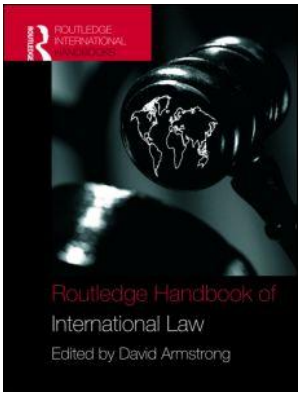

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International refugee law: dominant and emerging approaches

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International refugee law scholarship has long been dominated by a positivist tradition within which the human rights approach has now become the dominant approach. However, states and their formal agreements get us only so far in explaining how refugee law is created and how it develops. There is another layer of explanation that looks into transnational activities and their effect on how law is shaped, interpreted, applied and developed. This chapter therefore also explores two further emerging approaches in refugee law: the transnational approach and the participatory approach. It argues that whereas the dominant human rights approach focuses mainly on sources and contents of rules (and their enforcement), both the transnational and participatory approaches are useful in capturing the complexities of the process of law formation and law development by looking more specifically at networks and other participants in the process of law making. The challenge of contemporary international refugee law is to recognize more explicitly the role of such networks and the soft law and norms that they often produce.

There is little doubt that "international refugee law has long occupied centre stage in refugee studies"[1] (Wilde 2001: 140; Zetter 2000) and that traditionally "its scholarship has been dominated by a positivist tradition" detached from political reality (Chimni 1998: 352). Accordingly, international refugee law has long been viewed as a set of rules (e.g. the 1951 Convention Relating to the Status of Refugees) dominated by states in their application but helped by an international organization (i.e. UNHCR) in their development. However, the world has moved on and so has the way in which we theorize (refugee) law. Most significantly, the human rights approach has now become the dominant approach in refugee law. This scholarly school has not only had an impact on the content of refugee law, it has also changed the boundaries within which refugee law operates. However, the human rights approach has had little impact on the "formal scheme of the Convention [which] remains one of *obligations between States*" (Goodwin-Gill 2004: 7). This is because the human rights approach maintains a primary focus on rules as applied by states and relevant international organizations. Hence it fails to challenge the way international lawyers are trained to think "in normative and institutional hierarchies" (Byrne et al. 2004: 356). This chapter therefore also explores two further emerging approaches in refugee law that undertake such a challenge: the

transnational approach and the participatory approach.

Both these approaches originate in liberal theory of international law which focuses on the importance of non-state actors and progressive values in the world legal order (Lasswell and McDougal 1943; McDougal 1960; McDougal and Lasswell 1959). The transnational approach highlights the role of processes, networks and discourse involving actors that operate within and across state boundaries (Slaughter 2004a). These transnational networks and processes clearly contribute to international normative activity (Boyle and Chinkin 2007), and to a changing conception of the world less dominated by a vertical notion of international law and domestic law; one speaks of epistemic community, transgovernmentalism, and governance. The participatory approach highlights the imperative for wider participation in this discourse (from non-western states to the refugee themselves) as being essential to build the trust necessary for international refugee law to develop further. Through this discourse, our conception of the world is changing, and so is the law relating to refugees (Chimni 1998; Harvey 1998, 1999; Hathaway and Neve 1997). Both approaches are attractive because they offer a more *prescriptive* approach to international refugee law quite unlike the *descriptive* approach of legal positivism. From the point of view of scholarship, therefore, the task is not to ascertain the content of law but to advocate law that promotes core community values. These emergent approaches therefore provide a dynamic picture of the evolution of refugee law in a world increasingly characterized by globalization and the emergence of a "common public order" (Goodwin-Gill 2006). Beyond these theoretical approaches, refugee law scholarship has also become more sensitive to the moral and ethical dimension of refugee studies (Gibney 2004; Juss 2004) as well as to sound historical foundations (Nathwani 2000; see also Abuya 2007).

Positivism and the human rights approach

Positivism views international law as "an abstract system of rules which can be identified, objectively interpreted, and enforced" (Chimni 1998: 352; see also Hart 1998: 214; Armstrong et al. 2007: 9–33, 74–83). The positivist tradition limits the possibility of engagement with politics (a good illustration of this is Hathaway 2007 and Hathaway and Neve 1997). From this perspective, refugee law has been viewed as a self-contained regime of international law with roots in extradition law and the laws relating to nationality laws and aliens (Grahl-Madsen 1966: 79; Weis 1953: 480),[2] so very much "hooked on to traditional concepts of state territorial jurisdiction, i.e. the sovereign right of states to decide on admission and expulsion of all those not linked by the bonds of nationality" (Gowlland-Debbas 1996: x).

