

Refugee Advocacy Scholarship

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Aiming to advance protection standards, refugee law specialists have produced a vast body of advocacy scholarship. Literature within the field is framed by a protection narrative that speaks of a human rights approach to refugee law premised on legal duties and moral obligations towards refugees and the economic and cultural benefits that flow from fulfilling them. Having previously enjoyed varying degrees of acceptance by European policy makers and the public, the protection narrative has lost traction in the current EU refugee crisis. This article explores why this has happened by looking at the protection narrative and how refugee law speaks to politics. Discourse in the refugee rights is focused on the 1951 Convention and is commonly situated within an adversarial dialectic vis-à-vis governments. It is also marked by silences regarding core anxieties of the public which include how refugee policy impacts marginalized host communities, immigration and deportation, national identity, and security. Because compliance with international law rests on public as well as state goodwill, human rights narratives that are detached from perceived realities carry risks. The current EU refugee crisis has seen politics speaking back to law, attacking the underlying authority of international and EU law, the human rights experts who interpret it, as well as the legal, social and moral arguments for complying with its obligations. This wider political ecosystem may not be susceptible to change by advocacy scholars, but the new context makes it urgent for the profession to re-craft a more effective and relevant narrative that retains a human rights approach to refugee protection, widening the scope of rights holders to include host communities. The most effective way to achieve this is to distinguish more sharply between scholarship and advocacy, engage less selectively and defensively with the concerns of skeptics, and work more extensively with collaborators in other disciplines.

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Afin de faire progresser les normes de protection, les spécialistes du droit des réfugiés ont produit un vaste corpus d'études sur la défense des droits de la personne vus sous l'angle des devoirs juridiques, des obligations morales et des avantages économiques et culturels. Bien qu'il ait été accepté à des degrés divers par les décideurs politiques et le public européens, le discours fondé sur la protection a perdu de son attrait dans le contexte de la crise actuelle. Le présent article aborde la question de la protection et la façon dont le droit des réfugiés interpelle la politique. Le discours sur les droits des réfugiés est marqué de silences concernant les inquiétudes fondamentales du public, notamment quant à l'impact des politiques en matière de réfugiés sur les communautés d'accueil marginalisées, sur l'immigration et la déportation, sur l'identité nationale et sur la sécurité. La crise actuelle des réfugiés dans l'Union européenne a vu la politique répondre à son tour au droit. Le nouveau contexte justifie l'urgence de reformuler un discours plus efficace et plus pertinent qui maintiendrait l'approche des droits de la personne en matière de protection des réfugiés, tout en élargissant l'éventail des titulaires de droits pour y inclure les collectivités d'accueil. Il serait ainsi possible d'établir une distinction plus nette entre la recherche et la défense des droits, de cibler moins sélectivement et moins défensivement les préoccupations des sceptiques, et de travailler plus largement avec des collaborateurs d'autres disciplines.

I. Introduction

Law schools train refugee scholars to advance protection standards through a narrative that can equip future professionals to write and speak “law to politics”: an engagement, as David Kennedy notes, that is not the same as speaking “truth to power”.¹ Even as refugee legal research expanded into a strong body of advocacy scholarship, its underlying protection narrative has always been met with a mixed reception by policy makers and the public. It was during Europe’s refugee crisis that its underlying protection narrative lost traction amidst a scale of human suffering that was amplified by the political failings of the European Union (EU) and its Member States. All the more striking was the declining persuasion of the protection narrative in jurisdictions with proud asylum traditions, such as Sweden, Denmark and Germany.²

Soul-searching often takes place within professions that find themselves unexpectedly on the frontlines of a crisis, a process largely eschewed by refugee scholars. Alongside continuing and grave human rights abuses of migrants within Member States, across the EU there has been a hardening of grassroots attitudes towards refugees and a rise of populism. Politics is speaking to, if not shouting over, refugee law and its protection narrative. Advocacy scholars should feel compelled to understand why.

Refugee law academics do not self-identify as advocacy scholars. Many refugee lawyers would describe themselves as international lawyers specializing in refugee law. Yet, much of what the profession produces is a rigorous form of advocacy scholarship that is pervasive within the canon of human rights law. Typically, the aim of advocacy scholarship is to progressively raise protection standards. As an epistemic community, networks of refugee legal scholars are more aligned with the values of their human rights colleagues than with the traditional concerns of public international lawyers.³

For Voutira and Doná, in refugee studies “scholarship is embedded in advocacy and advocacy in scholarship”.⁴ Landau and Jacobsen have also

¹ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (New Jersey: Princeton University Press, 2004) at 28 [Kennedy].

² Suzanne Daley, “Nordic Countries, Overwhelmed by Migrants, Retreat from Generous Traditions”, *New York Times* (15 November 2015), online: <www.nytimes.com/2015/11/16/world/europe/nordic-countries-overwhelmed-by-migrants-retreat-from-generous-traditions.html> [perma.cc/G2WG-D9VJ] [Daley]; Atika Shubert & Nadine Schmidt, “Germany Rolls Up Refugee Welcome Mat to Face Off Right-Wing Threat”, *CNN World* (27 January 2019), online: <www.cnn.com/2019/01/26/europe/germany-refugee-deportations-intl/index.html> [perma.cc/XWR8-F7D3].

³ Refugee academic lawyers constitute a cohesive “epistemic community,” defined by Haas as “networks of knowledge-based experts’ that are engaged in ‘articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying salient points for negotiation’; see Peter M Haas, “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46:1 *Intl Organization* 1 at 2.

⁴ Eftihia Voutira & Giorgia Doná, “Refugee Research Methodologies: Consolidation and Transformation of

written about the ‘dual imperative’ of both research and protection that shapes refugee scholarship.⁵ This arguably weighs more heavily upon legal academics than on other disciplines engaged in refugee research. Lawyers emerge from a tradition of scholarship that has been framed around advocacy.⁶ However, the force exerted by the protection objective produces advocacy scholarship that maintains an almost exclusive focus on refugees. In Europe, scholarship on refugee protection focuses on the 1951 Convention and how it is interpreted and expanded in tandem with the evolution of human rights and EU law, providing critical analysis of the EU asylum *acquis* and national refugee legislation.⁷ In select contexts, refugee law research may extend to other protection seekers and migrants, but it is virtually never extended to include host populations. Refugee legal scholarship primarily engages with a human rights vetting of asylum and related legislation, both domestic and regional, and critiquing of jurisprudence and state practice in light of international standards. As advocacy objectives influence the research questions framing the field, findings are packaged in a rights-based narrative that aims to influence decision and policy makers, often via the mediation of practitioners and non-governmental organizations (NGOs).⁸

This type of research entails a constant adversarial dialectic between refugee legal scholars and restrictive state practices. The narrative that emerges is mediated through civil society; which at its most effective can shape both policy and public opinion. While international refugee lawyers operate primarily on international and national levels, they overlook the rich variation in policy and framing of migrant issues across cities in Europe. This local diversity is captured in the research on “municipal activism” on irregular migrants by Spencer and Delvino that examines the framing of urban policies towards irregular migrants in 18 cities from northern to southern Europe. The

a Field” (2007) 20:2 J Refugee Studies 163 at 167.

