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The Risks to Refugee Law of Humanitarian Responses to Flight from Ukraine

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The risks to refugee law of humanitarian responses to flight from Ukraine

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The invasion of Ukraine that began in February 2022 provoked an enormous exodus of people fleeing to safety by crossing Ukrainian borders into neighbouring states to seek refuge. The United Nations High Commissioner for Refugees (UNHCR) reported that as of mid-May 2023 more than eight million people had fled the conflict in Ukraine and crossed a border into another European state, and more than five million of these people were registered for temporary protection of some sort.[1] Many of these people were warmly welcomed, and further-flung states raised their hands to provide assistance and refuge as well.[2] Support for these displaced Ukrainians has come from states themselves, from civil society organizations, and from individuals; and it has arrived in a diversity of forms, from the quiet flying of the Ukrainian flag to boisterous public demonstrations, donations of food and money, and the opening of their homes by many people wishing to provide a welcome on a most personal level. All of this is to the good. This huge outpouring of humanitarian assistance is life-saving, generous, necessary and deserved. Long may it continue: or, rather, may it continue at least as long as the war.[3]

[1] UNHCR, 'Operational data portal: Ukraine refugee situation', https://data.unhcr.org/en/situations/ukraine (accessed 5 September 2023). As of 29 Aug. 2023, UNHCR reported 5,834,100 people as 'refugees from Ukraine recorded across Europe' (down from more than 8,000,000 reported earlier in 2023) and 6,203,300 people as 'refugees from Ukraine recorded globally'. Most of these people were in countries sharing a border with Ukraine, although there were more than 500,000 in the Czech Republic, which is formally part of the UNHCR's Refugee Response Plan but is not contiguous with Ukraine. Among other states in Europe not sharing a border, Germany has welcomed 1,084,410 people from Ukraine, while Italy, Spain and the UK were each hosting more than 100,000 as of 29 Aug. 2023. UNHCR acknowledges that there is likely some double counting in these numbers (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 1 June 2023.)

[2] Many countries beyond Europe have welcomed Ukrainians fleeing the war, and the overall total who have officially been welcomed elsewhere is likely about 400,000. In Dec. 2022, the US reported welcoming 221,000 Ukrainians (The White House, 'Remarks by President Biden and President Zelenskyy of Ukraine in joint press conference', 21 Dec. 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/21). Canada reported having welcomed 117,000 by Nov. 2022, and the programme was ongoing as of Feb. 2023 ('One in three Ukrainians with visas have reached Canada as applications approach 700K', CTV News, 22 Nov. 2022, https://www.ctvnews.ca/canada/one-in-three-ukrainians-with-visas-have-reached-canada-as-applications-approach-700k-1.6164262). Australia reported welcoming approximately 4,000, and the special programme for Ukrainians closed in July 2022 but the general humanitarian admissions programme remains available to Ukrainians (Cait Kelly, '"A different planet": displaced by war, Ukrainians prepare for a surreal first Christmas in Australia', *Guardian*, 21 Dec. 2022, https://www.theguardian.com/australia-news/2022/dec/22/a-different-planet-displaced-by-war-ukrainians-prepare-for-a-surreal-first-christmas-in-australia). No other country outside Europe reported having received more than 1,000 Ukrainians by the end of 2022.

[3] By late 2022, stories of compassion fatigue were being reported. See, for example, Amy Kazmin, Sam Fleming

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In the background of this humanitarian moment, some scholars, and many analysts in the popular press, have criticized aspects of the response to those fleeing this conflict. The critique has taken several forms: criticisms of international refugee law itself;[4] criticisms of the use of the EU's Temporary Protection Directive;[5] criticisms of specific state actions identified as discriminatory;[6] and criticisms that are generalized, and therefore confusing regarding their target.[7] The most persistent critique has been about racism and discrimination in refugee law, or in state actions, or both. The headline almost always mentions refugees. There are also myriad questions about which states have taken which course of action regarding this migration out of Ukraine, about which legal tools have been used, and about regional political alignments. Finally, there have been questions about whether Ukrainians fleeing Vladimir Putin's war of aggression are truly refugees under international law. All of this has generated a degree of attention to potential weaknesses in international refugee law. My central argument here is that this humanitarian moment poses risks to international refugee law because of this sustained and multipronged critique; because humanitarianism is amorphous and little examined; because international refugee law is poorly understood; and because the line between international refugee law and the politics of responding to refugees can be difficult to discern.

For the most part, a critique of refugee law in this context is premature. International refugee law has not been a principal tool of assistance for displaced Ukrain-

and Raphael Minder, 'Migration fatigue: Europe braces for new influx of Ukrainians', *Financial Times*, 11 Dec. 2022, https://www.ft.com/content/cf00788c-2799-4d4e-9158-666d1a31ca26.

[4] Marissa Jackson Sow, 'Ukrainian refugees, race, and international law's choice between order and justice', *American Journal of International Law* 116: 4, 2022, pp. 698–209, https://doi.org/10.1017/ajil.2022.56; Sunday Israel Oyebamiji, Olumide Oyewole Oyebade, Jeffrey H. Cohen and Abraham David Okechukwu, 'Echoes of colour discrimination in refugee protection regime: the experience of Africans fleeing the Russia–Ukrainian war', *Migration Letters*, 19: 5, 2022, pp. 695–707, https://doi.org/10.33182/ml.v19i5.2776; Jude Mary Cénat et al., 'War in Ukraine and racism: the physical and mental health of refugees of color matters', *International Journal of Public Health* 67: 1604990, 2022, https://doi.org/10.3389/ijph.2022.1604990.

[5] Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, 'Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine', in Sergio Carrera and Meltem Ineli-Ciger, eds, *EU responses to the large-scale refugee displacement from Ukraine: an analysis on the Temporary Protection Directive and its implications for the future EU asylum policy* (Florence: European University Institute, 2023), pp. 383–413; Dora Kostakopoulou, 'Temporary Protection and EU solidarity: reflecting on European racism', in Carrera and Ineli-Ciger, eds, *EU responses to the large-scale refugee displacement from Ukraine*, pp. 436–45; Meltem Ineli-Ciger, 'Reasons for the activation of the Temporary Protection Directive in 2022: a tale of double standards' in Carrera and Ineli-Ciger, eds, *EU responses to the large-scale refugee displacement from Ukraine*, pp. 59–85 (as examples).