The Refugee Convention was drafted at a time (1951) when the cold war took off, hence it has been labeled as the "child of the Cold War" (Bertrand 1993: 498). As its name indicates, the Convention Relating to the Status of Refugees is about defining who is a refugee (article 1), and the rights and benefits which persons recognized as refugees are entitled to, including the guarantee against *refoulement* (articles 2–34). *Non-refoulement* prohibits the return of refugees to any country where they are likely to fear for their life or freedom (article 33(1)). It has been described as "a cardinal principle of refugee protection" (Lauterpacht and Bethlehem 2003: 107). Issues of procedures (i.e. how to make a decision on refugee status) were never directly a matter for international law, thus states have been left with the choice of means as to implementation at the national level (Lambert 2006: 162–3). The principle of good faith in international law nonetheless requires that states provide fair and efficient asylum procedures in their compliance with the Refugee Convention, if not in

terms of states' intent, at least in terms of the effect of states' action (Goodwin-Gill and McAdam 2007: 458).

In its early days, the definition of a refugee (article 1A(2)) was limited to persons who were escaping events that took place before 1951 (essentially in Europe). A Protocol Relating to the Status of Refugees (1967) extended the application of the Refugee Convention to *all* refugees. Both instruments have been described as "the foundation of the international regime for the protection of refugees" (UNHCR 2005: 1). To maximize accession, "they were carefully framed to define minimum standards, without imposing obligations going beyond those that States can reasonably be expected to assume" (UNHCR 2001: 29). There are currently 141 states parties to both instruments.[3] The underlying values of the Refugee Convention are clearly stated by UNHCR as being: humanitarian, human rights and people oriented; non-political and impartial; international cooperation; and universal and general character (UNHCR 2001: 2–3).

According to article 1A(2), Refugee Convention:

> The term "refugee" shall apply to any person who owing to a 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.

It follows from this definition that the conceptualization of refugeehood in international law is based on the restrictive concepts of persecution and alienage (Shacknove 1985). This definition has been the subject of intense scrutiny through refugee determination procedures and a substantial body of jurisprudence has been created. But in the absence of an independent international body competent to interpret the Refugee Convention, each contracting party is free to adopt its own interpretation. This means that at present considerable divergence exists in the way international refugee law is interpreted and applied. In an effort to improve implementation of the Refugee Convention, UNHCR has suggested a more regularized system of reporting, periodic meetings of states parties to review implementation issues, and harmonized regional processes for interpretation and application of the principles (UNHCR 2001: 30). Meanwhile, some lawyers have called for the establishment of an international body competent to monitor the application of the Refugee Convention by contracting states and to interpret provisions of the Refugee Convention (Chimni 2001: 157; Hathaway 2002; Macmillan and Olsson 2001; North 2005). Arguably, such proposals may be presented as attempts to claw back some of the legal space occupied by states in this area of law (Chimni 2001: 158).

It has been argued that the dominance, in particular positivist, of refugee law within refugee studies during the cold war resulted in a "depoliticized approach" which was not without consequences (Chimni 1998: 354). One such consequence was the attention given by scholars to the basic activities, structure and legal status of UNHCR in preference to its "knowledge and dissemination functions" (Chimni 1998: 366). However, international refugee law has been significantly expanded through U.N. General Assembly's resolutions and EXCOM conclusions as well as customary international law and Security Council resolutions (Gilbert 2005: 5; Goodwin-Gill and McAdam 2007: 5–7, 20–50; Gowland-Debbas 2001; Lewis 2005). Furthermore, UNHCR has, since the end of the cold war, become an operational agency and through this has come to recognize the importance of human rights in its work (Stoltenberg 1991: 150).[4] Thus, today protection has been described as comprising "both a legal framework [i.e. international and regional refugee law and human rights law treaties] and a solutions framework [i.e. refuge/asylum, voluntary repatriation, and assistance]" (Goodwin-Gill 2006: 6). That said, the

