
Journeys in Search of Refuge

1.1 Introduction

The word ‘refugee’ has its roots not in what people are escaping from, but in what they are seeking: refuge.¹ Today, the number of people searching for sanctuary in foreign lands is the highest ever recorded.² However, many of the places to which people flee are sites of refuge only in a nominal sense. They are often unsafe and insecure; provide little access to healthcare, education and employment; and have inadequate sanitation, shelter, food and water. Hathaway laments that ‘people guilty of absolutely no crime except for doing what we have said they may do, which is to come seek asylum, find themselves in horrific conditions’.³ These problems exist in places of so-called refuge in both higher- and lower-income countries. Carens explains that, despite being ‘supposedly safe havens’, in some refugee camps in the Global South, ‘the deprivation and danger appear to be as bad as the conditions from which refugees fled’.⁴ Recalling a refugee settlement known as the ‘Jungle’ in Calais, an Afghani refugee writes that it ‘looked as though the world’s toilet had been flushed and the mess washed up here’.⁵ The conditions in some locales in which people seek refuge are so grim that many wish to return to the place from which they had initially fled.⁶

In response to these dangerous and bleak conditions of refuge, asylum seekers and refugees adopt various strategies. As Ramsay explains, ‘[e]ven in contexts of uncertainty, refugees ... imagine, and actively work toward, new futures’.⁷ Some move from camp environments to urban areas due to the prospect of greater security, better living conditions and employment opportunities. Others are able to make much longer expeditions across one or a number of international borders in search of sanctuary. These voyages are often

¹ ‘Refugee’ derives from the Old French word *réfugié*, meaning ‘gone in search of refuge’: Glynnis Chantrill (ed), *The Oxford Dictionary of Word Histories* (Oxford University Press, 2002) 424.

² UNHCR, *Global Trends: Forced Displacement in 2019* (18 June 2020) 2 <www.unhcr.org/en-au/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html>.

³ James Hathaway, ‘The UN’s “Comprehensive Refugee Response Framework”: Actually a “Contingent Refugee Assistance Project”’ (speech delivered at the Refugee Law Initiative Eighth International Refugee Law Seminar Series, 21 May 2018).

⁴ Joseph Carens, ‘Refugees and the Limits of Obligations’ (1992) 6(1) *Public Affairs Quarterly* 31, 40.

⁵ Gulwali Passarlay and Nadene Ghouri, *The Lightless Sky: An Afghan Refugee Boy’s Journey of Escape to a New Life* (Atlantic Books, 2015) 292.

⁶ Amnesty International, *EU: Asylum-Seekers Must Be Moved from Appalling Conditions* (14 December 2016) <www.amnesty.org.au/eu-asylum-seekers-must-be-moved-from-appalling-conditions/>; Georgina Ramsay, ‘Benevolent Cruelty: Forced Child Removal, African Refugee Settlers, and the State Mandate of Child Protection’ (2017) 40(2) *Political and Legal Anthropology Review* 245, 255.

⁷ Georgina Ramsay, ‘Incommensurable Futures and Displaced Lives: Sovereignty as Control over Time’ (2017) 29(3) *Public Culture* 515, 516.

hindered by various mechanisms states use to constrain refugees' movements.⁸ Factors such as age, gender, care responsibilities and disability increase the challenges refugees face in their quests for refuge. As a result, these journeys are rarely linear, but are instead 'fragmented'.⁹ For example, those in need of protection sometimes become trapped in certain places, unable to travel onwards or return home. In other situations, refugees who feel they have found a place of refuge are forced to leave and must find ways to stay or return.

While there are studies of these fragmented journeys in fields such as anthropology, sociology and criminology,¹⁰ there is little consideration of the role litigation plays. This is despite people in need of international protection increasingly turning to courts or other adjudicative bodies to continue their journeys in search of sanctuary. For example, a refugee may seek a court order granting them permission to leave the confines of a camp, or an asylum seeker living in the Jungle in Calais may initiate court proceedings in the UK seeking relocation there.

When refugees and asylum seekers bring these legal claims, they are seeking protection, not from persecution in their home country, but from a place of ostensible refuge. They want rescue from a place that raises serious protection concerns, but which is, notionally at least, serving as a place of refuge to hundreds or thousands of others. I refer to these actions as 'protection from refuge' claims and they are the focus of this book. While there are myriad studies of how courts interpret refugee definitions, in this first global and comparative study of protection from refuge jurisprudence, I examine how judges approach the remedy: refuge. I provide an account of how adjudicative decision-makers conceptualise refuge through a variety of legal prisms and arbitrate the clash between the search for sanctuary and the different ways states constrain refugees' mobility. I also consider whether these judicial approaches to protection from refuge claims assist or hinder refugees' (or particular refugees') journeys towards a safe haven with a particular focus on gender but also other factors such as youth, disability, sexuality and parenthood.

I outline, in Section 1.2, the 'protection from refuge' conundrum in more detail and discuss the frictions inherent in these legal claims. In Section 1.3, I identify where along a refugee journey these legal challenges can manifest, starting from what may be the first country of asylum to litigation that occurs farther afield. In Section 1.4, I highlight how bringing together what have traditionally been viewed as disparate areas of jurisprudence under the 'protection from refuge' rubric and adopting comparative and feminist methods of analysis provides unique insights on refugee law and the international protection regime more broadly. Finally, Section 1.5 outlines the scope of the work and how the protection from refuge framework developed in the book can inform future research.

⁸ Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452, 458.

⁹ Michael Collyer, 'Stranded Migrants and the Fragmented Journey' (2010) 23(3) *Journal of Refugee Studies* 273, 275.

¹⁰ See, e.g., Richard Black, 'Breaking the Convention: Researching the "Illegal" Migration of Refugees to Europe' (2003) 35(1) *Antipode: A Radical Journal of Geography* 34; Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States and Canada* (University of California Press, 2006); Mariana Nardone and Ignacio Correa-Velez, 'Unpredictability, Invisibility and Vulnerability: Unaccompanied Asylum-Seeking Minors' Journeys to Australia' (2016) 29(3) *Journal of Refugee Studies* 295; Susan Zimmermann, 'Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge' (2009) 22(1) *Journal of Refugee Studies* 74.

1.2 Protection from Refuge: Tensions and Queries

Protection from refugee claims are a burgeoning trend. They started to emerge in the early 2000s, but have increased in number over the first two decades of the twenty-first century and have arisen in Africa, Europe, North America, the Middle East and the Asia-Pacific region.¹¹ The majority of these claims are instigated in domestic courts and adjudicative tribunals, while others have been brought before supranational courts and UN treaty bodies. I include in the ‘protection from refugee’ rubric cases determined by an adjudicative decision-making body in which an asylum seeker or refugee is either resisting being sent to an alternative place of refuge or petitioning to be transferred from their current place of refuge to another. My definition of ‘refugee’ includes anyone recognised as a refugee under the Refugee Convention or a regional refugee instrument,¹² given complementary protection¹³ or qualifying as a Palestinian refugee according to UNRWA.¹⁴ While refugee status is declaratory as opposed to constitutive,¹⁵ I use the term ‘asylum seeker’ to refer to a person who is seeking international protection, but whose status has not been confirmed. This book examines protection from refugee decisions handed down between 1 January 2000 and 31 December 2020.¹⁶

Protection from refugee claims are grounded in different aspects of international, regional and domestic law, which I outline in Section 1.3. What unites them is that all of the asylum seeker and refugee litigants are seeking the same outcome: to continue their journey in search of a place of genuine refuge. Despite differences in the ways protection from refugee cases are framed, they raise similar quandaries for decision-makers that have implications for the international protection regime more broadly. These tensions are reflected in the phrase ‘protection from refugee’, which may, at first, appear to be paradoxical. The term ‘refuge’ is associated with notions of safety and well-being. Why would a person seek protection from a place intended to provide security and shelter? The apparent contradiction arises because the word ‘refuge’ is used to refer to both the idea of providing a safe haven (refuge as a concept) and the site at which that sanctuary may be provided (refuge as a place).¹⁷ In protection from refugee challenges, the ideal and the actuality of refuge both

¹¹ I discuss claims made in all of these regions, with the exception of the Middle East. The only relevant claim made in this region occurred in Israel but was withdrawn before final judgment – see note 85.