[6] Cathryn Costello and Michelle Foster, '(Some) refugees welcome: when is differentiating between refugees unlawful discrimination?' *International Journal of Discrimination and the Law* 22: 3, 2022, pp. 244–280, https://doi.org/10.1177/13582291221116476; Jaya Ramji-Nogales, 'Ukrainians in flight: politics, race, and regional solutions', *American Journal of International Law*, vol. 116, 2022, pp. 150–154, https://doi.org/10.1017/aju.2022.22. Many of the articles cited above also share these concerns. As well, this theme has been regularly aired in the mainstream media. To cite just two examples: Daniel Howden, 'Europe has rediscovered compassion for refugees—but only if they're white', *Guardian*, 10 March 2022, https://www.theguardian.com/world/commentisfree/2022/mar/10/europe-compassion-refugees-white-european; and Erika Solomon and Monika Pronczuk, 'A new refugee crisis stirs uncomfortable issues for Europe', *New York Times*, 3 Nov. 2022, https://www.nytimes.com/2022/11/03/world/europe/refugee-crisis.html.

[7] This type is found mainly in media accounts. See, among many others: Emmanuel Akinwotu and Weronika Strzyzynska, 'Nigeria condemns treatment of Africans trying to flee Ukraine', *Guardian*, 28 Feb. 2022; Phillip S. S. Howard, Bryan Chan Yen Johnson and Kevin Ah-Sen, 'Ukraine refugee crisis exposes racism and contradictions in the definition of human', *The Conversation*, 21 March 2022, https://theconversation.com/ukraine-refugee-crisis-exposes-racism-and-contradictions-in-the-definition-of-human-179150.

ians. In the case of EU states, Ukrainians do not need a visa for entry, and thus the crossing of the border does not trigger a legal inquiry.[8] Furthermore, very early on in the conflict the EU used its temporary protection mechanism to provide a legal framework for those fleeing the conflict.[9] Non-EU countries that have welcomed significant numbers of Ukrainians have followed a similar path, with the United States, the United Kingdom, Canada and Australia all creating special migration programmes for Ukrainians.[10] Accordingly, one response to criticisms can simply be to say that none of the state responses thus far have anything to do with refugee law—other forms of law are being used instead. But this retort is pedantic, and raises questions of its own, including: who are these people, if not refugees? And, if refugee law is *not* involved in responding to this mass migration of people seeking protection, what continued relevance does it have? The fact that a technical legal response to the sustained public critique leads directly to these questions signifies how the current situation puts respect for refugee law at risk.

My objective here is not to respond to various criticisms of international refugee law, despite the fact that the tools of international refugee law can indeed provide many such answers (and some answers do emerge, by the by). Rather, my goal is to acknowledge the importance of this questioning and to reflect on what its persistence means for international refugee law, and for the broader international refugee regime comprised of myriad domestic and international laws, policies and practices, amid which refugee law stands at the centre. The ongoing response to Ukrainians seeking refuge highlights strengths and weaknesses of refugee law. It calls attention to the ways in which the broader refugee regime sometimes undermines the law at its centre. Most importantly, it illustrates the tension between humanitarianism and refugee law, and the ways in which their not-quite-symbiotic relationship is damaging to the law. This is important for policy-makers more broadly, because it demonstrates what is at stake when policy responses take the easy path of accidentally-on-purpose failing to clarify what is required by the law and what is not. Refugee law sits at the centre of an increasingly contentious global politics. The way wealthy liberal democracies have responded to flight from Ukraine offers important lessons for understanding this politics and confronting future forced migration.

Finally, because of all of these features, the present war in Ukraine has some sobering lessons for refugee law scholars. There is a different type of risk involved in being critical of humanitarianism, and because in this field scholarship and

[8] This has been the case since 2017.

[9] Council of the European Union, Council Implementing Decision (EU) 2022/382 of 4 March 2022 established the existence of a mass influx of displaced persons from Ukraine within the meaning of article 5 of Directive 2001/55/EC, and had the effect of introducing temporary protection, ST/6846/2022/INIT, OJ L 71. This was initially in effect for one year, and has since been extended until 4 March 2024. While the Directive was created in 2001, the 4 March 2022 decision was the first time it was used. Indeed, prior to this, the Directive was slated for revision, a process that would almost certainly have weakened it. For a detailed discussion of its history and weaknesses see Meltem Ineli-Ciger, *Temporary protection in law and practice* (Leiden: Brill Nijhoff, 2018), pp. 149–67. See also Joanne van Selm, 'Temporary protection for Ukrainians: learning the lessons of the 1990s?', in Carrera and Ineli-Ciger, eds, *EU responses to the large-scale refugee displacement from Ukraine*, pp. 366–82.

[10] Some countries in Europe but outside the EU's Directive have also developed their own programmes for those fleeing Ukraine, e.g. Denmark, Switzerland and the UK.

advocacy are often intertwined, this critique feels uncomfortable.[11] Most refugee law scholars would agree that this humanitarian assistance is life-saving, generous, necessary and deserved. And thus critiques of humanitarianism are often muted, or non-existent. This, too, is telling.

This article builds its central argument by first examining the relationship of humanitarianism and refugee law. It then explains how refugee law developed its current legal status and moved away from its humanitarian roots, and how this trajectory led to widespread efforts to limit the law's effect by developing a broader regime encasing the law. Finally, it puts these pieces together to describe the humanitarian challenge of the present moment, and to consider better ways forward.

Humanitarianism and refugee law

Humanitarianism and refugee law are not the same. Indeed, it is even inaccurate to say that they tap into the same impulses, but the political power of humanitarianism is such that refugee advocates sensibly resist devoting energy to spelling out the distinction: the slippage of refugee law into humanitarianism serves many purposes. The difference, however, is fundamental. In part, refugee law originated because humanitarianism was—even in the immediate aftermath of the Second World War—an insufficient and unpredictable basis on which to meet the needs of millions of displaced people.

There is no agreed definition of humanitarianism in the legal or political literature about refugees. In this context, I consider humanitarianism as an alternative to a legal requirement. It is a voluntary activity motivated by a human impulse to assist those in need. It is not a duty, is not required of states, and is not mandated by the law. Humanitarianism is charitable, and its rewards include the positive feelings generated by doing something undeniably good, simply because one is capable of doing so.[12] Matthew Gibney has argued for the use of what he called 'the humanitarian principle' to guide refugee policy of prosperous liberal democratic states.[13] Vicki Squire cautions about the dangers of humanitarian politics which, in her view, can impoverish the humanity of migrants, and argues instead for a post-humanitarian politics.[14] In Squire's view, humanitarianism is

[11] The intertwining is well described in Rosemary Byrne and Thomas Gammeltoft-Hansen, 'International refugee law between scholarship and practice', *International Journal of Refugee Law* 32: 2, 2020, pp. 181–99, https://doi.org/10.1093/ijrl/eeaa011.