move by UNHCR towards the protection of internally displaced persons and its activities regarding refugee status determination in nearly all the developing countries have raised serious concerns under international human rights law (Chimni 2006; Pallis 2006). Another consequence (which will be discussed later) was the fragmentation and isolation of refugee law which became seen by many as *sui generis* (Chimni 1998: 354). Finally, the positivist approach to international refugee law has also been relied on to explain states' reluctance to recognize a subjective right of asylum. Goodwin-Gill and McAdam observe that when article 14(1) of the Universal Declaration of Human Rights (UDHR) was being drafted, states were divided between those "that regarded asylum as their sovereign prerogative [e.g. the UK], and those which saw it as a duty of the international community [e.g. France]" (Goodwin-Gill and McAdam 2007: 358). The former view won over the latter, indicating that "States had no intention to assume even a moral obligation in the matter" (Goodwin-Gill and McAdam 2007: 358). As a result, article 14(1) as adopted in the UDHR reads: "[E]veryone has the right to seek and *to enjoy* [as opposed to *be granted*] . . . asylum from persecution."

Today, Goodwin-Gill and McAdam maintain that "the individual still has no right to be granted asylum. The right itself is in the form of a discretionary power" (2007: 414). In practice, many states have used the refugee definition in article 1A(2) of the Refugee Convention as the basis for granting asylum but asylum "as an obligation on States to accord lasting solutions, with or without a correlative right of the individual, continues to be resisted" (Goodwin-Gill and McAdam 2007: 415). That said, states have certain legal obligations under refugee law, human rights law, and humanitarian law, in particular they have a duty of *non-refoulement*. Furthermore, international law, which until 1991 supported the doctrine of non-intervention (article 2(7) U.N. Charter) in countries of origin producing refugees (Baer 1996: 246; Goodwin-Gill and McAdam 2007: 2), has dramatically transformed under Security Council's action. So, it has been argued that we may be witnessing an "emerging international community interest" or "common public order" based on the following elements: a right of refugees and the displaced to return to their homes in freedom and dignity with a correlative states' responsibility to protect such right; an expansion of the recognition of criminal responsibility against individuals found to have committed genocide, war crimes or crimes against humanity; and a right of access to refugees and civilian populations at risk (Goodwin-Gill and McAdam 2007: 6–7; see also, more generally, CSW 2007; Jaquemet 2001).

The formal acknowledgement that international refugee law is indeed part of international human rights law has been traced back to the adoption of the Refugee Convention as a U.N. treaty (Gowlland-Debbas 2001: 193, 200–203; Weis 1995: 1).[5] This is because the Refugee Convention became an instrument intended to contribute to the achievement of the purposes and principles of the U.N. (articles 1(3) and 55, U.N. Charter). Crucially, this commitment to human rights, as enunciated in the U.N. Charter but also in UDHR, is explicitly stated in the Preamble of the Refugee Convention. Yet, a number of factors (such as, the lack of a subjective right of asylum, traditional concepts of sovereignty and the cold war) created a narrow conception of refugee law, one that became "segregated from the development of international human rights law" (Gowlland-Debbas 1996: x; see also McNamara 1998: 175). Flauss speaks of ambiguous and contradictory relationships between international refugee law and international human rights law (Flauss 2001: 94). He gives as an example, the fact that it took 30 years for the International Institute of Human Rights (Strasbourg) to introduce a course on refugee law as part of its annual teaching program (Flauss 2001: 94). Also, one has to wait for the 1990s to see any significant references made to human

rights in UNHCR EXCOM Conclusions (UNHCR 2005) and for law scholarship to articulate fully the relationship between refugee law and human rights law (Anker 2002; Harvey 1998, 1999; Hathaway 1991, 2007; Hathaway and Neve 1997; Helton 2002: 124). Gowlland-Debbas speaks of a veritable "rediscovery" that refugee law *is* human rights law (Gowlland-Debbas 1996: xiii). There is now clear understanding that international human rights law serves to reinforce refugee protection and that it gives meaning to the "right to enjoy asylum" in international law (Edwards 2005; Gil-Bazo 2006: 600). Should an inconsistency occur "between the two bodies of law, the higher standard must prevail" (Edwards 2005: 330).

