's last two case studies feature hybrid tribunals: the Extraordinary Chambers in the Court of Cambodia (ECCC), and the Special Panels for Serious Crimes in Timor-Leste (SPSC). The ECCC operated from 2006 to 2023, prosecuting and punishing a number of the Khmer Rouge leaders for their serious international crimes. Nonetheless, despite the majority of the judges on the ECCC being from Cambodia, there are real questions as to their independence from the ruling party in power. Peou concludes that the ECCC cannot be credited for ending armed conflict in Cambodia, nor can it be said that it has led to progressive democratic or legal developments.

The SPSC, which functioned from 2002 to 2006 in Timor-Leste and Indonesia, did manage to prosecute and convict successfully those responsible for serious international crimes. The SPSC indicted nearly 400 people and conducted fifty-five trials. Yet nearly all individuals were never prosecuted because they lived in Indonesia, where the process was considered to be tainted, and consequently did not participate in the SPSC. Nonetheless, some ninety suspects were charged and eighty-four convicted, with twenty-four pleading guilty. The majority of those convicted were low-ranking members of the East Timorese militias, not high-ranking Indonesian military officers who were the most responsible for the serious international crimes. The repatriation of refugees to Timor-Leste did occur and the process of national reconciliation did proceed, but not because of the SPSC. Rather than seeking retributive justice, the Timor-Leste government chose a different route establishing in 2005 a Commission of Truth and Friendship to promote peace and reconciliation between the two countries.

As with his conclusions regarding the ICTY and ICTR, Peou determines that the ECCC and SPSC hybrid tribunals did not end wars, foster peace, or deter serious international crimes. And because of Timor-Leste's and Indonesia's move away from retributive justice, they have developed a stronger democracy and rule of law than Cambodia has.

Peou's overall conclusion, based on the evidence presented, is that none of the ICTs/Cs ended armed conflicts or wars, deterred serious crimes, or built peace. He states, "The findings highlight the limitations of retributive justice and caution against excessive optimism." Peou offers the following observations to close his article: first, clearly, global retributive justice cannot free the world from power and security politics; second, military interventions influence the outcomes of wars and the perpetration of serious crimes, which

enable the establishment of ICTs/Cs, but can also risk escalation of the armed conflict and atrocity crimes; third, skeptics caution correctly against pursuing retributive justice in war-torn countries, as it can risk unintended consequences. In the end, “prioritizing peacebuilding without relying too much on the heavy hands of justice looks more promising” when it is paired with support for economic development.

These four articles employ a variety of different approaches and perspectives to address this special issue on “Racism, Rights, and the Responsibility to Protect Refugees.” The writers expand the scope and understanding of these four interrelated and interconnected concepts: race, human rights, R2P, and refugees. They will challenge your understanding of how these concepts are related to advancing peace and conflict resolution in the world today. This special issue not only offers intellectual food for further thought but also makes a valuable contribution to peace and conflict studies and refugee and forced migration studies. Furthermore, it provides practical insights and observations on how to advance the human rights of those forcibly displaced because of the most serious international crimes perpetrated in armed conflicts and wars, and how to move toward a more sustainably peaceful world.

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International humanitarian law (IHL) applies to situations of armed conflict, a de facto state of hostilities dependent on neither a declaration nor recognition of the existence of “war” by its parties. In terms of its material scope, whether an armed conflict is an international armed conflict (IAC) or non-international armed conflict (NIAC) will largely determine which rules of IHL apply. Articles 2 and 3 common to the Geneva Conventions differentiate between the rules applicable to IACs and NIACs. However, the term “armed conflict” is defined in neither article. Far from being an oversight, the omission plays an important role in depoliticizing the application of the Conventions to the situations of violence for which they were conceived. Having learned from earlier reliance on notions such as “declarations of war,” the drafters’ choice of the notion of “armed conflict” ensured that the Conventions’ catalyst would never become a vestige of its time, but rather a concept meant to endure and, indeed, adapt in response to the changing environments for which the Conventions are needed. The application of IHL has since been predicated on a fact-based analysis rather than only the formal recognition by a belligerent that a state of war exists.

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ARMED CONFLICT, WAR, THE RESPONSIBILITY TO PROTECT, THE HUMAN RIGHT TO PEACE, AND THE FORCIBLY DISPLACED

James C. Simeon

It is irrefutable that armed conflicts and/or wars are the principal causes of forced displacement in the world today. The numbers of those who have been forcibly displaced have reached unprecedented levels and have been escalating continuously for at least the last decade. The United Nations' Responsibility to Protect (R2P) doctrine has developed into an international norm and requires states, individually and/or collectively, to protect their residents from the "atrocities crimes"—war crimes, crimes against humanity, genocide, and ethnic cleansing—which are among the world's most serious international crimes and can be persecutory in and of themselves. The overlap between refugee protection and the R2P doctrine is self-evident. All states, both individually and collectively, have a responsibility to protect people from serious international crimes. This is perhaps most evident in the granting of refugee protection. This article argues that the human right to peace, which is essential for the realization of all other human rights, is so crucial that the mere breach of the human right to peace is persecutory and therefore could constitute grounds for a claim to a fear of persecution and form a basis for granting Convention refugee status, provided all other requirements in the 1951 Convention Relating to the

PEACE RESEARCH

The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 31-64

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Status of Refugees are met. Those persons whose fundamental human right to peace has been breached should be able to claim refugee protection. It is argued here that war refugees ought to be able to claim Convention refugee status because the violation of their most fundamental human right to peace can be persecutory in and of itself. Moreover, the goal of achieving a “sustaining peace” is directly aligned with both the R2P doctrine and the most fundamental human right to peace, which when breached can be the severest form of persecution, which can ultimately lead to a grant of Convention refugee status. The inevitable consequence of a “sustaining peace” is the significant reduction in the numbers of the world’s forcibly displaced.

INTRODUCTION

Armed conflict and war are the principal causes of forced displacement in the world today.¹ The numbers of those who have been forcibly displaced have reached unprecedented levels and have been continuously escalating for at least the last decade. The United Nations’ Responsibility to Protect (R2P) doctrine has developed into an international norm and calls for states, individually and/or collectively, to protect their residents from the so-called atrocity crimes.² States have a responsibility to protect their residents from war crimes, crimes against humanity, genocide, and ethnic cleansing,³ which are, of course, among the world’s most serious international crimes and can be persecutory in and of themselves. The overlap between refugee protection and R2P is self-evident. All states, both individually and collectively, have a responsibility to protect people from serious international crimes. This is perhaps most evident in the granting of refugee protection.⁴ This article argues that the human right to peace,⁵ which is essential for the realization of all other human rights, is so crucial that the mere breach of the human right to peace is persecutory in and of itself and, therefore, could constitute grounds for a claim for refugee protection through Convention refugee status.

The “human right to peace” has been described as the idea that all people have a right to peace, hence, it is universal, and like all human rights, it is inalienable, interconnected, indivisible, and non-discriminatory; moreover, states have an obligation to promote and preserve this right.⁶ The achievement of the human right to peace, it is argued, requires a major transformation to a world culture of peace.

A culture of peace will be achieved when citizens of the world understand global problems, have the skills to resolve conflicts and struggle for justice non-violently, live by international standards of human rights and equity, appreciate cultural diversity, and respect the earth and each other. Such learning can only be achieved with a systematic education for peace.⁷

Upholding the human right to peace is of vital importance if one ever hopes to address the seemingly ever-escalating problem of forced displacement in the world today.⁸ Building a sustainable or perpetual peace is absolutely essential to achieving a world without forced displacement. R2P is a crucial international norm that is directly pertinent and relevant to those who seek refugee protection from the travails and severe trauma of war and armed conflict.

This article begins with a review of the disturbing global trend of the ever-escalating numbers of those who are forcibly displaced due to war or armed conflict. It points out how international humanitarian organizations and refugee and forced migration researchers and scholars too often ignore the root causes of forced displacement in favour of trying to address its symptoms: those who have been forced to flee their homes.⁹ It also considers some of the consequences of the growing number of forcibly displaced people in the world today. The next section considers how and why armed conflicts and war, man-made disasters as opposed to natural disasters, are the principal cause of forced displacement. The UN’s R2P doctrine is then considered as an international norm and how it is closely aligned with the international refugee protection regime. There is a “responsibility to protect” refugees. This is most evident if the basis of their well-founded fear of persecution is one of the atrocity crimes. What underscores this is the fact that the atrocity crimes are most prevalent in situations of protracted armed conflict and war. The article then considers the critical human right to peace that is essential to the realization and enjoyment of every other human right.

It concludes by making the case that those who are fleeing armed conflict or war, who have had their most crucial human right to peace violated, should, therefore, be entitled to claim and to be granted refugee protection on that basis alone. By embracing fully the human right to peace, with the responsibility to protect those persons who are fleeing armed conflicts and/or wars—where the atrocity crimes predominate—we will be moving closer to achieving a more just world with fewer forced migrants and, in time, a world without wars or armed conflicts.¹⁰ The goal of achieving sustainable peace and conflict prevention requires “targeted investment in remedying structural issues that drive conflict. From a development perspective, this means addressing exclusion, injustice, inequality, corruption.”¹¹ UN Women sees “sustaining peace” in the following terms:

Sustaining peace should be broadly understood as a goal and a process with activities aimed at the prevention of conflict, underpinned by the people-centred approach of the 2030 Agenda for Sustainable Development and grounded in international human rights laws and standards. This ensures a central role for women, including for young women.¹²

Central to the achievement of this overriding goal of a sustainable peace is the acceptance of the R2P doctrine and the most fundamental human right to peace, and that its breach constitutes the severest form of persecution possible and hence is a basis for the grant of refugee protection.

AN EVER-INCREASING NUMBER OF FORCIBLY DISPLACED PEOPLE

The most recent UN High Commissioner on Refugees (UNHCR) *Global Trends in Forced Displacement 2023* report states that there were 117.3 million people forcibly displaced at the end of 2023 as a result of persecution, conflict, violence, human rights violations, and events seriously disturbing the public order.¹³ What is noteworthy is that nearly three-quarters, 73 percent, of all refugees under the UNHCR’s mandate and others in need of international protection come from only five countries:

Afghanistan	6.4 million
Syrian Arab Republic	6.4 million
Venezuela	6.1 million

Ukraine	6.0 million
South Sudan	2.3 million ¹⁴

All these countries are experiencing protracted armed conflict, save Venezuela, which is undergoing economic and political turmoil leading to massive, forced displacement.¹⁵

The UNHCR points out that these 117.3 million people constituted an 8 percent increase in forced displacement over the previous year, 2022, and note that there has been a year-on-year increase in the number of forcibly displaced for the last twelve years.¹⁶ That UNHCR states, “One in every 69 people, or 1.5 per cent of the entire world’s population, is now forcibly displaced. This is nearly double the 1 in 125 people who were displaced a decade ago.”¹⁷

To illustrate this point further, the UNHCR states that those who are trying to escape conflict tend to remain in their country and contribute to the greatest increase in those forcibly displaced.¹⁸ Quoting the Internal Displacement Monitoring Centre, the UNHCR notes that the number of those who were internally displaced rose to 68.3 million people. This was nearly a 50 percent increase in the last five years.¹⁹ Whether they are from Sudan (10.8 million people by the end of 2023), Democratic Republic of Congo (DRC), Myanmar, Syria (13.8 million people, externally and internally displaced), or are Palestinians from the Gaza Strip (1.7 million), most of the world’s forcibly displaced come from countries in protracted armed conflict and/or war.²⁰

From a broader perspective, the International Organization for Migration (IOM) *World Migration Report 2024* states that there have been “significant shifts in global migration patterns, including a record number of displaced people and major increases in international remittances.”²¹ What is especially interesting, according to IOM’s report, is that there was \$831 billion in remittances, of which \$647 billion dollars was sent by migrants to low- and middle-income countries.²² IOM points out that these remittances can constitute a significant portion of a country’s GDP and that globally, these remittances can now surpass foreign direct investment in these countries.²³ This is hardly surprising, of course, for those countries that are embroiled in protracted armed conflict.

The *World Migration Report 2024* also emphasizes that “with an estimated

281 million international migrants worldwide, the number of displaced individuals due to conflict, violence, disaster, and other reasons has surged to the highest levels in modern-day records, reaching 117 million, underscoring the urgency of addressing displacement crises.”²⁴ While it is well recognized that there is a need to address these rapidly escalating crises, and principally the nearly three-quarters of the world’s forcibly displaced coming from situations of protracted armed conflict and/or war, there appear to be few viable solutions on offer.

What is patently obvious is that this trajectory of year-over-year increases in the number of persons who are being forcibly displaced cannot continue. If the number of forcibly displaced continues to double every decade, this simply will no longer be viable for the international community. Not only will it be beyond the capacity of the international community to cope with such vast numbers of displaced persons, it will represent a vast number of persons, especially youth and women, who will be physically and/or mentally injured or traumatized by their experiences of forced displacement. This is a situation that is morally and ethically reprehensible and must be fully addressed once and for all.

Solutions that have been offered include the following: prevent and resolve conflicts; hold countries to account for the violation of international human rights and humanitarian law; alleviate poverty through developmental assistance; contribute to efforts that promote inclusive democracies; and promote the fair distribution of the earth’s resources.²⁵ A multi-causal, interrelated approach to combatting the root causes of forced displacement that may include addressing such things as “ethnic cleansing,” genocide, civil war, hunger, extreme poverty, drought or flooding. These underlying causes of forced migration are complex, numerous, and interrelated.²⁶ Who could disagree with such an analysis and approach? However, from the statistics available the most viable and critical solution from those provided is clearly to “prevent and resolve conflicts.” While there is significant effort underway by the UN on conflict prevention, peace-making, peacekeeping, peacebuilding, and peace enforcement,²⁷ the number of wars and armed conflicts continues to escalate.

It is worth asking, then, whether putting an end to wars and protracted armed conflicts, the obvious principal cause of forced displacement, is being properly and adequately addressed. This further prompts the overriding question of whether it is, finally, time to eradicate war and armed conflict.

Why is this question so difficult to take up or to propose for humanitarian and human rights organizations and agencies in the world today?

Such questions are relevant and appropriate given the fact that war has been illegal with the 1928 Kellogg-Briand Pact, or Paris Peace Pact.²⁸ Moreover, the 1945 United Nations Charter is premised on the principle that the use of force by states is prohibited unless it is sanctioned by the UN Security Council.²⁹

Nevertheless, the world is presently ablaze with wars and armed conflicts. According to the World Population Review there are currently thirty-two conflicts taking place in the world today.³⁰ The Council on Foreign Relations' Global Conflict Tracker, which keeps track of conflicts around the world of concern to the United States, lists twenty-seven conflicts.³¹ The Blavatnik School of Government at the University of Oxford points out that in the first twenty years of this century, there have been wars in fifty-four countries and that most of these wars are still taking place today.³² In addition, the Global Peace Index (GPI) 2024 states that the world is at a crossroads. The GPI is produced by the Institute of Economics and Peace (IEP), which has the most data-driven analysis of trends of peace.³³ The GPI report for 2024 notes that

without concerted effort, there is a risk of a surge in major conflicts. There are currently 56 conflicts, the most since World War II. They have become more international with 92 countries involved in conflicts outside their borders, the most since the GPI's inception. The rising number of minor conflicts increases the likelihood of more major conflicts in the future. For example, in 2019, Ethiopia, Ukraine, and Gaza were all identified as minor conflicts.³⁴

Sadly, global peacefulness has deteriorated and the GPI 2024 report indicates that "this is the eleventh deterioration in peacefulness in the last of fourteen years."³⁵

Yet some of the world's major humanitarian organizations do not seem to focus on the root causes of forced displacement. Rather, their focus is on providing more humanitarian space and protecting the human rights of those who are being forcibly displaced and not the principal cause of the displacement in the first instance.

Amnesty International, for instance, has proposed the following eight ways to solve the world refugee crisis:

1. Opening up **safe routes to sanctuary** for refugees is one important solution. That means allowing people to reunite with their relatives, and giving refugees visas so they don't have to **spend their life savings and risk drowning** to reach safety.
2. It also means resettling all refugees who need it. **Resettlement** is a vital solution for the most vulnerable refugees—including torture survivors and people with serious medical problems....
3. World leaders also need to put saving lives first. No one should have to die crossing a border, and yet almost 7,000 people drowned in the Mediterranean alone in the two years since the first big shipwreck in October 2013....States can stop this by investing in search and rescue operations and immediately helping people in distress.
4. And whether they travel by land or by sea, people fleeing persecution or wars should be allowed to cross borders, with or without travel documents. **Pushing people back** and putting up **massive fences** only forces them to take more dangerous routes to safety.
5. All countries should **investigate and prosecute trafficking gangs** who exploit refugees and migrants, and put people's safety above all else. Survivors whom Amnesty met **in Southeast Asia** said traffickers killed people on board boats when their families couldn't pay ransoms. Others were thrown overboard and left to drown, or died because there was no food and water.
6. Governments also need to stop blaming refugees and migrants for economic and social problems, and instead **combat all kinds of xenophobia and racial discrimination**. Doing otherwise is deeply unfair, stirs up tensions and fear of foreigners, and sometimes leads to violence—even death....
7. "Financially broke" is how Antonio Guterres, the [former] UN High Commissioner for Refugees, described UN agencies in September 2015. Wealthy countries quite simply are not keeping their high-profile promises to fund aid for refugees abroad. ... People are dying while governments spend billions on border control. They

urgently need to **guarantee full funding to alleviate refugee crises worldwide.**

8. The world has a very short memory. In the aftermath of World War II, most countries agreed to protect refugees through the 1951 Refugee Convention, and through UN agencies like the UNHCR. Barbed wire fences and chronic underfunding have left that vision of a better world in tatters. By ignoring the warning signs, **world leaders have allowed a huge, global humanitarian crisis to unfold.** *Ultimately, it will be resolved by ending the conflicts and persecution that forced people to flee in the first place.*³⁶

All eight recommendations would help to alleviate what Amnesty International calls the world refugee crisis. However, as Amnesty International itself acknowledges, this will do little, if anything, to solve the constant flow of forcibly displaced people, which, it points out, will require “ending the conflicts and persecution.”

Strengthening the international refugee protection regime and pressing states to live up to their legal obligations to protect refugees is obviously beneficial in saving lives and protecting those who are fleeing wars, protracted armed conflict, and persecution, but it does little, if anything, to tackle these root causes. The international refugee protection regime is already overwhelmed with trying to deal with the flow of forced migrants. These types of solutions seem to ignore the current untenable state and place hope on a dramatic change to the behaviour of states. It is fair to ask the obvious and poignant question, Would it not be better to try to address the root causes of the problem rather than its symptoms?

In one respect, the Amnesty International approach is to take in continually more and more refugees as the number of wars and armed conflicts continue to increase. It does little to address the real root cause of the plight of those who are fleeing wars and protracted armed conflict and persecution at present. In another respect, it exposes the futility of this as a long-term strategy for addressing the world refugee crisis. The underlying implicit assumption seems to be that addressing the root causes of the need for asylum is an unresolvable task and/or not of immediate interest to the protection of asylum seekers. However, the alternative approach to addressing the root causes is, of course, to stop the continuous generation

of those who are being forcibly displaced, and the severe hardship, endless suffering, and traumatization that this entails.

Of course, it could be argued that war and protracted armed conflict may be the major or even the principal cause of forced displacement, but what of the other causes such as poverty, climate change, severe discrimination, or the lack of economic opportunities so essential to the quality of life? A person's life, liberty, and security of the person can be affected by more than persecution. Undoubtedly, but according to the 1951 Convention Relating to the Status of Refugees, the definition of Convention refugee is dependent on whether the person has a "well-founded fear of persecution." If there is no persecution, the severest form of human rights violation, then there can be no Convention refugee status. The 1951 Convention has been criticized for having a rather narrow definition of who is a refugee. The expansion of the definition of who is a refugee or person in need of international protection under the regional refugee rights instruments acknowledges that war and armed conflict are legitimate grounds for claiming refugee protection.³⁷ Nonetheless, overall, the 1951 Convention's definition of who is a Convention refugee is limited.

It is interesting to consider how Human Rights Watch has dealt with Europe's refugee crisis in a November 2015 report entitled *Europe's Refugee Crisis: An Agenda for Action*.³⁸ The report lays out recommendations in four broad areas: (1) reducing the need for dangerous journeys; (2) addressing the crisis at Europe's borders; (3) fixing the European Union's broken asylum system; and (4) ensuring that EU cooperation with other countries improves refugee protection and human rights.³⁹ Human Rights Watch offers at least twenty recommendations to EU states for dealing with the so-called European refugee crisis. For instance, it suggests the following:

The provision of more and safe and legal channels into the EU—ways for migrants, asylum seekers, and refugees to reach EU territory without having to risk their lives or resort to criminal networks—could reduce the use of dangerous migration avenues. The development of such channels need not amount to an open door policy: those arriving can be screened, have their protection needs assessed, and their entitlement to remain in the European Union determined based on their international protection needs and any human rights imperatives. Those

found, after a fair procedure, not to have such a basis to remain could be removed.⁴⁰

Who could argue with such a recommendation? The point is not simply to address the symptoms of refugeehood but its cause. People do not require “safe and legal channels into the EU” if they are *not* being forcibly displaced. Voluntary migration is different from involuntary migration when your life, liberty, and security are at risk.

Further, Human Rights Watch recommends that EU states should guarantee adequate reception capacities at EU borders. This is, of course, a sensible and reasonable recommendation. Human Rights Watch notes, “Frontline states such as Italy, Greece, Hungary, and increasingly Croatia, Slovenia, Austria, and Germany have prepared poorly for the influx. Throughout 2015, arriving asylum seekers and migrants found themselves in chaotic and inhospitable scenes at EU borders.”⁴¹ This is an observation that points to a solid recommendation but, again, one based on the assumption that mass influx situations ought to be anticipated and planned for so that EU states can respond appropriately. But what of the proposition that it is better to try to address the root cause of the forced displacement as opposed to its consequences, the mass influx of asylum seekers?

For the last several decades, right-wing populist governments have come to power in liberal democratic states in both Europe and the United States. US President Donald Trump’s latest electoral victory is a case in point.⁴² These right-wing populist governments are opposed to immigrants and refugees per se.

Populists often construct the alienated others, including foreigners, immigrants, refugees, and asylum seekers, as scapegoats. The targeted language of populist discourse depends on various determinants like the majority and minority ethnicity or religion, the position of the populist party being either the ruling party or in opposition, and the opportunities that emerge in the country....

Rhetoric about “the foreigners” varies among the right-wing parties. Considering their nativist, even xenophobic politics, radical right populism might be assumed to always use hostile

discourse towards foreigners. In contrast, it can vary in different contexts.⁴³

It is trite to note that continuous forced displacement to migrant host countries can fuel anti-migrant sentiments that bolsters support for radical right-wing populist political parties.⁴⁴ This seems to underlie the very basis of the current shift in Canada's long-standing consensus of welcoming newcomers on humanitarian and economic grounds.⁴⁵

It is difficult to fully comprehend the logic of not trying to address the root causes of asylum rather than concentrating exclusively on its symptoms—those who are forcibly displaced and seeking asylum. Would it not be better to try to address the principal cause for forced displacement, protracted armed conflict, or war? If these are the principal causes of forced displacement, and ending wars and protracted armed conflicts can save everyone the grief and hardship of refugeehood, then why is this not being pursued?

This is not to say, of course, that the UN and other international organizations are not engaged in trying to prevent conflict or ending wars and building the capacity of states to maintain peace. Peace movements have been seeking to eradicate wars for centuries.⁴⁶ However, one cannot deny that international humanitarian organizations are primarily geared to protecting the rights of the forcibly displaced and not to preventing or to resolving the armed conflicts and/or wars that are the cause of their displacement.

It is a basic observation that first and foremost, what is required is the eradication of wars and protracted armed conflicts if we ever hope to eliminate the need for refugee protection. It is reasonable to assume that if the international community cannot contain and/or resolve the ongoing and growing number of armed conflicts and/or wars, that the numbers of those who are being forcibly displaced will continue to escalate. This is a completely untenable situation.