[12] Catherine Dauvergne, *Humanitarianism, identity, and nation: migration laws of Australia and Canada* (Vancouver, UBC Press, 2005) discusses the theoretical and religious underpinnings of humanitarianism at greater length. See also Catherine Dauvergne, 'Amorality and humanitarianism in immigration law', *Osgoode Hall Law Journal* 37: 3, 1999, pp. 597–693, https://doi.org/10.60082/2817-5069.1523. My usage corresponds to an ordinary dictionary definition of humanitarianism, as distinct from its use in the international law context as 'international humanitarian law' (the set of agreements about the conduct of international wars) or 'humanitarian intervention' (a justification for military intervention to prevent human rights abuses in another state).

[13] Gibney writes, 'Humanitarianism can be simply stated: the principle holds that states have an obligation to assist refugees when the costs of doing so are low'. Matthew Gibney, *The ethics and politics of asylum* (Cambridge, UK: Cambridge University Press, 2004), p. 321.

[14] Vicki Squire, 'Governing migration through death in Europe and the US: identification, burial and the crisis of modern humanism', *European Journal of International Relations* 23: 3, 2016, pp. 513–32, https://doi.org/10.1177/1354066116668662.

not unequivocally ' … a political "good" or a political "bad" … ', its content is more ambiguous.[15] Matthew Price has argued that a shift towards humanitarianism as a decision-making frame has undermined the political focus of refugee law, and thus its ideological content and its power as a foreign relations tool.[16] All of these uses fit within the parameters I propose, and each demonstrates aspects of humanitarianism's complexities, as well as its prevalence in analyses of this area of law and policy.

International refugee law, in contradistinction to humanitarianism, establishes a binding obligation on states not to return people to places where they face a risk of being persecuted on the basis of their race, religion, nationality, membership of a particular social group or political opinion.[17] This core obligation requires that states take seriously the claims of those who arrive at their doorstep, or have already crossed their threshold, seeking this protection. One aspirational goal of international refugee law is to treat like cases alike—a standard objective of rule-of-law governance. Political scientists and legal scholars have rightly drawn attention to the fact that refugee law often falls short of this standard (for reasons ranging from the proclivities of individual decision-makers,[18] to the extent to which decision-makers are insulated from political pressures,[19] and the foreign and domestic policy choices of governments[20]). Nonetheless, the 1951 UN Refugee Convention[21] has increasingly demonstrated that it has acquired the essential quality of legality that distinguishes it from the swirling political mire that sometimes surrounds it.[22] The Refugee Convention provides a standard with clarity, constancy and adherence; it shapes state practice even when states would clearly prefer otherwise; and it has been an enduring presence for more than 70 years. Over this time, it has garnered more of the quality of legality rather than less, as I discuss below.

Refugee advocates have long mined the seam of compassion that surrounds this hard core of obligation within refugee law. This intertwining traces right back to Fridtjof Nansen, who served as the League of Nations' first High Commissioner

[15] Vicki Squire, 'Desert "trash": posthumanism, border struggles, and humanitarian politics', *Political Geography*, vol. 39, 2014, pp. 11–21 at p. 20, https://doi.org/10.1016/j.polgeo.2013.12.003.

[16] This is the central argument of Price's *Rethinking asylum: history, purpose and limits* (Cambridge, UK: Cambridge University Press, 2009).

[17] This definition of a refugee is contained in article 1(A)(2), and the commitment against returning refugees is set out in article 33 of the 1951 *Convention relating to the status of refugees*, United Nations Treaty Series, vol. 189, p. 137 (entered into force 22 April 1954).

[18] See, for example, Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, 'Refugee roulette: disparities in asylum adjudication', *Stanford Law Review* 60: 2, 2010, pp. 295–411; Sean Rehaag, 'Judicial review of refugee determination: the luck of the draw?' *Queen's Law Journal* 38: 1, 2012, pp. 1–58, https://doi.org/10.2139/ssrn.2027517; Cathryn Costello, 'Who is recognised as a refugee? Insights from diverse disciplines', *Zeitschrift für Flucht* 7: 1, 2023, pp. 120–135, https://doi.org/10.5771/2509-9485-2023-1-120.

[19] Rebecca Hamlin, *Let me be a refugee: administrative justice and the politics of asylum in the United States, Canada, and Australia* (New York: Oxford University Press, 2014).

[20] Lamis Elmy Abdelaaty, *Discrimination and delegation: explaining state responses to refugees* (New York: Oxford University Press, 2021).

[21] *Convention relating to the status of refugees*.

[22] Jutta Brunée and Stephen J. Toope draw on Lon Fuller's legal theoretical work to form the core of their interactional account of international law and how it can be distinguished from international politics using the criterion of 'legality'. See Brunée and Toope, *Legitimacy and legality in international law: an international account* (Cambridge, UK: Cambridge University Press, 2010). This account of international law is especially useful in the case of refugee law.

for Refugees during the 1920s. Nansen originated the first legal documents for refugees and used photographs of victims of the famine in the Soviet Union in 1921 to appeal directly to European citizens as a way of motivating their reluctant governments to take action.[23] Compassion—humanitarianism—makes the core obligation of refugee law more palatable to the general public. In turn, citizens use humanitarian pleas to urge on governments at some moments, and governments use the same to assuage their citizens at others. In responding to flight from Ukraine, both of these movements are visible. States have moved quickly to open their borders and regularize this migratory path, and have drawn on humanitarianism to justify this response, which is certainly as much about the high politics of war as about charity; and citizens in bordering countries and beyond have contributed personally to support those fleeing the war, in ways that go beyond any obligation and have urged their governments to further action.[24]

The story of the development of international refugee law since its origins is a story of the law becoming more 'lawlike', and therefore of its core obligations becoming more widely understood and accepted.[25] This is a good thing—for refugee advocates, for those who value the rule of law, and even for those who would oppose assistance to refugees, who must surely find some value in having clarity and certainty about states' obligations. In Emma Haddad's powerful analysis of the inevitability of refugees in international society, she argues that '… refugee protection will remain an imperfect mixture of the political and the humanitarian'.[26] The response of states and citizens to contemporary Ukrainian refugees exposes the delicate balance of refugee law and humanitarianism. It lays bare the distinction between compassion and law, makes plain the political manoeuvring behind each, and thereby creates a risk that the progress we have all made in solidifying the lawful status of refugee law will be weakened in this moment. To unpack this complicated point, I will turn first to outlining the key aspects of international refugee law's evolution.