⁵ Karen Jacobsen & Loren B. Landau, “The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration” (2003) 27:3 *Disasters* 185; Rosemary Byrne & Thomas Gammeltoft-Hansen, “International Refugee Law between Scholarship and Practice” [forthcoming in *International Int'l J Refugee L*].

⁶ See Mark Tushnet, “Legal Scholarship: Its Causes and Cure” (1981) 90:5 *Yale LJ* 1205.

⁷ See *Final Act and Convention Relating to the Status of Refugees*, UNGAOR, 1951, A/CONF.2/108, online (pdf): <treaties.un.org> [perma.cc/N52Q-VGZ3] [1951 *Convention*]. As amended by the *Protocol relating to the Status of Refugees*, UNGAOR, 1967. The core instruments of the EU asylum *acquis* include Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC) (addressing minimum standards for the qualification and status of third-country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted); Council Directive 2005/85, 2005 O.J. (L 326) 13 (EC) (addressing minimum standards on procedures in member states for granting and withdrawing refugee status in the member states) Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC) (laying down minimum standards for the reception of asylum seekers in the member states).

⁸ Explorations of gaps between the stated standards and practice are also common in other disciplines, as for instance the humanitarian, human rights ‘rhetoric’ v. ‘reality’ paradigm that is common for sociologists working in border studies. For a critique see Nick Vaughn-Williams, *Europe’s Border Crisis: Biopolitical Security and Beyond* (Oxford: Oxford University Press, 2015).

authors found that where municipalities in their sample adopt a humanitarian or human rights framing to justify expanding services to irregular migrants, rights language omitted host populations as the beneficiaries of the policy. This was in contrast to policy framed around rationales of inclusive security, deserving workers, socioeconomic, or administrative efficiency. When these rationales were applied to policies that included irregular migrants as the recipients of benefits and services, they were framed as benefitting all city residents.⁹ It is unclear to what extent the framing of municipal policies towards migrants shapes public perceptions. While public opinion remains a domain largely ignored by international law, the views of host populations is likely to influence the will of elected governments to comply with international obligations. As Matthew Gibney aptly observes, how much any government “can do for refugees will be determined largely by the possibilities afforded by its domestic political environment.”¹⁰

This article refers to the current migration situation as a ‘crisis’, although it must be noted that refugee and migrant arrivals in Europe have declined very sharply since their peak in 2015.¹¹ In contrast to the solid consensus amongst advocacy scholars regarding the content of a rights-based approach to the recent arrivals of migrants in Europe, the question of whether a ‘crisis’ exists has been strongly contested. Some voices within the refugee protection community challenge the accuracy and ethics of the ‘crisis’ label.¹² The 1.1 million refugees that came to Europe by sea in 2015 represented only about 0.2% of the EU’s population, and less than 2% of those who had been forcibly displaced in that year worldwide.¹³ In 2014, however, the International

⁹ *Contra* Sarah Spencer & Nicola Delvino, “Municipal Activism on Irregular Migrants: The Framing of Inclusive Approaches at the Local Level” (2019) *J Immigrant & Refugee Studies* at 32–38.

¹⁰ Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 213.

¹¹ UNHCR figures for sea arrivals to Italy, Cyprus and Malta and both sea and land arrivals to Greece and Spain report there were 141,472 migrant arrivals in Europe in 2018 as opposed to over 1,032,408 in 2015 according to UNHCR statistics. UNHCR, “Operational Portal Refugee Situations: Mediterranean Situation” (14 October 2019), online: <data2.unhcr.org/en/situations/mediterranean#_ga=2.106899971.1080719576.1562240393-1998546193.1562240393> [perma.cc/FM4N-73HJ] [Mediterranean Situation]; European Union Agency For Fundamental Human Rights, “Beyond The Peak: Challenges Remain, But Migration Numbers Drop” (31 December 2018), online (pdf): *European Union Agency For Fundamental Human Rights* <fra.europa.eu > [perma.cc/M7J5-DXUG].

¹² Geoff Gilbert, “Why Europe Does Not Have a Refugee Crisis” (2015), 27:4 *International Journal of Refugee Law*, Volume 27, Issue 4, December 2015, 531 at Pages 531–535 [Gilbert]; Thomas Gammeltoft-Hansen and Nicholas Tan, “The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy” (2017), 5:(1) *Journal on Migration and Human Security* 28(2017), at 29; Violetta Morena Lax, “The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue-Through-Interdiction/Rescue-Without-Protection’ Paradigm” (2018) 56:(1) *J Common Market Studies*(2018) 119 [Lax]; Eddie Bruce-Jones, “Refugee Law in Crisis” in Mary Bosworth, Alpa Parmar & Yolanda Vaquez, eds, *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (Oxford: Oxford University Press, 2018) at 176–193.

¹³ European Union Agency for Fundamental Rights, “Fundamental Rights Report 2016” (2016) at 7, online (pdf): *European Union Agency for Fundamental Rights* <fra.europa.eu > [perma.cc/C2P5-ZS35] (noting that the 2015 migrant arrivals represented 0.2% of the approximately 60 million displaced people globally).

Organization for Migration (IOM) reported that the death toll of those seeking entry to Europe was higher than that of any other region in the world.¹⁴ These staggering fatality rates were accompanied by an increasing inability, or unwillingness, of Member States to receive, shelter and assess the claims of asylum seekers effectively. According to Europol, by 2016 over 10,000 asylum seeking minors had gone missing after registering claims in national systems.¹⁵ Protection seekers encountered the legal and social effects of the political backlash against migrants. In light of such facts, it seems reasonable to speak of a 'crisis'.

It is incorrect to look at the European refugee crisis as merely a period when refugee rights were put to the test. Although the number of migrant arrivals to Europe has decreased to pre-crisis levels, current EU and Member State arrival and reception practices, Mediterranean boat pull backs to Libya and the spread of national criminal sanctions against individuals providing humanitarian assistance, offer evidence of a prevailing legacy of compromised protection principles.¹⁶ The increasing precarity of refugee protection should force us to examine the limitations of the dominant narrative of refugee advocacy scholarship. Yet, when state practices routinely expose the frailty of the refugee protection regime, even the perception that there might be a turn from the refugee rights-based approach of the field triggers concern. Hathaway fervently cautions about the risks of refugee law collapsing into the wider domain of "forced migration studies". Shifting focus – even to reach other migrant and internally displaced populations – would risk distracting the international community from the unique obligations towards refugees under international law.¹⁷ Yet, looking at the field from different vantage points, Landau and Wilde, in separate works, highlight how prevailing refugee rights strategies have unintended consequences. Both scholars, writing from the global south and north, respectively, argue for a more holistic approach to refugee protection.¹⁸ As abandoning traditions of refugee protection in Europe maintains saliency amongst the voting public, this article posits that without negating a human rights based framework, advocacy scholars need to move

¹⁴ International Organization of Migration, "Fatal Journeys: Tracking Lives Lost During Migration" (2014) at 18, online (pdf): <www.iom.int> [perma.cc/K67H-9Z34].