PROTRACTED ARMED CONFLICT —THE PRINCIPAL DRIVER OF FORCED DISPLACEMENT

While there are different types of migration, the Migration Data Portal makes the point that in the study of forced migration a distinction is often made between conflict-induced displacement and disaster-induced

displacement.⁴⁷ The difference is that one is “man-made” while the other is a result of natural causes such as volcanic eruptions, earthquakes, tsunamis, hurricanes, or cyclones, and the like. However, the Migration Data Portal stresses that while this distinction is useful, in practice the lines between the two may be blurred when human activity may trigger such things as landslides, or when over-exploitation of natural resources such as forests or minerals leads to soil erosion and/or water contamination and pollution that make an area uninhabitable.⁴⁸ In addition, “although conflict and disasters are main drivers of forced displacement, other drivers include urbanization, general violence and human rights violations, among others.”⁴⁹ What is important here is the acknowledgement that “conflict and disasters are the main drivers of forced displacement.” But as already noted above, the main driver of forced displacement is armed conflict and/or war.

The Migration Data Portal acknowledges as much when it presents the latest statistics available on forced displacement. For instance, the portal notes that by the end of 2023, 75.9 million people were internally displaced. It reports that “68.3 million people in 66 countries and territories were internally displaced by conflict and violence (a 9% increase from 2022, and a 49% increase in five years), and at least 7.7 million people in 82 countries and territories were internally displaced by disasters (an 11% decrease from 2022, but still the third highest figure within the last decade).”⁵⁰ The number of those internally displaced by conflict far exceeds those who are displaced by natural disasters. The figure titled “Internally Displaced Persons (IDPs) due to Disaster and Conflict, end of 2014—end of 2023” drives this point home. It shows the escalating numbers of IDPs fleeing conflict rising from under 40 million people in 2014 to just under 70 million in 2023, while the number of IDPs escaping disasters remains fairly constant and with a slight increase to well under 10 million people over the same period.⁵¹

The Migration Data Portal makes the point that “it is important to note that displacement by conflict and displacement by disaster cannot always be reliably distinguished because many people can be displaced for one reason, and then get displaced for a second or even third time by a different reason.”⁵² It is evident from this statement that the Migration Data Portal is conflating different modes of displacement. It seems obvious that people can be displaced more than once in their lifetime and for varied reasons. But it seems preposterous to assert that it is not possible to distinguish

between those who are displaced by conflict, whether war or armed conflict or other forms of extreme political violence, and those who are displaced because of natural catastrophes such as earthquakes or volcanic eruptions. This is simply disingenuous. One can be displaced once for conflict and another time by natural disasters, but it would be difficult *not* to be able to distinguish between the two. In fact, the Migration Data Portal asserts that nearly half of all internal displacements in 2023 were in Sudan and the Democratic Republic of Congo, two countries that have been embroiled in protracted armed conflict for years.⁵³ It then notes other countries that have experienced large numbers of internal displacements due to conflict: the Occupied Palestinian Territory, Ethiopia, Ukraine, and Burkina Faso. Again, all these countries are embroiled in protracted armed conflict.

The humanitarian organization Concern Worldwide US identifies the following six most common causes of forced migration:

1. Drought
2. Hunger
3. Flooding
4. Earthquakes
5. War and conflict
6. Economic circumstances⁵⁴

Among these six common causes of forced migration, Concern points out that “conflict is the most common factor for forced migration around the world.”⁵⁵ Some of these six factors can be interrelated. For instance, regarding hunger, Concern notes the following:

Hunger’s connection to drought and other causes on this list is significant: What people in farming regions don’t consume from their own harvests is sold to make a living. *War and conflict can also mean a lack of access to markets and fields, or that crops and food supplies are destroyed or stolen.* Other causes of world hunger add up to the same result: Without any other alternatives, families affected by food shortages are often separated by forced migration, with one parent (usually the father) seeking work in a city to cover costs. Other families leave as a unit to begin their life in a new country.⁵⁶

One of the characteristics of modern warfare is that many civilian

non-combatants are the casualties of the conflict, not because of being victims of collateral damage or being caught in the crossfire of the two opposing sides, but because of insufficient water and food, the spread of disease, and a lack of medicine or medical treatment.⁵⁷ This does not include, of course, the deliberate targeting of civilian non-combatants for strategic military purposes in order to achieve a victory or for other heinous reasons such as crimes against humanity like ethnic cleansing and/or genocide.⁵⁸

The growing number of forcibly displaced persons in the world has been widely reported for some time. This led to the UN High Commissioner for Refugees, Filippo Grandi, to state, in no uncertain terms: *"It is high time for warring parties to respect the basic laws of war and international law ..."* The fact is that without better cooperation and concerted efforts to address conflict, human rights violations and the climate crisis, displacement figures will keep rising, bringing fresh misery and costly humanitarian responses.⁵⁹ It is widely recognized that most of the world's forcibly displaced are in that situation because of war and/or armed conflict, yet there remains a lack of focus on addressing the root cause of forced displacement, especially within the field of refugee and forced migration studies.

What is remarkable, at least to the most discerning peace activists, is that despite the prohibition on the use of force, with the UN Security Council the only legitimate international body that can authorize its use, and the illegality of war under the terms of the 1928 Kellogg-Briand Pact, war and armed conflicts are still rampant.⁶⁰ Clearly, this is *the* challenge of our time. To put it bluntly, conflict, in the form of armed conflict and/or war, is indeed the principal cause of forced displacement in the world today. If we are to address the ever-escalating numbers of those who are being displaced, with so many of them children,⁶¹ we must tackle the problem of war and/or protracted armed conflict in new and creative ways.

THE UNITED NATIONS' RESPONSIBILITY TO PROTECT DOCTRINE

The Responsibility to Protect (R2P) doctrine of the UN is essentially premised on the principle that state sovereignty carries "the obligation of states to protect their own people, and if a state is unable or unwilling to do so, the responsibility shifts to the international community to use

diplomatic, humanitarian, and other means to protect them”⁶²

At the 2005 World Summit meeting, states committed to the R2P principle in the outcome document of the meeting. In paragraphs 138 and 139 of the Summit Outcome document, states affirmed their responsibility to protect their populations from *genocide, war crimes, ethnic cleansing, and crimes against humanity*—the atrocity crimes—and accepted the responsibility to encourage and help each other uphold this commitment.⁶³ These paragraphs establish an important new political commitment on the part of the member states of the UN. The UN works with member states to prevent the atrocity crimes from taking place through capacity building, early warning, and other preventative and protective measures. The R2P doctrine has been further elaborated and developed since it was first adopted by the UN General Assembly.⁶⁴

Alex J. Bellamy has argued that the R2P can be seen as either a concept, a principle, or an emerging norm.⁶⁵ He argues that there is still much to do to operationalize the principle to a full international norm. The R2P was premised on three pillars: (1) The responsibility of states not to commit atrocity crimes nor allow other states to do so; (2) The responsibility of other states to assist those states without the capacity to protect; and (3) The responsibility of the international community to respond with “timely and decisive” action, including ultimately with coercive military force but only if authorized by the UN Security Council, if a state “manifestly fails” to meet its protection responsibilities.⁶⁶ Ramesh Thakur, one of the principal supporters and advocates of the R2P, has stated that “the Responsibility to Protect is very much part of the contemporary international normative and policy debate on the lawfulness and legitimacy of the use of force to protect at-risk populations inside sovereign jurisdictions.”⁶⁷

Despite the R2P’s being fully incorporated with the UN system and employed in numerous UN Security Council Resolutions,⁶⁸ it has yet to be fully and consistently applied by the UN and its member states. No less of an authority on the R2P than Gareth Evans, one of the originators of the concept, has pointed out that “R2P in many ways remains a work in progress, and there is much more work to be done in consolidating its effectiveness. The future of the responsibility to protect will only be assured if we—and in particular the next generation of policymakers—fight for it.”⁶⁹

The UN's R2P doctrine is relevant for the protection of refugees and other forced migrants in a number of respects. The following examples are worth bearing in mind:

- The commission of the so-called atrocity crimes is most evident in situations of protracted armed conflict. This is most obvious in the case of war crimes but also in situations when crimes against humanity and genocide take place.
- It is the combatants on either side of an armed conflict that are most likely to resort to the use of atrocity crimes to gain tactical and strategic advantage during an armed conflict in an effort to gain outright military victory.
- The commission of such atrocity crimes are the triggers that lead people to flee a war zone or conflict area. No one, of course, can live in a war zone, given the risk of death due to crossfire, collateral damage, stray and/or friendly fire, and of course, the lack of water, food, and medical supplies, and so on. Most civilians likely die during a protracted armed conflict because of disease and starvation rather than by direct military assaults *per se*.⁷⁰
- Those who are fleeing an armed conflict are not generally eligible to receive refugee protection unless they have been deliberately targeted on one or more of the five grounds of the 1951 Refugee Convention: race, religion, nationality, political opinion, and membership in a particular social group.⁷¹

The Responsibility to Protect Those Who Are Seeking Asylum

The R2P doctrine is based on the principle that the international community has a responsibility to step in and protect those persons who face persecution in the form of the atrocity crimes, whether it is genocide, war crimes, ethnic cleansing, or crimes against humanity,⁷² crimes that occur most often in situations of protracted armed conflict or war. Those who are fleeing a war zone or conflict area, which, as we have noted, constitute the majority of the world's refugees and other forcibly displaced persons, impose an obligation on states, whether or not they are a party to the 1951 Convention Relating to the Status of Refugees to protect those who are seeking asylum. Under the R2P doctrine, the international community has an obligation to protect

those who are fleeing atrocity crimes.⁷³

The 1951 Refugee Convention defines who is a refugee.⁷⁴ Under the convention, a person is a refugee if they have a well-founded fear of persecution for reasons of their race, religion, nationality, membership in a particular social group, and/or their political opinion; they must be outside their country of nationality or former habitual residence, and be unable or unwilling to avail themselves of their state's or country's protection.⁷⁵ Clearly, anyone who is subject to one of the four atrocity crimes under the R2P would have a well-founded fear of persecution. This is most evident with respect to genocide and crimes against humanity, but also evident in situations of ethnic cleansing and war crimes—all of which are the most serious international crimes.⁷⁶ Consequently, states not only have a responsibility to protect persons from the atrocity crimes when they are their own nationals but also if they are non-nationals, that is, citizens and foreigners alike.

Under international law, no one can be returned to a country where they could face persecution. The principle of non-refoulement is a peremptory international norm that all states are bound by.⁷⁷ Accordingly, the R2P doctrine obligates all states to protect persons from the atrocity crimes, both individually and collectively. And at the same time, customary international law requires that no state can return a person to a country where they may be persecuted. Moreover, all states that are parties to the 1951 Convention and its 1967 Protocol Relating to the State of Refugees must provide refugee protection to all those who meet the definition of a refugee under these international treaties. In short, there is direct overlap between the R2P and international refugee law in that states have a responsibility to protect persons from the atrocity crimes, and when such persons are seeking asylum because of a well-founded fear of persecution from an atrocity crime(s) and can meet the other elements of the 1951 Convention, then they can be granted refugee protection.

While not all states are parties to the 1951 Convention and/or its 1967 Protocol,⁷⁸ all states, under customary international law, cannot return a person to a country where they can be subject to persecution, including those who may be subject to one or more of the atrocity crimes.⁷⁹ They have a responsibility to protect those on their territory from persecution, the severest violations of one's most fundamental human rights.

There is an extensive and growing literature on the R2P and refugee protection.⁸⁰ As Jason Ralph and James Souter argue, “as refugee-producing atrocities sadly show little sign of abating, the relationship between the RtoP and refugee protection regimes will continue to be an urgent question for academics and practitioners alike, as both continue to grapple with the question of how best to respond to these crimes.”⁸¹ Susan Harris Rimmer has pointed out that “there is an obvious connection of intellectual heritage between R2P and the protection of IDPs [internal displaced persons]. The concept of ‘sovereignty as responsibility’ was developed by Francis Deng and Roberta Cohen and others (Deng et al. 1996) as the rationale for the Guiding Principles on IDPs (Weiss 2007: 89–98).”⁸²

Harris Rimmer goes on to make a case for placing an emphasis on “prevention,” the first pillar of the R2P: “Forced displacement is the primary concern of citizens experiencing armed conflict, and I assert that prevention of displacement will go a long way to preventing genocide and mass atrocities.”⁸³ However, she goes on to argue that “refugee and IDP protection is peripheral to the R2P doctrine.”⁸⁴ In my view, this misses the essential point that the atrocity crimes, which occur overwhelmingly in situations of armed conflict and war, produce forced displacement. Hence, the R2P is vital not only for addressing the plight of those who are the victims or the potential victims of such serious international crimes but for providing them with places of asylum.⁸⁵

Stefania Panebianco and Iole Fontana argue that refugee protection is directly relevant to the implementation of the R2P,⁸⁶ and that refugee protection allows for alternative peaceful ways to uphold the R2P.⁸⁷ For instance, they note that the R2P can pave the way to protect a specific category of refugees, those who are fleeing the atrocity crimes.⁸⁸ This expands the responsibility of states to include “war refugees,” who are not typically protected by the 1951 Refugee Convention. The link between the R2P and refugee protection is that it can be “used to facilitate international cooperation to share the costs of protecting refugees.”⁸⁹ Panebianco and Fontana conclude by stating that “refugee protection is the essential instrument for the implementation of R2P” and that “the protection of asylum-seekers is entailed by the principles at the very core of the R2P norm.”⁹⁰

Alise Coen makes a similar argument. She asserts that “in the wake of mass atrocity situations, facilitating access to asylum, granting temporary

protection, and upholding the principle of non-refoulement represent essential steps to fulfilling the international norm of RtoP.”⁹¹ Her preferred approach is culpability based, which will enhance “cooperative security, combat the narratives of militant groups such as ISIS, provide opportunities for reconciliation, and counter perceptions of human rights double standards.”⁹² The R2P and the refugee protection are directly related, Coen argues.

This view is also held by many others, including Hamzah S. Aldoghmi, who contends that the R2P and refugee protection have an interlinked agenda and can provide the protection needs of *prima facie* refugees who are fleeing mass atrocity crimes.⁹³ Susan Martin has also argued that the refugee regime could be effectively harnessed, led by the Office of the UN High Commissioner for Refugees, to advance R2P in those situations where a state is unable to provide its people with protection, regardless of the cause of the forced displacement, natural or man-made.⁹⁴ These are two further examples of many more authorities on this subject. It is evident from the above that the academic community is making the obvious connection between the R2P doctrine and refugee protection and calling for the mutual advancement of both in addressing the plight of those who are fleeing the atrocity crimes.

THE ESSENTIAL HUMAN RIGHT TO PEACE

In 1984, the UN General Assembly approved the Declaration on the Right of Peoples to Peace. It simply and elegantly states that “the maintenance of a peaceful life of peoples is the sacred duty of all States.” The declaration then:

1. Solemnly proclaims that the peoples of our planet have a *sacred right to peace*;
2. Solemnly declares that *the preservation of the right of peoples to peace and the promotion its implementation* constitutes a fundamental obligation of each State.⁹⁵

The implications for all member states of the UN are utterly profound. Sadly, this most fundamental obligation is not being honoured by many of the world’s states.

In 2016, the UN General Assembly adopted Resolution 71/189, the

Declaration on the Right to Peace. Article 1 of this declaration firmly states, “Everyone has the right to enjoy peace such that all human rights are promoted and protected, and development is fully realized.” And Article 2 declares, “States should respect, implement and promote equality and non-discrimination, justice and the rule of law, and guarantee freedom from fear and want as a means to build peace within and between societies.”⁹⁶ The role, obligation, and responsibilities of all states in the world today are emphatically clear.

Violations of one’s right to peace must be asserted in all circumstances, with the attendant responsibility of the UN and its member states to intervene and end these violations. This is, in essence, embodied in the UN’s R2P doctrine, which is premised, one might argue, on an appreciation that there is a fundamental right to peace. The UN’s R2P doctrine calls on states to protect their populations from genocide, crimes against humanity, war crimes, and ethnic cleansing, which occur either exclusively or predominantly in armed conflicts and/or wars.⁹⁷

The Violation of the Right to Peace as Basis for a Claim for Refugee Protection

To claim refugee protection under the 1951 Convention, one must have a well-founded fear of persecution. The reasons must be for persecution on one or more of the five grounds of race, religion, nationality, political opinion, or membership in a particular social group; being unable or unwilling, owing to such fear of persecution, to seek the protection of their state; and being outside one’s country of nationality or habitual residence.⁹⁸

It is reasonable to expect that the breach of the most fundamental right to peace could be deemed persecutory in and of itself. All those who are fleeing war or protracted armed conflict have a valid claim to refugee protection because their most fundamental human right has been violated. At present, those fleeing a war zone are not generally deemed refugees unless they have been deliberately targeted on one of the five grounds identified above.⁹⁹ The exceptions to this are the 1969 Organization of African Unity (OAU) Convention and the 1984 Cartagena Declaration, which have expanded the definition of refugee to include “war refugees.”¹⁰⁰ State parties to these international instruments accept that those who are forcibly displaced due to armed conflict and/or war should receive refugee protection.

All those who flee armed conflict and/or war should be entitled to claim refugee protection on that basis alone, given that their most fundamental human right to peace has been breached.

CONCLUDING THOUGHTS AND REFLECTIONS

The relationship between protracted armed conflict and/or war and forced migration is patently obvious. The correlation between war—extreme organized violence—and forced migration is often ignored or overlooked in the field of refugee and forced migration studies. There is an unprecedented number of forced migrants in the world today. The number has more than doubled in the last decade. This suggests that the number of protracted armed conflicts and/or wars and their intensity has been increasing steadily over the last decade. What does this say about our ability to resolve peacefully armed conflicts and wars? Clearly, there is much to be desired with respect to the way the international community is capable of preventing, resolving, and ending armed conflicts and wars.

The UN's R2P doctrine is intended to protect everyone from the perpetration of the most serious international crimes that occur most frequently in situations of protracted armed conflict and/or war. The relationship between R2P and refugee protection is evident in that those who are fleeing wars and/or armed conflicts have a well-founded fear of the atrocity crimes, which are clearly persecutory. The international protection provided through Convention refugee status, therefore, can be a fulfilment of the requirement of each state's commitment to apply the UN's R2P doctrine or international norm. This leads to the inevitable conclusion that states have a responsibility to protect those who are forcibly displaced due to the atrocity crimes that occur most frequently in armed conflicts and/or wars.

The essential human right to peace, which makes it possible to realize all other human rights,¹⁰¹ ought to be more widely recognized. The international community has a collective responsibility through the R2P doctrine to intervene in those situations where the atrocity crimes are likely or are, in fact, taking place. And it ought to be more generally acknowledged and accepted that the UN's R2P doctrine and the international refugee protection regime are advancing the same cause, the protection of persons from the violation of their most essential human rights and from being victims of

the atrocity crimes, the world's most serious international crimes.

Those persons whose fundamental human right to peace has been breached should be able to claim refugee protection. "War refugees" ought to be able to claim Convention refugee status because the violation of their most fundamental human right to peace can be persecutory in and of itself. Accepting these basic principles will bring us closer to the ultimate goal of a world without armed conflict and war and, undoubtedly, far fewer persons who are forcibly displaced.

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PUBLIC POLICY PROGRAMS: CANADA'S BYPASS TO
REFUGEE PROTECTION RESTRICTIONS*Maureen Silcoff**

This article explores Canada's use of discretionary public policy programs as a response to the limitations of international and domestic refugee protection frameworks, particularly for individuals fleeing war who fall outside the 1951 Refugee Convention. Anchored in the normative framework of the United Nations' Responsibility to Protect, the international community's duty to assist at-risk populations, the article argues that Canada's refugee system under the Immigration and Refugee Protection Act (IRPA) may not meet its obligations to war-affected populations, but public policy programs, enacted under section 25.2 of the IRPA, offer a pragmatic yet politically contingent mechanism to address these protection gaps. Drawing on a comparative analysis of public policy responses to crises in Ukraine, Gaza, and Afghanistan, this article evaluates the extent to which these ad hoc initiatives align with Canada's international legal responsibilities. It concludes with recommendations for institutional reform, transparency, and

* The author acknowledges the contributions of Chantelle McDonald in preparing this article.

accountability to ensure that refugee protection is equitably extended and not subordinated to political expediency.

INTRODUCTION

The United Nations' 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol are rooted in the aftermath of World War II, when the international community recognized the need for international norms to protect refugees. In signing the Refugee Convention, states agreed to binding obligations to offer protection to refugees, and minimum legal standards of refugee protection have emerged through the years. However, the Refugee Convention is limited, as only certain categories of individuals seeking protection fall within its scope. Fleeing war, for example, is not itself a ground for protection under the Refugee Convention.

Canada adopted the refugee definition from the 1951 Refugee Convention into domestic law in the Immigration and Refugee Protection Act (IRPA), and together with the Immigration and Refugee Protection Regulations (IRPR), Canada's refugee system includes inland refugee protection (that considers circumstances beyond the refugee definition) and resettlement for refugees overseas, including sponsorship programs, for individuals who are outside Canada.¹ Canada's overseas refugee programs are limited in their recognition of circumstances beyond the refugee definition, thereby leaving a gap in protection for certain types of refugees, including those fleeing war.

The United Nations' Responsibility to Protect (R2P), a 2005 General Assembly Resolution, articulates principles that offer a means for states to recognize an obligation to protect refugees fleeing war² that the Refugee Convention does not provide.³ While there is debate about the nature, scope, and promise of the R2P, scholars have argued that the R2P obligates states to protect refugees in contexts outside of the Refugee Convention. Canada, as a country relying on international and domestic laws that do not

go beyond the Refugee Convention definition, risks being remiss in these obligations under the R2P.

Canada has a tested path to address the gap. Canada has supplemented the IRPA refugee definition by creating public policy programs, which it has discretionary power to do. Public policies are flexible tools that can respond to war crises and uphold Canada's obligation to offer protection to refugees fleeing war.

This article evaluates, from a practical perspective, the extent to which this policy-based system meets Canada's obligation to protect refugees fleeing war, stemming from the second pillar of the UN R2P. The article starts with a brief overview of the limitations of refugee protection in international and Canadian domestic law and Canada's obligations under the R2P. This is followed by an assessment of the constraints and benefits of Canada's offering protection by way of public policy, as exemplified by several public policies. The conclusion summarizes public policy recommendations that can address the gap for refugees fleeing war.

THE LIMITATIONS OF REFUGEE PROTECTION IN INTERNATIONAL LAW

The UN High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* explains that "persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol."⁴ This restriction is based on the definition of a refugee found in the Refugee Convention, which confines the term refugee to a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."⁵ There may be instances where a person is fleeing war based on one of the five enumerated grounds of persecution, bringing them within the scope of the refugee definition, such as a person fleeing war who also has a well-founded fear of persecution because of their

religion or political opinion, as explained more fully later. But a significant segment of the world's population that is fleeing bombing, caught in the crossfire of armed conflict, and so on, is precluded from receiving refugee protection in Canada under the Refugee Convention.

CANADA'S REFUGEE PROTECTION OBLIGATIONS IN DOMESTIC LAW

The IRPA outlines legal protections for refugees in Canadian law. Along with the IRPR, it sets out mechanisms for both inland protection and refugee resettlement from outside Canada. The IRPA specifies protection provisions in sections 96 and 97. A discretionary humanitarian and compassionate (H&C) provision may supplement these provisions to offer refugees protection, in exceptional cases, as explored below. In addition, the IRPA objectives serve as interpretative tools for the IRPA by bringing into play the Canadian Charter of Rights and Freedoms and Canada's international legal obligations for refugees, which broaden Canada's protection obligations.