¹² For example, the Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45, in force 20 June 1974.

¹³ Complementary protection is protection given to those who are ‘fleeing serious harm but who do not fall within the technical legal definition of a “refugee”’: Jane McAdam, *Complementary Protection in International Law* (Oxford University Press, 2007) 1.

¹⁴ UNRWA’s definition of a Palestinian refugee is outlined in Section 1.3.

¹⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (1979, re-edited 1992) [28]; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 11 (see also James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2nd ed, 2021)).

¹⁶ The only exception to this is in Chapter 5, where I discuss *The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness v The Canadian Council for Refugees et al* [2021] FCA 72. This judgment was handed down on 15 April 2021 shortly before this book went to press and was an appeal of a decision by the Federal Court of Canada handed down on 22 July 2020.

¹⁷ The *Oxford English Dictionary* defines ‘refuge’ as meaning both ‘shelter from pursuit or danger or trouble’ and ‘a person or place etc. offering this’: RE Allen (ed), *The Concise Oxford Dictionary of Current English* (Clarendon Press, 8th ed, 1990) 1009. Grahl-Madsen makes the same point with the word ‘asylum’: Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume 2* (AW Sijthoff-Leyden, 1966) 3.

enter the judicial arena. When refugees make these claims, they draw attention to the disparities between ideas of what refuge is supposed to be with the material reality of the place in which they are or will be located. In other words, they highlight the incongruities between refuge as a concept and as a place. In arbitrating these disputes, decision-makers have the opportunity to draw on frameworks available in international, regional and domestic law to elucidate the concept of refuge. For example, they may understand refuge as allowing refugees to thrive or merely survive. They could posit refuge as a legally binding obligation or as a discretionary act. Decision-makers must then determine the extent to which they can use these notions of refuge to cast judgment on spaces of refuge within or outside their borders.

Another conundrum inherent in these cases and reflected in this book's title is why a person must seek protection from a place of refuge. If a person does not feel secure in their current location, why can they not simply find alternative places of sanctuary? The reason why refugees often need to resort to legal processes to obtain protection from such places is due to the operation of containment mechanisms. Containment mechanisms are laws, policies or agreements that aim or are used to prevent refugees from moving within and across borders and restrict them to particular places of ostensible refuge.¹⁸ They have been increasingly employed over the past three decades,¹⁹ with wealthier states in particular having 'a near-obsession with migration control, spending billions of dollars each year in the hope of securing their borders'.²⁰ Some containment mechanisms, such as encampment policies, aim to reduce refugee mobility within a state's borders and prevent refugees living in local communities. There are also policies and practices that externalise migration control beyond a state's borders – they aim to prevent asylum seekers arriving or staying in a state's territory²¹ and can exert 'control over the entire length of the journey'.²² Examples of these transnational and cooperative forms of containment mechanisms are offshore processing, international agreements determining which state has responsibility for a refugee and joint surveillance, interception and policing practices.²³ Some scholars argue that the Refugee Convention is a containment mechanism because it only responds to a fraction of people in need of protection and it is sometimes applied in a restrictive manner.²⁴

When refugees bring protection from refuge claims, they initiate a contest between their entitlement to refuge and states' interests in constraining refugees' ability to move within

¹⁸ Andrew Shacknove, 'From Asylum to Containment' (1993) 5(4) *International Journal of Refugee Law* 516, 521–3.

¹⁹ Thomas Gammeltoft-Hansen, 'International Refugee Law and Policy: The Case of Deterrence Policies' (2014) 27(4) *Journal of Refugee Studies* 574, 576.

²⁰ Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235, 236.

²¹ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 2.

²² *Ibid* 6.

²³ Azedeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 *Human Rights Law Review* 435, 436; Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights' (2013) 54(2) *Harvard International Law Journal* 315, 334–5, 344.

²⁴ See, e.g., B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350, 356; Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press, 1996) 69–71.

and across borders. The ‘dissonance’ between refugees’ ‘human needs and desires and generalised policies of migration control’²⁵ is what adjudicative decision-makers must arbitrate. Decision-makers’ determinations of these conflicts will either disrupt or cement containment mechanisms. In this book I examine whether these judicial responses impede or facilitate refugees’ journeys in search of refuge. I also consider if they assist or create additional hurdles for those who face the greatest difficulties in travelling in search of refuge, such as unaccompanied minors, refugees with disabilities and single female-headed families. I ask these questions against the background of how scholars, UN actors and refugees understand refuge, and I turn to this in the next section.

1.3 What Is Refuge and What Are the Different Types of Protection from Refuge Claims?

The word ‘refuge’ is widely used in refugee and forced migration scholarship,²⁶ but it is ‘rarely distinctly defined’.²⁷ This book provides the first detailed study of how adjudicative decision-makers conceptualise refuge. In particular, I identify how they understand the objectives, nature, threshold and scope of refuge. In Chapter 2, I outline how scholars from a variety of disciplines, UN institutions and refugees envision these aspects of refuge (in order to highlight refugees’ perspectives I draw on memoirs written by people with lived experience of displacement). This provides the background against which I examine how adjudicative decision-makers approach refuge and address the discrepancies between ideas of refuge and the reality.

The analysis in Chapter 2 indicates that there are commonalities across scholarship from different disciplines with respect to the starting points for elucidating what refuge is or should be. The literature on refuge also indicates that the concept is a robust one. Scholarship, UN materials and refugee memoirs provide sophisticated accounts of what refuge is intended to achieve beyond the ‘absolute priority on “saving lives”’.²⁸ There are also well-developed understandings of the nature of refuge as a remedy, legal status, duty, right and process. Scholars, UN institutions and refugees understand refuge to have a broad scope, encompassing a wide range of needs, desires and hopes. The standard of what is deemed to be adequate refuge is usually a high one, surpassing the basic duties of guaranteeing safety and providing essentials for the sustenance of life. Furthermore, the conceptualisation of refuge presented in the literature is dynamic in the sense that there are

²⁵ Gammeltoft-Hansen and Hathaway (n 20) 237.

²⁶ See, e.g., Catherine Besteman, *Making Refuge: Somali Bantu Refugees and Lewiston, Maine* (Duke University Press, 2016); Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017); Elena Fiddian-Qasimiyeh (ed), *Refuge in a Moving World: Tracing Refugee and Migrant Journeys Across Disciplines* (UCL Press, 2020) 1; Daniel Ghezzeback, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Klaus Neumann, *Refuge Australia: Australia’s Humanitarian Record* (UNSW Press, 2005); Silvia Pasquetti and Romola Sanyal (eds), *Displacement: Global Conversations on Refuge* (Manchester University Press, 2020); David Scott Fitzgerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press, 2019).

²⁷ Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018) 156.