Predictably, this "rediscovery" has not gone unchallenged. First, it has been argued that human rights law is not without its own problems and that some of these problems will simply transfer to refugee law, such as the domestic/international jurisdictional debate, the sovereignty/humanitarian intervention debate, the lack of self-interest as a motivating force, the proliferation of human rights coupled with the lack of a hierarchy of human rights, and the problem of institutional coordination and overlapping mandate (Gowlland-Debbas 1996: xiii; Kennedy 2005; Nathwani 2000: 364–7).[6] Second, it has been observed that the juridical link between these fields is mostly in the form of *soft law* (Gowlland-Debbas 1996: xiii). One notable exception is the adoption of the EU Qualification Directive (that is a binding legal instrument) which combines both refugee protection status and subsidiary protection status (Lambert 2006).

These criticisms notwithstanding, the human rights approach is currently the dominant one in refugee law. This approach explains that refugee law operates on the premise that a human rights violation has taken place or is going to take place imminently (Nathwani 2000). It also takes human rights law as a benchmark for the quality of protection provided by states (and by UNHCR) to refugees in countries of origin (e.g. internal protection) and in countries of refuge (in terms of the rights granted to asylum seekers as well as the rights granted upon recognition of refugee status and complementary protection status) (Goodwin-Gill 2004; Hathaway 2005; Lambert 1999, 2005). Finally, it is being used to tackle issues of states' responsibilities (Gil-Bazo 2006: 600) as well as UNHCR's accountability (Pallis 2006). Viewed from this enlarged perspective, the debate about the linkage between refugee law and human rights law has revealed a number of issues that had remained largely unaddressed in refugee law, such as the right to leave, to return, and to remain, the obligations of the receiving state to meet certain standards of treatments, the obligations of UNHCR to act in accordance with international human rights law in its refugee status determination activities, and the human rights situation in the country of origin (e.g. state responsibility, root causes).

The human rights approach is by no mean incompatible with a positivist tradition; it may indeed sit quite squarely with legal positivism (and its unilateralism and state-centered approach). Hathaway, for instance, argues that "a positivist understanding of international law is an important means to advance both refugee rights, and the more general international human rights project" (Hathaway 2005: 24). This approach may nonetheless be contrasted with a recent trend towards more dialog and wider participation. This trend is *not* incompatible with the human rights approach, but it is in the transnational approach and in the participatory approach that the full depth and breadth of such dialog is best captured.

The transnational approach and the participatory approach

The previous section discussed *international* refugee law based on the assumptions that

"International law has traditionally been just that – international" (Slaughter and Burke-White 2006: 327; see also Lauterpacht 1931: 31). However, globalization and new transnational threats have "changed the nature of governance and the necessary purposes of international law" (Slaughter and Burke-White 2006: 328). And refugee law has not been immune from these changes. Lubbers, for instance, observed that "In a globalizing world and a rapidly changing political environment, the Convention faces many challenges. These include new forms of persecution and conflict, complex mixed migration movements, the reluctance of many states to accept refugees, and restrictive interpretation of the Convention" (Lubbers 2003: xv). *International* refugee law therefore must contend with an increase in transnational activities and with calls for wider participation in these activities. This is not surprising since "the system of international protection of refugees remains a unique combination, bringing together states, international organizations, non-governmental organizations and the refugees themselves in the pursuit of common ends" (Goodwin-Gill 1999: 221).

This section discusses a few key transnational activities undertaken in this area of international law. It also discusses calls for widening participation in the process of refugee law making. Both these trends are reflected in the transnational approach and the participatory approach, respectively. As highlighted by scholars, these approaches are non-exclusive. Anker, Fitzpatrick, and Shacknove, for instance, talk about "pluralism in refugee law" (i.e. the existence of an increasing number of networks) *and* the need for refugee voices (in particular women refugees) to be taken into account in refugee law reforms (Anker et al. 1998). And Chimni talks about increasing and widening dialog between states and others actors, including refugees, in an "emerging global state" (Chimni 2001, 2004).

Transnational networks and processes in refugee law

More and more networks are working together to tackle cross-borders issues, such as refugee flows, immigration, crime, and terrorism. These networks have different shapes and sizes, and different aims. Single-issue networks focusing on one particular issue are constituted side by side with broader, more general refugee law networks. Government networks, constituted of judges and policy-makers, and networks of intergovernmental organizations (IGOs) are established alongside networks of academics and activists. Chimni argues that this increase in networks and activities is creating a "global state" (Chimni 2004). An alternative perspective offered by Slaughter is that the concept of states is not disappearing, so much as it is "disaggregating" in an age of global governance with states now confronted to a new range of actors that they themselves have created (Slaughter 2004b). With the exception of the EU, all these networks and processes have contributed to the development of refugee law through *soft law* (and norms). This section looks at three kinds of transnational network: judicial, based around an IGO-UNHCR, and based around the EU.