The inland refugee determination program for those seeking protection in Canada and refugee resettlement programs for those outside Canada who need protection each offer distinct protection mechanisms.⁶ Refugee claims in the inland system can be asserted at a Canadian port of entry on arrival or from inside Canada after gaining admission as a visitor, student, or worker. Refugee claims, if eligible to proceed, are referred to the Immigration and Refugee Board for a hearing and determination on the merits of the claim and must meet one of two IRPA sections, as described below.⁷

The refugee program that serves to bring refugees to Canada includes two classes of refugees as outlined in the IRPR. The first is the Convention Refugees Abroad class, under which the UNHCR identifies refugees for resettlement after an assessment of whether the person meets the refugee definition.⁸ This program includes government-sponsored refugees, privately sponsored refugees, and blended program refugees, and applies to persons outside their country of nationality.⁹

The second is the Country of Asylum class that may cover individuals who do not meet the Convention refugee definition. This class permits persons "in similar circumstances" to refugees to come to Canada.¹⁰ It covers persons who are privately sponsored and who are outside their country of nationality

when “they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.”¹¹

While the Country of Asylum class may appear to provide relief from the restricted refugee definition for refugees fleeing war, applications under this class face four obstacles. First, they are subject to the private sponsorship criteria, including a UNHCR referral, unless the private group sponsor is exempt from such a requirement.¹² Second, they are subject to lengthy wait times, which plague refugee sponsorship generally.¹³ Third, they require a person to be outside their country of nationality. Fourth, like the Convention Refugees Abroad class, they are limited to the definition of family members in the IRPA,¹⁴ which fails to recognize the reality of family composition outside the Global North and leaves *de facto* dependents behind.¹⁵

Turning to the refugee definition, Canada has a clear obligation to protect refugees who fall within the IRPA definition of refugee. Section 96 of the IRPA mirrors the Refugee Convention definition of a refugee. It states:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.¹⁶

Several factors must be met for a person to fall within this definition. For a discussion of refugees fleeing war, the most problematic limitation is the requirement that the refugee must have a nexus to one of the five enumerated grounds of persecution, which are race, religion, nationality, membership in a particular social group, or political opinion. The refugee definition

in section 96 does not prohibit refugees fleeing war to be captured by the definition. In fact, there may be circumstances when a refugee fleeing war falls within the ambit of section 96. As the Federal Court of Appeal stated in *Salibian*, “a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated or, even, by all citizens on account of a risk of persecution based on one of the reasons in the definition.”¹⁷

Mr. *Salibian* was an Armenian Christian and a citizen of Lebanon. That profile strengthened his ability to meet the refugee definition in the context of a civil war, rather than detract from it. As the Court stated, a fear under the refugee definition may result from acts committed “against the members of a group to which he belonged.”¹⁸ As long as there was evidence, in the context of the civil war, that Armenian Christians were subject to persecution because of their nationality and religion, he could qualify as a refugee. For a person who has a nexus to the refugee definition, no alternative refugee protection mechanism is necessary. However, Canada’s refugee protection system remains inaccessible to a significant number of refugees fleeing war, as explored shortly.

In addition to incorporating the Convention refugee definition into the IRPA, Canada has expanded its commitment to refugees who fall outside the scope of the refugee definition in creating section 97 of the IRPA. Section 97 is drawn from the Convention Against Torture.¹⁹ It resolves the problem of the need for a nexus to one of the five enumerated Refugee Convention grounds for protection but falls short of providing a solution for refugees fleeing war. Section 97(1) defines a person in need of protection as follows:

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.²⁰

Although section 97 offers protection to those who face “a risk to their life or to a risk of cruel and unusual treatment or punishment,” for the purpose of assessing its value for persons fleeing war, two factors limit its application. First, a person seeking protection must be in Canada, and second, that person must not face a risk that others generally face. These two factors preclude sponsored refugees from invoking protection needs based on this section. In addition, owing to the need to establish they have been personally targeted,²¹ refugees in Canada who are fleeing war are excluded from this definition. They have been personally affected by the war, but not personally targeted. As a result, section 97 does little to resolve the restrictive nature of section 96 for refugees fleeing war.

The IRPA also contains an H&C provision that may theoretically protect a person who does not meet the section 96 and 97 definitions. Section 25 of the IRPA provides the following:

Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, 35.1 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35, 35.1 or 37 — who applies for a permanent resident

visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.²²

This provision can be invoked from within Canada as a standalone application or to seek an exemption from another application when that application is made either from within or outside Canada. However, persons seeking to invoke it from within Canada face barriers. For example, those who have been denied refugee protection and seek an alternative way to obtain status in Canada are barred from having an H&C application considered for twelve months from the last refugee determination.²³ In addition, the filing of an H&C application does not stop removal to the applicant's country of origin or provide temporary status while a determination—that currently takes up to two years—is pending.²⁴

For those seeking protection from outside Canada, the H&C provision can only provide a cure when a person fails to meet an IRPA requirement but does not on its own constitute a mechanism for an applicant to obtain status in Canada. In other words, a person fleeing war cannot simply apply to come to Canada by way of an H&C application. Section 24 of the IRPA provides for the issuance of a temporary resident permit,²⁵ but an application for such a permit is dependent on the discretion of immigration officials, often requires political pressure on behalf of the individual applicants, a decision may take months if not years, and in practice, is applied in exceptional circumstances only.²⁶

Aside from the provisions regarding refugees, the IRPA's stated objectives offer insight into Canada's intended refugee commitments. The IRPA objectives emphasize Canada's obligation to protect refugees by requiring that the IRPA provisions be interpreted in accordance with both Canada's international legal obligations and the Charter. Although the IRPA objectives may not *require* the creation of public policies that address refugees fleeing war, given that the objectives speak to the interpretation of the existing IRPA provisions, they certainly provide a rationale for the creation of public policies that give effect to Canada's international legal obligations.

The IRPA objectives require that its provisions be interpreted according to international legal obligations. The Supreme Court of Canada in *Mason*²⁷ recently examined the IRPA objectives in the refugee context and indicated that the objectives require the IRPA provisions to be interpreted in accordance with these objectives. Section 3(2)(b) of the IRPA identifies one of its objectives as being “to fulfil Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement.” Section 3(3)(f) indicates that the IRPA provisions are to be interpreted in a manner that “complies with international human rights instruments to which Canada is a signatory.” These two sections require that the IRPA be interpreted in accordance with international law, arising both under treaties to which Canada is a party and under customary international law.

In addition, the IRPA objectives require Canada to interpret the IRPA in accordance with Charter rights. Section 3(3)(d) of the IRPA states that the IRPA must be interpreted “in a manner that ... (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*.” Relevant Charter provisions to refugee protection include section 7, the right to life, liberty, and security of the person; section 12, the right to be free from cruel and unusual treatment or punishment; and section 15, the right to equality.²⁸ Although there are issues around the applicability of the Charter to non-Canadians outside Canada, the Charter guides the formation and application of public policies.²⁹

These objectives highlight the IRPA’s intended scope of protection, which can find expression in public policy programs.

CANADA’S OBLIGATION UNDER THE UNITED NATIONS RESPONSIBILITY TO PROTECT

The UN’s Resolution on the R2P includes the principle that states have a responsibility to protect their own citizens and people outside of their borders when certain risks (i.e., human rights violations, genocide, war crimes, and ethnic cleansing) arise.³⁰ The R2P includes a three-pillared framework to guide the implementation of the principle.³¹

The R2P requires that in addition to a state’s obligation to protect its citizens against war, “the international community, through the United Nations,

also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”³²

The interpretation of this section of the R2P Resolution and the precise legal character and scope of the R2P have been the subject of a rich academic discourse since its inception. Some scholars and a UN official have posited that the R2P’s second pillar, which calls on the international community to offer state assistance, provides a positive obligation to protect refugees who are fleeing war despite the R2P documents not mentioning such protection.³³ Brian Barbour and Brian Gorlick, and others, acknowledge that such an obligation supports a gap in protection for refugees fleeing war in international law.³⁴ Barbour and Gorlick argue that refugee protection and similar measures are a “good starting point to enacting R2P” because such measures avoid other debated controversies.³⁵

An examination of the R2P discourse is beyond the scope of this article. I acknowledge that debate continues about precisely what international legal obligations the R2P imposes and whether it continues to hold promise for the prevention of and response to humanitarian crises.³⁶ For the discussion that follows, I accept the position of Barbour and Gorlick, who claim that “there may be no easier way for the international community to meet its responsibility to protect than by providing asylum and other international protection on adequate terms,” and accept that the R2P confers a responsibility to protect refugees fleeing war within the second responsive pillar of the framework.³⁷

Canada has a longstanding history as a global leader in human rights and international peace.³⁸ It signed on to the 1951 Convention and the 1967 Protocol in 1969 and has since enjoyed the reputation of being a world leader and model state for refugee protection, in particular.³⁹ Canada was also heavily influential in the conceptualization of the R2P, and as a “core” proponent of R2P recognition “took the lead in R2P’s authorship,” which became a “touchstone of [a] Canadian foreign policy.”⁴⁰ While there is criticism that Canada has waned in its promulgation of the R2P,⁴¹ the R2P remains an international norm that Canada viewed with importance, was committed to, and remains responsible for upholding in its refugee protection programs.

As explored above, despite the various refugee protection provisions in the IRPA, only the Country of Asylum class specifically concerns individuals fleeing war and obviates the need for applicants under that program to meet the refugee definition's terms. But it is not a viable protection mechanism for persons fleeing war, because the restrictions outlined above render it inaccessible to a significant number of people.

Given this gap in protection, Canada is remiss in meeting its obligations under the R2P. The only existing legal mechanism at Canada's disposal to rectify this is discretionary public policy.

PUBLIC POLICIES AS TOOLS TO ADVANCE CANADA'S OBLIGATIONS UNDER THE RESPONSIBILITY TO PROTECT

The Minister of Immigration, Refugees and Citizenship holds broad discretionary authority to enact public policies under section 25.2(1) of the IRPA.⁴² Through section 25.2(1), the Immigration Minister can remedy the overall legislative gap by creating public policy exemptions for an individual, or group of individuals, for whom the IRPA otherwise offers no possibility of obtaining Canada's protection.

Section 25.2(1) states:

The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.⁴³

As specified in section 25.2(1), public policy programs can exempt a person from the need to meet any IRPA criterion. This provision offers an immigration minister flexibility to create programs to meet the moment of any given global crisis when the IRPA does not contain an immigration pathway for a group of nationals in need of protection, allowing Canada to comply with its obligations flowing from the R2P.

These types of policies have existed in Canadian refugee law for decades and were formerly referred to as "Special Measures" that were invoked to permit

those who would not otherwise qualify for admission to Canada to receive protection.⁴⁴ Public policies vary in the type of status they provide to individuals. Recent public policies have offered either temporary or permanent status to refugees.

CANADA'S PAST PUBLIC POLICIES IN THE IMMIGRATION AND REFUGEE CONTEXT

A critical assessment of the terms and implementation of past public policies in the context of refugees fleeing war provides insight into their effectiveness. Before assessing specific examples of public policies, it is worth highlighting three common issues they present.

First, the creation of public policies is discretionary. An immigration minister can decide to invoke a public policy when “it is justified by public policy considerations.”⁴⁵ As the process for creating a public policy does not require legislative reform, it can be invoked quickly upon a minister’s decision to create a policy, resulting in a timely response to a global crisis.

However, while public policy considerations are presumably informed by the IRPA objectives, including the furtherance of Canada’s international legal obligations in sections 3(2)(b) and 3(2)(f), it would be hard to imagine an immigration minister developing a public policy that would not be politically viable. Given that these policies should be informed by Canada’s human rights commitments, basing them on their anticipated political acceptance can pose a barrier to advancing Canada’s Responsibility to Protect policy. It is highly unlikely that any immigration minister would announce a public policy that reflects Canada’s commitment to the R2P if that policy would lead to a serious political backlash.

Second, aside from developing the terms of a public policy, an operationalization plan is essential to an effective program. Such a plan requires dedicated government resources to create guidelines for the application process and for the assessment of the applications, and requires staffing the immigration department with trained officers to assess and decide on applications submitted under the program.

Expeditious processing of applications is essential, because applicants are either fleeing dire circumstances in their country of origin or are living in limbo

under precarious conditions in a third country. However, a public policy typically requires that an applicant not be inadmissible to Canada under certain criminal and security provisions of the IRPA. Admissibility is verified by way of biometric assessments, interviews, and other methods. Accessing the necessary service providers for these assessments may prove a barrier to successfully completing an application when dealing with refugees fleeing war.

Third, in defining a class of people who may be granted a pathway to come to Canada, public policies are a double-edged sword in the debate over restricting the spontaneous arrivals of refugees in Canada. As noted above, refugees historically have arrived at the Canada–US land border or have entered Canada at an airport, where they seek refugee protection, or enter as a student or visitor and later institute a refugee claim. However, these routes have become increasingly problematic.

An important barrier to Canada's inland protection program, even if refugees fleeing war are covered by an IRPA provision, is the Safe Third Country Agreement (STCA). The STCA is a bilateral agreement between Canada and the United States that was implemented in 2004. The STCA was created as a refugee responsibility-sharing agreement, preventing refugees from entering and seeking protection from the other country, save for certain exemptions.⁴⁶ Starting in 2017, it became commonplace for refugees to cross the border into Canada between ports of entry, at Roxham Road in Quebec, because the STCA applied at ports of entry only. The STCA was expanded in March 2023 to cover the entirety of the Canada–US land border,⁴⁷ resulting in a drop of entries at the border. Canada then witnessed a surge in refugee claims made at airports, which made up for the reduction in numbers that had resulted from the expanded STCA.⁴⁸ Those airport entries, except for those from Mexico, depend on refugees obtaining a visa for Canada, a viable option for only a select minority of the world's refugees.

The combination of the expanded STCA and the visa requirements result in only the most privileged refugees arriving in Canada to seek protection.⁴⁹ For example, to circumvent Canada's interdiction measures, refugees often require access to funds to pay travel agents, bribes, and travel costs, and the ability to obtain temporary resident visas.⁵⁰ The expanded measures give force to Canada's gatekeeping intentions by focusing on refugee selection from outside Canada while maintaining barriers at Canada's land border and airports.

Nonetheless, public policies equalize protection opportunities for refugees who would otherwise not be able to arrive in Canada to seek protection, which may outweigh its gatekeeping disadvantages. They ostensibly counterbalance the restrictiveness of the laws that prevent spontaneous arrivals in Canada by providing a refugee pathway for those who may be otherwise prevented from reaching Canada.

In terms of their form, the content of public policies tends to follow a specific format. They include a rationale for their creation by way of background information and an explanation of the public policy considerations that led to their creation. This information is followed by the conditions of eligibility, and a list of the IRPA and IRPR requirements for which exemptions are granted. The policies also typically explain that admissibility criteria not specifically exempt in the policy must be met. They conclude with effective and expiry dates and may contain a cap concerning the numbers of applicants who will be admitted under the policy. The policies may be renewed. Notably, there is no requirement to publish them in a timely manner, or to make them public at all, the implications of which will be explored below.

PUBLIC POLICIES OFFERING TEMPORARY STATUS FOR WAR REFUGEES: UKRAINE AND GAZA

Public policies can offer temporary status to persons fleeing war by easing visitor visa requirements, which permits entry to Canada for those who might not otherwise qualify.⁵¹ An example is Canada's Ukrainian program. Although a pathway for permanent residence for those who had arrived in Canada under the program was later created,⁵² it began as a temporary measure for Ukrainians who needed to leave the country because of Russia's invasion. The Canada-Ukraine Authorization for Emergency Travel (CUAET)⁵³ program approved close to one million applications between 17 March 2022 and 28 November 2023, when the initial program closed. Notably, fewer than 90,000 applications were refused. Over 210,00 people arrived in Canada under the program.⁵⁴

The public policy offered as its rationale that "Canada remains steadfast in its support of Ukraine's sovereignty and territorial integrity," noting that the policy was created to respond to "Russia's full-scale invasion of Ukraine." It further indicated that "it is critical that those fleeing the conflict have

the needed authorization and documentation so that they can remain in Canada and engage in their new community without delays.”⁵⁵

Key components of the CUAET are

- fee exemptions for visitor, student and work permits, and biometrics;
- waivers of the bar to work and study as visitors, and the issuance of open work permits, the need to establish the person will leave Canada at the end of their authorized stay, and medical assessments.⁵⁶

The program also permitted Ukrainians already in Canada to extend their stay and obtain work and study permits.⁵⁷

The program was tailored to meet the specific circumstances for Ukrainians and was successful for four reasons. First, it provided a measure for temporary entry to Canada by easing visitor visa requirements to allow many Ukrainians who were fleeing war to quickly relocate to Canada. This temporary nature of the status granted in the public policy likely made it more appealing to the public, permitting Sean Fraser, then immigration minister, to assert that Ukrainians would return home once the war subsided. However, Marc Miller, who succeeded Fraser as minister in 2023, later announced a public policy to provide a pathway to permanent residence for the over 200,000 Ukrainians in Canada, given that families would have established themselves in Canada after the passage of time and the war has not subsided,⁵⁸ essentially changing the nature of the program from temporary to permanent after the fact. Second, the program recognized that once Ukrainians fled the country, they could access processing centres for biometrics in neighbouring European countries. The ease with which Ukrainians could be assessed for admissibility requirements permitted quick and efficient processing of applications. Third, the program created a pathway to Canada that circumvented the need to meet the refugee sponsorship requirements for those who likely would not have qualified as refugees, opening the door to many more people than refugee sponsorship permits. Fourth, and perhaps most notably, it garnered applause from Canadians, who rallied together to provide settlement support for new arrivals.

However, it did not go unnoticed that former minister Fraser had readily created an easily accessible pathway to Canada for white European nationals, standing in sharp contrast to other public policies created to provide

relief—for example, the public policies for Afghans, as discussed shortly.⁵⁹

Another public policy that removes visa requirements is the “Temporary Public Policy for Foreign Nationals Who Are Family Members of Canadian Citizens and Permanent Residents Who Left Israel or the Palestinian Territories on or After October 7, 2023.”⁶⁰ This public policy lifts work and study permit requirements for family members of Canadian citizens and permanent residents who are resident of Israel or the Palestinian Territories. The policy explains that after the events of 7 October 2023 and Israel’s “sustained attacks in Gaza,” the “escalating conflict has resulted in the death or injury of thousands of people in Gaza, displaced more than one million people, and threatened regional stability.”⁶¹ A similar policy exists for those individuals already in Canada.⁶²

A second public policy for persons affected by the war between Israel and Hamas is the “Temporary Public Policy to Facilitate Temporary Resident Visas for Certain Extended Family Affected by the Crisis in Gaza.”⁶³ This policy notes the “volatile and unpredictable” situation in Gaza⁶⁴ and provides “a family-based temporary refuge for Palestinian nationals directly affected by the crisis in the Gaza Strip and who have Canadian citizen or permanent resident family members in Canada willing to support them during their temporary stay.”⁶⁵ This policy complements the above-mentioned public policy and grants temporary entry to Canada for those who fail to meet the definition of dependent in the IRPA for extended family members of Canadian citizens or permanent residents. Key eligibility requirements are that the applicant

- applied for a visitor visa when they were in Gaza;
- has an “anchor” who meets certain listed requirements;
- is a spouse, common law partner, child, grandchild, sibling, parent, grandparent, or sibling of the anchor; and
- provides a declaration from the anchor indicating that they will provide them with certain forms of support.⁶⁶

Like the public policy for Ukrainians, this public policy provides a temporary solution for refugees fleeing war that in theory enables arrival in Canada quickly, given that applicants are being processed for temporary entry only. Notably, unlike the public policy for Ukrainians, there is a cap of 1,000

applicants and a need for a family anchor in Canada. From the perspective of fulfilling Canada's R2P obligations, the cap and anchor requirement is problematic. However, it is possible that difficulty with departure for residents of Gaza may prevent large numbers of arrivals in Canada, as opposed to the cap itself.⁶⁷ In addition, a likely emphasis on security screening once applicants are in a third country may very well prevent speedy processing.

PUBLIC POLICIES OFFERING PERMANENT STATUS FOR WAR REFUGEES: AFGHANISTAN AND THE ECONOMIC MOBILITY PATHWAYS PILOT

Public policies are not limited to providing temporary status upon entry to Canada. They can offer permanent status to persons relocating to Canada. A public policy can provide effective relief from refugee sponsorship requirements by simply lifting the requirement that a sponsored refugee obtain a refugee status determination certificate. The removal of this requirement, at least in theory, expedites the immigration process by removing the need for an evaluation of whether an individual meets the refugee definition.

Canada has invoked such policies in the past for nationals of Syria and Iraq. In 2016, then minister John McCallum instituted a public policy that waived the need for refugee status determination for nationals of both countries. The rationale provided was that the policy "recognizes the ongoing humanitarian crisis in the Middle East affecting Syrian and Iraqi refugees, and forms part of a broader strategy to address the large backlog and long wait times in the Privately Sponsored Refugees category."⁶⁸

A public policy can also provide a pathway to permanent residence by profiling refugees according to their risk. In 2021, then minister Marco Mendicino created several programs to deal with the situation faced by Afghan nationals at the time of the Taliban takeover. In total, over 45,000 Afghans have arrived under these programs.⁶⁹ A review of some of these programs illustrates the limitations and benefits of these public policies.

The "Temporary Public Policy for the Resettlement of Afghan Nationals in Afghanistan," dated 22 July 2021,⁷⁰ marked Canada's recognition that Afghan nationals with a "significant and/or enduring relationship with the Government Canada" faced "an increased risk of being targeted for attacks and assassination campaigns from the Taliban,"⁷¹ as did their family

members, and shortly prior to the fall of the Afghan government Special Immigration Measures (SIMs) were instituted to bring them to safety in Canada. The program provided a pathway to refugee protection primarily for Afghans who had worked with the Canadian Embassy in Kabul or with Canada's military operation in Afghanistan.

Significant exemptions from the IRPA and IRPR included

- the recognition of de facto family members, acknowledging that the IRPR definition of dependent family members would exclude family members who were in fact dependent on the principal applicant and who could be at risk of harm from the Taliban due to their association with family members;
- the granting of refugee-like protection for persons who were in Afghanistan, their country of origin; and
- the removal of the need for a refugee status determination certificate (instead, Global Affairs Canada or the Department of National Defence would assess and refer candidates for the program to the immigration department based on applicants' ties to Canada).⁷²

The immigration department was ill-equipped to process the applications that it received, and the processing was ineffective from early days. It was clear that the immigration department had no idea of the numbers of applications it would receive and was unable to sort through applicants' initial emails, which was the only entry point to the program. Many applicants, including those clearly qualified, as they had worked as interpreters in Canada's military operations in Afghanistan, never heard from the immigration department, yet they understood that they qualified for the program based on the department's public information.⁷³ As months of inaction turned into over a year, a significant number of applicants were compelled to live in hiding from the Taliban in Afghanistan as they faced enormous risk because of their work with the Canadian government. As a result, litigation was commenced in the Federal Court seeking an application for mandamus to compel the government to process the applications of certain Afghan nationals who had worked with the Canadian government.⁷⁴

The public policy also lacked transparency. The initial policy was renewed on several occasions. Various policies operated from July 2021 until

August 2022 before the documents were made public, at which time it was revealed that there had been numerical caps on the program all along, which were not announced until April 2022, and that there was a four-month period when no policy existed at all, presumably erasing any legal basis for processing applicants during that time.⁷⁵ The applicants to the program had been led to believe that if they met its terms, they would be coming to Canada. That was not the case.

Around the same time, Mendicino stated that he was implementing a program that highlighted refugee profiles for Afghan nationals based on “particularly vulnerable groups that are already welcomed to Canada through existing resettlement streams,” including “government-supported and privately sponsored refugees, along with those sponsored by family already in Canada,” and specifically “women leaders, human rights defenders, journalists, persecuted religious minorities, LGBTI individuals, and family members of previously resettled interpreters.”⁷⁶ But because the public policy was kept secret until August 2022, the exact terms of the program were unclear, and applicants and organizations supporting them failed to understand that they could not directly apply to the program by emailing the immigration department (the entry point promoted for the other Afghan program), which created the hope of resettlement expectations that would never be met.