¹⁵ "MEPs discuss fate of 10,000 refugee children who have gone missing", *European Parliament News* (20 April 2016), online: <www.europarl.europa.eu> [perma.cc/AZ2R-HHTD].

¹⁶ European Council on Refugees and Exiles, "Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard" (May 18, 2018), online: <www.ecre.org> [perma.cc/H3M7-U4XD]; Lina Vosyliute & Carmine Conte, "Crackdown in NGOs and volunteers helping refugees and other migrants" (June 2019), online (pdf): *Research Social Platform on Migration and Asylum* <www.resoma.eu> [perma.cc/JL6Q-TTAB].

¹⁷ James Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" (2007) 20:3 *Refugee Studies* 349 at 353–356.

¹⁸ Loren Landau, "Southern Urbanism, Legalization and the Limits of Migration Law" (2017) 111 *AJIL Unbound* 165; Ralph Wilde, "The Unintended Consequences of Expanding Migrant Rights Protections" (2017) 111 *AJIL Unbound* 487.

from an adversarial protection narrative exclusive to refugees, to one that is inclusive of host communities.

The following discussion in section 2 will begin by addressing how advocacy scholarship uses its protection narrative in law and policy when responding to the ‘crisis’. Section 3 adapts David Kennedy’s premise of “speaking law to politics”, looking at how the protection narrative speaks of duties, virtues and benefits by making legal, humanitarian, economic and cultural claims.¹⁹ With legalism as the core strand of the protection narrative, section 4 provides some examples of the limits of the focused emphasis on law when it comes to refugee protection in Europe today. Section 5 identifies silences in the narrative that reflect a reluctance to draw attention to the anxieties about refugee arrivals that are held by many within host countries. These include: how refugee policy impacts host communities, deportation policies, transformations of host societies and the issue of national identity and domestic security. Against this backdrop, section 6 considers how politics speak against the protection narrative in Europe, challenging both the legitimacy of international law and the experts seeking to advance it. Section 7 concludes by calling for a re-examination of how advocacy impacts refugee legal scholarship, more research engaging with the anxieties of the public and more collaboration between legal scholars and social scientists. Departing from the rigidities of the protection narrative might better serve both our scholarly and advocacy objectives.

II. Narrative and Crisis

A. Narratives in Law and Policy

Narrative has always played a powerful role in legal discourse. It lowers law’s technocratic barriers, permitting the translation of its messages to better persuade diverse communities. Narratives can make complex laws, concepts and procedures accessible, and they have the capacity to explain and justify overarching principles and controversial adjudicative decisions.²⁰

The narrative of legal scholars is different from the narrative developed by human rights NGOs. Alex De Waal recounts how Human Rights Watch pioneered innovative reporting methods in the 1980s that gave “journalists and political scientists license to put their storytelling skills to use.”²¹ Law

¹⁹ Kennedy, *supra* note 1.

²⁰ See Greta Olson, “Narration and Narrative in Legal Discourse” in Peter Huhn *et al*, eds, *The Living Handbook of Narratology* (Hamburg: Hamburg University Press 2014) 1 at 4; Jane B Baron, “The Many Promises of Storytelling in Law: An Essay Review of Narrative and the Legal Discourse: A Reader in Storytelling and the Law” (1991) 23 *Rutgers LJ* 79 at 80–81.

²¹ Alex De Waal, “Writing Human Rights and Getting it Wrong” (6 June 2016), online: *Boston Review* <bostonreview.net/world/alex-de-waal-writing-human-rights> [perma.cc/C7T2-KWRM] [De Waal].

journal articles rarely provide the compelling narratives of glossy reports produced by NGOs working in the field. Yet, in trying to advance substantive and procedural protection standards, refugee law scholars and refugee rights activists typically share advocacy objectives and seek to persuade overlapping policy communities. The work of academics and NGOs on the responsibility of EU and governments in relationship to the push and pullbacks on the Mediterranean offers but one example of this synergy across sectors.²² As debates rage about how to engage with the rhetoric favored by governments and the media in response to Europe's 'refugee crisis', it is clear that, like their NGO counterparts, refugee scholars rarely lose sight of the overarching narrative.

The unspoken talent required of refugee advocacy scholars is the ability to craft a narrative that renders the procedural and substantive mechanics of the rule of law accessible to the intermediaries of civil society organizations and the mainstream media, as well as directly to the public. The political stakes are high and the law around which the narrative is crafted is persistently changing. The past three decades have seen a constant process of reforming regional and national immigration and refugee legislation, and witnessed the litigation of test cases before constitutional and regional courts.²³ Refugee legal academics have played a central role in this process. Their scholarship has pushed for the expansive interpretation of the scope of state protection obligations and who is entitled to enjoy them, pressed for compliance by states and monitored their implementation.²⁴ Professionals, as Susskind and Susskind remind us, "remain the gatekeepers of expertise over which they profess mastery".²⁵

The European regional and national political terrain within which advocacy scholars advance their protection expertise is volatile. Technocratic interpretations of international treaties rarely feature in public politics. In

²² See e.g. Lax, *supra* note 12; Tamara Last, Thomas Spijkerboer & Orcun Ulusoy, "Deaths at the Borders: Evidence from the Southern External Borders of the EU" (2016) 1 *Revue Hijra* 5; Amnesty International, "Between the Devil and the Deep Blue Sea: Europe Fails Refugees and Migrants in the Central Mediterranean" (8 August 2018), online (pdf): *Amnesty International* <www.amnesty.org> [perma.cc/49FG-FSQV]; European Council on Refugees and Exiles, "Joint Statement: European Union/Libya: Act Now to Save Lives" (12 July 2019), online: <www.ecre.org> [perma.cc/Y8CM-SV5N]; Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" (2018) 20:4 *Eur J Migr & L* 396.

²³ For an overview of refugee law jurisprudence see James C Hathaway & Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014).

²⁴ The literature on gender-based persecution is one area of scholarship that has had a significant impact on law and practice. See Deborah Anker, "Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 *Harv Hum Rts J* 133; Kelley Ninette, "The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress" (2002) 13:4 *Intl J Refugee L* 559; Rodger Haines, "Gender-related Persecution" in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 319; Nicole LaViolette, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary" (2010) 22:2 *Intl J Refugee L* 173.

²⁵ Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford: Oxford University Press, 2015) at 210.

triggering contesting understandings of legal obligations towards refugees, however, the 1951 Convention is a widely used point of reference on all sides of the debate.²⁶ On the European level, one of the remarkable features of this crisis is the extent to which hitherto unnoticed legal instruments have permeated public awareness and surfaced in popular migration debates. Knowledge of the Dublin Convention in the 1990s, and its later incarnation in the Dublin Regulations, was limited to a narrow group of specialists.²⁷ Now, there is a wide awareness in host communities of the impact of the Dublin regime for managing migration. A shorthand reference to “les Dublinés” has entered the French vernacular to refer to asylum seekers returned to another Member State.²⁸

There is a complex literature on narratives and social movements. NGOs working in both human and refugee rights have gained extensive experience from the 1980s onwards in how to use sophisticated reporting methods in order to gain attention and influence to further specific agendas.²⁹ In contrast, refugee advocacy scholarship involves the crafting of narratives by lawyers, not social activists. Because of the protection issues at stake, by necessity, the refugee lawyer’s narrative is narrowly framed around refugee rights and the rule of law. It focuses on the interplay between human rights and international legal, humanitarian and moral obligations towards protection seekers. The exclusion of protection seekers from enjoying rights within host societies is a prevalent challenge to effective refugee protection. However, it

²⁶ 1951 Convention, *supra* note 7.