²⁸ Jean-François Durieux, ‘Three Asylum Paradigms’ (2013) 20(2) *International Journal on Minority and Group Rights* 147, 162.

considerations of the ways it may differ for people of different genders, sexualities and ages, as well as those with disabilities and care responsibilities. To highlight the discrepancies between refuge as a concept and as a place, in Chapter 2 I also discuss literature that examines the conditions in which many refugees live. I focus in particular on the places of ostensible refuge that are the subject of the protection from refuge claims examined in this book.

I explore how decision-makers respond to the disjunctures between ideas and actualities of refuge in Chapters 3–7, in which I survey protection from refuge claims made at different points in a refugee journey. I start in Chapter 3 with legal challenges that arise in what may be a first country of asylum or a place of refuge relatively close to home. This chapter examines forced encampment litigation. I focus on Kenya, which is where most forced encampment litigation has occurred. These cases have been initiated by refugees living in urban areas resisting being forcibly sent to a refugee camp, as well as refugees living in camps seeking permission to leave. They are grounded in domestic, regional and international human rights and refugee law. I examine how Kenyan judges use these legal frameworks as prisms to articulate the functions and nature of refuge. I show that Kenyan courts have understood refuge as a process as well as a human rights remedy that must allow refugees to live a liveable life in the present, have hope for the future and heal from past trauma. This extends understandings of refuge when compared to the academic literature. Judges arrive at these sophisticated understandings of refuge when they identify and reflect on irreducible aspects of refugeehood.

However, in more recent cases, Kenyan judges have moved away from this approach and instead focus on the uniqueness of the protection from refuge litigants. This results in conceptualising refuge as a limited commodity that, akin to welfare, must be given to those most in need or most deserving. Nevertheless, in line with adopting feminist methods of analysis (which I describe in Section 1.4), I highlight that, in identifying the anomalous refugee, Kenyan courts have addressed protection concerns relating to gender, age and disability in a sensitive and nuanced manner.

I continue my examination of the use of human rights arguments to secure protection from a place of refuge in Chapter 4, where I look to Europe. Most of these protection from refuge claims are brought by those who have made longer, often transcontinental journeys. They are using human rights law to request or challenge a transfer made pursuant to the EU's Dublin System²⁹ or other containment practice. These cases are brought before the European Court of Human Rights or domestic adjudicative decision-making bodies pursuant to the ECHR. They have also been brought before UN treaty bodies. While these cases do not directly call into question the validity of European containment practices, they have potential to set precedents that jeopardise their continued operation.

Unlike Kenya's forced encampment litigation, which has received scant scholarly attention, there are numerous studies of this jurisprudence. Most analyses are written from the perspective of how it develops (or, with respect to UN treaty body jurisprudence, compares to) European human rights law, especially regarding migrants' rights.³⁰ In Chapter 4,

²⁹ The Dublin System determines the EU member-state responsible for hearing an asylum claim. It was adopted in 2003 and recast in 2013. There was a proposal for its reform in 2016. However, in 2020 the European Commission announced that the Dublin System would be abolished and the proposal for its reform was withdrawn. At the time of writing, the Dublin System was still in force.

³⁰ Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press, 2019); Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21

I depart from the existing scholarship by opening a different line of enquiry. I examine how the case law develops judicial understandings of refuge and what it says, through the prism of different areas of human rights law, about international refugee law and the remedy it offers. My analysis is also unique in that I critically examine the jurisprudence from a gender perspective. The leading legal and sociolegal examinations of this case law do not take a feminist or intersectional approach. Briddick notes that women are ‘conspicuously absent or underrepresented’ in Dublin System cases³¹ and that ‘consideration of gender has been noticeably absent from debates on Europe’s re-bordering’.³²

The human rights arguments available to refugee and asylum seeker litigants to plead in the European context are more limited than in Kenya. Most protection from refuge claims are based on the right to be free from torture and inhuman and degrading treatment, the right to family life, the right to an effective remedy and the right against collective expulsion: rights not in the Refugee Convention and rights that would be considered far below the standard of adequate protection when compared to the legal literature on refugee protection (outlined in Chapter 2). I deepen the analysis made in Chapter 3 by highlighting that, in initial and early European protection from refuge claims, decision-makers identified common aspects of refugehood and used the above-noted rights to engage with the functions and nature of refuge. Similar to Kenyan case law, there was an understanding that refuge is a remedy that must address present, future and past vicissitudes of displacement, but decision-makers now search for the ‘good’ or ‘peculiarly vulnerable’ refugee. This has resulted in decision-makers approaching refuge as a scarce commodity and one stripped down to the barest minimum of protections. Unlike their Kenyan counterparts, in searching for the exceptional refugee, most decision-makers approach questions of gender, age and disability in a nominal manner.

In Chapter 5, I continue with the journeys of refugees who have travelled beyond what may be their first country of asylum in search of sanctuary farther afield, but I examine cases they have initiated that directly challenge regional containment instruments. This has occurred in four parts of the world: North America (an agreement between the US and Canada), Asia-Pacific (agreements between Australia and Malaysia, Australia and Papua New Guinea and Australia and Nauru), Europe (the Dublin System and an agreement between Europe and Turkey) and Libya (an agreement between Libya and Italy).³³ Human rights arguments are present in these cases, but they are less central. The arguments pleaded traverse many areas of domestic, regional and international law. In

(3) *German Law Review* 355; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).

³¹ Catherine Briddick, ‘Some Other(ed) “Refugees”?: Women Seeking Asylum under Refugee and Human Rights Law’ in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 281, 287.

³² *Ibid* 284.

³³ With respect to the EU, I examine cases before the Court of Justice of the European Union that directly challenge the validity and operation of the Dublin System such as *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ECR I-13905. These cases are different from the cases discussed in Chapter 4, most of which are challenges made before the European Court of Human Rights under the ECHR. Unlike the cases discussed in Chapter 5, the cases in Chapter 4 do not directly call into question the Dublin System’s validity, and the European Court of Human Rights does not have jurisdiction to make such a determination: Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12(2) *Human Rights Law Review* 287, 307.

deciding these cases, judges must determine the extent to which they will take regional law, international law or foreign jurisprudence into account in setting the threshold for adequate refuge. Another contentious issue is whether these legal frameworks permit them to pass judgment on other states' laws and policies. Therefore, the main theme in Chapter 5 is the role that cartographic and juridical borders play in protection from refuge challenges. I examine the ways decision-makers position and manoeuvre juridical borders in constructing ideas of refuge and determining the legality of states' attempts to prevent refugees crossing international borders in search of refuge. I observe that, when courts consider the significance of refugeehood and expand their juridical borders to permit assessment of sites of refuge in other states, they set high thresholds for refuge and characterise it as a duty owed by states. These powerful conceptualisations of refuge disrupt the continuation of containment agreements.

However, in most cases examined in Chapter 5, courts ignore the salience of refugee status and retract their juridical borders. This means that there is no minimum standard of refuge set in these protection from refuge cases and refuge morphs from an obligation to a discretion. Refugees become trapped in the resisted place of refuge, unable to continue their journey except in exceptional or extraordinary circumstances. What is considered exceptional is highly gendered with the narrow frameworks developed sidelining experiences of male and also many female refugees. The extraordinary circumstances needed to trigger these legal frameworks also have significant gendered consequences, placing both men and women at significant and different forms of risk.