Once the public policies were made public, it was clear that one program focused on Afghan nationals at a “increased risk of violence from the Taliban” and included “women, children, members of the LGBTI community, human rights defenders and individuals associated with allied forces.”⁷⁷ As a refugee resettlement program, although it waived the need for applicants to be outside Afghanistan, it did not waive the need for refugee status determination, which posed a barrier for many Afghans.⁷⁸ A private sponsorship program that did waive the need for such a determination was created in September 2022. It was limited to 3,000 applicants and quickly met its cap.⁷⁹ Other public policies were created that were tailored to specific Afghan profiles or named individuals who were included in the policies.⁸⁰

The contrasts between the Ukrainian and Afghan public policies have been the subject of much criticism.⁸¹ It has not gone unnoticed that white Europeans from Ukraine were offered an accessible program that was quickly operationalized, while Afghan nationals, no less in need of protection, were

offered a program with serious barriers that resulted in a slow trickle of entry to Canada. Indeed, the fact that CUEAT yielded the arrival of over 200,000 Ukrainians but just over 40,000 Afghans tells its own story. The Canadian government defended the stark difference in numbers, citing that security assessments were hampered by the lack of Canada's presence in Afghanistan and that there were difficulties for people fleeing the country, as well as referring to the temporary nature of the CUAET program.⁸²

A final public policy worth exploring that is not country-based is the Economic Mobility Pathways Pilot (EMPP). It was initiated in 2018 and remains operational.⁸³ It is geared toward assisting skilled people in refugee circumstances to immigrate to Canada.

Important current features include

- work experience, education, and language requirements;
- a job offer stream;
- the need for either a refugee status determination certificate, a refugee certificate (through UNRWA, the UN Relief and Works Agency), or a trusted partner referral letter; and
- expedited processing (within six months of an application being submitted).⁸⁴

Low enrolment has been the main issue in this program, indicating a lack of accessibility to refugees. As of July 2023, approximately 200 principal applicants have arrived in Canada under the EMPP.⁸⁵ As a result, certain eligibility requirements were amended, including the addition of a refugee certificate and the provision of the trusted partner referral letter, and the job offer stream recognizing jobs at all skill levels, not simply high skilled jobs. However, the language requirement remains prohibitive for a significant number of applicants.⁸⁶

Although the EMPP is inclusive of refugees fleeing war, its focus on labour market needs means that it remains out of reach for many refugees fleeing war. This focus also highlights Canada's clear choice of offering protection based on Canada's needs, as opposed to the needs of refugees fleeing war. However, it represents an example of how a public policy can be developed

to assist at least a certain segment of the population in need.

RECOMMENDATIONS

The successes and failures of previous and current public policies canvassed above inform appropriate conditions for a public policy. The government can draw from lessons learned in drafting future public policies.

For example, the government can

1. review public policies for compliance with Canada's international legal obligations as detailed in section 3(2)(b) of the IRPA and set out in the Charter;
2. develop a dedicated emergency response operational team within Immigration, Refugees and Citizenship Canada and cooperating ministries to functionally respond to international human rights crises arising from war to allow for urgent and tailored processing when public policies responding to war are launched;
3. commit to publishing public policies, so that their scope and terms are clear; and
4. ensure transparent communication with clients and stakeholders to explain whether elements of public policies depend on factors outside the Canadian government's control but are necessary for the proper functioning of any given public policy, such as the ability to leave a country and/or enter a third country to continue processing.

CONCLUSION

Given the limitations of both the inland and refugee sponsorship programs, and the flexibility needed to address the unique circumstances of refugees fleeing war, the use of public policies is an effective way for Canada to meet its international legal obligations embodied in the UN's Responsibility to Protect Resolution. Indeed, the current public policy regime may offer broader protection for refugees fleeing war.

Canada has used public policy programs to quickly react to emerging crises where refugee laws would be inapplicable or ineffective in providing

protection. While left to the political discretion of the government of the day and dependent on efficient processing, both temporary and permanent measures have filled the gap left by Canadian refugee and refugee-related laws.

These types of policies serve as a model internationally to fill the gap left by the limitations of the Refugee Convention refugee definition when considering protection for refugees fleeing war. However, as global displacement is at an all-time high,⁸⁷ the ability for Canada—and for any country—to meet the needs of refugees fleeing war is diminished and will assist only a tiny minority of people in need of protection. In addition, given the increasing politicization of immigration worldwide, the political will of the Canadian government to provide protection measures may overshadow the lack of legislation or public policies as the most serious obstacle in offering protection for refugees fleeing war.

ENDNOTES

- 1 In keeping with the Refugee Convention's indication in Article 1A(2) that refugee status is declarative, the term "refugee" is used in this article to describe persons seeking protection, not simply persons to whom protection has been granted.
- 2 The term "refugees fleeing war" is used for discussion purposes throughout this article. It is acknowledged that because of limitations in refugee status determination, as explored in this article, persons fleeing war may not be recognized as refugees without further grounds situating them within legal refugee protection definitions, internationally and domestically. This is explored in the section "Canada's Refugee Protection Obligations in Domestic Law."
- 3 UN General Assembly, Resolution 60/1, 2005 World Summit Outcome document, A/RES/60/1, 16 September 2005, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.
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- 14 IRPR, s. 1(3).
- 15 For a discussion of differences in family composition between countries, see generally James Georgas, “Family: Variations and Changes Across Cultures,” *Online Readings in Psychology and Culture* 6, no. 3 (2003): 3; Bron B. Ingoldsby and Suzanna Smith, eds., *Families in Multicultural Perspective* (New York: Guilford Press, 1995). See also UN, “Household Size and Composition Around the World 2017,” ST/ESA/SER.A/405 (1 December 2017). Further, de facto dependents, defined by IRCC as “persons who do not meet the definition of a family class member ... [but] are in a situation of dependence that makes them a *de facto* member of a nuclear family,” are excluded. See IRCC, “The Humanitarian and Compassionate Assessment: De Facto Family Members,” <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-facto-family-members.html>.
- 16 IRPA, s. 96.
- 17 *Salibian v. Canada (Minister of Employment and Immigration)*, 1990 CanLII 7978 (FCA) at 258. For further reading of *Salibian* and contexts where there is an overlap between war and the Convention refugee definition, see e.g. Immigration and Refugee Board of Canada, “Chapter 4—Grounds of Persecution—Nexus,” s. 4.8, <https://www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef04.aspx#n48>.
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- 22 IRPA, s. 25(1).
- 23 Ibid., s. 25(1.2)(c). Under ss. 25(1.21)(a) and (b), the IRPA exempts foreign nationals from removal if there is a risk to the foreign national's life due to inadequate medical or health care in the country they are being removed to, or if removal would adversely impact the best interests of a child directly affected.
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- 25 IRPA, s. 24.
- 26 See e.g. IRCC, "Temporary Resident Permits (TRPs): When to Consider Issuing a TRP," <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/when-to-consider-issuing.html>, which addresses the discretionary nature of TRP issuance and factors that officers may assess.
- 27 *Mason v. Canada* (Citizenship and Immigration), 2023 SCC 21 at para. 106.
- 28 Canadian Charter of Rights and Freedoms, ss. 7, 12 and 15, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
- 29 See e.g. *R v. Hape*, 2007 SCC 26 (CanLII); *Slahi v. Canada* (Justice), 2009 FC 160 (CanLII); and *R v. McGregor*, 2023 SCC 4 (CanLII).

- 30 See e.g. H. Haider, *International Legal Frameworks for Humanitarian Action: Topic Guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013), <https://gsdrc.org/wp-content/uploads/2015/07/ILFHA.pdf>; Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice," *Review of International Studies* 34, no. 3 (July 2008): 445, <https://doi.org/10.1017/S0260210508008115>; Gareth Evans, "From Humanitarian Intervention to the Responsibility to Protect," *Wisconsin International Law Journal* 24, no. 3 (2006–7): 703.
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- 35 Barbour and Gorlick, "Embracing the 'Responsibility to Protect,'" 536. Barbour and Gorlick acknowledge that refugee protection in the R2P context is "plagued by a number of misconceptions" and that its practical implications require development. These issues are acknowledged, but further analysis is beyond the scope of this article.

- 36 See e.g. Barbour and Gorlick, "Embracing the 'Responsibility to Protect'"; Panebianco and Fontana, "When R2P 'Hits Home'"; Susan Harris Rimmer, *Refugees, Internally Displaced Persons and the "Responsibility to Protect,"* New Issues in Refugee Research, Research Paper no. 185 (Geneva: UNHCR, March 2010), <https://www.unhcr.org/sites/default/files/legacy-pdf/4b97b0909.pdf>; A. Gallagher & J.G. Ralph, "The Responsibility to Protect at Ten," *Global Responsibility to Protect* 7, nos. 3–4 (2015): 239, <https://doi.org/10.1163/1875984X-00704002>.
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- 43 IRPA, s. 25.2(1).
- 44 James C. Hathaway, “Selective Concern: An Overview of Refugee Law in Canada,” *McGill Law Journal* 33, no. 4 (September 1988): 676–715. See also Mina Mir, Natasha Syed, and Kalkidan Alemayehu, “Seven Decades of Refugee Protection in Canada: 1950–2020” (research paper, UNHCR Toronto, 2020), <https://www.unhcr.ca/wp-content/uploads/2020/12/Seven-Decades-of-Refugee-Protection-In-Canada-14-December-2020.pdf>.
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THE RIGHT TO SEEK ASYLUM AS A MANIFESTATION OF RESPONSIBILITY TO PROTECT REFUGEES

Gamze Ovacık

Building on the close connection between the right to seek asylum and the Responsibility to Protect (R2P), this article offers a critical analysis of the implementation of the right to seek asylum in Turkish judicial practices that relate to the principle of non-refoulement. Turkey is the second top refugee-hosting country in the world and the bottleneck between Europe and countries of origin for refugees, principally in the Middle East, Africa, and Asia. The state of judicial affairs in Turkey impacts more than three million refugees who are hosted there as well as regional and international practice. This article criticizes problematic practices detected in Turkish asylum jurisprudence through a comparative methodology based on the European Court of Human Rights (ECtHR) case law as an established point of reference. Essentially, Turkey's deviations from international standards around the principle of non-refoulement in the context of the right to seek asylum compromise its responsibility to protect refugees.

PEACE RESEARCH

The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 99-127

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INTRODUCTION

The Responsibility to Protect (R2P) doctrine entails prevention, response, and rebuilding measures by states concerning certain atrocities of genocide, war crimes, crimes against humanity, and ethnic cleansing.¹ Similarly, the duty of states to ensure the right to seek asylum and to provide refugee protection as provided in the United Nations 1951 Refugee Convention is triggered in cases of flight from persecution. These frameworks display overlapping traits, especially in terms of the situations they seek to address.² Both the R2P and refugee protection are rooted in the institution of human rights and in efforts to promote peace and protect individuals in tackling similar conflict dynamics.³ Their common political motivation is to contain the impacts of conflicts so that they do not threaten international peace and security.⁴ Building on these similarities, this article argues for a broader application of the international norm of R2P, beyond extraterritorial measures such as military interventions⁵ and toward measures of protection implemented at home that are owed to individuals who reach a state's borders by fleeing atrocities.

Taking the close connection between the right to seek asylum and the R2P, this article offers a critical analysis of Turkey's implementation of the right to seek asylum through the principle of non-refoulement in its judicial practices. These practices are measured against the background of the European Convention on Human Rights (ECHR) framework to assess the extent to which Turkey fulfills its responsibility to protect refugees. Turkey is the second top refugee-hosting country in the world and the bottleneck between Europe and countries of origin for refugees, principally in the Middle East, Africa, and Asia. Therefore, the implementation of the right to seek asylum in Turkey is not only important for the protection of more than three million refugees hosted in Turkey but also for shaping the practice at the regional and international levels.

CONNECTION BETWEEN THE R2P AND THE RIGHT TO SEEK ASYLUM

The R2P requires states to protect persons under their control, regardless of their citizenship, as a reflection of state sovereignty. It also requires states to

support other states to this end and to take action to protect the population when the primary state fails to do so. Similarly, in the context of asylum, when a state fails to protect its population, international protection replaces national protection to make up for that failure.⁶ When atrocities addressed by the R2P cause individuals to flee their country of origin and become refugees, the state of asylum becomes responsible for their protection and the appropriate response measure automatically becomes ensuring fulfillment of their right to seek asylum.⁷

The host state's R2P through refugee protection is triggered on two accounts. First, asylum seekers who reach its territory become part of the host state's population, subject to its protection responsibility. Second, the host state needs to take action in the form of international protection because of the country of origin's failure to protect its citizens.⁸ Therefore, considering these overlaps between the R2P and the refugee protection regime, we subscribe to an expanded understanding of the R2P to include the right to seek asylum and the provision of refugee protection⁹ as a response measure.¹⁰ Although this is not the only nexus between R2P and refugee protection,¹¹ the focus here is on framing the right to seek asylum as a tool of the R2P,¹² which, when combined, becomes the responsibility to protect refugees.

Clearly, the right to seek asylum is largely embedded to the context of international refugee law and customary international law in connection with the principle of non-refoulement and with human rights law in connection with the prohibition of torture. The effort here is not to replace its independent standing by confining it to the R2P context but rather to add to the interplay between the different frameworks.¹³ The outcome of considering asylum within the R2P context is to offer an additional angle for states' protection obligations toward asylum seekers as these different frameworks, which cannot be thought of in isolation, converge in upholding the right to seek asylum from different aspect.

In the absence of international accountability mechanisms,¹⁴ this reinforcement that regimes can provide to each other and the interlinkage established between them can only increase their strength. Such interlinkage is much needed to match the law with reality as well. After all, despite divides between different protection frameworks, in real life, what happens to a person fleeing a war zone is part of the same continuum. And what use does

the law have if it fails to see the protection needs of such a person through a holistic lens? Thus, fulfillment of the right to seek asylum becomes an expression of R2P;¹⁵ in other words, a state protecting refugees is exercising its responsibility to protect.¹⁶

TURKEY'S RESPONSIBILITY TO PROTECT REFUGEES AND JUDICIAL PRACTICES ON NON-REFOULEMENT

When countries of origin fail their protection duties, ensuring that people seeking asylum in Turkey are provided the right to seek asylum becomes a way for Turkey to fulfill its individual R2P obligation toward the population under its jurisdiction.¹⁷ The idea that people should not be sent back to places where their lives and freedoms will be under serious danger, embodied in the principle of non-refoulement, is the soul of the legal concept of asylum, and all other protection obligations arising from the international refugee and human rights framework surrounding the right to seek asylum are essentially anchored to the principle of non-refoulement. In this sense, being at the heart of the right to seek asylum, the principle of non-refoulement can be framed as an R2P mechanism.¹⁸

The responsibility to protect refugees intrinsically requires conformity with the refugee protection framework under the Refugee Convention and other relevant international or regional instruments, such as the ECHR framework, as applicable. Deviations from such international standards of refugee protection and the right to seek asylum essentially compromise this responsibility to protect refugees. In this vein, adequate protection measures should be in place, including fair and efficient asylum status determination procedures, adequate reception conditions, and resettlement mechanisms, as well as temporary and complementary protection schemes.¹⁹ This also entails that national procedures connected to asylum should adhere to non-refoulement obligations, and the judiciary is a crucial component in normative compliance.²⁰

Accordingly, judicial practices that engage with the removal of asylum seekers and refugees are in conflict with the principle of non-refoulement, considering the direct compromise this poses for their right to seek asylum. Within Turkish jurisprudence on asylum, there are three problematic legal issues, which are often projections of legislative or administrative discrepancies.

These issues are not exhaustive of problematic practices in Turkey but are highlighted here because of their prominence in the axis of the right to seek asylum and the R2P. The literature establishes a theoretical link between the R2P and the principle of non-refoulement,²¹ as elaborated above, and the following analysis aims to show how this connection should manifest in judicial practices.

The first issue arises from a legal provision that allows the removal of asylum seekers and refugees based on their threat to public order or security, at the expense of their right to seek asylum. The second issue concerns the non-specification of the country of removal in removal orders, which translates into a risk of refoulement. The final issue comes up in judicial appeals against asylum decisions where judges rule out risk upon removal without full knowledge of relevant facts and in conflict with their duty of impartiality. The point of departure that all three legal issues have in common is the removal of asylum seekers and refugees in conflict with the principle of non-refoulement, eroding the right to seek asylum and causing Turkey to fail its responsibility to protect refugees.

Based on Turkey's first comprehensive legislation on migration and asylum, adopted in 2013, administrative decisions on the removal of foreigners and on asylum procedures are rendered by the provincial branches of the Presidency of Migration Management. A removal order is issued once a final decision is made rejecting the asylum application on merits, or considering it implicitly withdrawn due to procedural reasons, or if other grounds for removal, such as posing a threat to public order or security, exist. Judicial review of these administrative decisions on asylum and removal are carried out within the administrative judiciary, composed of first-instance courts, Regional Administrative Courts, and the Council of State. Once the administrative judiciary is exhausted, it is possible to lodge an individual complaint with the Turkish Constitutional Court claiming violation of fundamental rights and freedoms that fall within the common scope of the Turkish Constitution and the ECHR, resulting in extensive parallels with the European Court of Human Rights (ECtHR) case law.

The following analysis of judicial practices reflects seventy-five judgements of Turkish courts of different levels across the country, which are part of a larger research sample.²² The judgements selected here represent the problems

in Turkey's implementation of the principle of non-refoulement, which is central to the right to seek asylum and, thus, to its responsibility to protect refugees. The analysis uses a comparative methodology, taking human rights standards in removal practices embodied in ECtHR case law as a point of reference. As a party to the ECtHR that has accepted the jurisdiction of the ECtHR in individual complaints, Turkey is bound by the standards set forth by that court. The court's case law is particularly significant because the EU accession process and violation decisions of the ECtHR against Turkey concerning removal and immigration detention practices were the two major driving forces of Turkey's comprehensive legal and administrative reform.²³ This created an intense norm diffusion dynamic, resulting in extensive alignment with the EU *acquis* and the ECHR framework, and frequent citation of ECtHR judgements by Turkish courts.²⁴ Drawing on the ECtHR's role of setting standards for alignment for the Turkish judiciary, this article compares legal analyses in Turkish case law with that of thirty-three relevant ECtHR judgements.

Removal of Asylum Seekers and Refugees Based on Public Order or Security Reasons

The first legal issue arises from a legal provision that allows the removal of asylum seekers and refugees from Turkey on the grounds of threat to public order or security, compromising their right to seek asylum. Legislative ambiguity as to the scope of this provision leaves extensive discretion to administrative authorities, which makes judicial review all the more critical in terms of legal certainty. Removal of persons with pending or accepted asylum claims based on a problematic public order and security assessment leads to returns in breach of the principle of non-refoulement and the right to seek asylum, and it falls short of Turkey's responsibility to protect refugees.

With the impact of the terrorist attacks by ISIS and the military coup attempt in Turkey around 2015, several legislative changes concerning the removal of foreigners were made, motivated by protection of national security. Before these amendments, removal of asylum seekers or refugees was possible only based on their posing a serious threat to national security and conviction of a crime that was a danger to public order, parallel to the Refugee Convention. With the amendments,²⁵ removal of foreigners became possible for reasons related to connection with terrorist organizations and

posing a threat to public order, security, and health. Precisely what constitutes a connection with a terrorist organization and a threat to public order, security, or health are not defined further in the legislation; these concepts can demonstrate a changeable character and the relevant administrative and judicial practice varies significantly.²⁶

The ECtHR accepts that the requirement of foreseeability does not amount to obliging states to adopt legislation listing in detail all cases that may trigger a removal decision based on grounds of national security. However, lawfulness and the rule of law dictate the possibility for an individual facing removal to challenge the national security risk claim before an independent authority or a court competent to conduct effective review. This authority must be able to intervene when the national security claim does not have a reasonable basis or relies on an unlawful or arbitrary interpretation.²⁷

This makes the judiciary's role crucial in attaining legal certainty. Nevertheless, Turkish courts often interpret these grounds liberally, without challenging the low standard of proof in administrative decisions. The majority of the reviewed case law reveals outcomes approving removal orders to the detriment of individual applicants,²⁸ whereas there are decisions where the courts have annulled removal orders mostly by taking into account the risk of persecution upon return and the pending or accepted asylum claims.²⁹ Often, the judgements refrain from comprehensive assessment of the risk of refoulement and fail to recognize the asylum claim or status of the applicants.

Granting excessive discretion to administrative authorities, Turkish courts condone removal orders based on intelligence information that may not be available to the court and the individual,³⁰ or based on the initiation of criminal prosecution against the applicants despite acquittal or lack of conviction.³¹ Other judgements merely recognize the discretion of the administrative authorities without further scrutiny.³²

Other miscellaneous factors that Turkish judges consider in determining threats to public order or security demonstrate how these concepts are used as blanket provisions. They include the proximity of the individual's city of apprehension to the conflict zones in Syria;³³ the applicant's driving a motorcycle without a license plate, indicating that it might be stolen;³⁴ the applicant's ongoing co-habitation with a married Turkish citizen in

disruption of marital unity;³⁵ resisting a police officer;³⁶ suspected connection with conflict zones; based on contradicting answers during interrogation;³⁷ driving an illegal taxi cab;³⁸ and stealing a perfume bottle from a department store.³⁹

The legal risk associated with these judgements is the misuse of these removal grounds for expulsion of asylum seekers and refugees at the expense of their right to seek asylum. The removal order may be issued regardless of the status of the asylum claim, which poses a destructive disruption to access to asylum and compromises the principle of non-refoulement. Considering the absolute nature of non-refoulement within the ECHR,⁴⁰ and its central weight in international refugee law,⁴¹ this directly undermines the responsibility to protect refugees.

The ECtHR recognizes that the concept of national security cannot be defined comprehensively, and the margin of appreciation granted to domestic administrative and judicial authorities in construing what constitutes a threat to national security is extensive. However, the ECtHR still emphasizes that the limits of these concepts may not be stretched beyond their natural meaning.⁴² The ECtHR has reviewed many cases where, similar to Turkish practice, domestic courts merely relied on the assessments of administrative authorities such as intelligence or migration agencies, where the information indicating security risk is not made available to the courts or the applicants. The ECtHR considers that the rights of applicants are violated when court decisions do not provide any justification for denying access to information by individuals and fail to clarify the national security reasons.⁴³ Purely formal review by the local courts or administrative authorities without full knowledge of the facts and where the applicants are not able to argue against them diminishes the reliability of domestic proceedings. It fails to subject the claim of national security risk to meaningful independent scrutiny.⁴⁴ The court emphasizes that even if national security is at stake, lawfulness and the rule of law in a democratic society require that such measures affecting fundamental human rights are made subject to adversarial proceedings before an independent body that is competent to review the reasons and the relevant evidence.⁴⁵

Apart from the issue of indicators of threat, another important dimension of Turkish practice is the legal effect of judicial appeals against expulsion orders. Whereas a 2016 legislative amendment to Turkish law provided that

a removal order cannot be enforced before the judicial appeal is finalized, this automatic suspensive effect of judicial appeal was abolished for removal grounds related to terrorism and public order, security, and health. Thus, expulsion became possible for these categories even if the judicial appeal process is ongoing. This is striking because according to the settled case law of the ECtHR, in expulsion cases, the automatic suspensive effect of the judicial appeal is one of the indispensable components for the fulfillment of the right to effective remedy.⁴⁶ In *Saadi v. Italy*,⁴⁷ the ECtHR stated that the prohibition of torture within the ECHR is absolute and that even if foreigners pose a threat to national security, they cannot be removed when there is a risk of treatment contrary to this prohibition.⁴⁸ In *Conka v. Belgium*⁴⁹ and *Gebremedhin v. France*,⁵⁰ it was set forth that judicial appeal against removal orders must have a suspensive effect, meaning the removal procedure must be suspended until the judicial appeal process is finalized. Accordingly, automatic suspensive effect is considered one of the elements of effectiveness of a legal remedy,⁵¹ and contrary practices result in violation decisions by the ECtHR.⁵²

After the legislative amendment of 2016, more than one thousand individual applications were lodged with the Turkish Constitutional Court, all requesting suspension of enforcement of removal orders, as judicial appeals before domestic courts no longer provided that guarantee. In 2019, the Turkish Constitutional Court issued its first pilot decision clarifying that abolishing the automatic suspensive effect of judicial appeals against removal orders violates the right to an effective remedy by referring to ECtHR judgements.⁵³ The court rightly specified that this structural problem arose from the legislation, which should be reverted to its original version, where the automatic suspensive effect was provided indistinctively.⁵⁴ A few months after this pilot decision,⁵⁵ the relevant provision was changed so that expulsion orders, regardless of their basis, cannot be enforced until their judicial appeals are finalized.