How international refugee law gained ground

International refugee law was never intended to be all things to all people. The 1951 Convention, which came into force in 1954, was aimed at ensuring that states would share responsibility for people displaced by the war in Europe.[27] Given

[23] Hans Olav Thyvold, *Fridtjof Nansen: explorer, scientist, and diplomat* (Oslo: Font Forlag, 2011), pp.77–81.

[24] For example, Amelia Gentleman, '"There's nowhere else for them to go": what next for 100,000 Ukrainians and the Britons who took them in?' *Guardian*, 29 Nov. 2022, https://www.theguardian.com/world/2022/nov/29/homes-for-ukraine-refugees-ukrainian-britons-scheme; Eileen Sullivan, 'Biden extends stay for thousands of Ukrainians' *New York Times*, 13 March 2023, https://www.nytimes.com/2023/03/13/us/politics/ukraine-war-refugees.html.

[25] None of the studies aiming to explain variation in the applications of refugee law in specific instances have yet tackled the even more difficult question of whether standardization has increased over time, nor have they measured the effectiveness of governmental and international efforts to improve standardization.

[26] Emma Haddad, *The refugee in international society: between sovereigns* (Cambridge, UK: Cambridge University Press, 2008), p. 204.

[27] The definition of a refugee includes the phrase 'as a result of events occurring before 1 January 1951'. (Article 1(A)2) which is understood to mean 'events occurring in Europe before 1 January 1951' (Article 1(B)1(a) and (b)). The Convention's preamble speaks directly to the goal of states sharing the burden of hosting refugees.

its success in this role, an amendment was made in 1967 to remove the temporal and geographic limitations of the Refugee Convention, and additional states for whom the original Convention had not been directly relevant joined the regime.[28] The 1967 Protocol marked the advent of refugee law that aspired to a truly international reach.

Since that time, the ambit of refugee law has steadily expanded for two reasons. The first reason is both banal and appalling. The centrepiece of the Convention is protection against a risk of being persecuted. Despite the paradigmatic forms of persecution during the Second World War that informed the drafters, the ensuing years have revealed that discriminatory persecution is appallingly widespread.[29] The second reason for the expansion of the reach of refugee law is that interpretations of the Convention have become increasingly sophisticated, mostly because of the maturing of international human rights jurisprudence. This form of expansion works in two ways. In the first instance, because refugee law works closely with human rights law, the development of our understanding of human rights protections flows into our understanding of refugee law. The second form of expansion is through interpretation of provisions of the Refugee Convention itself, such as the meaning of 'particular social group' or 'political opinion'. This interpretive growth is (slowly) moving the Convention beyond the biases that are baked into it because of its origins in addressing postwar displacement in Europe.

As one small but vital element of the international human rights regime, refugee law is still not meant to be all things to all people. The Convention contains a number of provisions that serve to limit state responsibility, so that it is not an exaggeration to say that such limitation is one of its central achievements.[30] The main limiting provisions are that in order to trigger the core obligation to protect, an individual must reach the border of another state and must be at risk not of any form of harm but of a harm that can be defined as persecution, and that risk must have arisen for a discriminatory reason. There is no obligation on states to resettle refugees from elsewhere, no obligation to address the situation of refugees in camps around the world, and no general obligation to help those displaced by so-called 'natural' disasters or war. The list could go on. In the closing decades of the twentieth century there were some refugee advocates who urged formal expansion of the Convention to alter some of these limitations,[31] but these days such calls have died away. Now most refugee advocates believe that if the Convention were opened to alteration, states would undoubtedly seek to narrow its ambit of protection, not to increase it.

[28] Protocol relating to the status of refugees (1967), United Nations Treaty Series, vol. 606, p. 267.

[29] This growth is the subject of Matthew Price's critique in *Rethinking asylum*.

[30] This point is familiar to refugee law scholars. For a particularly eloquent, and early, elucidation see James C. Hathaway, 'A reconsideration of the underlying premise of refugee law', *Harvard International Law Journal* 31: 1, 1990, pp. 129–83.

[31] For example, there was considerable advocacy urging that 'sex' or 'gender' be added to the list of named grounds of potential risk of being persecuted. See Catherine Dauvergne, 'Women in refugee jurisprudence' in Cathryn Costello, Michelle Foster and Jane McAdam, eds, *The Oxford handbook of international refugee law* (Oxford: Oxford University Press, 2021) at pp. 728–44.

This fact points us to the most remarkable achievement of refugee law. States follow it. A staggering 149 states are party to the Convention or the Protocol, or in most cases, both.[32] These ratifications are not mere window-dressing: most of these states are taking meaningful action to comply with at least some aspects of the Convention.[33] Despite ample evidence that most prosperous western liberal democracies find the core obligations of the Convention to be onerous and unwelcome, not a single state party has withdrawn from the Convention, nor even entered a new reservation. The number of states party to it continues to grow. And even as states seek to minimize their commitment to international refugee law, they invariably do so while asserting that their particular form of wriggling out of that commitment is not in fact wriggling out.[34] These state actions show that the Refugee Convention matters to them—that it is treated as law. Respect for the Refugee Convention is enshrined, for example, in the EU's Temporary Protection Directive.[35] This adherence to international refugee law is a meaningful constraint on state sovereignty. It requires much more of states than do the most widely accepted human rights conventions, and it has now demonstrated remarkable endurance. It has the quality of legality that distinguishes it from politics.[36] Indeed, such is the respect for the obligation not to return people to face a risk of being persecuted that increasing numbers of scholars have argued that the *non-refoulement* obligation has become a matter of *jus cogens*—the very tiny subset of international obligations that bind all states, even those who decline to agree.[37]

This acceptance and strengthening of international refugee law explains why it is encased in a broader regime—a cluster of now widespread norms that accompany the Convention itself, some stresses of which are exposed by how the world is responding to displaced Ukrainians. It is also why the outpouring of humanitarianism in the context of the war in Ukraine puts refugee law at some considerable risk: the development of refugee law to the point where it has this lawlike quality has been long and hard-fought, and it is fragile. I take up these two points in turn in the sections that follow.