In Chapters 6 and 7, I examine protection from refuge claims that arise under the Refugee Convention. These claims are also brought by those who have made long journeys to countries in the Global North. However, instead of being sent to or trapped in a nearby country within the region, these litigants face the prospect of being returned to a place of ostensible refuge in the Global South. Human rights arguments are present in these claims, and the role of borders is significant, but another factor at play is Global North states' concerns that potentially significant numbers of people may use the Refugee Convention to transfer their place of refuge from a lower- to a higher-income country.³⁴ To assist a dissection of decision-makers' approaches to these claims, I draw on literature written from third-world approaches to international law, critical race and postcolonial perspectives that position the Refugee Convention as a containment mechanism.

I embark on this line of investigation in Chapter 6, in which I examine cases that are instigated by Palestinian refugees. Palestinians are the only group of refugees who do not come within the UNHCR's mandate and instead have their own UN body that provides protection and assistance – UNRWA. The history behind the different treatment of Palestinian refugees is discussed in Chapter 6. UNRWA defines Palestinian refugees as those whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict, as well as descendants of men who meet this criteria.³⁵ UNRWA is also mandated to provide protection and assistance to other displaced persons, including those displaced as

³⁴ Chimni (n 24) 351; Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 189, 206.

³⁵ UNRWA, *Consolidated Eligibility and Registration Instructions (CERI)* (May 2006) 2 <www.unrwa.org/sites/default/files/ceri_24_may_2006_final.pdf>.

a result of the 1967 Israel–Arab conflict and subsequent hostilities.³⁶ UNRWA uses the term ‘Palestinian refugee’ to encompass the groups it is mandated to protect and assist as well as those who come within UNRWA’s definition of a Palestinian refugee.³⁷

Some Palestinian refugees leave an UNRWA area of operation (Jordan, Lebanon, Syria, the Gaza strip, East Jerusalem or the West Bank) and seek refugee protection elsewhere. In making these journeys, they confront article 1D of the Refugee Convention, which applies only to Palestinian refugees and is described as an exclusion³⁸ or ‘contingent inclusion’ clause.³⁹ Article 1D provides that Palestinian refugees are excluded from protection under the Refugee Convention unless their UN protection or assistance has ceased for any reason. I explain in detail article 1D and the debates on its interpretations in Chapter 6. Decision-makers’ approach to these claims determines whether Palestinian refugees should return to an UNRWA region to receive international protection or be entitled to remain in the country where they made the article 1D claim and receive protection as Convention refugees.

When decision-makers reflect on the nature of Palestinian refugeehood and expand their juridical borders, they come close to setting a broad scope of refuge for Palestinian refugees and characterising refuge as a right, duty and act of international solidarity. In particular, a 2019 Aotearoa/New Zealand decision may open the door to a protection-sensitive approach to article 1D, at least for those Palestinian refugees who travel to the Antipodes. However, most decision-makers determine these claims in a way that truncates the scope of refuge for Palestinian refugees, positions refuge not as a right but as an act of benevolence and entrenches article 1D as a containment mechanism. This inhibits Palestinian refugees’ ability to find a place of refuge outside the UNRWA region unless their circumstances are deemed exceptional in some way. A feminist analysis of the case law indicates that the approach to exceptionality in article 1D jurisprudence creates additional barriers for female Palestinian refugees. This is because it prioritises those who have been specifically targeted with a form of harm manifesting in the public sphere but disregards harms most likely to occur behind closed doors.

In Chapter 7, I analyse cases in which decision-makers have to determine whether a person can seek refuge in an IDP camp. These cases arise under article 1A(2) of the Refugee Convention and are made by putative refugees. A putative refugee is a person outside their country of origin or habitual residence, whose circumstances indicate they satisfy one aspect of the refugee definition in the Refugee Convention (a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion), but who have not yet established another part of the definition (that they are unable to avail themselves of the protection of their country of origin or habitual residence). In most jurisdictions, decision-makers will ask whether the putative refugee can relocate to another part of their country of origin or habitual residence in which they will have protection. This is an internal protection alternative (‘IPA’) enquiry.⁴⁰ In some of these cases, the putative refugee has pleaded that, if they internally

³⁶ Damian Lilly, ‘UNRWA’s Protection Mandate: Closing the “Protection Gap”’ (2018) 30(3) *International Journal of Refugee Law* 444, 446.

³⁷ *Ibid.* 446.

³⁸ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 513, 515.

³⁹ Guy Goodwin-Gill and Susan Akram, ‘Brief *Amicus Curiae* on the Status of Palestinian Refugees under International Law’ (2000) 11 *Palestine Yearbook of International Law* 187, 191.

⁴⁰ See Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill, 2019) 15–7 for a discussion of other terminologies, including ‘internal flight alternative’ and ‘internal relocation’. I use ‘internal

relocate, they would have no option but to live in an IDP camp. Decision-makers must then determine if an IDP camp is an acceptable internal protection alternative. These cases have arisen in the UK and Aotearoa/New Zealand.⁴¹ It is possible to consider all putative refugees facing an IPA assessment as prospective IDPs⁴² (IDPs are people who have fled their homes but remain within their state).⁴³ However, in these particular cases, refuge as a place and concept collide because the putative refugee is resisting the prospect of seeking refuge in an IDP camp, a place intended to provide refuge to significant numbers of people displaced from their homes.⁴⁴

When these claims initially came before courts and tribunals in the early 2000s, decision-makers reflected on the situations of those living in IDP camps. They set a broad scope for adequate refuge and approached decisions with an ethic of international cooperation. But subsequently, there has been a transition in which decision-makers produce rudimentary notions of refuge. They give it a narrow scope – limiting it to bare survival rights – and there is a shift from understanding that refuge involves a nation-state bestowing protection to positioning refuge as something individuals can forge themselves. The understanding that refuge is an act of international solidarity has dissipated from the jurisprudence. Protection from life in an IDP camp will only be granted if the putative refugee can establish that they are exceptionally vulnerable. Feminist methods of analysis highlight that decision-makers' notional approaches to the interactions between gender and vulnerability have resulted in problematic outcomes for refugees of all genders.

In the concluding chapter, I reflect on the patterns in the ways decision-makers across all of these jurisdictions, grappling with different legal instruments and doctrines, approach and determine protection from refuge claims. Across the globe, decision-makers have transitioned from sophisticated to impoverished understandings of refuge, from approaches that disrupt containment mechanisms to those that cement them and from decisions that facilitate to ones that impede refugee journeys. However, some recent jurisprudence indicates that there may be a shift back towards more protection-sensitive decisions.

protection alternative' because it highlights what should be decision-makers' main concern: whether the putative refugee will have *protection* if they relocate.

⁴¹ I conducted a search of IPA jurisprudence on LexisNexis, Westlaw and Refworld. The issue of internal relocation to an IDP camp has arisen in some decisions in which the individuals are not entitled to refugee protection. See note 92 for an example. As outlined on page 18, protection from refuge claims made by those whose claims for international protection have been unsuccessful are outside the scope of this book.

⁴² Schultz (n 40) 7.

⁴³ IDPs are those 'who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border': Guiding Principles on Internal Displacement, UN ESCOR, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998) [2].

⁴⁴ Principle 12(2) of the Guiding Principles on Internal Displacement (n 43) provides that IDPs 'shall not be interned in or confined to a camp' unless 'absolutely necessary'. However, this 'addresses the use of closed camps which [IPDs] cannot leave, and has to be distinguished from the practice of using camps to host large numbers of such persons': Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (Paper No 32, American Society of International Law Studies in Transnational Legal Policy, 2008) 32. In most contexts, IDP camps are intended to be sites of protection for IDPs and many are staffed by representatives from various international organisations: Brookings Institution, *Protecting Internally Displaced Persons: A Manual for Law and Policy Makers* (October 2008) 63 <www.unhcr.org/50f955599.pdf>.