²⁷ European Union, “Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities” (1997), online: *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=EN> [perma.cc/7DR6-KA3C]. The responsibility sharing Dublin system under the treaty was subsequently incorporated into EU law by Dublin regulation, which has been reformed three times. While the European Commission advanced a proposal for a fourth reform, it is still under consideration. The Dublin III Regulation is now in force. (establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person); European Union, “Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person” (2013), online: *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN> [perma.cc/5B9H-ZYD2] [Dublin III].

²⁸ E.g. Nathalie Birchem, “Le casse-tête des migrants “Dublinés” (18 June 2017), online: *La Croix* <www.la-croix.com/France/Le-casse-tete-migrants-dublins-2017-06-18-1200855953> [perma.cc/QG8P-H6DD]; “Migrants: les “dublinés”, symboles des divisions européennes” (6 July 2018), online: *L’Express* <www.lexpress.fr/actualites/1/styles/migrants-les-dublins-symboles-des-divisions-europeennes_2023373.html> [perma.cc/Y52Z-K7U2]; “Europe’s Dublin dilemma” (25 June 2018), online: *Euronews* <www.euronews.com/2018/06/25/europes-dublin-dilemma> [perma.cc/DNE7-Y7LL]; “Britain’s Dublin dilemma” (22 March 2017), online: *Financial Times* <www.ft.com/content/d008b0a9-addb-39d0-b052-2a8012861a3e> [perma.cc/9QGB-9DF8]; “Migration and ‘Dublin regulation’ concerns continue to simmer” (2018), online: *The Irish Times* <www.irishtimes.com/news/world/europe/migration-and-dublin-regulation-concerns-continue-to-simmer-1.3489383> [perma.cc/K4UG-XW4G].

²⁹ See De Waal, *supra* note 21.

warrants noting that in different, yet often overlapping ways, parts of host communities also experience exclusion.

Refugee rights discourse addresses the economic and social implications of refugee arrivals only tangentially.³⁰ Given this relative silence, the empirical tools of social science are giving a prominent voice to scholars, such as Alexander Betts and Paul Collier, in debates on the refugee protection regime that had long been dominated by refugee legal academics and practitioners.³¹

Much remains to be understood about the interrelationships between academic narratives, their reception by the public and their influence on public policy. Yet, it is commonly accepted that the cultural context within which narratives are heard matters, as does the need for narratives to reflect perceived realities.³² When it comes to narratives of migration, as Christina Boswell argues, the need for simple cause and effect explanations leads to over-simplification and a significant disconnect between narratives and the phenomena that they seek to depict. The result is unrealistic expectations about the state's capacities and "clumsy policy interventions".³³ Applied to the European refugee crisis, Boswell's 2011 research had predictive value. As the crisis unfolded, the idea that migration could be controlled by closing borders ignored the reality that refugees and other migrants would embark on alternative, and more dangerous, routes into Europe.³⁴ Arguably, Boswell's caution also speaks to the widening disconnect between a protection narrative that promoted the opportunities of receiving protection seekers and media coverage that often focussed on the perceived burdens and risks of hosting refugees.³⁵

B. Seizing the Narrative in the Refugee Crisis

Narratives provide a familiar background in stable legal policy areas, but they are particularly influential when policy areas experience large-scale

³⁰ For an overview of social science literature on host communities see Sarah Deardorff Miller, "World Refugee Council Research Paper No. 4: Assessing the Impacts of Hosting Refugees" (August 2018), online (pdf): *World Refugee Council* <www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.4.pdf> [perma.cc/N999-J7R4].

³¹ Alexander Betts & Paul Collier, *Refuge: Transforming a Broken Refugee System* (London: Penguin Random House, 2017).

³² Francesca Polletta & Beth Gharrity Gardner, "Narratives and Social Movements" in Donatella Della Porta & Mario Diani, eds, *The Oxford Handbook of Social Movements* (Oxford: Oxford University Press, 2015) 534 at 544.

³³ Christina Boswell, "Migration Control and Narratives of Steering" (2011) 13:1 *British Journal Politics & Intl Relations* 12 at 12.

³⁴ John Campbell, "Conflicting Perspectives on the "Migrant Crisis" in the Horn of Africa" in Cecilia Menjivar, Marie Ruiz & Immanuel Ness, eds, *The Oxford Handbook of Migration Crises* (Oxford: Oxford University Press, 2019) 229 at 234-235.

³⁵ See Dalia Abdelhady, "Framing the Syrian Refugee: Divergent Discourses in Three National Contexts" in Cecilia Menjivar, Marie Ruiz & Immanuel Ness, eds, *The Oxford Handbook of Migration Crises* (Oxford: Oxford University Press, 2019) at 635.

upheavals.³⁶ These are often marked by the language of ‘crisis’ that occupies a strategic position in political discourse. Europe remains awash in crises even if the concept has become normalized by popular media that amplifies crisis rhetoric.³⁷ Confronted with looming catastrophes, the EU is a fertile ground for contesting and mobilizing narratives articulated by an increasing array of actors and via new and untested media. When these voices frame refugee protection as matters of immigration, terrorism or the economy, however tenuous the empirical support may be underlying their claims, they are speaking to what the 2018 Eurobarometer survey identifies as the top three concerns at the European level in public opinion across Member States.³⁸

In their tenacious adherence to advancing refugee policy arguments within a rights based framework, refugee advocacy scholars have been highly attuned to the possibility that the EU refugee crisis could lead to a rejection by governments and the public of the core responsibilities embedded in the protection narrative. While it is impossible to ascertain with accuracy the number of lives lost by migrants attempting to enter into Europe by crossing the Mediterranean, UNHCR reports 18,922 deaths between January 2014 through October 14 2019.³⁹ For euro-skeptics, migration has become yet one more EU failure. When migrant arrivals on European shores began to climb in 2011, Europe was already facing crises relating to banks, sovereign debt, democracy and the legitimacy of the EU.⁴⁰ Crisis language encourages a demand for more radical solutions to actual or perceived policy problems. This raises the stakes for advocacy scholars seeking to advance protection standards in an often-hostile political climate.

The classic adversarial engagement of advocacy scholars with governments over the duties owed to asylum seekers and refugees has not always been fit for purpose during this crisis. The dynamics of how political debates are influenced have changed rapidly as populist and far-right actors achieved prominence and electoral support.⁴¹ These political actors craft competing

³⁶ Brett Davidson, “Narrative Change and the Open Society Public Health Program” (2016) at 7, online (pdf): <askjustice.org> [perma.cc/3KKP-3QFS].

³⁷ Nina Witoszek & Lars Trägårdh, eds, *Culture and Crisis: The Case of Germany and Sweden* (New York: Berghahn Books, 2002).