Although the automatic suspensive effect of judicial appeal in expulsion cases is now brought back, it was lacking for three years, so the practice during 2016–19 should be noted. To paint a more concrete picture, during this period a removal order could be issued for a legally recognized refugee, a person acknowledged to be fleeing from persecution, for a reason as vague as posing a threat to public order without further evidence, and the refugee could be expelled from Turkey even though their objections had not yet been

heard by a court. This meant that many asylum seekers and refugees who were using their rights to seek asylum in Turkey were expelled without having had a chance of judicial review of their expulsion grounds. Being within the asylum process, they all had a claimed risk of persecution, and the wrongful implementation of expulsion potentially resulted in *refoulement* falling short of the responsibility to protect refugees.

The provision providing for the possibility of expulsion of asylum seekers and refugees on the grounds related to terrorism and public order, security, and health remains effective to date. Thus, a removal order may be issued even if it is recognized that the person is in need of asylum, or even if the procedure to determine the existence of such need is not finalized yet. This jeopardizes the effective implementation of the principle of non-*refoulement* and thus, the right to seek asylum and R2P to that extent.

Non-Specification of Country of Removal

The second legal issue concerns the non-specification of the country of removal in removal orders and inconsistent judicial scrutiny in this respect. When the country of removal is unknown, it is impossible for the administration or the individual to evaluate the risk upon removal and whether the return will potentially go against the principle of non-*refoulement*. This compromises the right to seek asylum for those with a well-founded fear of persecution and Turkey's R2P regarding refugees.

As a natural reflection of the principle of non-*refoulement* as derived from the Refugee Convention and the prohibition of torture under the ECHR, Turkish law prohibits the issuance of a removal decision when there are serious indications that a person will be subjected to the death penalty, torture, inhuman or degrading treatment, or punishment in the country of removal. The law requires case-by-case assessment, which inherently includes evaluating the conditions in the country of removal *vis-à-vis* the individual.

The courts cannot assess the risk of human rights violations upon return and therefore, the legality of removal, unless the country of removal is specified. Yet removal orders issued by Turkish authorities typically omit such specifications. This differs from the prevailing practice in other party states to the ECHR.⁵⁶ ECtHR case law also finds that non-specification of the country of removal in removal orders does not fulfill the requirements of legal certainty

and the right to an effective remedy. In two cases against Bulgaria, the court explicitly stated that the legal regime and practice whereby the country to which a foreigner is to be removed is not specified in the removal order is problematic regarding legal certainty, a requirement inherent in all provisions of the ECHR.⁵⁷ The ECtHR emphasized that measures for execution of the respective judgements should include changes to the legal framework as well as to administrative and judicial measures so that the country of removal is always indicated in removal orders and can be subject to judicial review.⁵⁸ In another case against Turkey, as a response to the government's argument that the issuance of removal orders does not necessarily mean that the applicants would be removed to their country of origin where there is a risk of torture, the court stressed that this was still a possibility.⁵⁹ The ECtHR noted that non-specification of the country of removal had worsened the already precarious position of the applicants and prevented a meaningful judicial review, frustrating its purpose. Thus, the court concluded that the applicants were not provided an effective remedy for their claims under the prohibition of torture.⁶⁰

With respect to the non-specification of the destination country, the general tendency of Turkish judges in reviewing the legality of removal orders is to conduct their assessment by assuming that the applicants will be sent to their countries of origin. However, there are also judgements that deviate from this practice, demonstrating judicial inconsistency.

The first category of court decisions underlines the lack of legal certainty and the failure of administrative authorities to collect information and conduct assessments concerning bases of exemption from removal. In two cases with Russian applicants, the courts stressed the need to determine the country of removal to assess whether the principle of non-refoulement is respected, and found that removal orders are unlawful when they do not contain information on where the applicants will be removed.⁶¹ In another appeal by an Iranian national, the court concurred with the authorities on the removal ground that the individual was posing a threat to public order due to drug abuse; however, it found the removal order unlawful. The lack of explicit specification as to whether the applicant would be removed to their country of origin, a transit country, or a third country indicated that no assessment was made regarding the risks the applicant would face in the country of removal.

Therefore, the administrative authority did not sufficiently carry out its duty to collect information.⁶² In some cases, the courts accepted the lack of specification of the country of removal as an indicator of risk of removal to danger. In one judgement, the court pointed out that the removal order did not state where the applicant from East Turkistan would be sent, which meant there was a risk of removal to the country of origin, China, and annulled the removal order on this basis.⁶³ Similarly, in a case related to an asylum seeker from Iran who had been accepted for resettlement by the United States, court's reasoning in annulling the removal order was that the country of removal was not specified, and it should have been clarified that it would be the country of resettlement.⁶⁴ The Constitutional Court was operating on the same wavelength when it issued an interim-measure decision to suspend the enforcement of a removal order, pointing out that due to non-specification of the country of removal, it was not possible to eliminate definitively the possibility of return to the country of origin, which would have caused serious danger against the applicant's physical or moral integrity.⁶⁵ In these judgements, the Turkish courts engaged with the principle of non-refoulement in a manner that prioritizes Turkey's responsibility to protect refugees.

The second category of court decisions shows an opposite tendency. In these instances, the courts mostly relied on the uncertainty of the country of removal to uphold the removal order and to disregard applicants' claims of danger in the country of origin. One court decision mentioned that the applicant from Pakistan, who had a pending international application in Turkey, had argued, among other things, that the removal order was unlawful because the country of removal was not specified. In its reasoning, the court ignored this argument and upheld the removal order without assessing claimed risks upon return.⁶⁶ Another version of judicial argumentation typically uses non-specification of the country of removal as a reason to reject arguments that the removal orders are unlawful. In one case, the court stated that the removal order imposed on Syrian nationals was not unlawful, because they would not necessarily be sent to Syria, as the administrative authorities were obligated to act in line with the principle of non-refoulement—as if administrative action never deviates from the law.⁶⁷ In another case, the court ruled that the fact that the applicant could be sent to the country of origin, Uzbekistan, did not render the removal order unlawful, because the applicant could be sent to another country.⁶⁸ Thus,

these decisions uphold legal uncertainty in favour of the authorities and deviate from the settled practice of the judiciary, which is to assume the country of removal is the country of origin.

There are also other cases that lack the assessment as to whether the applicants can be removed to their country of origin. These directly rely on non-specification of the country of removal in order to set aside any claims as to risks upon return. In two cases, concerning an Iranian and an Iraqi national,⁶⁹ the court rejected appeals because the removal orders only mentioned removal from Turkey and not the countries of origin. In other similar decisions, the removal orders were found lawful because they did not entail removal exclusively to the country of origin.⁷⁰ According to similar reasoning, it is not possible for the removal orders that do not identify the country of removal to breach the provision on exemption from removal, because removal to a transit or third country is also possible.⁷¹ The same reasoning was also used concerning a Syrian applicant whose removal to the country of origin would clearly have been problematic regarding the right to seek asylum and the R2P as it pertains to refugees.⁷²

In several cases, the courts simply relied on the statements of the authorities or on the letter of the law that the applicant would not be removed to the country of origin but to a third country, and if such a country could be identified, that the applicant would be granted a humanitarian residence permit.⁷³ Finally, in a case where the court assessed the presence of an internal flight alternative in the country of origin, it also relied on the non-specification of the country of removal in the removal order as a supporting argument.⁷⁴

The main problem with these judgements is that by upholding removal orders based on the possibility of removal to a third country, they completely leave risks upon removal out of judicial scrutiny. As per Turkish law, removal of foreigners is enforced through a single removal order. Therefore, when the applicants have claims concerning risks in a country of removal, it is only during the appeal of the removal order that they can raise these claims, and they are virtually left without any effective remedy in this regard. This is a great step down from Turkey's implementation of the principle of non-refoulement and the R2P.

Assessment of Lawfulness of Removal During Judicial Appeal of Asylum Decisions

The final legal issue occurs in judicial appeals against asylum decisions where judges rule out risk upon removal without full knowledge of the relevant facts and in conflict with their duty of impartiality. This happens when such an assessment is made at a stage where the assessment should be limited to the individual's compliance with administrative duties within the asylum procedure. This creates a significant disruption to the right to seek asylum, since removal is endorsed by a court even before the asylum procedure is exhausted and without full examination of the asylum claim. The responsibility to protect refugees in this context entails granting asylum to individuals who fulfill the conditions for it, and opining on removal before the asylum claim is resolved interferes with this process.

Turkish law considers asylum applications implicitly withdrawn when the asylum seeker fails to comply with procedural duties such as attending interviews, reporting obligations, or notifying address change, and cannot demonstrate justified excuses for such failure. This results in termination of the asylum procedure, leading to the issuance of a removal order. When rejecting appeals of implicit withdrawal decisions, Turkish judges sometimes go beyond the subject matter of the appeal and opine on the possible removal of applicants by asserting a lack of risk upon return. This conflicts with the judges' duty of impartiality, and such an assessment goes beyond the scope of the appeal's subject matter.

In one case, going beyond the assessment of whether the asylum seeker had a justified excuse for neglecting his reporting obligation, in considering the claims of risk if returned to Iraq and the refugee status granted by the United Nations High Commissioner for Refugees (UNHCR), the court made a detailed assessment of the asylum seeker's personal situation and concluded that there is no real risk of persecution in case of return.⁷⁵ In an appeal by another Iraqi applicant, the court dismissed the risk in case of return, arguing that the applicant had arrived from a safe region and had left due to reasons of marital problems and difficult living conditions.⁷⁶ Similarly, the court found no serious risk of persecution in an applicant's country of origin, Iran, given that the applicant did not submit any document or information supporting his claims of detention upon a police raid of a house church.⁷⁷ In the case of an Afghan asylum seeker, the judge relied on the lack

of past ill treatment, any problems with the authorities, and any connection with a political or religious group and concluded that the individual's arrival from Iran, where she had lived for many years, was because of a failed marriage to a person her family disapproved of.⁷⁸ In other cases concerning Afghanistan, one judgement endorsed the internal flight alternative and dismissed the serious risk of persecution, because the applicant did not mention any concrete situation or incident that could constitute personal threat.⁷⁹ Sometimes, the courts supported their arguments with the government's generic country-of-origin information reports.⁸⁰ In all these cases, the judges took their analyses further than assessing reasons for implicit withdrawal. They declared their opinion on the merits of the asylum applications and removal of the applicants, considering the asylum interview reports, country-of-origin information from the government, and lack of concrete information or documents supporting asylum claims. Indeed, in evaluating risks, these decisions are essentially equivalent to judgements upon appeal of negative asylum decisions or removal orders. This is despite the fact that, at the time of ruling by these courts, no administrative decisions have been issued just yet to reject asylum applications or order removal.

The cited court decisions are problematic, first, because the administrative process after these judgements does not necessarily have to lead to removal. Second, by ruling on these matters before the issuance of relevant negative asylum decisions or removal orders, the courts are essentially using an authority that belongs to administrative authorities and not themselves at that point. Finally, such court decisions do not accord with the right to an impartial tribunal, or at the very least, they endorse administrative authorities to undertake removal. And they do that without full knowledge of relevant facts.

Implicit withdrawal is a result of non-compliance with procedural duties; it does not necessarily signify a lack of need for international protection. Sometimes, the applicants who actually qualify for asylum status abandon their asylum applications for other reasons such as lack of trust in the asylum system, misinformation, or asylum shopping.⁸¹ Similarly, applicants may fail to comply with procedural requirements for reasons other than the absence of protection need.⁸² Implicit withdrawal grounds may arise at any stage of the asylum process, and sometimes before full examination of the merits of an asylum application, before the asylum interview, or before the applicant

has submitted all relevant information and documents related to protection claims. This is also why the asylum system in Turkey allows re-applying for asylum after implicit withdrawal. Thus, implicit withdrawal does not necessarily result in the applicant's removal; it is only a possibility. Other possibilities include re-entering the asylum system, which in principle prevents removal for most applicants, or obtaining a humanitarian residence permit if there are barriers to removal. Thus, at the time of decision-making by the judge on implicit withdrawal, not all information and documents required to assess the asylum claim or removal may be available before the court. In any case, from the perspective of judicial procedure, judicial assessment should focus on the subject matter of appeal, which is implicit withdrawal alone.

Another issue is that deciding on asylum and removal, which are essentially the subject of an administrative process other than implicit withdrawal, technically creates a conflict of authority. Under Turkish law, administrative authorities are the ones to issue administrative decisions concerning asylum and removal. The courts are to review such decisions upon judicial appeal, which in any case can only take place at a point in time after the judicial assessment of implicit withdrawal. To reach a conclusion on asylum or removal without prior decision-making by the administrative authorities in this regard is not a legal power vested in judges. Thus, these court decisions interfere with the powers of the administrative authority.

The final concern relates to the right to have access to an impartial tribunal. According to the established case law of the ECtHR⁸³ and Turkish courts,⁸⁴ the right to a fair trial does not extend to measures in the context of asylum and migration. However, the principle of impartiality of all courts under the Turkish Constitution applies to judicial processes regarding administrative decisions related to asylum and removal. As explained above, an unsuccessful appeal of an implicit withdrawal decision comes before a possible removal order. Usually, with respect to a certain applicant, appeals of implicit withdrawal and of removal fall within the jurisdiction of the same administrative court. Thus in the normal course of events, some or all of the judges who declare their opinion on the lawfulness of removal during the appeal of implicit withdrawal will also be the judges reviewing the appeal of such removal order at a later point in time. Therefore, it is worth questioning whether the fact that the judges who will decide on the lawfulness of a removal

order have already expressed their view in this regard in a prior court decision casts doubt on the court's impartiality.

According to the ECtHR, whether there is a lack of impartiality on the part of the judges must be decided on a case by case basis.⁸⁵ In case of a legitimate reason for doubting a judge's impartiality, that judge must withdraw from the case, considering that it is a matter of confidence that the courts must stimulate in a democratic society.⁸⁶ The ECtHR states that whether impartiality is affected by the participation of the same judge in different stages of a case must be determined in each case separately. The scope and nature of the procedures carried out previously are important factors in this regard.⁸⁷ In any case, the judgement should be based on the analysis conducted, evidence, and arguments submitted in the subject matter lawsuit.⁸⁸ If the substantive issues are very closely connected, the impartiality of the judge participating in the different stages may become questionable.⁸⁹

In one case with a parallel construction to the concern described here, the ECtHR recognized that a situation where a judge participated in two proceedings related to the same set of facts might raise an issue as to the impartiality of the tribunal.⁹⁰ The judge, who was a member of the tribunal deciding on the appeal concerning the applicant's dismissal, was later also part of the tribunal that reviewed the appeal against rehabilitation proceedings about the dismissal. Technically, the subjects of the two judicial proceedings were different; however, both judicial proceedings concerned the same set of facts, and the court found the applicant's fears about the judge's impartiality to be legitimate.

Considering that statements about risk upon return to the country of origin, contained in previous appeals against implicit withdrawal, can be regarded as public expressions on the outcome of a possible future lawsuit, two decisions of the ECtHR assessing such expressions are relevant. The court found that public expressions of a judge that indicated his negative opinions about the applicant's lawsuit objectively justified the applicant's fears about impartiality.⁹¹

Assessment of risk upon return within the appeal of implicit withdrawal of asylum application is at least a factor weakening the judge's impartiality, if not a breach of it. Questioning the judge's impartiality is a matter that

relates to the moment an appeal is brought against the removal order issued after the rejection of an appeal of an implicit withdrawal. The problem created by such premature assessment of removal at the previous stage of implicit withdrawal of asylum application manifests itself earlier. Due to the likely overlap in members of the tribunals reviewing the appeals against the implicit withdrawal decision and the removal order, the whole administrative and judicial process is a continuum of dialogue between the court and the relevant administrative authority concerning the applicant's situation. Therefore, the assessment of the court asserting lack of risk upon return can easily be read as a green light to the administrative authority to issue a removal order, which increases the risk of issuance of removal orders without a thorough assessment.

All factors considered, premature judicial assessment of risk upon return creates an important barrier before access to the right to seek asylum, in defiance of Turkey's responsibility to protect refugees.

CONCLUSION

The R2P and international protection frameworks are closely connected in their aims of offering protection mechanisms to persons facing atrocities. They also overlap in holding states responsible for offering protection to asylum seekers in their jurisdiction by replacing the failed protection of their countries of origin. Based on these premises, this article has framed asylum as a tool of the R2P, whereby a state offering the right to seek asylum is exercising its responsibility to protect refugees. As the most important component of the right to seek asylum, implementation of the principle of non-refoulement within asylum and removal procedures is crucial, which was the focus of critical analysis of Turkish court decisions here, with reference to ECtHR case law.

The problematic legal issues concerning legislative, administrative, and judicial practices of Turkey concerning refugee protection and its precursor right to seek asylum are detrimental to Turkey's responsibility to protect refugees. Comparative analysis reveals that arbitrary removal of asylum seekers and refugees based on public order or security reasons, judicial inconsistency as to non-specification of the country of removal, and judicial assessment of the lawfulness of removal prematurely during the appeal of

asylum decisions are significant impairments to the standard of refugee protection in Turkey.

Turkey's position as the second top refugee-hosting country in the world increases the significance of the challenges in satisfaction of the right to seek asylum and protection of refugees. Smooth operation of Turkish administrative and judicial procedures so as not to make asylum seekers and refugees prone to arbitrary expulsion is of paramount importance in providing effective refugee protection in the region. Consequently, Turkey's deviations from international standards connected to the right to seek asylum essentially compromise its responsibility to protect refugees within its territory.

ENDNOTES

- 1 Elizabeth Ferris, "International Responsibility, Protection and Displacement: Exploring the Connections between R2P, Refugees and Internally Displaced Persons," *Global Responsibility to Protect* 8, no. 4 (2016): 393.
- 2 Angus Francis, "The Responsibility to Protect and the International Refugee Regime," in *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, ed. Angus Francis, Vesselin Popovski, and Charles Sampford (Tokyo, New York: United Nations University Press, 2013), 221.
- 3 Ferris, "International Responsibility, Protection and Displacement," 391.
- 4 Ibid., 403.
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POLITICAL VIOLENCE, REFUGEES, AND THE NEAR FUTILITY OF GLOBAL RETRIBUTIVE JUSTICE

Sorpong Peou *

ABSTRACT

This article examines whether global retributive justice pursued by international criminal tribunals and courts (ICTs/Cs) can indirectly contribute to addressing global refugee crises, noting the current lack of academic discussion on this topic. The root causes of refugees and internally displaced people include political violence, such as war and mass atrocities. Therefore, ending such violence is essential for better managing global refugee crises. ICTs/Cs have the potential to address this violence through four mechanisms: achieving just retribution, facilitating war/conflict termination, promoting peacebuilding,

* This article is dedicated to my dear friend, Pierre Lizée, who passed away recently.

I am deeply grateful to the two anonymous reviewers whose insightful comments have significantly enhanced the quality of my work. I also thank the following for their positive and critical feedback: David Welch, David Dewitt, Paul Evans, Bernard Frolic, Richard Stubbs, Brendan Howe, and Pierre Lizée. Full responsibility for the content of this article remains mine alone.

PEACE RESEARCH

The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 128-178

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and deterring crime. Findings still indicate that retributive justice aimed at prosecuting individuals for serious crimes proves insufficient and may be counterproductive. The article's case studies reveal that military interventions have ended mass atrocities, but this tool still comes with risks.

INTRODUCTION

This article examines the implicit assumption that formal trials conducted by international criminal tribunals and courts (ICTs/Cs) may effectively help end political violence, thus mitigating global refugee crises, one of today's most pressing international concerns. However, the relationship between global retributive justice and refugee crisis management remains neglected in the academic literature because directly addressing refugee crises is not part of ICTs/Cs' mandate.¹ James Simeon addresses the association between repressive regimes and political violence, identifying them as "the prime drivers of forced migration and displacement globally." He establishes a "direct correlation" between "war and protracted armed conflict" and "forced migration and displacement" as a "weapon of war." Although it does not explore whether global retributive justice contributes to refugee crisis management, his work sheds light on one point: the rise of refugee numbers.² According to the United Nations High Commission for Refugees (UNHCR), as of June 2024, there were 122.6 million forcibly displaced people worldwide (including millions of refugees). This figure is significantly higher than the 22.3 million displaced people in 2000.³ During this period (2000–2024), the world also witnessed an intensifying commitment to prosecuting serious international criminals, evidenced by the growing number of ICTs/Cs.

This article, therefore, examines whether ICTs can effectively contribute to the end of political violence. Political violence occurs in different forms, including armed conflict and mass atrocities (notably the crimes of aggression, war crimes, genocide, and crimes against humanity). Effectiveness

is broadly defined as the ability of ICTs/Cs to produce positive effects or impacts under four criteria: accountability, conflict termination, peace-building, and crime deterrence in countries where they operate and beyond. Effectiveness is assessed in terms of positive effects compared to when mass atrocities were committed, whether the atrocities end during or after judicial intervention.

This article presents research findings structured in four parts. The first part examines competing perspectives on global retributive justice. Given space constraints, only general arguments and a brief comparative analysis method are discussed. The remaining parts focus on three types of ICTs/Cs: permanent, ad hoc, and hybrid. The second part assesses the performance of the International Criminal Court (ICC). Proponents of this permanent court assume its superiority to that of the other two types. Thus, the third part evaluates the impact of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), followed by the fourth part, which focuses on two hybrid tribunals: the Extraordinary Chambers in the Court of Cambodia (ECCC) and the Special Panels for Serious Crimes in Timor-Leste, District Court of Dili (SPDDC). Findings indicate that global retributive justice is nearly futile, with none of the courts performing significantly better than the others. The article concludes with general recommendations for policy consideration and further research.

INTERNATIONAL CRIMINAL JUSTICE: SOME BASIC ASSUMPTIONS ABOUT ITS EFFECTIVENESS AND CRITIQUE

Academic and policy literature emphasizes prosecuting and punishing serious criminals, those guilty of aggression, war crimes, genocide, and crimes against humanity.⁴ Such justice seeks accountability, ends conflicts, promotes peace in war-torn nations, and deters atrocities. Critics, however, argue that retributive justice lacks tangible benefits and may be counterproductive.

The Assumed Merits of Global Retributive Justice

The concept of just retribution (not vengeance or revenge) is prominently featured in this field's academic literature. As Peter Malcontent points out, "The main objective of retributive justice, which includes both criminal justice and administrative justice, is to punish wrongdoers out of fairness towards those who have been wronged."⁵ Proponents of just retribution, therefore,

do not consider this form of justice based on vengeance or revenge (such as an eye for an eye). They believe such personal and emotional responses outside the courtroom to be wrong or unjust.⁶

Retributionists, who include liberal legal scholars and moralist thinkers critical of political realism, further assume that pursuing criminal justice offers an effective means to terminate armed conflicts or wars.⁷ After the Second World War, for example, Chief Prosecutor Robert Jackson at Nuremberg defended the idea of natural law to end and prevent war by punishing war criminals. Criminal trials represent the ultimate step toward securing world peace by preventing war. In his words, such trials are “mankind’s desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world’s peace.”⁸

Others also claim that the role of ICTs/Cs ensures international peace and security.⁹ According to Cherif Bassiouni, retributive justice “will contribute to the reduction of social harm and the preservation or restoration and maintenance of peace.”¹⁰ The ICTY, for instance, was designed to end a real war—a case of war termination,¹¹ namely, “to stop the Balkan wars.”¹² When criminals are tried and sentenced to prison, they can no longer engage in criminal activity.