The ways courts are arbitrating protection from refugee challenges has significant implications for refugee law and the international protection regime more broadly. In particular, two of the most pressing problems in refugee protection are protracted encampment situations and that the majority of the world's refugees are hosted by states least able to do so.⁴⁵ Courts cannot comprehensively address these dilemmas, and there is scepticism about the long-term utility of using litigation as a tool to reshape refugee protection policy.⁴⁶ Nevertheless, the significance of courts as arbitrators of conflicts between refugee journeys and states' containment mechanisms is unlikely to abate. As states shift from earlier forms of *non-entrée* practices, such as interception, to more externalised and cooperative forms of border control, new legal challenges will emerge.⁴⁷ Courts can, depending on the way they determine these claims, alter or reinforce the current inequities in location of and responsibility for refugees. In Chapter 8, I highlight the approaches to protection from refugee claims likely to help to create a more just and equitable system of refugee protection and those that compound existing injustices and inequities. I make these observations while acknowledging that protection from refugee claims across the globe are grounded in different legal frameworks. Bringing these divergent areas of case law together in the one study is an integral aspect of my methodology, which I outline in the next section.

1.4 Methodology: Tracing Litigation across the Refugee Journey

By tracing the different points at which protection from refugee claims can arise in refugee journeys, I am conducting what Minow calls a 'recasting project': a study that gathers 'more than one "line" of cases across doctrinal fields' to 'show why they belong together' and offer 'a new framework or paradigm' in which they can be examined.⁴⁸ While analyses of case law are commonly categorised according to the legal framework in which actions are grounded,⁴⁹ I bring together cases on the basis of similarities in what the litigants are seeking. Thus, this project has methodological parallels with studies of remedies. Remedies scholars collate jurisprudence with reference to what a court orders or grants, as opposed to specific causes of action, and draw together cases framed in different areas of law such as contract, tort, equity and property.⁵⁰ Zakrzewski highlights the significance of such approaches by underlining that all civil litigants come to lawyers or courts wanting a remedy, and it is the lawyer's job to work backwards and assist them to obtain that remedy by pleading their case using the appropriate cause of action.⁵¹ Translated to refugee law, the

⁴⁵ Developing regions host 85 per cent of the refugees under the UNHCR's mandate: UNHCR (n 2) 2. Also, in Europe, southern border states host disproportionate numbers of refugees due to the operation of the Dublin System: Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill, 2016) 156, 165–6.

⁴⁶ Baumgärtel (n 30) 79; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015) 232.

⁴⁷ Gammeltoft-Hansen and Hathaway (n 20) 236, 244.

⁴⁸ Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63(1) *Journal of Legal Education* 65, 66.

⁴⁹ Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 5.

⁵⁰ See, e.g., Peter Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11(1) *Kings College Law Journal* 1; Michael Tilbury, *Principles of Civil Remedies* (Butterworths, 1990).

⁵¹ Zakrzewski (n 49) 1.

litigants in protection from refuge cases all seek what they believe to be a genuine place of refuge. Their representatives use the legal frameworks available to them to achieve this objective. The legal frameworks will differ depending on the refugee's status and circumstances and whether they are in, for example, Kenya, Greece, Canada, Australia or Papua New Guinea. There are significant distinctions between the ways protection from refuge cases are framed and the jurisdictions and institutional cultures of the decision-making bodies that determine them. These are acknowledged and discussed throughout the book. Nevertheless, at the core of these claims, refugees and asylum seekers are using the legal frameworks available to them to resist transfer to or seek rescue from a place of refuge.

While there are a plethora of studies on the ways decision-makers have interpreted refugee definitions,⁵² bringing protection from refuge cases into conversation with each other enables an examination of how they draw the contours and content of the remedy: refuge. The best-known study of the rights refugees are entitled to is Hathaway's seminal 2005 publication (the second edition was published in 2021),⁵³ in which he elucidates a refugee rights regime through synthesising entitlements in the Refugee Convention with rights in the ICCPR and ICESCR. However, when refugees seek courts' assistance in securing transfer to or rescue from a place of refuge, it is rare that they can directly plead these rights. As noted earlier, they often have to resort to other, and often local, legal instruments to frame their case. Hathaway says that, '[d]espite its length', his study 'is no more than a first step in the development of a clear appreciation of how best to ensure the human rights of refugees under international law'.⁵⁴ In this book, I take another step. Rather than starting my enquiry, as Hathaway does, with reference to international legal instruments, I begin with the legal claims refugees have brought in their attempts to secure a place of genuine refuge. While many of these claims do not directly invoke the Refugee Convention, I show that courts bring local and regional legal frameworks into conversation with international refugee law and sometimes in a way that deepens our understanding of refugee protection. As Knop explains, there is a process of translation that occurs when domestic and regional courts refer to international law alongside domestic and regional law.⁵⁵ This process of translation can produce new meanings and enrich our understanding of international law obligations.

While cutting across different areas of jurisprudence can offer new frameworks or paradigms, it is not without its challenges. Adopting a recasting methodology requires analysis of areas of law that are often considered distinct. As discussed earlier, this book brings together jurisprudence and literature on people with refugee status pursuant to the Refugee Convention, those granted complementary protection, Palestinian refugees, putative refugees and IDPs. The legal frameworks that apply to these categories of protection

⁵² See, e.g., Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) 2(2) *New Zealand Law Review* 257; Constance MacIntosh, 'When Feminist Beliefs Became Credible as Political Opinions: Returning to a Key Moment in Canadian Refugee Law' (2005) 17 *Canadian Journal of Women and the Law* 135; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2/3) *International Journal of Human Rights* 391; Hugo Storey and Rebecca Wallace, 'War and Peace in Refugee Law Jurisprudence' (2001) 95 *American Journal of International Law* 349.

⁵³ Hathaway (n 15). ⁵⁴ *Ibid* 991.

⁵⁵ Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32(2) *New York University Journal of International Law and Politics* 501, 504.

seekers are different. From an international law perspective, protection for Convention refugees and those with complementary protection is governed by the rights in the Refugee Convention, supplemented by international human rights law.⁵⁶ Palestinians were excluded from the Refugee Convention when it came into force and some scholars and courts take the view that they remain excluded. As noted earlier, they are the only group of refugees not to come under the UNHCR's mandate and, instead, receive protection and assistance from UNRWA. In examining the protection available to Palestinian refugees, Albanese and Takkenberg look across statelessness law, international humanitarian law, human rights law and UNRWA's mandate.⁵⁷ Protection of IDPs is outlined in the Guiding Principles on Internal Displacement⁵⁸ and, in Africa, the Convention for the Protection and Assistance of Internally Displaced Persons in Africa.⁵⁹ There is no legal framework as such that applies to putative refugees but there are various legal tests, grounded in refugee and human rights law, that are applied to determine whether a putative refugee will have adequate protection if they internally relocate within their country of origin. Each of the aforementioned legal frameworks and principles are discussed in Chapter 2.

Limiting the case studies in this book to Convention refugees or those with complementary protection (jurisprudence in Chapters 3–5) would have been more intellectually pure. Chapters 6 and 7 necessitate consideration of the different legal frameworks and principles applicable to Palestinian refugees, putative refugees and IDPs. Nevertheless, in Chapter 2 and throughout the book, I show that, while there are different categories of people entitled to protection and distinct legal frameworks that apply to them, there are similarities with respect to understandings of what that protection should be. In particular, ideas about what refuge should achieve and what it should contain are paralleled across legal frameworks, scholarship and jurisprudence, addressing Convention refugees, those with complementary protection, Palestinian refugees, putative refugees and IDPs.