The International Association of Refugee Law Judges (IARLJ) was established at Warsaw in 1997 to facilitate communication and dialog between refugee law judges around the world in an attempt to develop "consistent and coherent refugee jurisprudence" (Storey 2003: 422).[7] This need was felt particularly strongly in this area of law because of the lack of a supranational court competent to develop authoritative legal standards based on the Refugee Convention. Hathaway has described the IARLJ as "One of the most exciting recent developments in refugee law" because it provides clear evidence of the existence of an "ongoing transnational judicial conversation" (Hathaway 2003: 418; see also Slaughter 1994: 121, 127; Slaughter

2003). He further notes that refugee law has recently evolved mostly under the influence of judges and that refugee law has "become fundamentally judicialized" (Hathaway 2003: 418). During the last 10 years, several decisions of superior courts in states parties to the Refugee Convention have indeed contributed to the advancement of international refugee law.[8] Storey even called for the application of "a *principle of convergence*, i.e. that tribunals and courts in different countries should seek as far as possible to apply the same basic principles" (Storey 2003: 423). The role of high courts as "agents of normative change" has been recognized in other areas of law, e.g. aliens' rights (Guiraudon 2000: 1107). In the area of refugee law, this role is particularly strong in light of the coordinating work of IARLJ with many of these decisions (mostly from western states) finding a place on the IARLJ database. This role is nonetheless limited because "of necessity those cases are dependent on their own facts and have no binding qualities outside their own jurisdiction" (Gilbert 2005: 3).[9] However, the EU harmonization process of refugee law is reshaping our understanding of "persuasive authority" and cross-referencing between common and civil law jurisdictions in refugee law is on the increase. So, it may indeed be the case that refugee law judges are increasingly becoming "independent actors in the international arena" (Slaughter 2004a: 68; see also Slaughter 2003).

It has been argued that networks of national governments officials are useful in building trust and establishing good relationships among participants. In particular, looking at the judiciary, it has been argued that judges not only exchange information about different approaches to common legal issues, they also "offer technical assistance and professional socialization to members [. . .] from less developed nations" (Raustiala 2002; Slaughter 2000). Such learning experience has been identified as a two-way street when cross-referencing between high courts happens from the developed world to the developing world and vice versa (Slaughter 2004a: 65–103). This is something that could be developed further in refugee law as it would go some way in addressing some of the criticism raised regarding these networks. Chimni, for instance, argues that a growing network of international institutions – economic, social, and political – is creating a global state of an imperial character (Chimni 2004) and that this "emerging global state" notably lacks the elements necessary for a strong dialog between south and north (Chimni 2001).

There are also a number of networks based around UNHCR. One such network is the Global Consultations Process, launched in October 2000 with the purpose of provoking "both reflection and action to revitalize the international refugee protection regime" (UNHCR 2002: 1). As a process, particular attention was given to dialog and cooperation, and to broad-based participation. So, the participation of refugees as key stakeholders in the system and of NGOs was promoted through an international dialog with 50 refugee women in Geneva and a debate bringing together over 500 refugees in the French National Assembly as well as a forum of refugees in Europe (Rouen, France) (UNHCR 2001: 31). This process lasted 18 months and led to the universal reaffirmation of the Refugee Convention as the basis of refugee protection. A first outcome of the Global Consultations Process was the adoption of the Agenda for Protection, i.e. a program of action drafted by UNHCR (approved by EXCOM in 2002) to improve the protection of refugees and asylum seekers by highlighting existing gaps in the refugee protection regime. Since then UNHCR has drafted several guidelines to complement its now quite outdated Handbook on Procedures and Criteria for Determining Refugee Status. A second outcome of the Global Consultations Process was the publication of the debates (i.e. papers and conclusions) that took place during the Global Consultations expert roundtable consultations (Feller et al. 2003). Lewis has described the Global

Consultations Process and the Programme of Action (in the Agenda for Protection) as "novel methods for contributing to the development of international refugee law" (Lewis 2005: 90). And Chimni sees UNHCR Consultation Process as one step in the direction of UNHCR's new advocate role (between south and north, and between states and other participants, including refugees) (Chimni 2001). He also calls for such initiative to be more sustained if one is to see any change in UNHCR's existing deference towards northern states (Chimni 1998: 365–71).[10] The Convention Plus Process is yet another step in that direction.