The administration of global criminal justice serves a dual purpose: not only does it help end conflict and atrocity, but it is also “part of an integrated peacebuilding”¹³ — a dual process aimed at preventing armed conflict within states from recurring and thus promoting peace and security in post-war societies. International criminal law is viewed as a powerful tool for helping to reconcile and rebuild post-conflict societies.¹⁴ Peacebuilding is a complex process that involves reconciliation, democratic institution-building, rule-of-law development, and economic reconstruction.¹⁵

There are several optimistic assumptions about international criminal justice and social reconciliation. Mark Amstutz writes that “to become reconciled is to overcome alienation, division, and enmity and to restore peaceful, cooperative relationships based on a shared commitment to communal solidarity.”¹⁶ First, justice establishes the truth about crimes committed based on factual and forensic evidence, as well as guilt individualization. Individualizing guilt “can help defuse the animosities and mistrust among formerly warring communities.” Political or social groups are no longer subjected to collective

punishment for crimes committed by individual members, “thus contributing to social and political healing and reconstruction.”¹⁷

Second, peace is also built when reconciliation is part of the international judicial process, which advocates think will help victims see that justice is done. The ICTY and ICTR, for instance, were expected to ensure reconciliation between two mutually hostile groups,¹⁸ a process designed in the case of the ICTR to restore a harmonious relationship between the Hutus and Tutsis.¹⁹

Third, prosecuting and punishing criminals to satisfy their victims’ desire for justice provides a sense of closure, a source of reconciliation and a precondition for lasting peace.²⁰ By bringing justice closer to the victims,²¹ “restitution and redress” become possible. This “victim-centered justice [fosters] gradual reconciliation and a cathartic process for the victims.”²²

Fourth, pursuing international criminal justice is believed to help build, rebuild, and strengthen democratic and rule-of-law institutions. Formal international and domestic trials enable post-conflict countries to transition to democracy (based on free and fair elections), a rule of law (based on principles like equality before the law and due process), and respect for human rights.²³ Democratic systems further help deepen national or ethnic reconciliation and prevent potential political violence. As Paul Seils puts it:

The argument that transitional justice processes contribute to the strengthening of democracy rests on the idea that it helps to build confidence in democratic institutions and values by restoring previously abusive institutions to their proper place within a democratic order and by restoring victims to their proper place as rights-holding citizens.²⁴

Once incapacitated (after their imprisonment and executions by the International Military Tribunal for the Far East), for instance, dangerous top Japanese criminals (both civilian and military) were no longer capable of influencing Japanese politics and society or recapturing power.²⁵ As a result, Japan transitioned to democracy. Thus, retributionists view criminal prosecutions as a positive force that contributes to democratization and counters militarism and authoritarian abuse of power.

Ending impunity further means “rebuilding and helping to strengthen the

local judicial system.”²⁶ Judicial systems in post-conflict states often struggle to pursue justice independently owing to a lack of infrastructure, qualified local professionals, and limited budgets. ICTs/Cs can provide institutional capacity to prosecute alleged criminals. Their investigators, prosecutors, judges, and administrators can offer technical and legal expertise and support.

Moreover, by pursuing retributive justice, ICTs/Cs are positively assumed to help build the rule of law in post-conflict societies. The UNHCR is cited as defining the “legacy” of ICTs/Cs in these words: any lasting impact on bolstering the rule of law in a particular society by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity.”²⁷

For example, the ICC can positively impact states’ judicial and legal systems by working with government officials and civil society actors. The court’s role in Colombia has been cited as an example of how national justice systems can be reformed.²⁸

Overall, this body of academic literature heavily emphasizes the concept of deterrence (both specific and general) as the top priority in pursuing criminal justice or global retributive justice. David Wippman, for instance, writes, “For many, deterrence is the most important justification [for pursuing retributive justice], and the most important goal.”²⁹ Other scholars make a similar point: “Many prominent international legal academics, as well as the ICTs themselves, have emphatically proclaimed deterrence as a significant justification for the creation of ICTs.”³⁰

Based on the above assumptions, a general conclusion can be hypothesized: the pursuit of global retributive justice is likely to encourage refugees to return to their former countries where political violence in the form of war or armed conflict and mass atrocity was committed. This process is facilitated in different ways or forms. One is that criminals have been punished and put behind bars, armed conflict and serious crimes have been ended and prevented, and returnees have nothing else to fear. Upon their return, they can participate in democratic and rule-of-law institution-building processes and enjoy the return to normalcy because of international and national economic reconstruction and development efforts. Above all else, global and national criminal justice systems effectively serve as deterrents.

Retributive Justice, Realist-Inclined Skeptics, and Other Critics

Although it reveals a sense of optimism about the relationship between formal trials and community reconciliation, this academic literature has been called into question for several reasons. First, just because ICTs/Cs are set up to prosecute and punish serious criminals does not necessarily mean war, armed conflict, and mass atrocities can be ended, as hoped for.

War is a complex phenomenon, and any serious pursuit of retributive justice may jeopardize prospects for a smooth transition from war to peace. Seeking to punish heavily armed individuals is likely to exacerbate armed conflicts, leaving no room for diplomacy and political compromise. In war-torn countries, violent conflicts are likely to remain protracted, with no side likely to emerge as the clear victor. Consequently, pursuing justice in such a fragile political environment may prove counterproductive.³¹ In some cases, retributive justice may increase suffering and violence globally, thus failing to achieve a genuine sense of justice. In addition, an aggressively relentless pursuit of retributive justice may alienate the criminal offender, causing or leading them, or members of their group, to seek vengeance by committing further acts of political violence. This cycle of retaliation could perpetuate existing violence or revenge, making the attainment of peace even more challenging.³²

Second, whether judicial punishment or its threat helps build peace through reconciliation, democratic and rule-of-law institution building remains unclear. Critics question whether and why this judicial strategy would yield significant benefits, even though it does not necessarily produce any adverse effects.³³ Several vital reasons contribute to this uncertainty. For instance, pursuing retributive justice may hinder reconciliation if social groups (still hostile to each other) regard ICTs/Cs as biased or favouring one side. Additionally, reconciliation through the return of refugees is likely to face challenges, especially when newly elected governments are unwilling to pursue amnesty or forgiveness.

Moreover, the process of reconciliation is likely to face serious challenges if the democratization process fails, and pursuing retributive justice may hinder its positive evolution when some group members are punished while others are not. Jack Snyder and Leslie Vinjamuri make a noteworthy point: "Trials ... are not highly correlated with the consolidation of peaceful democracy."³⁴

Neil Kritz argues that formal trials may even subvert the democratization process or “may run directly counter to the development of a democratic legal order.”³⁵

Thus, some critics suggest that it might be more productive to the cause of peace if the international community gave more attention to democratic and rule-of-law institution building without aggressively pursuing retributive justice. Julian Ku and Jide Nzelibe write, “Developing an effective framework for addressing humanitarian atrocities might have less to do with initiating international prosecutions, and more to do with building robust domestic institutions in weak states that can successfully channel political participation and dispute resolution.”³⁶

Third, judicial punishment may not work to build judicial and legal institutions in post-war societies where armed groups refuse to disarm. Snyder and Vinjamuri contend that

when a country’s political institutions are weak, when forces of reform have not won a decisive victory, and when peace spoilers are strong, attempts to put perpetrators of atrocities on trial are likely to increase the risk of violent conflict and further abuses, and therefore hinder the institutionalization of the rule of law.³⁷

In war-torn countries or institutionally fragile states, the politics of survival are so extreme that the threat of judicial punishment often rings hollow. Antagonists prioritize imminent threats to their security over concerns about what ICTs/Cs might do to them.

Critics of retributionists also argue that weak or failing states face difficulties in defeating armed perpetrators of mass atrocities solely through military means. When undefeated, criminal offenders will likely disregard and attempt to undermine the rules that prohibit atrocities. If they are in power and well armed, they may seek to dominate judicial and legal systems and politicize them. Victor’s justice is the likely outcome when they prioritize punishing their enemies regardless of the costs.

Fourth and lastly, the expectation that formal trials and punishment effectively deter armed conflict and mass atrocities remains deeply questionable. David Wippman, for example, makes an insightful point: “The connection between international prosecutions and the actual deterrence of future

atrocities is at best a plausible but largely untested assumption.”³⁸

Several reasons contribute to the ineffectiveness of formal criminal trials and punishment as deterrents. Powerful criminals often remain unafraid of weak or toothless ICTs/Cs. In politically fragile states, the extreme politics of survival prioritize fear of sudden death or regime collapse over the fear of judicial punishment. Additionally, international criminal law prohibits capital punishment, and life imprisonment sentences for convicted criminals are rare.

Even the imposition of the death penalty might not have any deterrent effect. A sophisticated meta-analysis raises questions about the retributionist proposition that threats of judicial punishment deter potential criminals or those involved in cases of homicide. The authors state that minor crimes, administrative offences, and social norm infringements can be deterred. However, they conclude that the death penalty has no deterrent effect.³⁹

In short, realist-inclined scholars and other skeptics question the optimism of retributionists, who overwhelmingly tend to belong to the liberal school of thought in legal studies. This study, however, assumes that global retributive justice is nearly futile.

Method of Analysis: Case Studies

There is good reason to remain skeptical about the liberal proposition that formal trials are adequate for accountability, conflict termination, peace-building, and deterrence. Still, this skepticism requires a more rigorous method of analysis, based on the logic of consequences supported by strong empirical evidence rather than the logic of appropriateness.⁴⁰ A comparative analysis method is employed,⁴¹ using the ICC, ICTY, ICTR, ECCC, and SPDDC as case studies.

The case studies were selected for several reasons, one of which is that they represent the three types of ICTs/Cs in different regions (Asia, Africa, and the Balkans) and are well known. Another reason is that space constraints limit the inclusion of other cases in this study. The qualitative method also does not require numerous case studies in a minor project, as it necessitates in-depth research. This study's method requires enough details to describe and trace retributive justice processes. Process tracing can be typically used as a comparative method to test retributionist assumptions against empirical

evidence—primarily qualitative data—within regression-oriented research, where tracing events is essential for both descriptive and causal inference.⁴²

More specifically, this comparative method can be adopted at different levels of analysis. This study only focuses on two levels. One is the impact of formal trials, by determining the extent to which each criterion is met. Establishing timelines is essential to process tracing. The effectiveness of criminal trials can be systematically assessed by comparing the impact of each tribunal or court in different periods: pre-trial, trial, and post-trial. The researcher should be able to show that the independent variable (formal trials) and dependent variables (accountability, conflict termination, peacebuilding, and crime deterrence) covary or change together.

For instance, the impact of the ECCC can be assessed by comparing developments in the country before, during, and after the trials. If the Khmer Rouge trials made a difference in meeting the four criteria, the researcher should observe positive outcomes in retribution, crime deterrence, war termination/prevention, and peacebuilding. If retribution was adequate, the targets (such as many identified offenders, prosecutions, verdicts, sentences, and penalties) should be evident. If conflict termination resulted from retributive justice, the end of the war in Cambodia should have occurred during or after the ECCC began its mission in the country. The effectiveness of peacebuilding can also be evaluated by examining the tribunal's impact on developing democratic, rule-of-law, and economic institutions. If global retributive justice works to deter serious crimes, crime deterrence can be assessed by showing the ECCC's ability to prevent serious crimes during and/or after the trials. Conversely, formal trials were ineffective if the tribunal did not provide sufficient retribution, end the armed conflict, build peace, and deter serious crimes (not only in Cambodia but also in other countries, especially in the same region, Asia).

The second level of analysis goes beyond assessing a single ICT/C by comparing its performance with another tribunal that produced similar and different results. For instance, if the SPDDC in Timor-Leste was less effective than the ECCC in terms of meeting its objectives, but Timor-Leste has become more democratic than Cambodia and if the rule of law in the former has become more established than in the latter, the researcher should not conclude that the two tribunals were primarily responsible for the positive results in Timor-Leste and poor results in Cambodia. Other

variables (independent or intervening) must be identified and used to explain Timor-Leste's more successful peacebuilding efforts and Cambodia's less successful ones.

This comparative method of analysis requires more qualitative than quantitative data. Even scholars who study the impact of formal trials using quantitative methods acknowledge that "in-depth examination of the establishment of such legal mechanisms [such as international tribunals and domestic human rights trials] and process tracing of their effects may reveal the details of their impact that are concealed in large N studies."⁴³ The data used for analysis is primarily from secondary sources, mainly reports and other academic studies.

THE INTERNATIONAL CRIMINAL COURT

Established by the 1998 Rome Statute, the ICC began functioning in 2002, intervening in countries where mass atrocities were alleged. Despite progress in accountability and retribution, the ICC remains a judicial body with unproven effectiveness as a deterrent and an elusive mission to achieve global peace. Unquestionably, the ICC has been on trial.⁴⁴ It faces ongoing scrutiny, struggling to confront state leaders, end wars, promote peace, or deter serious crimes.

The ICC in Action and the Limits of Accountability

The ICC has conducted criminal investigations in various countries, prosecuted serious offenders, and imposed penalties on some. The investigations focus on alleged war crimes, crimes against humanity, and genocide. By the end of 2024, the court had initiated investigations in at least fourteen countries, focusing on Africa (the Democratic Republic of the Congo, Uganda, Darfur in Sudan, the Central African Republic, Kenya, and Libya); non-African countries include Afghanistan, Bangladesh, Bolivia, Colombia, Myanmar, the Philippines, Palestine, and Ukraine.⁴⁵

Formal trials have indeed taken place within the ICC. For instance, between 2005 and 2020, the court indicted forty-five individuals accused of committing atrocity crimes. During its initial decade, most of those indicted were prominent civilian and military leaders from African states. Notable figures included Joseph Kony (Commander-in-Chief of the Lord's Resistance

Army), Ahmed Harun (Minister of State for the Interior in Sudan), Jean-Pierre Bemba (President and Commander-in-Chief of the Mouvement de libération du Congo), Omar al-Bashir (President of the Republic of Sudan), Abdel Rahim Hussein (Sudan's Minister of National Defence), Uhuru Kenyatta (Kenya's Deputy Prime Minister and Minister of Finance), Muammar Gaddafi (Libyan head of state), and Laurent Gbagbo (former president of Côte d'Ivoire).

More recently, other top leaders have been indicted and arrested. In 2022, the court dispatched its “largest-ever” team of forty-two experts to investigate alleged war crimes after the Russian invasion of Ukraine.⁴⁶ The best-known indictees are Russia's President Vladimir Putin and Israel's Prime Minister Benjamin Netanyahu. Myanmar's top general has been the target of criminal investigations. The Philippines' former president, Rodrigo Roa Duterte, was arrested and appeared before the Pre-Trial Chamber in March 2025 for crimes against humanity.

After almost twenty-five years in operation, the ICC has indicted only sixty-nine individuals for serious crimes. Only three of them currently serve sentences, and seven have completed theirs. The remaining cases include four acquittals, seven dismissals, four withdrawals, and nine deaths before proceedings concluded.⁴⁷ While the court may exceed critics' expectations, its success may fall short of proponents' aspirations for accountability and other benefits, such as peace.

The ICC's Non-Action After the 2003 US-UK Invasion of Iraq

At a general level, no evidence suggests that the ICC has either ended wars and mass atrocities or deterred them. The US-UK invasion of Iraq in 2003, the civil war in Syria (2014–present), the Russian annexation of Crimea (2014), and the Russian war against Ukraine (February 2022–present) are among the best examples. The 2003 US-UK invasion of Iraq led to regime change after the death of President Saddam Hussein, but it did not prevent human catastrophes.

Widespread conflict, instability, human suffering, and refugee problems have mounted. However, reports show that little has been done to prosecute or stop post-2003 crimes. As Belkis Wille puts it, “Too many Iraqi and international representatives were willing to overlook crimes committed by state security forces.” She goes on to stress that “even backers of human rights

in different settings and situations, both in the Middle East and elsewhere, ignored crimes committed against communities in Iraq they ultimately considered undesirable.”⁴⁸

International peacebuilders also have not met their objectives, as “Iraqis are still left picking up the pieces. They are living under a repressive political system.”⁴⁹ *The Guardian* observes that “the consequences of the US action have reverberated domestically and in geopolitics to this day.”⁵⁰ “Since the start of the Israel-Hamas War [October 2023–present],” according to one study, “Iraq’s stability has deteriorated.” The country “still faces significant challenges to its recovery. Over one million people remain internally displaced while three million people need humanitarian assistance as Iraq continues its reconstruction.”⁵¹

The ICC has done virtually little to hold alleged criminal suspects accountable and punish them, not to mention helping to end the conflict or promote stability or build peace. The principle of complementarity unquestionably poses a challenge to the court, but Iraq, as an ICC state party, proves unwilling or unable to do anything about the crimes committed. The ICC initiated a preliminary examination (2005–2006) based on 240 communications alleging various war crimes and reopened the case in 2014; however, it did not investigate the allegations due to multiple challenges.⁵²

Neither the United States nor the United Kingdom supported the ICC’s investigations into the alleged crimes in Iraq. The United States is not a state party to the ICC and remains hostile to the court.⁵³ The United Kingdom is a state party to the ICC but proves unwilling to prosecute its nationals who are alleged to have committed serious crimes in Iraq. Clive Baldwin, Human Rights Watch’s senior legal adviser, for instance, makes this noteworthy point:

The UK has a lamentable record of failing to prosecute war crimes committed by its nationals overseas. There has just been one prosecution of UK forces for war crimes in Iraq and Afghanistan in the last 20 years. The UK government has blatantly interfered in the military justice system to prevent investigations and prosecutions, including shutting down the main criminal investigation into war crimes in Iraq.⁵⁴

As a result, the ICC prosecutor chose not to prosecute any British nationals.

Baldwin has reason to question this decision: “The prosecutor’s office decided not to seek to proceed to an investigation on the basis that there is insufficient evidence that the UK is unwilling genuinely to investigate and prosecute the allegations, given that the ICC is a court only of last resort.”⁵⁵

The actions of the United Kingdom and the United States are predictable from a realist perspective to the extent that great powers may pursue justice against others, such as those after the Second World War. Nevertheless, they do not subject themselves to the call for justice against them.

The ICC and Political Violence in Eurasia, the Middle East, and Africa

The ICC’s inability to prosecute any serious criminals involved in the Iraq War is not the only example. Its inability to do so (for various reasons, such as power politics) can be further demonstrated by the more recent Russian war of aggression and war crimes committed by members of the Russian armed forces. Tom Dannenbaum (2022) makes this observation: “Russia’s aggressive war against Ukraine is one of the clearest violations of Article 2(4) of the United Nations Charter since its entry into force. In addition to legal implications for the responsibility of Russia as a state, the events have generated renewed interest in the possibility of individual accountability for the crime of aggression.”⁵⁶ The ICC prosecutor has now indicted several top Russian officials and issued warrants for their arrest, but an end to the war is nowhere in sight.⁵⁷ As a result, the number of refugees from Ukraine (and elsewhere around the world) continues to rise. According to one report based on the International Organization for Migration’s assessment, “By April 2023, more than eight million refugees from Ukraine had been recorded across Europe, while nearly six million people had been internally displaced in Ukraine at the end of 2022.”⁵⁸

Political violence in Africa and the Middle East has worsened. Although the UN Security Council referred the Darfur region of Sudan and Libya to the court (in 2005 and 2011, respectively), opposition from China and Russia has made it impossible for the Security Council to refer the case of Syria to the court. Syria is not a state party to the ICC. In 2014, the two permanent members of the Security Council vetoed a resolution to refer Syria to the ICC.⁵⁹ However, the civil war continued and produced one of the largest refugee numbers in the world.⁶⁰ The Syrian civil war did not end until December 2024, when President Bashar al-Assad was driven out of

power by the armed rebels. Still, the overall situation in the Middle East has grown more unstable than ever before, especially after the Hamas massacres of Israeli civilians on 7 October 2023.⁶¹

The Hamas-Israel war has further exacerbated instability in the Middle East, having produced a humanitarian catastrophe with Palestinians suffering from displacement, destruction, and deprivation of necessities. The war widened when Iran's proxies in Syria and Yemen became involved, and when, for the first time in history, Iran launched an attack on Israel on 13 April 2024. This does not mean the ICC has done nothing. In 2021, it launched an investigation into actions by Israel and Hamas (starting in 2014) and is seeking arrest warrants for their leaders.⁶²

Whether the court will eventually succeed in prosecuting the alleged serious criminals, ending the war and building peace remains to be seen, but "G7 diplomats argue any move now in investigation ... could disrupt current ceasefire talks."⁶³ US President Joe Biden supported the ICC's investigation into Russian crimes in Ukraine, but he criticized the ICC's scrutiny of Israel. Great power or alliance politics still matter more significantly than pursuing justice.

The ICC Interventions in Africa and Questionable Impact

The ICC appears to have a better record in African countries (like Uganda, the DR Congo, Kenya, Sudan, and Uganda) than in other regions. Still, any of its "successes" assessed in ending the region's political violence and refugee crises can be questioned.

In Uganda, the ICC prosecuted very few criminals. Until 2023, only one of the Lord's Resistance Army (LRA) leaders had been put on trial. Charged with seventy counts of serious crimes, Dominic Ongwen was convicted by the Trial Chamber. On 4 February 2021, he was found guilty of sixty-one counts of serious crimes (including war crimes and crimes against humanity) and sentenced to twenty-five years of imprisonment.⁶⁴ However, the ICC's intervention may have hindered the peace process in Uganda. The top leader of the LRA, Joseph Kony, and his five commanders made an offer for peace in exchange for their immunity after the ICC had issued arrest warrants on 8 July 2005 for their crimes, but their offer was rejected. The 2006 Cessation of Hostilities Agreement initiated the peace process between the Ugandan government and the LRA, significantly reducing armed conflict, though a

final peace accord was never signed.⁶⁵ As a fighting force, the LRA weakened but was transformed into a group of armed bandits who “smuggle and trade arms across borders, supplying all sorts of other militias in northeastern DRC.”⁶⁶ The joint efforts (by US special forces, UN peacekeepers, the African Union, and African armies) to hunt down Kony played a significant military role in weakening the LRA but did not destroy it.

The ICC’s intervention in Burundi also had hardly any positive impact. On 25 April 2016, the court announced it would launch a preliminary investigation into alleged crimes against humanity committed between 26 April 2015 and 26 October 2017 by government and opposition forces (after political violence had broken out in April 2015 because of President Pierre Nkurunziza’s decision to run for a third term and after his victory). The political violence then left 430 persons dead and forced 230,000 Burundians to seek refuge in neighbouring countries.⁶⁷ Instead of cooperating with the ICC to prosecute the perpetrators, the government withdrew from the court. After the withdrawal took effect on 27 October 2017, the court continued to work independently, but political violence in the country continued unabated.

According to Human Rights Watch, the Burundian government (run by the National Council for the Defense of Democracy-Forces for the Defense of Democracy, or CNDD-FDD) relentlessly targeted “real and suspected opposition members in recent years—through extrajudicial killings, enforced disappearances, arbitrary detention, and torture—[which] has contributed to the ruling party’s de facto monopoly of the country’s political space and economy.” The report further indicates that “as of September 2023, there were over 250,000 Burundian refugees living in the Democratic Republic of Congo, Rwanda, Tanzania, and Uganda.”⁶⁸

The DR Congo ratified the Rome Statute in April 2002, referred (in April 2004) the situation in its territory (since 1 July 2002) to the ICC, and filed a complaint against Rwanda’s army and the Tutsi-led M23 rebels. The court began to intervene in the DR Congo in 2004 and then convicted three Congolese militia leaders (one of war crimes; the other two of war crimes and crimes against humanity for their roles in atrocities committed in the eastern part of the country). However, the number of refugees from this country rose because of political violence. The armed conflict between the Congolese armed forces and the resurgent non-state armed group M23 had

displaced people internally, and more than 384,000 people from the DR Congo now took refuge in Uganda. The UNHCR writes: “The country [now] has 6.2 million internally displaced people, while more than 1.3 million have become refugees.”⁶⁹

Political violence in Sudan after the atrocities in the Darfur region did not end after the ICC had issued two arrest warrants for President Omar Hassan Ahmad Al Bashir (the first one on 4 March 2009 and the second one on 12 July 2010). He was charged with crimes against humanity and war crimes allegedly committed between 2003 and 2008, but he was never brought to justice. Moreover, political violence in Sudan continued. According to a report by the UNHCR, “Forced displacement within Sudan and into neighboring countries has continued to increase since an armed conflict erupted between the Sudanese Armed Forces (SAF) and the paramilitary Rapid Support Forces (RSF) in mid-April 2023.”⁷⁰ The UNHCR also reports a lack of progress regarding the possibility of an end to the conflict: “Over the years, outbreaks of violence have also forced people to flee within Sudan, with over 3.7 million people internally displaced and over 800,000 Sudanese refugees seeking safety and protection across borders.”⁷¹ As recently as July 2023, the ICC prosecutor reportedly still said that he was “investigating alleged new war crimes and crimes against humanity in Sudan’s Darfur region during the country’s current conflict that ... killed more than 3,000 people and forced over 3 million to flee their homes.”⁷²

By 2023, the ICC had generally proved ineffective in terms of ending the political violence that created refugees in Africa, where the promise of peace through retributive justice remained far from fulfilled. Phil Clark makes an important observation about the ICC’s role: “Throughout peace negotiations in... [Uganda and DRC], the ICC was one—but never the decisive—barrier to peace, often exacerbating more fundamental challenges.”⁷³ He adds this negative remark: “The ICC’s and its supporters’ vehement insistence on a narrow brand of international criminal justice has undermined these important attempts to resolve conflict and often made peace less, rather than more, likely.”⁷⁴ In short, the ICC’s interventions suggest that it was either unable to perform its job effectively or was part of the problem in hindering the peace process.