Further, if this book did not include protection from refuge claims made by Palestinian refugees and putative refugees fearing life in an IDP camp, some things would have been lost. Kagan bemoans 'Palestinian exceptionalism', by which he means that Palestinian refugees are treated as an anomalous group of refugees and rarely discussed alongside other refugees.⁶⁰ By including a chapter on Palestinian refugees, this book pushes against this pattern. Consideration of putative refugees fearing life in an IDP camp in Chapter 7 aligns with scholarship that problematises the distinction between refugees and IDPs on the grounds that both groups are often fleeing for similar reasons but only some have managed to cross an international border.⁶¹ The reason for the distinction between IDPs and refugees, from an international law perspective, is that, due to the limits of state sovereignty, the Refugee Convention cannot apply to a person

⁵⁶ Hathaway (n 15); McAdam (n 13).

⁵⁷ Francesca Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Oxford University Press, 2nd ed, 2020).

⁵⁸ The Guiding Principles (n 43) 'consolidate into one document the legal standards relevant to the internally displaced drawn from international human rights law, humanitarian law and refugee law by analogy': Francis Deng, 'Preface' in Kälén (n 44).

⁵⁹ 23 October 2009, in force 16 December 2012.

⁶⁰ Michael Kagan, 'The (Relative) Decline of Palestinian Exceptionalism and Its Consequences for Refugee Studies in the Middle East' (2009) 22(4) *Journal of Refugee Studies* 417.

⁶¹ See, e.g., Andrew Shacknove, 'Who Is a Refugee?' (1985) 95(2) *Ethics* 274; Patricia Tuitt, 'Refugees, Nations, Laws and the Territorialization of Violence' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate, 2004) 37, 48.

within the borders of their homeland. The jurisprudence discussed in Chapter 7, in traversing ideas of protection under the Refugee Convention and protection of IDPs, provides an opportunity to unsettle these (some would say arbitrary) categories of protection seekers.

In examining protection from refugee claims made in different jurisdictions and by different categories of people with or seeking international protection, I draw on comparative legal analysis as a methodology. Comparative legal analysis involves searching for similarities and differences across legal systems and, in particular, looking for ‘differences in an area of perceived similarities, and for similarities in an area of perceived difference’.⁶² This book is an invitation to readers to both appreciate the specific legal frameworks pleaded in each type of protection from refugee claim and look beyond these differences to consider how these cases arbitrate the objectives, nature, threshold and scope of refuge. In this sense, this book is a response to the concern that much refugee law scholarship is ‘relentlessly local’ in that it ‘tend[s] to frame questions and answers within national or regional frameworks’.⁶³ Developing tools and terminology to identify and analyse shifting judicial standards of refugee protection is important. Durieux suggests that ‘to define refugees is to say as much about “who we are” as about “who they are” – it goes to the identity of the definer’.⁶⁴ Similarly, where we set the ambit of refuge – whether we are generous or uncharitable – is a reflection of the principles we hold. Studying courts’ views is important because their role is to give ‘clear messages to states as to what is and what is not permitted under human rights law’ and ‘nip in the bud arbitrariness and a descent into totalitarianism and exclusivism’.⁶⁵

This book also adds a new dimension to refugee law scholarship because I analyse this jurisprudence by drawing on feminist approaches to international law. Feminist legal methodology involves ‘looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them’.⁶⁶ This requires interrogating the positive rules of law and the issues deemed ‘irrelevant or of little significance’.⁶⁷ These silences or legal boundaries often ignore or ‘distort the concerns that are more typical of women than men’.⁶⁸ Nevertheless, asking the woman question, or ‘asking the gender question’,⁶⁹ does not mean focussing only on women. It includes an analysis of the different ways in which law impacts upon people of all genders as well as members of marginalised groups such as people with disabilities, children, the elderly and people who are lesbian, gay, bisexual, transgender, gender diverse, intersex, queer, asexual and questioning.⁷⁰ There is a large literature on refugee decision-makers’ approaches to questions of gender, but the overwhelming majority of these studies focus on how they interpret refugee definitions and

⁶² Gerhard Danneman, ‘Comparative Law: Studies of Similarities or Differences?’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 384, 406.

⁶³ Efrat Arbel, Catherine Dauvergne and Jenni Millbank, ‘Introduction, Gender in Refugee Law – From the Margins to the Centre’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 1.

⁶⁴ Durieux (n 28) 151. ⁶⁵ Dembour (n 30) 508.

⁶⁶ Katharine Bartlett, ‘Feminist Legal Methods’ (1990) 103(4) *Harvard Law Review* 829, 843.

⁶⁷ Hilary Charlesworth, ‘Feminist Methods in International Law’ (1999) 93 *American Journal of International Law* 379, 381.

⁶⁸ Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2010) 30.

⁶⁹ *Ibid* 30. ⁷⁰ Bartlett (n 66) 831.

grounds for complementary protection.⁷¹ What is missing is an assessment of the role of gender in decision-makers' conceptualisations of refuge and approaches to refugees' searches for sanctuary.

In their assessment of gender in refugee law scholarship and advocacy, Arbel, Dauvergne and Millbank state that renewed focus on gender in refugee law is vital, because 'while much has been accomplished, in the most recent years ground has also been lost'.⁷² In this book, I answer this call by examining whether the ways decision-makers approach protection from refuge claims, and in particular, what they deem crucial and irrelevant, disadvantages certain refugees in their journeys in search of refuge. In their analysis of refugee status assessment, Arbel, Dauvergne and Millbank argue that, after decades of sustained feminist engagement with refugee law, jurisprudence has moved from being gender blind and being 'a much better fit for men than for women'⁷³ to a situation where 'decision-makers in Western refugee receiving countries routinely put gender on the tick-box of topics for consideration'.⁷⁴ In this book, I examine whether there has been a similar trajectory with respect to judicial approaches to the concept of refuge and contests between refugees' entitlement to refuge and states' interests in constraining refugees' mobility.

By switching the focus from refugee definitions to the remedy (refuge), this book illustrates that, in some contexts, refugee law decision-makers have not made the basic progression from gender-blind decisions that create legal tests more fitting for men than women to including gender as an important unit of analysis. Nevertheless, while some protection from refuge challenges are arbitrated in this manner, in others, decision-makers acknowledge that gender as well as factors such as sexuality, youth and disability are important factors that must be considered. This puts these protection from refuge decisions in line with refugee status assessments where decision-makers 'routinely' consider questions of gender.⁷⁵ However, most decision-makers are not engaging with questions of gender in any substantive way, but are approaching them in a perfunctory manner. These desultory approaches to gender in protection from refuge claims raise the same query Arbel, Dauvergne and Millbank ask in the refugee status assessment context: when 'the argument can no longer be for jurisprudential inclusion', how do we facilitate 'more meaningful, more complicated, more substantive analysis'?⁷⁶ The jurisprudence analysed in this book

⁷¹ Arbel, Dauvergne and Millbank provide the most recent collection of scholarship on decision-makers' approaches to gender concerns and describe their project as 'an international comparative project on gender-related persecution and [refugee status determination]': (n 63) 9. There is only one chapter in their edited collection concerning what I call protection from refuge challenges, Arbel's study of litigation on a containment agreement between Canada and the US, on which I draw in Chapter 5. Edwards 'traces the history of feminist engagement with refugee law and policy' from 1950 to 2010: Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010' (2010) 29(2) *Refugee Survey Quarterly* 21. Her analysis focusses on the refugee definition. Anderson and Foster explain that '[w]hile [refugee status determination] has been (perhaps inevitably) dominated by feminist legal scholarship, such analysis is much less prevalent, even largely absent, in some respects of the wider refugee experience': Adrienne Anderson and Michelle Foster, 'A Feminist Appraisal of Refugee Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 60, 69.