Convention Plus started as "an *ad hoc* response to the Agenda for Protection" (Betts and Durieux 2007), the essence of which (i.e. north–south responsibility sharing) had already been floated in North American legal scholarship (Betts 2005).[11] Its specific aims were twofold: "to increase the level and predictability of burden-sharing" and "to channel this new, abstract commitment into finding durable solutions to specific protracted refugee situations." Its overall purpose was to discuss "creating a normative framework for global burden-sharing" (Betts and Durieux 2007: 516; see also Betts 2006: 655). As an interstate process, Convention Plus involved creating structures to facilitate dialog between countries in the south (i.e. host states) and countries in the north (i.e. donor states). It also encouraged coalition and convergence between particular states (i.e. "plurilateralism"). As a multilateral negotiation process, Convention Plus involved states, NGOs and UNHCR in an open and structured dialog. Convention Plus was supposed to lead to the development of special agreements (in either binding or *soft law* form). Sadly, by the end of 2005, all that was achieved was the Multilateral Framework of Understanding on Resettlement and two joint statements relating to targeting development assistance and irregular secondary movements (Betts and Durieux 2007: 514). Nonetheless, Betts and Durieux have praised Convention Plus for its norm-setting role. In particular, they see Convention Plus as representing "a significant new departure for UNHCR" within its approach to facilitating norm creation and as contributing "to the development of a range of ideas that speak to a broader debate on the role of norms within both the refugee regime and global governance broadly" (Betts and Durieux 2007: 515). Thus, they argue that "A mutually shared understanding of 'the rules of the game' [i.e. asylum, assistance and burden-sharing] may therefore offer a basis for beginning to change behaviour" (Betts and Durieux 2007: 515). More generally, Betts and Durieux highlight the key role that UNHCR can play in facilitating "the creation and development of new norms" (Betts and Durieux 2007: 516). Substantively, they identify two complementary models of norm creation in this context: the "institutional bargaining model," which is top down and which is most appropriate when trying to develop universal norms, and the "good practice model" which is bottom up and which provides examples of good practice to be followed in future.

Finally, the European Union can be described as a set of rules (i.e. treaties and secondary legislation), networks (e.g. policy networks on how to implement the asylum EC Directives to achieve harmonization) and processes that are substantially transnational because they go into states (Burley and Mattli 1993: 43)[12] (e.g. the formation of EC asylum measures, their adoption as EC law, and their implementation in domestic law). Europe is now the only region in the world to legislate (through legally binding instruments) on substantive (and procedural) matters of interpretation of the Refugee Convention. While the "power of law" clearly plays a role in these processes, the interaction of "Individual actors – judges, lawyers, litigants – [. . .] with specific identities, motives, and objectives" has been crucial in the further developments of the EU (Burley and Mattli 1993: 53). In the area

of refugee law, however, individual actors have so far mostly been states. The adoption of four key directives and two regulations on matters of asylum concluded the first phase towards the establishment of a Common European Asylum System (CEAS).[13]

The formulation of these legislative acts was a result of political negotiations between key EU member states. Indeed, NGOs, academics and some key non-EU states (e.g. the U.S. and Canada) were only invited by the European Commission to participate in the early drafting stage of this process. Chimni thus describes the harmonization process in Europe as "the positivist methodology taken to its logical conclusion with Eurocrats framing the law in secrecy, away from democratic pressures" (Chimni 1998: 355). Byrne, Noll, and Vedsted-Hansen offer a more comprehensive picture of this process towards harmonization by re-orienting the debate onto the lateral process of refugee law formation, transformation, and reform, i.e. on the activities between domestic, sub-regional and regional forces (Byrne et al. 2004). For instance, having located the formative stage of the "safe third country" notion into Danish legislation, they show how 10 years later, this notion came to be implemented in practically every western European state, and how, again 10 years later, it became EU law. Crucially they note that this process of formation (in Denmark followed by other western European states), transformation (in mostly *soft law*) and reform (in EU law) followed its own dynamic in spite of opposition from the European Court of Human Rights, national courts and UNHCR. They thus conclude that "In reality, norms are transformed in a constant interplay between domestic, sub-regional and regional forces, rather than replicated from the acquis into domestic legislation" (Byrne et al. 2004: 357). So, "bilateralism accounts for a greater degree of normative development and proliferation than multilateralism at EU level" (Byrne et al. 2004: 358). Byrne et al. have thereby revealed a transnational legal process whereby up until 2004-05, "domestic legislation [was] sending norms to, rather than receiving them from, the asylum acquis" (2004: 366). Following the adoption of the necessary directives and regulations necessary to establish a CEAS (as well as the move to the qualified majority voting and the co-decision procedure), this upward state-centrist transnational legal process is only now starting to feed back downward from Brussels to the member states.