³⁸ According to the European Commission’s bi-annual survey results published in “Standard Eurobarometer 89” (2018) at 4, online: *European Commission* <ec.europa.eu> [perma.cc/9AL4-A7ZR] [Standard Eurobarometer 89]: “Immigration remains the leading concern at EU level, with 38% of mentions (-1 percentage point since autumn 2017). At 29%, terrorism remains in second position, though it has lost ground since autumn 2017 (-9, and -15 since spring 2017). The economic issues lag behind, even though they have registered slight increases since autumn 2017: the economic situation is in third place (18%, +1), ahead of the state of Member States’ public finances in fourth (17%, +1) and unemployment in fifth (14%, +1). The hierarchy of these top five concerns has remained unchanged since autumn 2017.”

³⁹ See Mediterranean Situation, *supra* note 11.

⁴⁰ Randall Hansen & Joshua C. Gordon, “Deficits, Democracy, and Demographics: Europe’s Three Crises” (2014) 37:6 *West European Politics* 1199.

⁴¹ See Jasper Muis & Tim Immerzeel, “Causes and consequences of the rise of populist radical right parties and movements in Europe” (2017) 65:6 *Current Sociology* 909.

representations of the refugee crisis through alternative prisms, such as austerity and class and power asymmetries within and between Member States of the EU. It is not surprising that advocates fear the political and policy implications of the language of crisis. Migrant arrivals in Europe have come at a time when the region's legal, political, economic and moral consensus is frail.⁴² Although advanced by comparative global standards, Europe's regional human rights system is young, and the legitimacy of the European governance framework within which it is embedded is under attack from well-mobilized political factions.⁴³

The wars over refugee policy are taking place in political ecosystems that are enmeshed in Europe's collective crises. Crises are noted for helping to forge national and cultural identities. As Hirdiman points out, crisis connotes an "acute condition" and "acute conditions demand radical remedies."⁴⁴ The refugee crisis has occurred in tandem with, and been a trigger for, conflicts over cultural transition. It has generated what Liav Orgad terms "cultural defense policies", stemming from a backlash against multiculturalism in immigration policy and the rise of majority nationalism.⁴⁵ Against this backdrop, crisis language can form part of a semantic strategy with significant fallout.

It is the nature, not the gravity, of the situation of refugees arriving in Europe that remains widely contested. When human rights advocates concede that, at least in humanitarian terms, we are in the midst of a 'crisis', this is qualified as being a crisis of policy, asylum, reception or of refugee status determination (RSD) systems. Alternatively, we are experiencing the crisification of asylum, a crisis of solidarity or a crisis in refugee law.⁴⁶ In the policy arena, the tensions, complexities and conflicts between narratives are "gloss[ed] over".⁴⁷

Advocacy scholars have crafted a protection narrative in the crisis that remains true to this narrative form. In all of these variants, the message is a clear one. The language of crisis primarily is used to describe the unpreparedness or unwillingness of Europe to offer genuine protection to those who arrive at its shores.⁴⁸ This battle over how to describe the catastrophic failures of

⁴² For an analysis of the divisions between Member States played out in the EU negotiations over the allocation of refugee see Natascha Zaun, "States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System" (2018) 56 J Common Market Studies 44.

⁴³ Eugenio Salvati & Michelangelo Vercesi, "Anti-System Eurosceptic Parties: Where and Why They Succeed" (2017), online: *ResearchGate* <www.researchgate.net> [perma.cc/VD8M-VCS7].

⁴⁴ See e.g. Yvonne Hirdiman, "Crisis: The Road to Happiness" in Nina Witoszek & Lars Trägårdh, eds, *Culture and Crisis: The Case of Germany and Sweden* (New York: Berghahn Books, 2002) 155 at 156.

⁴⁵ Liav Orgad, *The Cultural Defense Of Nations: A Liberal Theory Of Majority Rights* (Oxford: Oxford University Press, 2016) at 5 [Orgad].

⁴⁶ Lax, *supra* note 12.

⁴⁷ Christina Boswell, "Migration Control and Narratives of Steering" (2011) 13 British J Politics & Intl Relations 12 at 13.

⁴⁸ See e.g. Gilbert, *supra* note 12. (editorial in leading journal for refugee law refers to an "alleged crisis" within the global context and available resources within Europe).

refugee protection in Europe is, in part, a battle about where accountability for this situation should lie.

As policy scholarship would predict, the crisis has allowed new actors to seize the humanitarian message of the protection narrative and old state actors to rebrand themselves within it. Prior to the crisis, refugee advocacy scholarship may at times have been criticized for providing “wishful legal thinking”, but it always enjoyed an uncontested position *vis á vis* state actors as the humanitarian voice in policy discussions.⁴⁹ Now, the lethal migratory route across the Mediterranean has also allowed state actors and the EU to recast their own role as being that of humanitarian rescuers. This is being supported by a steady dissemination in old and new media of simple and powerful images of the role that the EU and Member States are playing in Mediterranean rescue missions. As Adrian Little and Nick Vaughn-Williams argue, in the context of border control and migration management in Australia and Europe, states have increasingly entangled securitization and humanitarianism.⁵⁰ This provides yet another challenge to protection advocates who traditionally have enjoyed an effective monopoly on claims to the humanitarian space in the refugee policy wars. Given the scale of the loss of human life in the Mediterranean, even right-wing political parties promoting ‘closed borders’ have been able to frame their agenda as one that will reduce human suffering by reducing the incentives for illegal migrants to make the dangerous crossings.⁵¹

While legal scholars are experts on legal liability, they are less convincing on matters such as state reception capacities and policy accountability. States may not offer stronger evidence than refugee advocates when making their own assertions. Yet, even if the current situation may be the result of the conscious acts and omissions of Member States, powerful images of clearly overwhelmed reception institutions and refugees sleeping on sidewalks are widely visible to the public. These images encourage the simplistic message that compliance with 1951 Convention obligations towards refugees, while perhaps desirable, is not viable given existing infrastructures. Countering this effective communication strategy is beyond the current legal protection narrative. Refugee legal scholarship has, to date, been reluctant to engage with complex policy debates regarding resources and alternative policy solutions.

If we define a ‘crisis’ in Gramscian terms, where “the old is dying”, “the

⁴⁹ E.g. Kai Hailbronner, “Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?” (1986) 26 *Va J Intl L* 857 [Hailbronner].

⁵⁰ See Adrian Little & Nick Vaughn-Williams, “Stopping boats, saving lives, securing subjects: Humanitarian borders in Europe and Australia” (2017) 23:3 *Eur J Intl* 533 at 549 [Little].