Overall, Africa has not made progress, despite the ICC’s interventions. The region still leads in state-based conflicts per year (28), surpassing Asia (17),

the Middle East (10), Europe (3), and the Americas (1). Conflicts have nearly doubled since 2013, rising from fifteen to twenty-eight, with over 330,000 battle-related deaths in the past three years. African countries, where the ICC has intervened, rank low in the Economist Intelligence Unit's *Democracy Index 2024*: Kenya (89th out of 167 countries), Uganda (98th), DR Congo (156th), and Sudan (162nd), showing no positive impact from the ICC.⁷⁵ The World Justice Project's *Rule of Law Index 2024* reveals the same problem: Kenya (102 out of 142 countries), Uganda (126th), DR Congo (136th), and Sudan (134th).⁷⁶ Thus, it is difficult to conclude that the court has made any significant contribution to peace in Africa.

AD HOC INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND FOR RWANDA

The ICTY and ICTR were created post–Cold War to prosecute offenders, deter atrocities, and foster peace in the Balkans and Rwanda. While political violence persisted during the ICTY's operation, peace was restored at the end of the 1990s, primarily thanks to the efforts of NATO (North Atlantic Treaty Organization), the European Union, and the United States.⁷⁷ For the ICTR, the genocide ended when Tutsi rebels toppled the Hutu regime, but the new government failed to bring peace and leaned toward dictatorship.

The ICTY and the Positive Role of Other Actors

On 25 May 1993, the UN Security Council established the ICTY, whose purpose was to prosecute war crimes committed during the Yugoslav wars by bringing their perpetrators to justice. As noted earlier, ending the wars stood among the tribunal's objectives.

On the one hand, proponents of justice have claimed that peace through political amnesty or immunity could not have been achieved without a tribunal. They would point to the fact that revenge killings would have been far more extensive if there had been no justice.⁷⁸ On the other hand, much can be said about the ICTY's questionable effectiveness in terms of ending and deterring armed conflicts and atrocity crimes. The wars that produced refugees and internally displaced people did not come to an end because of judicial intervention. Other actors played a more significant role in ending the wars. NATO (a US-led military alliance not part of the ICTY) intervened

militarily. In December 1995, NATO's 60,000-strong Implementation Force (IFOR) replaced the UN peacekeeping force deployed since 1992 and operated from 20 December 1995 to 20 December 1996 as part of the Dayton Peace Agreement to end the Bosnian War. The IFOR was given several tasks, including enforcing the ceasefire and disarming various groups.

The peace agreement (reached on 21 November 1995 among the presidents of Bosnia, Croatia, and Serbia) was designed to end the Bosnian War. On 14 December 1995, the Serbian government signed the Dayton Peace Accords with Croatia and Bosnia and Herzegovina in Paris. However, the Peace Accords would not have been possible without military intervention, namely NATO's Operation Deliberate Force (its first military campaign in the Balkan Wars).⁷⁹

From 12 December 1996 to December 2004, NATO's Stabilization Force (SFOR) (which operated under Chapter VII of the UN Charter with its authority derived from UN Security Council Resolution 1088 of 12 December 1996) was deployed in Bosnia and Herzegovina and assisted in apprehending war crimes suspects. The SFOR succeeded in bringing thirty-nine indicted war criminals to The Hague, where the ICTY was located.⁸⁰ The "stigmatization of extremists" and "detering ethnic violence" became possible due to the bombings by NATO.⁸¹ According to Victor Peskin, "The war dealt Milosevic a serious blow since Kosovo, now occupied by a NATO force and run by the UN, was for all intents and purposes no longer part of Serbia."⁸² Thus, the tribunal made "no meaningful impact" until NATO intervened militarily.⁸³

However, it is far from clear that humanitarian concerns solely drove Western military and political intervention. Jeffrey Isaac, for instance, also makes the following point:

The war was fought to restrain an oppressive regime that was a severe human rights abuser. It succeeded in removing Serbian troops; restoring the autonomy of Kosovo; establishing a policy of reconstruction and liberalization; and helping to weaken, and eventually to undermine, the Milosevic regime. These are all worthwhile results, eminently supportable by people serious about human rights, even if these results were secured by governments that did not have human rights as their primary concern.⁸⁴

Isaac's point shows how and why the Balkan Wars and mass atrocities ended and lends some support to the position taken by both China and Russia, which heavily criticized the NATO military campaigns. Both Beijing and Moscow viewed the military intervention as a violation of Serbia's sovereignty and as being driven by Western geopolitical interests.⁸⁵

The ICTY played no role in Balkan peacebuilding. The continuation of Balkan peace owes much to the UN, the European Union, and NATO. As Daniel Serwer puts it, "the United Nations, European Union, and American administrators and diplomats as well as peacekeeping troops from many countries played vital roles in stabilization and reconstruction."⁸⁶

In conflict-management terms, the United States and Europe, working in tandem, "ripened" these situations in order to produce the kind of "mutually hurting stalemates" regarded as necessary for negotiated settlements. The willingness of the Americans and Europeans to guarantee peace, while leaving in place many of the wartime leaders, made negotiated arrangements enticing that would otherwise surely have been rejected.⁸⁷

The EU and NATO, which helped end the Balkan Wars, made it possible for most refugees to return home, and there was little evidence that the ICTY contributed to the process of reconciliation after the wars, as inter-ethnic groups in the former Yugoslavia and the refugee crisis were left unsolved. Until the end of 1999, when the inter-ethnic war in Kosovo finally ended, more than 230,000 Croats, Serbs, and Albanians had perished, and nearly four million people had become refugees. Out of the 3.3 million people displaced during the breakup of the Former Yugoslavia, 1.3 million had still not returned to their home countries by 2005.⁸⁸ "After the war," according to a report published in 2017, "which claimed more than 100,000 victims and saw millions of people displaced, the new Balkan republics were not in a position to offer any sustainable help."⁸⁹

Bosnian, Serbian, and Croatian societies remain divided along ethnic lines.⁹⁰ The ICTY tribunal "initially stood out as an instrument that would bring justice and that could give a chance to start again the relations among the divided parties," but it did not turn out to be the case. The tribunal proved unable to produce the expected outcomes as the trials became politicized, as collaboration with the ICTY was linked to the Euro-Atlantic integration of the countries.⁹¹ Ongoing reconciliation in the Western Balkans owes much

to the work of the Organization for Security and Co-operation in Europe and other actors (state and nonstate).⁹² More can be said about regional gains regarding democracy and the rule of law.⁹³

The ICTR's Questionable Role After the Genocide and War

On 1 July 1994, the UN Security Council voted to establish an international commission of experts to recommend the establishment of an international tribunal, similar to the ICTY. It adopted Resolution 955 on 8 November 1994 to establish the ICTR.⁹⁴ Christina Carroll argues that the ICTR successfully facilitated Rwanda's peace through reconciliation.⁹⁵

This positive assessment of the tribunal's performance has some merits, but the evidence provided is relatively weak. Some scholars, for instance, correctly point to "the absence of empirical data on the Tribunal's actual contribution to peace and reconciliation."⁹⁶ More can be said about the ICTR's inability to end and deter armed conflicts and mass atrocities. Evidence shows that the ICTR held many of the perpetrators of genocide accountable and punished them, but the tribunal proved itself to be far from able to achieve peace.⁹⁷ The ICTR was created after the genocide in Rwanda, which witnessed the massacre of about one million Tutsis and moderate Hutus in a matter of weeks.⁹⁸ Still, the tribunal did not end the armed conflict, nor did it succeed in peacebuilding through reconciliation between the Tutsis and Hutus.

The civil war in Rwanda had complex roots, and the threat of criminal prosecution and judicial punishment would not have stopped its security dynamics. A brief history is revealing. In October 1990, the Tutsi-led exile army of the Rwandan Patriotic Front (RPF) launched from neighbouring Uganda an armed attack on Hutu-led government forces to dismantle the one-party state controlled by the Hutus and facilitate the return of Tutsi refugees.⁹⁹ The civil war and political instability provided fertile ground for extremism among Hutu militants, soldiers, and civilians to perpetrate atrocities against Tutsi and moderate Hutu populations.¹⁰⁰ When the Tutsi rebels were on the verge of taking control of the country, the Hutu regime launched a retaliatory counterattack by massacring over three-fourths of Rwanda's domestic Tutsi population in three months.¹⁰¹ The RPF also killed thousands of Hutu women and children in retaliation as they marched toward Kigali to end the genocide.¹⁰²

The armed Tutsi rebels finally put an end to the genocide and formed the Government of National Unity. Still, the ICTR's actions did not even deter any armed conflicts and mass atrocities that produced more refugees. As the RPF gained military ground and was on its way to victory, "members of the government forces and militias fled to eastern Zaire, along with over one million Hutu civilians."¹⁰³ After the genocide ended, some two million Hutus (both civilians and some of those involved in the 1994 killings) fled to Zaire (called the Democratic Republic of the Congo since 1997). Other Hutus fled to Tanzania and Burundi. This mass exodus led to the establishment of refugee camps, which became hotbeds of further tension and violence. Following the 1994 Rwandan genocide, tens of thousands of Hutu militants used refugee camps in eastern Zaire as bases for cross-border attacks into Rwanda. Their presence not only destabilized the region but also deepened ethnic tensions between the Hutu and Tutsi populations, many of whom had long-standing roots in eastern Zaire.¹⁰⁴

ICTR's Inability to Build Peace

Some Rwandan refugees returned home, but the ICTR was not directly or indirectly responsible for their return, either. Some scholars contend that "it is doubtful that the Tribunal can be credited for the return of refugees." Success "has been based on policies of the post-genocide governments as well as support from the international community."¹⁰⁵ They add, "While the Tribunal establishes the international community's interest in conflict resolution, the Tribunal is too far removed to be an effective agent of reconciliation."¹⁰⁶ The tribunal focused much of its attention on prosecuting the crimes of genocide, but it was not well known in Rwanda. However, there was some movement to shift its focus from prosecution to reconciliation.¹⁰⁷

Other reasons point to the ICTR's inability to promote reconciliation in Rwanda, build sustainable peace, and deter conflict and mass atrocities. According to legal expert Mark Drumbl, "Lessons learned from the Rwandan experience—in which the pursuit of punitive criminal justice (although successful in establishing microscopic truths in some select cases) does not appear to be making significant headway in reducing ethnic tensions and divides—apply to the international level."¹⁰⁸ Drumbl further suggests that the formal trials may even have exacerbated ethnic identity politics, thereby threatening Rwanda's long-term stability.¹⁰⁹ The point made here remains compelling to the extent that much evidence still supports the fact that the

ICTR did not help prevent armed conflicts and mass atrocities committed during the post-genocide period. Its intervention did little to improve peace and security or promote ethnic reconciliation.¹¹⁰

There are several reasons for this lack of success, one of which is that the tribunal's outreach efforts failed to significantly enhance Rwandans' understanding or acceptance of the ICTR. In one scholar's view, "Contrary to the theoretical argument, on a national level throughout society over time, outreach activities by the ICTR did neither increase awareness and understanding, nor shape positive perceptions towards the Tribunal and its expected contribution to reconciliation."¹¹¹

One of the main challenges is that definitions of reconciliation and beliefs about the conflict's origins varied among different groups, making it difficult to find common ground as a basis for reconciliation.¹¹² Another obstacle to reconciliation in post-genocide Rwanda was the limited reach of the ICTR, which prosecuted only a small number of high-level perpetrators.¹¹³ For many survivors, participation in local legal proceedings meant reliving traumatic experiences, which not only hindered the healing process but, in some cases, deepened psychological suffering.¹¹⁴

The return of exiled populations further complicated the ICTR's mandate.¹¹⁵ The repatriation of refugees (particularly those affiliated with the Hutu militias responsible for the genocide) posed challenges to reconciliation efforts. The government sought to prevent the reintegration of previously militarized Hutu populations into the political landscape,¹¹⁶ thus exacerbating ethnic tensions and hindering the prospects for genuine reconciliation. Many victims had no or little desire for a relationship with those who had harmed them.¹¹⁷

Moreover, the ICTR did not deter serious crimes and armed conflicts in Rwanda and Africa. Two significant wars in the region broke out soon after the creation of the ICTR. The First Congo War began in 1996 when Rwanda and Uganda, backing the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL), invaded eastern Zaire (now the Democratic Republic of Congo). Their stated aim was to dismantle refugee camps harboring Hutu extremists responsible for the 1994 Rwandan genocide. The Rwandan Patriotic Front (RPF)-led government played a central role in the intervention, viewing the camps as a direct threat to Rwanda's security. The

armed invasion forcibly repatriated hundreds of thousands of refugees.¹¹⁸ In 1997, three years after the genocide and the creation of the ICTR, the RPF forces murdered six thousand innocent Hutus living in north-west Rwanda when they carried out indiscriminate criminal actions against the Hutu population, and two million Hutus were displaced.¹¹⁹ In 1998, the Second Congo War broke out and lasted until 2003. Better known as Africa's World War (involving nine African countries (including Rwanda, Uganda, Angola, Zimbabwe, Namibia, and Chad), the second war claimed up to six million lives, either as a direct result of fighting or because of disease and malnutrition.¹²⁰

More armed violence has since occurred, as the government of Rwanda continues to lend support to the Tutsi-led M23 (March 23 Movement) rebels. The M23 rebels and the Rwanda Defence Forces (RDF) are still at war, and many Tutsi refugees have not returned to Rwanda. According to the Centre for Preventive Action, "Since 1996, conflict in eastern DRC has led to approximately six million deaths."¹²¹ Thus, the ICTR was unable to end armed conflicts and deter atrocities.

Rwanda has not become a democracy, nor has its judicial system advanced the rule of law. Little evidence supports the argument that progress has been made in encouraging peaceful dispute settlement, allowing people to voice their concerns openly, and thus strengthening the democratization process by weakening the state's monopoly of power. After twenty-five years, the country has not reached its democratic potential. According to Noel Twagiramungu and Joseph Sebarenzi,

The challenge facing Rwanda is that it's an autocratic regime. The democratic space in the country has shrunk dramatically. Independent thinkers and alternative voices have been silenced. President Paul Kagame has walked in the footsteps of his predecessors by concentrating power in the hands of a tiny political and military elite.¹²²

In their view, "Kagame could be violently replaced by another autocrat. Experience has shown that a change of guard without deep structural transformation is not sustainable."¹²³ Rwanda has been transformed into a dictatorship, not a source of reconciliation between the Tutsis and Hutus.

Rwanda's judicial process was essentially one-sided when seeking to

prosecute and punish those who committed the genocide, thus making it difficult to strengthen the rule of law and achieve reconciliation. The ICTR succeeded in prosecuting individuals involved in the genocide, but the Office of the Prosecutor did not request a single indictment for RPF crimes.¹²⁴ This is perfectly understandable, given the fact that the newly formed Tutsi-dominated government primarily sought to consolidate its power and prevent the previously militarized Hutu returnees from regaining political influence.¹²⁵ The government established its own Gacaca courts to prosecute those who committed the genocide, but the local pursuit of justice was expected to “contribute to the insecurity of all Rwandan citizens in the future, since it pursues inequitable justice, accentuates the ethnic divide and will be interpreted as revenge.”¹²⁶ Although they succeeded in prosecuting more than one million criminal suspects, these local courts shifted the focus from confession to accusation and deepened societal divisions.¹²⁷

In short, the two ad hoc international tribunals were not “effective in providing peace and security, justice to victims and defendants, ... [or] fostering national reconciliation.”¹²⁸ Despite their effectiveness in holding some serious criminals accountable and prosecuting many of them, neither the ICTY nor the ICTR can be said to have played a significant role in bringing about reconciliation among hostile communities and getting refugees back to their homes.

HYBRID TRIBUNALS: THE SPECIAL PANELS FOR SERIOUS CRIMES IN TIMOR-LESTE AND THE EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA

The SPDDC (2000–2006) and ECCC (2006–23) have also prompted doubts about their role in ending political violence and refugee return. The two tribunals were created after armed conflicts had ended. Unlike in Cambodia, where justice succeeded better than in Timor-Leste and Indonesia, the latter two’s shortcomings did not hinder peacebuilding progress. While serious crimes have not been committed since the beginning of their operations, others have occurred elsewhere in the region.

The ECCC’s Role After the War

The ECCC was created long after Cambodian refugees in Thailand had been repatriated. After the Third Indochina War broke out in late 1978,

more than 500,000 Cambodians fled to Thailand, and many of them were resettled in other countries such as the United States, France, Canada, and Australia. Some 200,000 refugees who remained in Thailand were finally repatriated to Cambodia in the early 1990s,¹²⁹ but this took place long before the ECCC was created in 2006.

The UN Transitional Authority in Cambodia (UNTAC, established to implement the Paris Peace Agreements adopted by the Cambodian factions and nineteen other foreign countries in 1991) was responsible for the peace process. The peace agreement was political in that it included the Khmer Rouge faction, whose leaders were responsible for the mass atrocities committed in the second half of the 1970s. This murderous faction was allowed to participate in the peace process that involved disarmament, demobilization, democratization, and economic reconstruction.¹³⁰

Although the Khmer Rouge faction violated the peace process by refusing to disarm and then pulling out of the electoral process, UNTAC succeeded in organizing and holding national elections in 1993, which produced a coalition government led by the royalist party (known as FUNCINPEC), the Cambodian People's Party (CPP), and the Buddhist Liberal Democratic Party (BLDP). The Khmer Rouge was left out of the post-election process and was excluded from the new government but staged an armed rebellion until its disintegration in the late 1990s.¹³¹

The disintegration resulted from a government effort to negotiate with some Khmer Rouge leaders by encouraging them to defect from their movement by guaranteeing their security.¹³² Ieng Sary (former Khmer Rouge minister of foreign affairs) and his supporters were the first to defect, leaving the armed faction further fractured by growing infighting that eventually led to the death of Pol Pot, the former Khmer Rouge prime minister (known as Brother Number 1).¹³³

Following the late 1990s, the Khmer Rouge as an armed movement ceased to exist, paving the way for justice when the government cooperated with the UN to establish the ECCC and arrested several top Khmer Rouge leaders. In other words, the movement's disintegration effectively ended the civil war several years before the tribunal was established.

From 2006 to 2023, when the ECCC began and ended its mission, several Khmer Rouge leaders were prosecuted and punished for their serious crimes.

There were four criminal cases: Case 001, Case 002, Case 003, and Case 004. Cases 001 and 002 have been dealt with most successfully. Case 001 involved Kaing Guek Eav (alias Comrade Duch), known as the Khmer Rouge regime's chief executioner, responsible for the crimes committed against people at Tuol Sleng prison, known as Security Center 21 (S-21), based in Phnom Penh.¹³⁴ Charged with crimes against humanity and grave breaches of the Geneva Conventions of 1949, he was the first defendant to be convicted and sentenced to life in prison. He died in prison in 2020.

Case 002 involved four top Khmer Rouge leaders: Chea Nuon, Samphan Khieu, Sary Ieng, and Thirith Ieng. In terms of his position within the murderous regime, Nuon was known as Brother No. 2 (second only to the top Khmer Rouge leader, Prime Minister Pol Pot, known as Brother No. 1, who had escaped justice because he died in his stronghold in 1998, before the ECCC was created). Nuon was arrested in 2007, found guilty of crimes against humanity and genocide, and sentenced to life imprisonment. Khieu, arrested in 2007, was also found guilty of these crimes and received a life sentence. Khieu remains in prison, but Nuon died in 2019 at the age of ninety-three. Sary Ieng and his wife Thirith Ieng were arrested in 2007 and brought to justice, but they died before a verdict could be issued. The husband (foreign minister under the Pol Pot regime, known as Brother No. 3, and the brother-in-law of Pol Pot) died in 2013 of heart failure at the age of eighty-seven. His wife, the Khmer Rouge minister of social affairs, could not be tried because she was deemed unfit to stand trial due to her dementia. She died in 2015 at the age of eighty-three.

Judicial proceedings in Cases 003 and 004 remained unresolved. Case 003 involved Meas Muth and Sou Met. The investigation against Sou Met was terminated in 2015 after his death. Meas Muth was a senior military official. Case 004 defendants included Im Chaem, Ao An, and Yim Tith. Im Chaem held various high positions. Ao An has been charged with genocide of the Cham people, crimes against humanity, other inhumane acts such as forced marriage and rape, and violations of the 1956 Cambodian Penal Code. Yim Tith has been charged with crimes against humanity and genocide, as well as with grave breaches of the Geneva Conventions of 1949 and violations of the 1956 Cambodian Penal Code. None of these suspects has been punished.