The creation of a CEAS and its full establishment by 2010 means that implementation of refugee law is no longer only an area of national concern, it has also become a European issue. So, the Commission has recently embarked into an evaluation of the first phase, i.e. a monitoring program of activities on the implementation of all the instruments adopted so far in the field of asylum pursuant to articles 211 and 226 EC Treaty. This evaluation should help facilitate a convergence in interpretation between member states and arrive at levels of harmonization beyond what is stipulated in the directives. The European Commission has also initiated a series of cooperation measures of a practical nature (or networks), such as "contact committees,"[14] Eurasil[15] and the General Directors' Immigration Services Conference (GDISC).[16] Some of these implementation-related activities have been coordinated by the Odysseus Network.[17]

Beyond this political role, the European Court of Justice (ECJ) will ensure that national judicial interpretation of these instruments is indeed correct. Crucially, its rulings on interpretation will contribute to uniform interpretations of EU asylum law, as well as more largely to links, desperately needed in this new area of European law, between the ECJ and subnational actors.[18] The recognition of certain provisions of European Directives as having direct effect should further strengthen the legal protection of persons in need of protection in the national courts.

More dialog, more participants

Most scholars sympathize with the idea that refugee law should develop through dialog between a wide range of participants worldwide (Pallis 2006). Chimni notably argues that dialog is crucial to arrive at "a consensus on the changes to be introduced in the post-war regime" (Chimni 1998: 369). This dialog must not be limited to between scholars, lawyers, states, UNHCR, NGOs from the north but also include the south, and it should be based on the principles of deliberative democracy (i.e. on the basis of good argument as opposed to one's own interest) (Chimni 2001: 152). However, looking at the EU, Chimni denies that such dialog already exists. He relies on the fact that the EU is developing its common asylum system without entering into dialog with other regions, in spite of the influence that this regime will have on other regions (e.g. the practices of non-entrée that undermine the principle of burden sharing).

The more specific argument has also been made that refugee voices should be heard.[19] For instance, it has been argued that the participation of refugees should be enhanced in the context of UNHCR's refugee status determination activities and accountability for such activities (Pallis 2006), when discussing legal solutions (such as repatriation) to the refugee problem (Aleinikoff 1992: 134–8), or when looking at the impact of refugee law and policy (Polzer 2007).

The participatory approach therefore suggests a culturally sensitive approach to refugee law (Wilde 2001: 148). Juss even called for refugee rights to be located within a broader system of immigration rights that would be more humane and more culture sensitive (Juss 1998).

Conclusion

States and their formal agreements (e.g. the Refugee Convention and EU asylum laws) get us only so far in explaining how refugee law is created and how it develops. There is another layer of explanation that looks into transnational activities and their effect on how the law is shaped, interpreted, applied and developed. Whereas the dominant human rights approach focuses mainly on the sources and contents of rules (and their enforcement), both the transnational and the participatory approaches (as emerging approaches) are useful in capturing the complexities of the process of law formation and law development by looking more specifically at networks and other participants in the process of law making. The challenge of contemporary international refugee law is to recognize more explicitly the role of such networks and the soft law and norms that they often produce.