⁵¹ See Jon Stone, “EU Condemns rescue boats picking up drowning refugees in Mediterranean as leaders side with populists”, *The Independent* (29 June 2018), online: <www.independent.co.uk/news/world/europe/eu-migrant-crisis-rescue-boats-refugees-drowning-charity-mediterranean-a8423261.html> [perma.cc/AZ28-ZJAQ].

new cannot be born” and in the “interregnum a great variety of morbid symptoms appear”, then we are still experiencing a global refugee crisis.⁵² Although the number of arrivals in Europe has returned to below 2014 levels, the continued deaths on the Mediterranean, policies of pull backs to Libya and the absence of dignified and safe reception conditions for asylum seekers within many Member States point to the failure to reconstruct a viable protection system within Europe.⁵³ Protection seekers, along with the EU, its Member States and citizens remain trapped within a Gramscian interregnum. Any expectations for a visionary reconstruction of a protection framework that has proven to be severely ill-equipped to meet the challenges of contemporary forced migration were disappointed in September 2016, at the UN Global Summit Addressing Large Movements of Refugees and Migrants.⁵⁴ In spite of the urgency, agreement on a non-binding Global Compact was delayed until 2018,⁵⁵ an outcome that the UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein concluded offered “no cause for comfort”.⁵⁶

Protection scholarship is packaged within a narrative that for decades has been tailored around our legal, moral and humanitarian duties towards refugees, as well as the benefits they promise our societies. This narrative has appeared in different forms, offering legal guidance to courts, policymakers, practitioners and civil society. These actors also mediate and transmit the protection narrative into the wider public discourse.⁵⁷ In Europe, the crisis

⁵² Quintin Hoare & Geoffrey Nowell-Smith, eds, *Selections from the Prison Notebooks of Antonio Gramsci*, translated by Quintin Hoare & Geoffrey Nowell-Smith (London: ElecBook, 1999) at 556.

⁵³ UNHCR figures for sea arrivals to Italy, Cyprus and Malta and both sea and land arrivals to Greece and Spain report there were 141,472 migrant arrivals in Europe in 2018 as opposed to 225,455 in 2014 according to UNHCR statistics. Mediterranean Situation, *supra* note 11; European Union Agency For Fundamental Human Rights, “Beyond The Peak: Challenges Remain, But Migration Numbers Drop” (31 December 2018) at 5, online (pdf): *European Union Agency For Fundamental Human Rights* <fra.europa.eu> [perma.cc/M7J5-DXUG]; Anja Palm, “The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe? EU Immigration and Asylum Law and Policy” (2 October 2017), online: <emigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/> [perma.cc/7AF7-8NQW]; Human Rights Watch, “EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk” (25 July 2018), online: <www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk> [perma.cc/8DKS-R3TP].

⁵⁴ UN High Commissioner for Refugees, “Comprehensive Refugee Response Framework: from the New York Declaration to a global compact on refugees” (5 December 2016), online (pdf): *refworld* <www.refworld.org/docid/589332a90.html> [perma.cc/76N4-YBQX].

⁵⁵ United Nations High Commissioner for Refugees, “Global Compact for Safe, Orderly, and Regular Migration (Final Draft)” (11 July 2018), online (pdf): *Global Compact for Migration* <refugeemigrants.un.org> [perma.cc/577U-83UX].

⁵⁶ “When millions of people see freedom’s invitation only through the flapping canvas of a tent; when they carry their children and possessions on their backs, walking hundreds, perhaps thousands of miles; when they and their families risk drowning, and are kept cramped in appalling detention centres and, once released, risk abuse by racists and xenophobes. There is no cause for comfort here.” Tharanga Yakupitiyage, “UN Refugee Summit: “No Cause for Comfort”, *Inter Press Service* (20 September 2016), online: <www.ipsnews.net> [perma.cc/CRG3-M393].

⁵⁷ The work of the European Consultation on Refugees and Exiles (ECRE), an alliance of 104 NGOs across 41 European countries that seeks to protect and advance the rights of refugees and asylum-seekers in Europe offers a good example of the centrality of communication in advancing protection. One of the

has left refugee academics consumed with revisiting the modalities of our failing regional protection system. Protection professionals are confronting the urgent challenges of a dysfunctional refugee regime that can pose grave and immediate risks to asylum seekers.⁵⁸

Not much energy has been devoted to reflecting on the limits of our narrative in Europe's changing political eco-system. Given the gravity of looming protection threats, and the persistent political and media manipulation of migration in this period of pronounced restrictivism, advocacy scholars are understandably reluctant to open up their approach to refugee protection to consider the public anxieties that could be open to exploitation by the far-right. Unfortunately, in the short term, it would appear that the new political and grassroots actors have beat them to it: silence is not always golden.⁵⁹

Whether anxieties about immigration are ill-founded or exaggerated, they are not simply an issue of the European far-right. In promoting a turn towards restrictivism on both sides of the Atlantic, former US presidential candidate Hillary Clinton advised, "if we don't deal with the migration issue it will continue to roil the body politic."⁶⁰ In preparing for the arrival of Syrian refugees in 2015, Canadian Immigration and Refugees Minister John McCallum was concerned about "social backlash" and did not want "Canadians to think we are giving refugees everything and not accommodating the needs of our own people".⁶¹

The body politic matters for refugee protection. If narratives need to reflect recognizable realities on the ground in order to be effective, then scholars should ensure that their rights based narrative resonates with the issues of ambivalent host communities. How law speaks to politics matters.

III. Speaking Law to Politics

When the refugee law profession speaks law to politics, refugee law frames its messages. The legal imperative of refugee rights lends an uncompromising voice to migration policy discussions. Although protection is premised on the rule of law, the post-World War II history of refugee arrivals demonstrates the precarious position of refugee law at the nexus of global, national and grassroots politics. Greenhill's review of displacement in the history of the

organizations four main activities is to transmit "ECRE knowledge and expertise into effective messages that can be directed towards the public". See www.ecre.org.

⁵⁸ As early as 2007, research was highlighting the gravity of consequences of EU border policies, see Thomas Spijkerboer, "The Human Costs of Border Control" (2007) 9:1 *Eur J Mig & L* 127.

⁵⁹ Human Rights Watch, "The Dangerous Rise of Populism: Global Attacks on Human Rights Values" (2017), online: <www.hrw.org> [perma.cc/W9YS-PBY3].

⁶⁰ Patrick Wintour, "Hillary Clinton: Europe must curb immigration to stop rightwing populists", *The Guardian* (22 November 2018), online: <www.theguardian.com> [perma.cc/8ZWZ-JZ9U].

⁶¹ David Ljunggren, "Canada anxious over possible backlash against Syrian refugees", *Reuters* (1 December 2015), online: <ca.reuters.com> [perma.cc/S4FG-HUDJ].

late 40's and 50's argues that it was only with the 1951 Convention, when moral duties towards refugees were transformed into legal obligations, that the subject of migration and refugees entered into the realm of "high politics".⁶² Critically, with legal protection at the core of the refugee regime, this is a field that is shaped and dominated by law. The protection narrative may be woven in different ways by advocacy scholarship, UN and EU policy and civil society lobbying, but it is first and foremost about refugee rights and state obligations.