[32] 146 states are party to the Convention and 147 are party to the Protocol; 144 are party to both instruments.

[33] The rights of refugees once refugee status has been recognized, which take up a majority of the Convention's text, are given scant attention and less respect. This is an area where much work is still required.

[34] The legislative and policy framework through which the UK government has been seeking to move asylum claimants to Rwanda without determining whether or not they are entitled to refugee protection is the most recent high-profile example of this. The convoluted text asserts its adherence to both the Refugee Convention and the European Human Rights Convention (see discussion in *AAA and others v. Secretary of State for the Home Department* [2022] EWHC 3230 (Admin)). National legislation in Australia, the US, Canada and many other places contains similar features. Even the EU's Qualification Directive (Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 2011, which recasts the original Qualification Directive of 2004) pulls away from the Refugee Convention in some respects.

[35] The Temporary Protection Directive references preserving the Convention explicitly; it incorporates directly some Convention provisions; and it preserves the right to seek asylum at some later date.

[36] See Brunée and Toope, *Legitimacy and legality*, pp. 9–12.

[37] Cathryn Costello and Michelle Foster, 'Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test', in Maarten den Heijer and Harmen van der Wilt, eds, *Netherlands yearbook of international law* 46 (The Hague: T. M. C. Asser Press, 2015), pp. 273–328.

Unwrapping the packaging of refugee law

While most states go to considerable lengths to show they are adhering to international refugee law, the stringency of its core obligation is such that, over the past few decades, provisions have been layered onto refugee law to blunt its effect. These provisions are found in myriad domestic laws and policies, as well as in bilateral and regional arrangements in many parts of the world. This packaging runs the gamut from domestic rules about interpreting the international law that fly in the face of the accepted rules of international interpretation, to non-entrée and asylum deterrence provisions, to safe third country rules and 'white lists' of safe countries of origin.[38] Many of these provisions are at odds with the object and purpose of the Refugee Convention as broadly understood, but states go to great lengths to assert that they do not directly contradict the letter of the Convention. What is more, as there is no international authoritative enforcement body for the Refugee Convention, states cannot be formally held to account by other states for constructing rules that narrow refugee law's impact in a way that amounts to a breach of the law.[39]

In addition to the array of provisions developed by states to limit the ambit of the Convention, there are other elements of the international refugee regime which have been developed to foster coherence, as well as international cooperation. Much of the UNHCR's work on developing interpretive standards for the Convention falls into this category. While this work is not directly aimed at limiting international refugee law (often the contrary) it does reinforce the point that refugee law does not stand on its own: it is surrounded by a highly developed normative shell, and the norms constructing that shell contain elements of both pragmatism and bare politics. This is one reason why the line between refugee law and the politics of its application is often obscured. Some aspects of this casing are laws in themselves, the most prominent example being the EU's Qualification Directive, which seeks to bind EU states in their application of the Refugee Convention and which contains elements that limit the Convention, as well as a few that extend its reach, and many that add procedural requirements that are not addressed by either the Convention or the Protocol.[40]

All of this means that international refugee law is difficult to discern. The complex, multi-layered, sometimes-legal regime gets in the way of clear explanations of international refugee law itself. The result is that refugee law specialists are often talking in some kind of secret code that is confusing, or irrelevant, even to other sophisticated actors such as policy-makers, opinion leaders and political leaders.

[38] See Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalization of migration control* (Cambridge, UK: Cambridge University Press, 2013); James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-refoulement in a world of cooperative deterrence', *Columbia Journal of Transnational Law* 53: 2, 2015, pp. 235–84, https://doi.org/10.2139/ssrn.2479511.

[39] Domestic and regional courts do sometimes rule on breaches of the Convention, but the reach of those rulings is limited. The likelihood that one state party would bring another before the International Court of Justice is infinitesimally small.

[40] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

In the case of the invasion of Ukraine, there are several elements of the broader refugee law regime that have attracted criticism, or at least curiosity, such that they contribute to how this war might weaken international refugee law. One of these is the fact that the response to those fleeing Ukraine provides a stellar example of what is known as a 'regional solution'. Regional solutions have been advocated by the UNHCR and others as a preferred response to mass displacement of people.[41] The centrepiece of a regional solution is that people displaced across a border should remain as close as possible to their home state, both in order to facilitate an eventual return home, and to ensure that they are hosted by neighbouring nations where they will find social and cultural affinity. We see this happening with displacement from Ukraine, where the overwhelming majority of those who have fled are in countries that border Ukraine.

There is not a problem with regional solutions when they are available, but there are serious concerns with the idea that they are required, or even preferred, by refugee law. A preference for regional solutions provides a justification for states in the global South to bear a disproportionate responsibility for the world's refugees and would-be refugees; it props up long-term confinement of refugees in the sprawling camps near global South conflict zones; it is a convenient tool for states of the global North wishing to justify their minuscule commitments to refugee resettlement; and it exposes the refugee regime to (well-founded) charges of racism, discrimination, and importation of 'immigration values'.[42] The rhetoric of regional solutions also assumes that those in flight would, or should, themselves prefer to remain as close to their country of nationality as possible. In embedding this perspective, it robs refugees of agency. Furthermore, there is nothing in the Convention that suggests that a person seeking protection ought not to choose where to do so. Regional solutions have become a refugee policy standby because they reflect geopolitical realities: neighbouring states are where most refugees will seek refuge in the first instance, and many such states lack the coercive power—or the will to deploy their coercive power—to prevent those fleeing from crossing the border. Regional solutions also reflect one of the uncomfortable truths about humanitarianism: people are more likely to act compassionately towards those whom they perceive as being like them.[43]

In the present instance, the regional solution of hosting the majority of those displaced in neighbouring countries (or at least in Europe) reinforces a preference for regional solutions, and has led observers and analysts to critique refugee law for allowing states to selectively help those who are closest to them geographically,

[41] Regional solutions have been labelled and talked about as such since the 1990s (see UNHCR's *Refugees Magazine*, no. 99, 1995). This approach is highlighted in the Global Compact on Refugees, adopted by the UN General Assembly on 17 Dec. 2018, (A/RES/73/151).

[42] By 'immigration values' I mean a system of discriminatory preferences whereby a state selects those migrants that are most likely to contribute to its economy (or some other value, but typically, immigration preferences are all about different aspects of the national economy).