⁷² Arbel, Dauvergne and Millbank (n 63) 14. See also Catherine Dauvergne, 'Women in Refugee Jurisprudence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 728.

⁷³ Arbel, Dauvergne and Millbank (n 63) 3. ⁷⁴ *Ibid* 1. ⁷⁵ *Ibid* 1. ⁷⁶ *Ibid* 6.

provides some counterintuitive insights on moving towards a more meaningful, complicated and substantive gender and intersectional analysis in refugee law jurisprudence.

1.5 Scope

While this is a global and comparative study, it is not an exhaustive one. Within the confines of a single book, I cannot address all aspects and manifestations of protection from refugee scenarios. In this section, I highlight the issues and jurisprudence that lie outside the scope of this work and also how the protection from refugee framework developed in this book can be deployed to inform future research.

The question this book poses is: *how* do decision-makers approach and determine protection from refugee claims? To answer this question, in each case study I identify the methods of reasoning judges and other adjudicative decision-makers use in arbitrating protection from refugee claims. In this sense, this book sits alongside other studies in the field that trace changes in judicial reasoning.⁷⁷

It is beyond this book's scope to investigate *why* decision-makers adopt particular approaches. As noted earlier, one of the findings is that there has been a shift in how decision-makers approach protection from refugee claims. Courts are constrained by codified law, rules of interpretation, the way the litigants frame their case and, where *stare decisis* applies, earlier precedent. Yet, in almost all of the jurisprudence examined in this book, courts had a choice in how to determine the arguments pleaded.⁷⁸ Indeed, in most court challenges, there are numerous outcomes open to the judges and the result is a consequence of both legal reasoning and choice.⁷⁹ Explaining why a particular decision was made presents methodological challenges for legal researchers, in particular because judicial deliberations are conducted in confidence. In most cases, the best a researcher can do is to provide 'informed guesses'.⁸⁰

There are a number of methodological models in refugee law scholarship for how to confront this dilemma. Mann tracks the trajectory of judicial responses to unauthorised migration but does not interrogate or comment on judges' motivations.⁸¹ Spijkerboer, in his analysis of refugee jurisprudence in the Court of Justice of the European Union, speculates on the political motivations behind the Court's decisions.⁸² Similarly, Dembour, in her analysis of the European Court of Human Rights' approaches to migrant rights, notes that the reasons why the Court takes specific approaches is outside the scope of her study but provides 'potential explanations'.⁸³ Going further, Baumgärtel and Ticktin interview judges to gain direct insights into the reasons for their decisions.⁸⁴

Given the global focus of this book, the approach I take lies between that of Mann and Spijkerboer and Dembour. I focus predominately on the reasoning adopted and, where appropriate, offer suggestions about the underlying judicial motivations. The reasons for

⁷⁷ Dembour (n 30) 22; Mann (n 23).

⁷⁸ The only exception is some of the Australian cases in Chapter 5, in which High Court of Australia was confined by changes to the Migration Act 1958 (Cth).

⁷⁹ Dembour (n 30) 20; Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalisation of Migration Policy before the EU Court of Justice' (2017) 31(2) *Journal of Refugee Studies* 216, 232.

⁸⁰ Dembour (n 30) 419. ⁸¹ Mann (n 23). ⁸² Spijkerboer (n 79). ⁸³ Dembour (n 30) 9.

⁸⁴ Baumgärtel (n 30); Miriam Ticktin, 'Policing and Humanitarianism in France: Immigration and the Turn to Law as State of Exception' (2005) 7(3) *International Journal of Postcolonial Studies* 346.

the changes observed in each case study demand further scholarly attention and require a different methodological repertoire than the one employed here. This book, by tracking these disconcerting shifts across multiple jurisdictions, provides the groundwork for these future studies.

This book addresses most, but not all, protection from refugee claims. As described earlier, I have selected case studies that allow for an examination of legal challenges made at various stages of a refugee journey, initiated in different parts of the world and governed by divergent legal frameworks. Nevertheless, the rubric developed in this book can be applied to other legal challenges that raise the protection from refugee conundrum. In this book, I do not consider cases that have been initiated but withdrawn before final judgment due to changes in government policy.⁸⁵ An examination of the strategic value of such litigation would enrich understandings of the roles of courts in addressing protection from refugee scenarios. With respect to cases concerning safe third country rules in domestic legislation unconnected with a bilateral agreement, these are not included in this book. This is because in many jurisdictions judicial review of safe third-country decisions is heavily curtailed⁸⁶ and, in others, legislation significantly restricts the considerations courts and other decision-making bodies can take into account when determining whether the third country is indeed safe.⁸⁷ While there have been comparisons of safe third-country legislation and practices,⁸⁸ these restrictions make comparative assessments of judicial approaches difficult and ill-suited to the questions this book addresses. However, an emerging issue in the European context is the extent to which the European Court of Human Rights is willing to interfere with domestic safe third-country provisions.⁸⁹ An analysis of this

⁸⁵ The Israeli government made arrangements to relocate asylum seekers to undisclosed countries in Sub-Saharan Africa. A legal challenge was commenced and the Israeli Supreme Court issued a temporary injunction against the transfers. The proceeding was withdrawn when the Israeli government called off the removals. See Ruvi Ziegler, 'Benjamin Netanyahu's U-turn: No Redemption for Asylum Seekers in Israel', *The Conversation* (online 9 April 2018) <<https://theconversation.com/benjamin-netanyahus-u-turn-no-redemption-for-asylum-seekers-in-israel-94441>>. As this book was being written, the Biden Administration announced that it had initiated the process of terminating safe third-country agreements between the US, Guatemala, Honduras and El Salvador (entered into by the Trump Administration). I do not consider legal challenges to these agreements commenced prior to this announcement because only preliminary matters were determined and no final judgments had been handed down.

⁸⁶ Legislation in the UK allows for the removal of asylum seekers to a safe third country without substantive consideration of their claim: Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s 33, sch 3. If the Secretary of State certifies that a person is proposed to be removed to the safe third country, the asylum seeker cannot bring an appeal alleging that the transfer would breach the Refugee Convention: Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 sch 3, pts 2.5(3)(a), 3.10(3), 4.15(3).

⁸⁷ For example, sections 36(4)–36(5A) of Australia's Migration Act 1958 (Cth) limit decision-makers' considerations to: whether the asylum seeker would have a well-founded fear of being persecuted for a Refugee Convention ground in the third country, would be at real risk of suffering significant harm in the third country, has a well-founded fear that the third country would return them to another country where they will be persecuted for a Refugee Convention ground or has a well-founded fear of being returned to a country where there is a real risk they would suffer significant harm.

⁸⁸ Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff, 2015) 665; Jane McAdam, 'Migrating Laws? The "Plagiaristic Dialogue" Between Europe and Australia' in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press, 2013) 25, 28–35.