Several observations can be made. The Khmer Rouge atrocities ended in 1979 (long before the ECCC was established) when Vietnam sent more than

100,000 of its troops to drive the Pol Pot regime out of power. The Third Indochina War widened when China, the Khmer Rouge's ally, responded by attacking Vietnam, and the war continued until the Paris Peace Agreements were reached in 1991. However, the Khmer Rouge continued its armed rebellion until 1998. Several of its top Khmer Rouge leaders were then brought to justice. For retributionists, some form of justice was served. But this optimism invites caution. Other legal scholars are critical. Cherif Bassiouni is not at all incorrect about the tribunal: "No greater sham of international criminal justice has ever been perpetrated, yet human rights advocates see this as another brick in the foundation of international criminal justice."¹³⁵

The ECCC's Questionable Impact on Peacebuilding

To this day, the legacies left by the ECCC remain unclear. Cambodian democracy finally "died" in 2018 when the ruling party (CPP) eliminated the main opposition party (Cambodian National Rescue Party) by banning it from competing in the 2018 national election.¹³⁶ According to a study by Randle Defalco, "The Cambodian government has, to date, allowed the ECCC to operate independently, so long as the court does not present the risk of threatening CPP interests, including the maintenance of its foundational 'rescue' narrative."¹³⁷

Moreover, the ECCC has left little or no positive legacy for the country's rule of law. John Ciorciari and Anne Heindel conclude that the tribunal "provides almost no evidence that having a majority of domestic judges on the bench improves the Court's function or its public legitimacy or legacy."¹³⁸ They then observe: "The ECCC's broader effect on the Cambodian judiciary or rule of law is much less apparent. Major change in the domestic legal system in the near term is unlikely."¹³⁹ After twenty years, the Cambodian judicial process has been increasingly politicized and tightly dominated by the ruling party.¹⁴⁰ In fact, according to the World Justice Project's Rule of Law Index 2023, Cambodia still ranks 141st out of 142 countries, just above Venezuela. The country's score decreased within East Asia and the Pacific, where it ranks 15th out of 15.¹⁴¹

More noteworthy is that Cambodia's state fragility has improved little over the years. According to the Bertelsmann Stiftung's Transformation Index, Cambodia's fragility has intensified in recent years, primarily in the societal and political dimensions, marked by shrinking civic space and declining

democratic governance. While some economic and security indicators showed modest improvement, overall fragility remained largely unchanged.¹⁴²

In short, the ECCC cannot be credited with ending the civil war in Cambodia, nor can it be said to have produced positive legacies in terms of democratic and legal developments. The Cambodia case shows that political reconciliation made it possible for the repatriation of refugees to occur despite the absence of justice. This does not mean that national reconciliation has now been ultimately achieved. Political factionalism continues to pose a challenge to reconciliation.¹⁴³

The SPDDC's Insignificant Role in Timor-Leste and Indonesia

Compared to the hybrid tribunal in East Timor (Timor-Leste), the ECCC was more effective in prosecuting and punishing the leaders most responsible for serious crimes. The SPDDC, which operated from 2002 to 2006, succeeded in indicting and convicting some criminal suspects, but almost all were those in low-ranking positions. More than five hundred outstanding cases were investigated. The tribunal indicted nearly 400 people and conducted fifty-five trials. The indictees included seven Indonesian military officers from the Indonesian National Armed Forces (TNI), four Indonesian police chiefs, sixty Timorese TNI officers and soldiers, the former governor of East Timor, and five former district administrators. However, almost all of them were never prosecuted, as they still lived in Indonesia, where the judicial process was considered tainted and let them “walk free or be subjected to insignificant sentences.”¹⁴⁴ Close to ninety suspects were charged with serious crimes; eighty-four were convicted, but only twenty-four pleaded guilty.¹⁴⁵ The eighty-four convictions involved only low-ranking members of East Timorese militias, and no high-ranking Indonesian military officers—those most responsible—were prosecuted.¹⁴⁶

However, evidence suggests that Timor-Leste has experienced higher levels of peace, reconciliation, democracy, and the rule of law than those in Cambodia. The process of national reconciliation and the return of refugees to Timor-Leste did occur, but not as a result of the tribunal. Alison Ryan writes, “Despite being based in Dili and staffed with some national actors, the SPDDC did not engage the people of Timor-Leste. The domination of international personnel and lack of outreach is likely to have contributed to the lack of attendance by local communities.”¹⁴⁷

To facilitate the return and reintegration of refugees and ex-combatants, the Timorese government granted safe passage to indicted high-ranking pro-Indonesian militia members and later, following the 2006 crisis, granted ninety-four presidential pardons.¹⁴⁸ Timor-Leste's "incentive for moderate, reconciliation-oriented policies was the pressing need to repatriate the roughly 250,000 refugees who had relocated to West Timor after the overwhelmingly pro-independence vote, many under compulsion from Indonesian forces."¹⁴⁹ This point does not suggest that victims of serious crimes found a true sense of closure. According to Ellen Nakashima, "survivors' frustration is deepened by a sense of betrayal by their own government and the United Nations," whom they view as "playing word games."¹⁵⁰

However, the government made it possible for most Timor refugees to return home, not because of the threat of retribution and accountability but because of its absence.

Timor-Leste's Resistance to Retributive Justice for Peacebuilding

The political leaders of Timor-Leste even resisted international pressure to prosecute criminals and instead chose to pursue peace and reconciliation on a different path. Not only did they reject justice, they also made reconciliation one of their top policy priorities (along with others such as economic development).¹⁵¹ The Ministry of Justice was unwilling to accept substantial international funding offers to the SPDDC. Instead, the Timorese and Indonesian leaders created the Commission of Truth and Friendship (signed in 2005) to help promote reconciliation between the two countries and provide some closure for victims.¹⁵²

Based on democracy indices, Timor-Leste and Indonesia are now more democratic than Cambodia. The Democracy Index 2024 ranks Timor-Leste 46th and Indonesia 50th out of 167 countries, ahead of Cambodia (130th). Both also rank higher than Kenya (89th), Uganda (98th), Rwanda (114th), the DR Congo (156th), and Sudan (162nd), where retributive justice efforts have been noted.¹⁵³ The Bertelsmann Stiftung *Transformation Index* places Timor-Leste 21st and Indonesia 48th, far above Cambodia at 123rd. Bertelsmann Stiftung concludes: "Since 2001, free and fair multi-party elections have been held regularly in Timor-Leste. Universal suffrage is ensured, and all political parties can run. Hotly contested national elections in 2017 and 2018 saw no reports of violence and fewer irregularities than

in previous elections.”¹⁵⁴

Although it does not rank Timor-Leste among 140 countries, the *Rule of Law Index 2024* gives Indonesia 92nd place out of 142 countries,¹⁵⁵ which is still better than Cambodia. However, the Fragile States Index (FSI) 2021 report concludes that “among the ten most improved over the decade are Indonesia and Timor-Leste.” The report states that Timor-Leste (one of the world’s youngest countries) saw the most significant improvement in its 2021 FSI score thanks to a decade of steady progress and increased resilience in 2020.¹⁵⁶ The country has shed its fragile status, achieving one of the most considerable global reductions in fragility scores.

In short, these hybrid tribunals did not help end wars, foster peace (including refugee return), or deter serious crimes. Despite the SPDDC’s weaker performance compared to the ECCC, Indonesia and Timor-Leste have each developed a stronger democracy and rule of law than Cambodia. Serious crimes still allegedly occurred in China, North Korea, Myanmar, and the Philippines.¹⁵⁷

CONCLUSION

The empirical evidence presented in this article raises more questions than answers about the impact of global retributive justice. On the brighter side, the case studies show that some of the most serious criminal offenders were held accountable. On the darker side, the rising number of refugees worldwide indirectly underscores the profound global retributive justice crisis.¹⁵⁸

The question is whether the ad hoc and hybrid tribunals and the ICC have ended armed conflicts, deterred serious crimes, and built peace. Impunity has become the norm, and the international criminal justice system has not adapted swiftly enough to address it.¹⁵⁹ Although not discussed in this article, the International Military Tribunals at Nuremberg and for the Far East (created after the Second World War to prosecute German and Japanese criminals) did little to transform world politics. The more recent judicial mechanisms under discussion failed to end the political violence that produced refugee crises, deter serious crimes, and build peace.¹⁶⁰ Between 1945 and 2008, conflicts and mass atrocities committed in countries around the world (including Cambodia, China, and the Soviet Union) caused countless millions of deaths, many falling under crimes against humanity. By 2016, experts were noting

a “democratic recession,” with more nations regressing than progressing.¹⁶¹ There has also been a notable global decline in the rule of law.¹⁶²

None of the case studies shows that one type of ICT/C performed more effectively than the others. On one level of comparative analysis, evidence does not confirm that formal trials made a decisive impact in all case studies. The ICC did not hold enough criminal offenders accountable; it did not end political violence, deter serious crimes, or build peace. The ICTY and the ICTR were neither instrumental in ending the wars nor in preventing serious crimes, nor in contributing to peacebuilding. NATO played a pivotal role in ending the Balkan Wars. The European Union, the United Nations, and the United States all contributed to helping stabilize the region. The Tutsi rebels ended the genocidal regime led by the Hutu before the ICTR was created. Still, the new Tutsi government has pursued political justice, engaged in new wars, and moved toward dictatorship. The hybrid tribunals in Cambodia and Timor-Leste were established after the wars ended (following the Vietnamese and Austrian-led UN military interventions, respectively). Still, it is questionable whether the tribunals contributed to crime deterrence and peacebuilding in the region. Serious crimes are committed elsewhere, such as in Bangladesh, China, Myanmar, and North Korea.

On the second level of comparative analysis, findings do not find a consistent pattern of effectiveness regarding the impact of retributive justice. Although the ECCC succeeded in prosecuting more top criminal leaders than the SPDDC, for example, Cambodia has been ranked significantly lower than Indonesia and Timor-Leste in terms of democracy and rule-of-law development.

The findings highlight the limitations of retributive justice and caution against excessive optimism. Although there is no space for detailed recommendations, several brief observations are worth considering. First, global retributive justice has not freed the world from power and security politics. Theoretically, political realism offers a more robust explanation of justice than liberalism, which emphasizes retribution but lacks a mechanism for achieving lasting peace.

Second, military interventions ended wars and crimes, enabling ICTs/Cs but risking escalation without a credible commitment to defeating offenders. Post-Second World War prosecutions and formal trials in Cambodia,

Timor-Leste, and Rwanda proceeded only after the armed conflicts had ended. Force can save lives, but this coercive means often causes more significant harm without peacebuilding efforts. Two examples: the Vietnamese invasion of Cambodia widened the Third Indochina War, and Israel's military efforts against Hamas only highlight severe humanitarian costs, but the use of force has widened the war against those who committed atrocities.

Third, skeptics correctly caution against pursuing retributive justice in war-torn countries, as it risks unintended consequences. Critical scholars are not wrong when suggesting that memories of colonialism, tied to Europe's "civilizing mission," may resurface when retributive justice is applied without nuance. The African Union's criticism of the ICC reflects these complexities. While the ICC's actions focus on justice, perception, survival or security politics in fragile states, their implementation remains a significant challenge.

Thus, a delicate tension always persists between retributive justice and peace—both desirable, yet when pursuing the former, the latter falters, making pragmatic peace deals appear to be a more practical approach. Peacebuilding is a highly complex post-conflict process that can still be successfully pursued without aggressively pursuing retributive justice. Cambodia had achieved a degree of peace and stability prior to the establishment of the ECCC. Despite the denial of justice in Timor-Leste, the country remains a compelling model for conflict management and peacebuilding—a potential model that warrants meticulous consideration for further progress.¹⁶³ Specifically, no severe refugee crisis exists in Timor-Leste. Thus, prioritizing peacebuilding without relying too much on the heavy hands of justice looks more promising.

Well-crafted and effectively implemented peace agreements (incorporating amnesty, elections, the rule of law, and economic reconstruction) can promote reconciliation and remain vital for conflict termination, peacebuilding, and crime deterrence. Jean Kamatali's perspective adds more depth to this point: reconciliation should prioritize political initiatives and alternative approaches to conflict management and peacebuilding over reliance on retributive justice. These efforts must also be paired with supported economic development to be effective.¹⁶⁴

Future research should incorporate diverse theoretical approaches and employ other comparative research methods to help deepen the understanding of

retributive justice. Developing a quasi-experimental research design, for example, may present an opportunity to compare different cases systematically, where mass atrocities were followed by formal trials versus control cases involving serious crimes without them. This method could further yield valuable insights into the comparative effectiveness of formal trials in addressing mass atrocities.

ENDNOTES

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BOOK REVIEWS

Monica Prasad. *Problem-Solving Sociology: A Guide for Students*. New York: Oxford University Press, 2021. ISBN: 978-0-19-755849. Pp. 234.

Monica Prasad's *Problem-Solving Sociology: A Guide for Students* embarks on an ambitious journey to reorient sociology toward addressing and solving social problems, positioning the discipline as a potent tool for societal change. Prasad critiques the current state of sociology, which she perceives as bogged down by an overabundance of descriptive research that, while valuable, often stops short of proposing solutions. She identifies a core tension within the discipline: the conflict between the sociological values of resistibility—skepticism toward absolute claims of truth—and solidarity—the collective action necessary for social change. This tension, Prasad argues, has led to a scholarly impasse where descriptive analysis predominates at the expense of problem-solving research.

Prasad's argument unfolds against the backdrop of sociology's fundamental dilemma: how to remain critically engaged with the world without succumbing to paralysis by analysis. She suggests that the discipline's strength lies in its ability to theorize, or engage with the "thought machine" of sociology, not just for its own sake but as a means toward solving real-world issues. Theorization, according to Prasad, is not antithetical to practical problem-solving but is, in fact, indispensable to it. She advocates for a pragmatic approach to sociology that does not lose sight of the importance of theory. The crux of her argument is that theory and practice are not separate domains but are interconnected in a feedback loop that can enhance our understanding of social problems and the most effective ways to address them.

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The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 179-187

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Prasad meticulously develops this thesis throughout the book, guiding readers through the intricacies of conducting problem-solving research. She emphasizes the need for a shift toward causation analysis—understanding the root causes of social issues, the reasons they persist, and the mechanisms by which change can occur. This approach, she posits, enables researchers to move beyond mere description to actively seek solutions to societal problems.

A significant portion of the book provides practical advice for students interested in undertaking problem-solving research. Prasad delves into the complexities of defining social problems, arguing against the notion that such definitions are straightforward or uncontroversial. Drawing on Max Weber, she contends that while objectivity is an ideal, sociology cannot be value-free. Awareness of one's values, Prasad suggests, is crucial for conducting research that aspires to be as objective as possible. She also tackles the challenge of normative questions, advocating for their transformation into analytical questions that can be systematically explored.

Prasad urges students to critically examine their research subjects, be they “victims” or “villains.” She stresses the need for a nuanced analysis that addresses the factors of victimization without attributing blame to the victims, and considers villains as potential catalysts for change. Prasad also highlights the value of using comparative case studies to identify causal mechanisms that can guide effective solutions. Additionally, she advocates for broadening the scope of research beyond specific case studies to gain deeper theoretical insights.

In chapters 6 through 8, which Prasad designates as “the core of the book,” she delves into the essential decisions that students encounter throughout the research journey. These chapters provide a scaffold for students to critically evaluate their research approaches. The segment “Finding Your Project” is particularly noteworthy, where Prasad tackles the formulation of research questions, the scope of the project, and the identification of problems, guiding students toward a nuanced understanding of their research projects.

A key aspect of her approach is the transformation of normative queries into analytical questions, a move that shifts the research focus from broad, value-laden inquiries to specific, actionable investigations. This methodological pivot allows researchers to trace the pathway from the current state to potential solutions, thereby deepening the impact of sociological research

on real-world problems. Prasad crystallizes this approach with the statement “If the world you wish to see is a world without sexism, examine what leads to less sexism and what reduces it” (p. 103), illustrating how analytical questions can dissect and address complex social issues.

Furthermore, Prasad underscores the importance of embracing a broad spectrum of insights, advocating for the inclusion of perspectives beyond academia to enrich research findings. She cautions against letting the search for meaning unduly influence one’s analysis, promoting a research ethos that values diversity of thought and critical self-reflection.

Prasad also includes exercises designed to help students clarify their research decisions, from developing hypotheses to conceptualizing causal mechanisms. These practical tools aim to equip students with the skills necessary to navigate the complexities of problem-solving research.

In concluding, Prasad addresses potential objections to problem-solving sociology, presenting counter-arguments that underscore the value of this approach. She situates problem-solving within the broader landscape of American sociology, arguing for a pragmatic synthesis of the discipline’s rationalist, emancipatory, and skeptical traditions. This synthesis, she asserts, can overcome theoretical stalemates and advance the discipline by fostering a deeper understanding of social problems and their potential solutions.

Problem-Solving Sociology is not just a call to action for aspiring sociologists; it is a nuanced argument for the discipline’s capacity to effect real change. By advocating for a closer integration of theory and practice, Prasad offers a vision of sociology that is both intellectually rigorous and practically engaged. The book is a valuable resource for students and scholars alike, providing a road map for conducting research that not only analyzes but also seeks to ameliorate social problems. Through its insightful analysis and practical guidance, Prasad’s work challenges the discipline of sociology to fulfill its potential as a force for good in the world.

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Charles F. Howlett, Christian Philip Peterson, Deborah D. Buffton, and David L. Hostetter, eds. *The Oxford Handbook of Peace History*. Oxford: Oxford University Press, 2023. ISBN 978-0-19-754908-7. Pp. 933.

This volume contains an impressive number of essays, a total of forty, discussing a wide range of topics related to the whole peace spectrum, that is, from negative to positive peace. This immediately captures the reader's interest because the discipline of history is more focused on war. There has been less historical effort and less interest in considering the countless voices and fates of people working to overcome the curse of war and structural violence. This raises the question of whether the preoccupation with war reinforces its hold over our minds and bodies.

The book is divided into six parts, preceded by an introduction. The introduction, sixty-eight pages long, explains the difficulties of compiling a history of peace. It touches on being mindful of the diverging historical and cultural perspectives on peace and war that need to be accounted for in a history of peace. It also adopts Johan Galtung's distinction between negative and positive peace and argues that both a history of peace as counterweight to the history of the brute violence of war and a history of efforts to overcome structural violence need to be included in the book.

Close to half of the book follows the predominant historical account of cultural epochs and their periodization, however with a focus on peace instead of war (though both are interrelated). Thus, Part 1 covers ancient times to 1500 CE, Part 2 is on the age of empires, from 1500 to 1914, and Part 3 deals with the era of global conflicts, from 1914 to the twenty-first century. The essays in Part 1 explore traditions and ideas about peace in ancient Egypt, ancient Greece, ancient Rome, imperial China, and the European Middle Ages. Part 2 explores peace efforts in Europe, Africa, Asia, North America and specifically the United States, as well as in Latin America. Part 3 addresses peace movements since the beginning of the First World War, reflecting on efforts in Europe and America as well as in Asia, by Muslims, in the Arab world, and between India and Pakistan.

Part 4 dedicates a chapter to each of these famous peacemakers: Erasmus, Elihu Burritt, Bertha von Suttner, Toyohiko Kagawa, Jane Addams and

Emily Greene Balch, Mohandas Gandhi, Albert Luthuli, Olof Joachim Palme, and Sérgio Vieira de Mello. Though these remarkable personalities are well-known, having a chapter on each of them helps to understand their times, their challenges, and their achievements.

Part 5 addresses “essential issues” in peace history (p. 609). It shows that the peace project depends on dealing with the many factors contributing to structural violence. It also shows how fragile peace is and that the neglect of one positive aspect of peace can prompt people to embrace violence in the service of justice. The themes discussed are (using the self-explanatory chapter titles) “Trade, Insecurity, and the Costs of Conflict”; “International Law, International Institutions, and the Pursuit of Peace”; “International Dimensions of Anti-Nuclear Activism”; “The Literature of Peace: A War Refugee’s ‘Orphaned Voice’ in *The Sympathizer*”; “Gender, Sexuality, and Peace”; “Religious Peacebuilding Since World War II”; “Addressing Inequality in Peace Studies: How the Peace-Development Nexus Is Driving a Needed Transformative Turn”; “Conscientious Objection: A Brief International History”; and “Socialism, Internationalism, and Peace: 1869–1919.”

The last part of the book contemplates the future of peace history. It starts with the suggestion of author John Smolenski to define peace as the “maximum amount of allowable violence at any given moment or place in time” (pp. 825–26). This definition should allow an assessment of peace within differing cultural and historical contexts. This is admittedly a more realistic view of peace and conflict, because it affirms our necessary situatedness within a cultural *Geworfenheit*. It also gives a useful entry point for peace interventions, that is, by highlighting the internal contradictions of a violent practice that can lead to positive change.

Michael Goode, in his essay “The Future of Peace History,” argues that historical accounts should be less captivated by reporting on the seemingly endless occurrence of war. Rather, history should tell the story of peace, giving us another vision than brute force for resolving our conflicts. A story of peace also can teach us lessons we can adopt in working to create a peaceful world. Goode further stresses that storytelling needs to reveal and address past trauma that often is partly responsible for present-day conflicts.

The last chapter, by Wendy E. Chmielewski, gives the reader a toolbox for finding sources for peace history that haven’t been included in official

history accounts. It thus is an encouragement to continue the work of this long anthology.

As an anthology of peace history, this book is an ambitious project. In reading through the essays, it quickly becomes clear that even this very thick book barely captures the proverbial tip of the iceberg of peace and its many fascinating facets. Still, it is encouraging to see such an attempt, and it inspires further exploration of the whole range of peace issues that have been tangentially addressed in the volume. In the end, there is so much more to peace than there is to war which is, maybe, testimony to the problematic human desire for simple solutions.

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Rajat M. Nag and Harinder S. Kohli. *From Here to Denmark: The Importance of Institutions for Good Governance*. Oxford: Oxford University Press, 2023. ISBN 978-0-19-889310-3. Pp. 444.

This book provides a thorough analysis of development practice by experts on emerging markets, using a fictional Denmark where “freedom reigns, justice prevails, people live in peace and security under the rule of law, and are treated fairly and with dignity by their fellow citizens and their government” (p. 1). There are four parts to the book, highlighting the essential understandings for moving toward “Denmark.” These are awareness of the present human condition, the importance of mindsets, lessons learned from history, and the interplay of the state, markets, and the community.

The first part addresses the components influencing development. These are the after-effects of the pandemic, population developments, economic output, income levels, inequalities within countries, the rise of the middle class in many developing countries, urbanization, human development, access to infrastructure, climate change and its economic effects, democracy as a development factor, corruption, civic society, social media, and access to justice. These issues are well documented by the authors, constituting an

excellent resource for other researchers interested in social and economic development.

The authors then identify the four elements of good governance, which are predictability, transparency, participation, and accountability. It is important to look closely at governance policies and reflect whether they exist only on paper or whether they have also been actualized. The authors also establish that good governance is an important factor for better social development—which is now honoured by the 2024 Nobel Prize in Economics.

A whole chapter is dedicated to corruption. This is a serious development issue, and the authors are very clear that corruption doesn't only hurt—No, it kills" (pp. 81–103). Also, institutions play a significant role and are characterized by commitment, cooperation, and coordination. Institutions can be used for power politics (called extractive institutions by the authors), or they can create open-access societies based on universal ethics (called inclusive institutions). These discussions also form a segue to behavioural economics and the second part of the book, on the importance of mindsets.

Part 2 uses the findings of Daniel Kahneman's *Thinking, Fast and Slow*, underscoring the premise that most human decision-making is not rational. The authors present in detail what affects decision-making and models that can be applied such as the Nash equilibrium, the prisoners' dilemma showing the importance of reciprocity, limited altruism, and motivators for cooperation. Again, these explanations are a great resource for social planning.

The authors' reflection on mental models, beliefs, and norms is also most valuable because they emphasize not only the existence of these factors but also their resilience, thus raising awareness of the "long-term staying power of mental models" (pp. 190–95), or *inertia* (the reviewer's choice of term), which is often underplayed as a crucial determinant for mental models. Changing beliefs, norms, and mental models is thus a major challenge for human development that requires sensitive and pragmatic approaches to be effective. The authors use several examples that are inspiring, though they warn that individual and social inertia is a force to reckon with in change management.

Part 3 analyses the historical conditions that have led to societies with high scores on the human development index. In Europe, such societies exist in

the actual Denmark and Great Britain, demonstrating that pressures for more political and economic inclusion through historical political developments have contributed to better governance. In Asia, the authors investigate Japan and Korea and conclude that the emphasis in these countries on education and health, as well as on changing social norms to allow for open-access orders, has contributed to their social, political, and economic successes. This part of the book also looks at Botswana and Uruguay, both—for different reasons—benefitting from open-access orders.

In Part 4, the authors identify the interplay of the state, the market, and the community as guarantor of the ideals of the fictional Denmark. Taking Thomas Hobbes's social contract theory as premise, they argue that there is a role for a strong state, though it needs to be controlled in order not to become despotic. Equally, a free market generates wealth, though reliance on the invisible hand can easily lead to competition distortions such as monopolies or intolerable wealth inequalities stifling social and economic development. The free market thus needs to be controlled by state and the community. Also equally important is the role of community, by devolution of political power to the community level, leaving the power of decision-making with those affected by these decisions. Thus, it is a delicate balance between the three players, the state, the markets, and the community, to achieve positive results for individuals in society.

In their final remarks, the authors summarize their findings, re-stating the importance of good government and institutions that are not smokescreens but are delivering on their mandates. They reiterate how norms, beliefs, and mental models are the determinants for individual, social, and economic actualities, and need to be addressed for desired changes. Human well-being also depends on open societal systems and inclusive institutions, as well as on the right balance of the state, the market, and the community. For humanity to move forward, the inertia that supports unjust regimes is a major challenge that requires enlightened leadership to resolve. The authors conclude the book by identifying “ten global megatrends” (pp. 366–75), which are better education, rising middle class, more urbanization, rising inequalities, climate change, fast technological progress, better information sharing, the spread of social media, stronger civic societies, and stronger emerging economies.

From Here to Denmark is a valuable contribution to what needs to be

considered in overcoming structural violence to create peaceful societies. It deserves to be widely studied as a countermeasure to the present emphasis on securitization, with its rather harmful consequences for human development.

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PEACE RESEARCH

The Canadian Journal of Peace and Conflict Studies

Volume 56, Number 1 (2024): 188-190

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