[43] This point, which is observable in state responses to refugees, is borne out and elaborated by social psychology research (some examples include Alexander Kustov, 'Borders of compassion: immigration preferences and parochial altruism', *Comparative Political Studies* 54: 3–4, 2021, pp. 445–81, https://doi.org/10.1177/0010414020938087; Dshamilja Marie Hellmann, Susann Fiedler and Andreas Glöckner, 'Altruistic giving toward refugees: identifying factors that increase citizens' willingness to help', *Frontiers in Psychology*, vol. 12, 2021).

culturally and racially.[44] Despite these criticisms, the current situation elevates the logic of the regional solution, and tends to skip over the fact that this has worked very well in the case of Ukraine because its neighbours and near-neighbours are wealthy, powerful and stable states that typically host an incredibly small share of the world's migrants in flight. It makes the regional solution look like part of refugee law. It is not. And it ought not to be. Refugee law does not require, preference or recommend regional solutions. The Convention's preamble, on the contrary, speaks of sharing the burden of refugees among states. This was the innovation of the 1967 Protocol, which transformed the Refugee Convention from a regional solution to a global tool. Ever since that time, a central problem for refugee law has been how to bring that vision to fruition by truly engaging states of the global North in meaningfully sharing responsibility for refugees.

Responses to those fleeing Ukraine have also normalized several other aspects of the refugee regime which do not conform with the Refugee Convention. These features include designating large groups of people as deserving of support without individual inquiries; skating over the kinds of security scrutiny that are frequently the reason for *not* offering this kind of response (i.e. in the case of those fleeing Syria or Afghanistan); and calling people refugees without any regard to the legal categorization.

There is nothing wrong with any of these actions in a political, or even a legal, sense. That is, states are free to do what they want in terms of which non-citizens they choose to let across their borders on a humanitarian basis, and the Convention permits large-scale designations.[45] Each of these decisions ensures that more people get more and better help, and more quickly. What these actions do show, however, is that international refugee law is vulnerable to allegations of irrelevance. To wit: if refugee law is not front and centre of a crisis such as displacement from Ukraine—in the geographic centre of its birthplace—does it matter any more at all? It is tempting to respond to this critique by not calling attention to this vulnerability, by allowing this high-profile humanitarian moment to pass by without reflection or analysis; by turning away from the questions about refugee protection that are arising at the margins of this moment. The EU's use of its Temporary Protection Directive is part of this story. It is extremely valuable because it facilitates rapid entry without requiring any determination of refugee status—it is a bypass valve for refugee law, designed for when the confluence of

[44] Ramji-Nogales, 'Ukrainians in flight'; Costello and Foster '(Some) refugees welcome'; Sow, 'Ukrainian refugees, race, and international law's choice'.

[45] Costello and Foster argue that large-scale determinations are permitted by the Convention because it is silent on the matter of how status determinations are to take place, especially when it is known that a significant number of those designated would be likely to be found to be refugees. Costello and Foster, '(Some) refugees welcome', p. 267. Despite this point of view, refugee determination has generally been envisioned under the Convention to be an individual matter because the definition of a refugee is individually focused (Art 1(A)(2)). See James C. Hathaway and Michelle Foster, *The law of refugee status*, 2nd edn (Cambridge, UK: Cambridge University Press, 2014), pp. 1–16. In wealthy liberal democracies, asylum processes have invariably been built on the basis that individual determinations are the fairest possible way to enact the Convention—to give each individual a chance to be personally considered. The fairness claim is hard to make out empirically. As Cathryn Costello writes, 'it may well be time to treat highly individualized asylum procedures as inherently prone to arbitrary variation': see Costello, 'Who is recognised as a refugee?', p. 131.

politics and humanitarianism militate in favour of quick response. Those who enter European states under this provision can potentially claim asylum later, and states are freed from having to shift their individually focused asylum systems into high gear, or to make group determinations—two alternatives that would have given greater rights protections to those who entered.

It is in large part the fact that the response to the Ukrainian exodus is working so well that makes it risky for refugee law. As an advocate I am proceeding with trepidation, but proceeding nonetheless, because I believe that the critiques of international refugee law that are brought into focus by the war in Ukraine have been there for a very long time and will not go away. And, more importantly, I believe that international refugee law can and should be defended from this allegation in clear terms by the scholarly community that has grown up around it, even though we generally spend our time demonstrating its frailties and failings. The present moment provides a focus on elements of the broader refugee regime that undermine both refugee protection and respect for the law. It also serves to highlight—precisely by doing this—that refugee law would be easier to champion if the varied and complicated regime encasing it were stripped away.

The challenge of humanitarianism

The intertwining of refugee law with humanitarianism makes refugee law vulnerable, and the response to mass migration out of Ukraine brings this clearly into focus. Right from the beginning, refugee law has ridden on humanitarianism's coat-tails: without the backdrop of the human suffering of the Second World War, it is unlikely that the international community could ever have agreed to the terms of the Convention. What makes refugee law so powerful for those who need its protection, however, is that it does not rely on humanitarian impulses to function. The politics of humanitarianism muddy the waters of refugee law *as law*. In moments of mass humanitarian outpourings, it is tempting to lean into that space of generosity and compassion as a way forward for refugees. But it is a trap. Humanitarianism is not enough, and not good enough, for rights protection.[46] That too is part of the origin story of the Convention: it would never have been *necessary* for states to agree to this law if there were any prospect of resolving displacement in Europe in the 1950s on the basis of goodwill and fellow feeling alone. The best example of how a reliance on humanitarianism fails refugees is refugee resettlement, the practice whereby states themselves bring refugees into their territory and allow them to settle on a long-term basis. There is no legal requirement for resettlement—it is a gesture purely of compassion and generosity on behalf of states and of their citizens. [47] Resettlement numbers are incredibly

[46] Costello and Foster discuss this when talking about how sometimes a desire to support generosity means that we do not call attention to discrimination in applications of refugee law. See Costello and Foster, '(Some) refugees welcome', p. 268.

[47] See Susan Kneebone and Audrey Macklin, 'Resettlement' in Costello, Foster and McAdam, eds, *The Oxford handbook of international refugee law*, pp. 1080–1098; Shauna Labman, *Crossing law's border* (Vancouver: UBC Press, 2019).

small. In the decade between 2012 and 2021, the average number resettled annually was 87,492.[48]

The challenge of humanitarianism is to find a way to protect refugee law from its potential to erode the lawlike quality of refugee law, while not repudiating the benefits that humanitarian politics bring to those in need. Is it even possible to square this circle? The acceptance of refugee law (however imperfect) *as law* is vitally important. It is the core obligation of refugee law that provides that refugees are rights holders, and that their rights constrain state action, regardless of any sense of compassion or generosity. The point of a right is that its recognition does not depend on the graciousness of the state. We should not only do everything we can to protect refugee law, but we also can—and must—encourage further growth, like the hermeneutical growth that we have witnessed during the past fifty years.