A. Legal Duties

The protection narrative has three familiar strands: legal duties, moral obligations and economic and cultural benefits. Legal duties are, as suggested above, the first and primary strand, as they wed refugee protection to international treaty obligations and the broader importance of the rule of law. Upholding refugee rights is integrally linked to a wider respect for human right.⁶³

Advocacy scholarship responds to the inclination of states to interpret narrowly the obligations that flow from the 1951 Convention. Under Article 1(A)(2) of the 1951 Convention, a refugee is

'an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.'⁶⁴

Hathaway reminds us that the refugee definition under article one was tailored to respond to forced migration in light of the strained state resources and mass displacement in Europe in the aftermath of World War II. The Convention definition was designed to offer protection to the "most deserving" individuals through definitional criteria that were reflective of an era that prioritized civil and political rights.⁶⁵ The field has advanced a progressive interpretation of the treaty in order to provide protection for forced migrants fleeing contemporary forms of persecution. Expansive treaty interpretation is thus the hallmark of the refugee law literature.⁶⁶ Interpretive error is on the side of being over- rather than under-inclusive when it comes

⁶² Kelly Greenhill, "Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion" (2010) 9:1 Strategic Insights 116 at 117.

⁶³ Colin Harvey, "Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law" (2015) 34:1 Refugee Survey Quarterly 43.

⁶⁴ 1951 Convention, *supra* note 7.

⁶⁵ James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31:1 Harv Intl LJ 129 at 140-41.

⁶⁶ See James C. Hathaway & Michelle Foster, "Principled Approach to Treaty Interpretation" in James Hathaway & Michelle Foster, eds, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 5-12.

to the normative scope of the definition of a refugee. This treaty-based rule of law approach to protection, and the urgency of protection priorities, can foster a certain tunnel vision in scholarship. On the EU level, the interest is on the implementation of, and interplay between, international, regional and domestic law, with the Common European Asylum System (CEAS) as the central focal point.⁶⁷

Pushing the interpretive boundaries of who is a refugee under article one of the 1951 Convention and the scope of the rights that refugees are to enjoy under the treaty places the profession in an oppositional relationship to officials in receiving states, who are inclined to limit, rather than expand, protection. A recent example of this dynamic can be seen in the Trump administration's retreat from the US courts recognition of persecution by private actors, such as that involving domestic or gang violence.⁶⁸

Debates on refugee policy between state authorities and advocates commonly take the form of occasionally intersecting monologues. In adopting such an adversarial approach to refugee rights, advocacy scholarship can often seem strident and uncompromising in its tone. This is explained by states' absolute obligation of non-refoulement that mandates, at a minimum, temporary protection to refugees, including asylum seekers whose status has not been determined.⁶⁹ Despite this obligation, the practices of immigration and border authorities are often shielded from public scrutiny.⁷⁰ Furthermore, the many lacunae in the 1951 Convention facilitate bad faith interpretations of treaty obligations in national RSD practices and the content and scope

⁶⁷ See Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, "Understanding Refugee Law in an Enlarged European Union" (2004) 15:2 *Eur J Intl L* 355 at 365- 367; Olga Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (The Hague: TMC Asser Press, 2007) at 7-40.

⁶⁸ Katie Benner & Caitlin Dickerson, "Sessions Says Domestic and Gang Violence are Not Grounds for Asylum", *New York Times* (11 June 2018), online: <www.nytimes.com> [perma.cc/2TW7-PTQT].

⁶⁹ Executive Committee of United Nations High Commissioner for Refugees, "Non-Refoulement No 6 (XXVIII)" (1977) para (c), online (pdf): [refworld <www.refworld.org/docid/3ae68c43ac.html>](http://refworld.org/docid/3ae68c43ac.html) [perma.cc/XU3F-XH8A] (reaffirming "the fundamental importance of the principle of non-refoulement ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.")

⁷⁰ For instance, checks on persons by border guards are often carried out of public view. European Union, "Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)" (2006) art 7(4), online: *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R0562&from=EN> [perma.cc/6E2E-SBQN]: "Where facilities exist and if requested by the third-country national, such thorough checks shall be carried out in a private area."; A report of the European Union Agency for Fundamental Rights, "Fundamental rights at airports: border checks at five international airports in the European Union" (2014) at 26, online (pdf): <fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf> [perma.cc/8B6U-825T] found that at five international airports (Charles de Gaulle, France; Fiumicino, Italy; Frankfurt am Main, Germany; Manchester, United Kingdom; and Schiphol, the Netherlands) 70% of border guards surveyed indicated that they conducted more detailed checks on individuals 'in a separate place not visible to other passengers'.

of refugee rights.⁷¹ More detailed requirements govern Member States through EU Directives and Regulations governing asylum.⁷² Yet, an array of bureaucratic devices in individual Member States can quietly gut formal protections, for example, dubious age assessment tests for unaccompanied minors or administrative barriers to submitting asylum claims and receiving safe shelter and food.⁷³ Advancing effective protection requires constant vigilance towards the law and practice. As it stands, this is a consuming task and explains the adversarial, but curtailed, scope of advocacy scholarship.

A human rights approach to protection is filtered through the 1951 Convention, with the refugee as its core beneficiary.⁷⁴ The limitations of a prism that exclusively focuses on the category of 'refugee' has implications for research. These are similar to that of the categories employed in other fields on migration, which as Bakewell laments, directs us to "look for explanations on that basis first, rather than on the grounds of social class, length of residence, education or so forth".⁷⁵ While these prisms may have worked well enough in the past, they will not necessarily prove sufficient in Europe's new political landscape

B. Moral Obligations

The second strand is about moral obligations, eliciting a sense of ethical duty, sympathy or empathy with migrants that should then be translated into respect for the binding legal duties deriving from both international and EU

⁷¹ Erika Feller, "International Refugee Protection 50 Years On: Challenges Past Present and Future" (September 2001), online (pdf): *International Committee of the Red Cross* <www.icrc.org> [perma.cc/A3TZ-BJDZ]; see also United Nations High Commissioner for Refugees (UNHCR), "Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective" (17 December 2015), online (pdf): *United States Senate Committee on Appropriations* <www.appropriations.senate.gov> [perma.cc/8GDU-E5LC].

⁷² See e.g. European Union, "Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" (2004), online: *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0083&from=EN> [perma.cc/HVD2-AXP2] [Qualification Directive] (on minimum standards for the qualification and status of third-country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted); European Union, "eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0085&from=EN" (2005), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0085&from=EN> [perma.cc/F3DL-4LNN] [Procedures Directive] (on minimum standards on procedures in member states for granting and withdrawing refugee status in the member states).

⁷³ Gregor Noll, "Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum" (2016) 28:2 Intl J Refugee L 234; "MSF Opens Day Centre for Unaccompanied Minors in Paris" (28 November 2017), online: *Medecins Sans Frontieres* <www.msf.org> [perma.cc/E4AS-MR35].

⁷⁴ Vincent Chetail, "Are Refugee Rights Human Rights: An unorthodox questioning of the relations between refugee law and human rights law" in Ruth Rubio-Marin, ed, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014) 19 at 19-21.

⁷⁵ Oliver Bakewell, "Research Beyond The Categories: The Importance of Policy Irrelevant Research into Research into Forced Migration" (2008) 21:4 J Refugee Studies 432 at 439.

human rights instruments. It also includes the broader concept of solidarity which, while referred to in international and regional legal instruments, and a frequent feature of Brussels rhetoric, remains undefined and unrealized.⁷⁶ Other concepts have successfully been repackaged in the refugee law lexicon in more morally persuasive language; for example, “burden-sharing” becomes “responsibility-sharing”.⁷⁷ Moral duties are an essential component of humanitarianism.