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Notes

1 Other disciplines such as anthropology, politics, sociology, economics, and international relations are playing an increasing role.
2 Paul Weis, for instance, argues that the lack of diplomatic protection is an essential element for the status of refugee. Whereas for Atle Grahl-Madsen, it is the rupture of the ties between a national and the authorities of his own country (i.e. de facto statelessness) that constitutes an essential element of being a refugee.
3 http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf. In this chapter, all references to the "Refugee Convention" are meant to include the 1967 Protocol.
4 This publication contains excerpts from the Statement by Stoltenberg to the 46th session of the U.N. Commission on Human Rights, February 22, 1990.
5 Weis notes that the initial impetus for a Convention relating to the status of refugees originated in an initiative from the U.N. Human Rights Commission.

6 Nathwani instead suggests a "necessity approach" but admits nonetheless that both the human rights approach and the necessity approach share a common space.
7 One other objective of the association is training to improve "judicial decision-making on refugee issues."
8 E.g. *Islam v Secretary of State for the Home Department, R vs. Immigration Appeal Tribunal and another, ex parte Shah*, House of Lords, March 25, 1999, and *R vs. Special Adjudicator, ex parte Hoxha*, House of Lords, March 10, 2005.
9 For this reason, Gilbert considers UNHCR guidance (although equally non-binding) as offering "more general and far reaching analysis that, by definition, ought not to be as concerned with state interests."
10 Chimni gives two examples: UNHCR's reliance on "the language of security to recommend solutions to the global refugee problem" and "the relationship of UNHCR to human rights." Both examples illustrate UNHCR's practice in borrowing concepts developed by northern states and scholars.
11 Betts refers in particular to Hathaway's York-based Refugee Law Reformulation Project of the 1990s.
12 Or in the words of Burley and Mattli, the EC is a process of "gradual penetration of EC law into the domestic law of its member states."
13 http://ec.europa.eu/justice_home/doc_centre/intro/docs/acquis_1006_en.pdf. The European Commission's Green Paper on the Future Common European Asylum System (June 6, 2007) starts the second phase (due to end in 2010). The Eurocrats' drive is clearly for total harmonization of procedures, protection status, and asylum decisions, and for all states' discretion to be removed.
14 "Contact committees" are informal networks of experts meetings between the EU member states, with UNHCR as an observer. Meetings take place to discuss practical issues relating to the implementation of the Directives on asylum and immigration and to reach a common interpretation on the basis of best practice. The European Commission then drafts a non-binding report that is circulated only between the Member States (and UNHCR).
15 Eurasil was created in 2002 as an EU network of asylum practitioners (asylum experts, member states representatives, and UNHCR) from the member states administration. It is the main network for discussing countries of origin information. The purpose is one of exchange of information, of common interpretation, and of common usage. This network is now developing further to coordinate more activities, such as common guidelines on the use of countries of origin information and fact-findings missions, and the development of a European Asylum Curriculum (as a joint practical training and education of asylum service personnel): www.ulb.ac.be/assoc/odysseus/EAC.doc.
16 The General Directors' Immigration Services Conference was established in 2004 as a network of the General Directors of European Immigration Services to promote operational cooperation between the immigration services responsible for the implementation of migration and asylum issues through the exchange of experience and best practice and by building up networks of experts. In particular, it organizes activities funded by the European Refugee Fund and the European Commission, such as the European Asylum Curriculum.
17 The Odysseus Network was created in 1998 (at the initiative of Philippe de Bruycker – Université Libre de Bruxelles – with the financial support of the Odysseus Programme of the European Commission) to carry out legal research and offer expert opinions, and to exchange and diffuse information in the field of immigration and asylum law in Europe http://www.ulb.ac.be/assoc/odysseus/odnetuk.html. As an academic network for legal studies, it brings together experts from the 27 member states of the EU and collaborates closely with judges, governments' officials and EU institutions' officials. It is currently involved in establishing the European Asylum Curriculum: http://www.ulb.ac.be/assoc/odysseus/index2.html. It is also involved in the monitoring of the implementation of 10 Directives in the field of immigration and asylum law in the 27 member states: http://www.ulb.ac.be/assoc/odysseus/CallTenDirectives.html.
18 Note that the article 234 procedure in the area of asylum/refugee law contains some inherent limitations.
19 E.g. the Mexico Declaration to Strengthen the International Protection of Refugees in Latin America states "the importance of fully involving uprooted populations in the design and implementation of assistance and protection programs, recognizing and valuing their human potential." Mexico City, November 16, 2004, reprinted in *International Journal of Refugee Law*, 17(4), 2005: 802–807.