One of the problems with humanitarianism as a guide to state action is that it carries with it the idea that some people are deserving of our beneficence while others are not. As long as states are bestowing a benefit, and the recipient of that benefit is cast as a mendicant, it seems fair enough to bestow our goodness on the most deserving. But the Convention itself recognizes that states will perpetually struggle with the notion of desert—the idea that some people are morally worthy of refugee protection and others are not. Rather than allow this concern to run roughshod through the Convention and thereby to let refugee law to build invidious hierarchies of need, the tension is resolved within the Convention by the exclusion provisions contained in article 1F.[49] Article 1F was designed to ensure that states would support the Convention by providing an outlet for a very small, agreed in advance, group of undeserving persons.[50] The question of deservingness, which grows from the humanitarian context of refugee protection, therefore has a limited textual home within the Convention.

In some ways, the challenge presented by the present moment is that despite the growth and strength of refugee law, the term 'refugee' is rarely used in popular or political discourse with legal precision. Even the UNHCR, in its reporting on displacement over Ukrainian borders, designates every person who has moved as a 'refugee', some of whom are seeking refugee status, and some of whom are registered for temporary protection in other states, and some of whom are doing neither of these things.[51] Decades of scholarly insistence on promoting precision in use of the term have proven insufficient to foster any change. It is in part for this reason that I advocate talking about a distinction between refugee law and the

[48] UNHCR, 'Refugee data finder', https://www.unhcr.org/refugee-statistics/download/?url=hLRO3z (accessed on 11 Feb. 2023). I have not included data for 2022 because the temporary arrangements for those fleeing Ukraine distort the picture.

[49] Article 1F of the Convention excludes from any entitlement to refugee protection people who have committed war crimes or crimes against humanity; who have committed serious non-political crimes (prior to becoming a refugee); and who are guilty of acts contrary to the purposes and principles of the United Nations.

[50] See analysis in Hathaway and Foster, *The law of refugee status*, pp. 525–8.

[51] UNHCR, 'Operational data portal: Ukraine refugee situation', accessed 1 Feb. 2023. There is obviously no incentive for legal precision on behalf of the UNHCR, given both the broad ambit of its mandate and its reliance on states funding it on a more-or-less voluntary basis.

broader regime that surrounds it. In a similar way, Costello and Foster talk about refugees *latu sensu* (meaning 'in the broad sense'), another way of acknowledging the gap.[52] In this moment of crisis, one factor that makes the Refugee Convention vulnerable is that every critique about how 'refugees' are treated becomes a critique of refugee law. It is difficult to pull these threads apart when talking about flight from Ukraine. The pre-eminent example of this problem is that while the framework of refugee law embeds racism in some aspects, and while states may surround it with overtly racist policies, it is also true that the most shocking instances of racism witnessed in the case of flight from Ukraine have occurred beyond the reach of refugee law (for example, in refusing to let overseas students of African origin get onto trains to leave Ukraine).[53] There is a long overdue need to seriously address the confusion between refugees—in a legal sense—and the much larger and different group of people known as refugees today. It is probably time for scholars and advocates to admit defeat on this point and devote attention to finding a better way of moving forward.

In addition, reminding people too strongly of the intertwining between refugee law and humanitarianism—as happens in times of humanitarian outpourings like this one—is risky. It is, of course, possible for states to act to protect people without recourse to refugee law, but we should not muddle the law up with this impulse. Most states are (so far) not using refugee law as a tool to respond to those fleeing this conflict. They are instead deploying other legal responses—on a scale and with a speed that was never made available to those fleeing conflict in Syria, or the return of the Taliban in Afghanistan. There is a likelihood that many of the people who have fled Ukraine would in fact be eligible for refugee status (although this is because of particular characteristics of this conflict, not because those fleeing war can be assumed to meet the formal definition of a refugee),[54] and eventually many of these people may encounter a status determination process. But that is not the case at present, more than a year into the conflict. Despite this fact, states have not been quick to clarify their actions or motivations, and some seem quite happy to let their publics assume that they are generously helping refugees, which of course they are in part. This contributes to the confusion in this moment about what refugee law requires or does not require. While EU states governed by the Temporary Protection Directive do have an obligation to admit and protect Ukrainians in flight, other states innovating their own temporary programmes have no obligations at all. The danger in this instance is that humanitarian action is voluntary, does not constrain states, has no standards, and is most likely to be deployed in cases that tap into a sense of fellow feeling. Discrimination can easily

[52] Costello and Foster, '(Some) refugees welcome', p. 247.

[53] See B. S. Chimni, 'The geopolitics of refugee studies: a view from the south', *Journal of Refugee Studies* 11: 4, 1998, pp. 350–374, https://doi.org/10.1093/jrs/11.4.350-a; Hathaway, 'A reconsideration'; E. Tendayi Achiume, 'Race, refugees, and international law', in Costello, Foster and McAdam, eds, *The Oxford handbook of international refugee law*, pp. 43–59. Many media reported on race discrimination at the Ukrainian border in the early weeks of the war, for example Akinwotu and Strzyzynska, 'Nigeria condemns treatment of Africans'.

[54] Hugo Storey presents a detailed analysis of the likely application of the refugee definition to those fleeing Ukraine in 'Are those fleeing Ukraine refugees?', in Carrera and Ineli-Ciger, eds, *EU responses to the large-scale refugee displacement from Ukraine*, pp. 101–20.

seep into these contexts. Furthermore, there is a risk that refugee protection will begin to look voluntary, unconstraining, and without standards. It is no wonder that states do not work to clarify the basis for their actions—this confusion is only to their advantage.