⁸⁹ *Ilias and Ahmed v Hungary* (Fourth Section, Application No 47287/15, 14 March 2017) and *Ilias and Ahmed v Hungary* (Grand Chamber, Application No 47287/15, 21 November 2019) indicate that the

new area of jurisprudence using the methods and terminology developed in this book would add to understandings of courts' use of human rights law to engage with notions of refugee protection. Finally, I do not examine cases in which refugees are challenging detention and they are not detained pursuant to a bilateral or regional containment agreement.⁹⁰ In most of these cases, courts and other decision-making bodies are concerned with issues such as whether detention is lawful or arbitrary and not wider issues of refugee protection. Nevertheless, cases concerning escape from immigration detention may warrant examination of how decision-makers use legal frameworks to facilitate or hinder refugee journeys.⁹¹

There are also cases that do not quite fit into the protection from refuge framework adopted in this book but an analysis of which would add to our understanding of judicial notions of refuge. There are some protection from refuge cases brought by litigants who have not claimed or have been denied international protection.⁹² I do not to examine these cases because I wish to explore the functions, nature, scope and threshold of refuge for those who are or may be entitled to some form of international protection. The ways decision-makers conceptualise refuge for those otherwise not entitled to international protection is a topic that is starting to receive attention.⁹³ Another set of cases that could illuminate judicial understandings of refuge are cases in which refugees challenge their host states' policies on, for example, access to healthcare or welfare.⁹⁴ I do not include these cases because they do not involve a refugee litigant demanding to be rescued from or transferred to a specific place of refuge and I seek to explore the ways judicial ideas of refuge facilitate or impede refugees' journeys. Nevertheless, the concepts and methods of analysis developed in this book could be used to critically assess the ideas of refuge reflected in these decisions and whether they respond to the particular needs of refugees from more marginalised backgrounds.

Finally, I only examine cases that have come before adjudicative decision-making bodies and reached the stage where a decision has been delivered. Many factors determine whether an asylum seeker or refugee is able to access courts or other decision-making bodies to secure protection from a place of refuge. In particular, refugees in many jurisdictions do not

European Court of Human Rights is willing to consider transfers via safe third-country provisions to be in violation of article 3 of the ECHR.

⁹⁰ See, e.g., *Amuur v France* (1996) III Eur Court HR 850; *Plaintiff M76 2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Refugee and Migratory Research Unit v Government of Bangladesh* Writ Petition No. 10504 of 2016, Bangladesh Supreme Court, 31 May 2017.

⁹¹ See, e.g., *R (B & Others) v SSFCA* [2005] QB 643; ΑΡΙΘΜΟΣ:682/2012 ΠΡΑΚΤΙΚΑ ΚΑΙ ΑΠΟΦΑΣΗ ΤΟΥ ΜΟΝΟΜΕΛΟΥΣ ΠΛΗΜΜΕΛΕΙΟΔΙΚΕΙΟΥ ΗΓΟΥΜΕΝΙΤΣΑΣ Συνεδρίαση της 2ης Οκτωβρίου 2012.

⁹² An example of such a case is *Sufi and Elmi v UK* [2012] 54 EHRR 9. The European Court of Human Rights considered whether a Somali man whose application for refugee status had been refused and a Somali refugee who had lost the protection of the Refugee Convention due to art 33(2) could be deported. The Court held that levels of violence in Mogadishu presented a real risk of treatment contrary to art 3 of the ECHR: [250]. The Court then considered the prospect of internal relocation to IDP camps in Somalia as well as to the Dadaab refugee camp in Kenya. It concluded that conditions in both camps raised a real risk of treatment contrary to art 3 of the ECHR: [291]–[292].

⁹³ Brid Ní Ghráinne, 'Complementary Protection and Encampment' (2021) 21(1) *Human Rights Law Review* 54.

⁹⁴ See, e.g., *Canadian Doctors for Refugee Care, The Canadian Association of Refugee Lawyers, Daniel Garcia Rodrigues, Hanif Ayubi and Justice for Children and Youth v Attorney General of Canada and Minister of Citizenship and Immigration* [2014] FC 651; *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* (Cases 443/14 and 444/14) ECLI:EU:C:2016:127.

receive free legal representation.⁹⁵ Even when legal representation is available, factors such as language difficulties, youth, gender, disabilities, restrictions on freedom of movement, illiteracy and mistrust of legal authorities can inhibit an asylum seeker or refugee's access to legal services.⁹⁶ The use of courts to seek protection from a place of ostensible refuge can exacerbate inequities between refugees who have access to legal representation and those who do not.⁹⁷ An important question for future research is to consider who has access to adjudicative decision-making bodies in protection from refuge contexts.

1.6 Conclusion

While scholars have investigated refugees' journeys within and across borders and outlined various understandings of what refuge should be, there has been little work on judicial conceptualisations of refuge and how these may facilitate or impede refugees' searches for sanctuary. This is despite refugees and asylum seekers in a number of jurisdictions turning to courts and other decision-making bodies to either resist or seek transfer to an alternative place of refuge. This book is the first study to draw together these protection from refuge claims and examine how decision-makers approach and determine them. In doing so, it sheds light on judicial ideas of refuge and the role adjudicative bodies play in refugees' journeys.

This study identifies a pattern across the various jurisdictions in which protection from refuge claims are made. When decision-makers reflect on the nature of refugeehood and use the legal frameworks pleaded to address the predicaments faced by refugees and asylum seekers, judicial ideas of what refuge should be go beyond basic notions of safety and survival and advance ideas of refuge outlined by scholars and UN institutions. These judicial conceptualisations of refuge are also responsive to the particular needs of refugees of different genders, sexualities and ages, as well as to the difficulties faced by refugees with care responsibilities and disabilities. In these jurisprudential moments, refuge becomes a potent concept and one that refugees can wield to disrupt the continuation of containment mechanisms and continue their searches for refuge within and across borders.

However, most of these victories have been ephemeral. Decision-makers reverse or dilute initial protection from refuge successes by reframing the legal issues in ways that excise consideration of refuge as a concept, of refuge as a place or of both. While the reasons for this change must be assessed with respect to what is occurring in each particular jurisdiction, the common outcome of this reframing is that decision-makers shift from purposive and broad understandings of refuge to rudimentary ones. Once this occurs, the protection from refuge litigant must prove that they are exceptional in some way. Decision-makers' approaches to identifying the 'atypical' refugee often create additional hurdles for women, men, parents, children and those with disabilities to use courts to seek a safe place of refuge.

⁹⁵ Stephen Anagost, 'The Challenge of Providing High Quality, Low Cost Legal Aid for Asylum Seekers and Refugees' (2000) 12(4) *International Journal of Refugee Law* 577.

⁹⁶ Andika Ab. Wahab and Aizat Khairi, 'Right to Justice and Legal Aid Barriers to the Vulnerable Non-Citizens in Malaysia' (2020) 16(1) *Malaysian Journal of Society and Space* 13; Jacqueline Bhabha, 'Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection' (2004) 42(1) *International Migration* 141, 143; Mary Anne Kenny, Nicholas Proctor and Carol Grech, 'Mental Health and Legal Representation for Asylum Seekers in the "Legacy Caseload"' (2016) 8(2) *Cosmopolitan Civil Societies Journal* 84.

⁹⁷ Baumgärtel (n 30) 78.

This disengagement from the concept of refuge and search for the extraordinary refugee transforms these judgments from refugee protection to migration management decisions. These judicial approaches impede refugees' journeys in search of refuge, perpetuate the current injustices and global inequities in refugee responsibility and render refuge, as both a concept and a place, elusive.

Nevertheless, some very recent jurisprudence indicates that the tide may be turning and courts will once again provide a forum where refugee rights can triumph over containment mechanisms, enabling refugees to continue their journeys in search of sanctuary. It is hoped that this book, by identifying the methods of judicial reasoning that produce robust ideas of refuge and gender-sensitive decisions, provides some guidance for the future conduct and analysis of protection from refuge litigation.