One way to broadly characterize the growth of refugee law over the past 70 years is to say that it has moved away from the humanitarian impulses that brought it into being. The strengthening of the law, its ability to provide protection for new groups of people at risk of unforeseen types of persecution, its application around the world: each of these owes something to the Refugee Convention being understood *as law*, rather than as an act of generosity. While it is undoubtedly the case that refugee law ought yet to be improved, that the rights of refugees enumerated in the Convention get remarkably short shrift, and that there are western biases in the Convention that make it vulnerable to racist deployment, none of these flaws will be remedied by leaning into a humanitarian ethos. Nor will humanitarianism aid in challenging the broader refugee regime that has grown up around refugee law, constructed by states seeking to limit what it asks of them. Sometimes it seems this could be the case, but we have seen time and time again that humanitarianism does not stand the test of time: states acting on the basis of generosity are free to say—at whatever time its suits them—'we have done enough'. For all of these reasons, squaring the circle is very difficult indeed. It might be impossible both to protect refugee law from the erosive challenge of humanitarianism and to make the most of the possibilities that come with humanitarian outpourings. But the effort of attempting to do so has value nonetheless, for when the humanitarian moment recedes, and refugee law returns to business as usual, advocates and scholars, as well as policy-makers and political leaders, will need to continue to respond to the millions of individuals seeking refugee protection who are not fleeing a highly visible aggression by a global hegemon. Refugee scholars, therefore, ought not to be afraid to point out the tension between the law and the politics of these moments. For all the weaknesses of refugee law, it has helped millions of people over the past 70 years who would not have been protected by humanitarian actions alone, and for this reason the ongoing work of defending it, and improving it so that it can do better, is vital. This includes defending it from humanitarianism itself.

Conclusions—the agenda this war sets for refugee law

The response of European states, and their citizens, to the mass displacement of people fleeing the war in Ukraine is a significant achievement, worth studying to better understand how it could be emulated in response to conflicts in other parts of the world. Amid this humanitarian outpouring, a number of questions about refugee law have arisen that are uncomfortable for advocates and scholars because criticizing significant efforts of generosity is a fraught endeavour. Taking this discomfiting juncture as a starting-point reveals that this historic moment carries with it some risks of harming existing support for international refugee

law; and that this harm comes precisely because of the way humanitarianism and refugee law are intertwined.

The response to people fleeing Ukraine is highly visible to leaders and citizens of prosperous western states, and thus it has a capacity to stand for 'how refugee support is done'. This is worth thinking long and hard about. Perhaps refugee support could be done this way in the future; but it never has been in the past. The comparative success of this endeavour is such that it risks making people think that humanitarianism is, in fact, all we need. That it is better (in the sense of more effective) than refugee law. That refugee law, with its rules and policies and endless time-consuming loops, is somehow not worth the effort. Using the Temporary Protection Directive ensured that this crisis did not lead to a rapid improvement in the ability of European states to use refugee law nimbly, to speed up individual assessments, to regularize group determinations as part of their refugee law toolkit, or to develop an interpretive stance about how those fleeing the Ukraine fit the refugee definition. In a sense, this crisis has become a squandered opportunity. This is emblematic of the threat to refugee law in this moment: it was not used. Every part of the history of refugee law over the past 70 years makes clear that humanitarianism does not accomplish nearly enough, and that it has enormous capacity for bias. Indeed, many of the critiques pointing out discriminatory bias in the response to this mass displacement (including the Temporary Protection Directive) arise precisely because refugee law has not been used.

Beyond the problems of its intertwining with humanitarianism, this moment in time affords us three types of insights about refugee law's vulnerability. First, it is clear that the confusion about which actions are a result of refugee law and which are not has some benefits to states. In addition, it is clear that it is very hard to dispel because of the failure of the refugee definition to seep into public and political discourses. This confusion undermines the lawlike stature of refugee law, and muddles it with politics, which risks sending the message that politics is all it is.

Second, the present situation shines a light on some of the difficulties with the morass of norms that surround the core of refugee law. At the top of this list is the prominence of a 'regional solution'. The Ukrainian exodus put this in a spotlight, showing how well this works when neighbouring countries are wealthy, have strong human rights regimes, and are morally and politically invested in the conflict in question.

Finally, the current crisis displays both how slowly refugee law typically operates as well as the limits of its reach. The first of these problems is about political will. Despite its crisis response rhetoric, refugee law is not well tooled to respond to crises.[55] This is a weakness that should be high on the agenda of renewed reform efforts. The second of these issues speaks to the work that still needs to be done within refugee law itself. Even as we defend refugee law, it is impossible not to admit that it has gaps, blind spots and weaknesses. Despite

[55] Catherine Dauvergne, 'Refugee law as perpetual crisis', in Satvinder Singh Juss and Colin Harvey, eds., *Contemporary issues in refugee law* (Cheltenham: Edward Elgar, 2013), pp. 13–30.

this, in a world that is increasingly hostile to migrants, refugee law is the most powerful tool that exists. Strengthening refugee law should include doing the important work of ensuring that all aspects of the Convention are understood, and that refugees have the ability to fully exercise the rights contained within the Convention.[56]

Challenges to international refugee law have long simmered, prompting David Cantor to ask: '[W]hat *is* refugee law today and where does its future lie?'[57] This is an important question that is thrust forward by this ongoing crisis. This article attempts one form of answer. If we do not as a scholarly community take up the challenge articulated by Cantor of writing about the entirety of the refugee regime, we cede this ground to others.[58] Within this challenge, however, we encounter a dilemma that we need to grapple with more directly. Rosemary Byrne and Thomas Gammeltoft-Hansen describe this as the link between advocacy, policy and scholarship that typifies refugee law scholarship.[59] One slice of the dilemma is that as scholars it is too easy to succumb to the temptation to mute or temper our analysis when it risks undermining our advocacy commitments. This predicament is front and centre in attempting to assess how international refugee law is positioned within the migration crisis presented by the war in Ukraine. There are some uncomfortable truths here, and some evidence that issues many scholars have turned away from are laid bare in these circumstances. Taking the position that international refugee law is imperfect, but that it ought to be defended nonetheless, cannot mean turning away from its weaknesses and from the complexity of the politics of humanitarianism. The response of states, international agencies and citizens to this particular crisis creates a vantage point that we should be brave enough to embrace.

[56] In the case of responses to those fleeing Ukraine, Costello and Foster have written compellingly about how the Convention's non-discrimination commitment can and should be better understood and deployed (Costello and Foster, '(Some) refugees welcome'). See, generally, James C. Hathaway, *The rights of refugees under international law*, 2nd edn (Cambridge, UK: Cambridge University Press, 2021).

[57] David James Cantor, 'The end of refugee law?' *Journal of Human Rights Practice* 9: 2, 2017, pp. 203–11 at p. 205, https://doi.org/10.1093/jhuman/hux022.

[58] Cantor, 'The end of refugee law?', pp. 205–6.

[59] Byrne and Gammeltoft-Hansen, 'International refugee law'.