C. Economic and Cultural Benefits

The third strand strays into areas where social scientists, rather than legal scholars, are the real experts. This strand is about benefits, with little being said in the narrative about costs. Refugee arrivals are cast as economic and cultural opportunities for host communities. Migration is portrayed as bringing innovation, workers and a solution to the problems posed by declining and aging populations. In the era of the Global Compact on Migration, senior UNHCR officials Volker Türk and Madeline Garlick further extend the framing of how we should think about refugees, arguing for a semantic shift from “burdens, to responsibilities, to opportunities”.⁷⁸

Such claims are usually made via oblique references to the economic benefits of inward migration. In fact, there is vast and contested economics literature on the impact of immigration on host country workers, suggesting that it can sometimes be positive, sometimes neutral and sometimes negative, depending on the characteristics of the workers concerned, the nature of the immigration flows and the nature of the institutional environment.⁷⁹ As Betts *et al* observe in their work on refugee economies, “existing findings relating to refugees impacts are ambiguous and highly dependent on context.”⁸⁰ However, reputable studies in top economics journals showing negative impacts of immigration on host country workers are typically ignored.⁸¹ In like

⁷⁶ See Madeline Garlick, *Solidarity Under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the International Protection of Refugees in the European Union* (Nijmegen: Radboud University Nijmegen, 2016).

⁷⁷ Rebecca Dowd & Jane McAdam, “International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why And How?” (2017) 66:4 ICLQ 863 at 868–871.

⁷⁸ Volker Türk & Madeline Garlick, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees” (2016) 28:4 Intl J Refugee L 656 [Türk & Garlick].

⁷⁹ Kevin H. O'Rourke, “Economic History and Contemporary Challenges to Globalization” (2019) 79:2 J Economic History 356 at 363–366; Philip Martin, “Migration Research and Policy in the United States” in Martin Ruhs, Kristof Tamas & Joakim Palme, *Bridging the Gaps: Linking Research to Public Debates in Policy-making on Migration and Integration* (Oxford University Press, 2019) 146 at 154–162.

⁸⁰ See Alexander Betts *et al*, *Refugee Economies: Forced Displacement and Development* (Oxford: Oxford University Press, 2014) at 45, online (pdf): <www.mcrj.ac.in > [perma.cc/HS5E-BHLP].

⁸¹ For example Christian Dustmann, Tommaso Frattini & Ian P Preston, “The Effect of Immigration Along the Distribution of Wages” (2013) 80:1 Rev Economic Studies 145; Christian Dustmann, Uta Schönberg & Jan Stuhler, “Labor Supply Shocks, Native Wages, and the Adjustment of Local Employment” (2017) 132:1

fashion, social changes that emerge from the hosting of refugees are commonly presented as a means of replenishing and diversifying communities. Orgad's study of cultural policies in Europe argues that this is driven by a presumption of the positive consequences of diversity and multiculturalism in society.⁸² Understandably, as lawyers, few advocacy scholars engage seriously with the sociology of multiculturalism. Inward migration that results from state compliance with the obligation of non-refoulement is presented as a public good, with strong presumptions of, at least, long term economic and cultural benefits. An analysis of the legal duties of states is combined with an un- or under-examined acceptance of strictly empirical, complex economic and sociological claims.⁸³

An adversarial dialectic between advocacy scholars and state authorities would be expected if academics served as legal counsel representing clients seeking protection, or if they acted on behalf of NGOs representing migrants. Yet, advocacy scholars are primarily concerned with macro policy issues and the procedural and substantive mechanics of protection. While engaged in protection research, refugee law scholars occupy a different professional terrain than NGO advocates, being subject to academic rather than advocacy standards. The risks of adversarial advocacy for human rights and refugee law scholars is evident. In human rights, "soft law" instruments have grown exponentially and 'best practices' abound.⁸⁴ For refugee law, these non-binding sources of law have provided a critical framework for advocacy. In an evolving field, a wide ranging protection narrative will struggle to locate the boundaries between the existing and legal duties of states and an aspirational exposition of select human rights that, however worthy, exceeds the imposed obligations of public international law. For refugee law, there are many areas that are not explicitly addressed by the 1951 Convention, such as due process, and where state practice is dynamic and varied.⁸⁵ A worst case scenario that David Kennedy describes (and arguably overstates) is one in which "[t]he human rights movement degrades the legal profession by encouraging a combination of both sloppy humanitarian arguments and overly formal reliance on textual articulations which are anything but clear or binding."⁸⁶

QJ Economics 435.

⁸² Orgad, *supra* note 45.

⁸³ For an overview of the extensive work on the impact of forced displacement in other disciplines, see Elena Fiddian-Qasimiyeh et al, "Study on Impacts and Costs of Forced Displacement: State of the Art Literature Review (Vol 2)" (2011), online (pdf): *The World Bank* <documents.worldbank.org> [perma.cc/5WUA-Q4B7]: a review of over 480 articles and reports published over the past forty years which analyse qualitative and quantitative data pertaining to the impact of displacement on the following key stakeholders: displaced populations (refugees and internally-displaced people); host populations; host state; country of origin and stayee population in the country of origin; and the international community).

⁸⁴ See Stéphanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016) at 1-13.

⁸⁵ Hailbronner, *supra* note 49.

⁸⁶ Kennedy, *supra* note 1 at 27.

To be clear, refugee scholarship in peer-reviewed journals is rigorous and sophisticated. The problem for the profession is less about flawed methodologies applied by advocacy scholars than about the restricted scope of questions that they choose to ask in their research. Very few refugee scholars move beyond writing about policy and practice from the perspective of refugees as the exclusive rights holders. With the legal challenges as acute as they are now, pivoting the research focus to also explore issues relevant to host communities seems an excessive strain to place on the limited resources of legal academics. But, the risk is that when filtered into civil society debates, scholarship focused almost exclusively on refugee rights may create the impression that human rights are distributed and prioritized in accordance with different identities.

Refugee advocacy research is distinctive because it is inhibited by the protection consequences that it might have on the ground. Until this crisis, the profession's narrowly focused tailoring of the protection narrative has been relatively successful. The role played by academics in UNHCR's 2000 Global Consultations in framing core doctrinal discussions reflects the significance of refugee legal scholarship on policy and practice.⁸⁷ Within Europe, treaty-based approach to protection has been an effective mechanism for curtailing some of the worst abuses of Member States, as proven by the jurisprudence of the European Court of Human Rights.⁸⁸ Refugee research that engages with some of the complexities of migration and protection could be manipulated for political purposes. However, the almost monolithic commitment of advocacy scholars and their civil society stakeholders to pursue an approach to asylum law focused solely on the treaty rights of refugees and asylum seekers has led them to avoid discussions of refugee law and policy that intersect with the top three anxieties of the public in Europe today: immigration, terrorism and the economy.⁸⁹

With national and regional asylum laws undergoing frequent reform, the protection narrative became largely reactive in Europe responding to proposed or existing policies and indicating ways for them to become more rights-compliant and humane. Protection is seen to depend primarily on the entrenchment of state duties towards refugees in law, not on public policy or opinion that fluctuate over time.⁹⁰ The approach of advocacy scholarship

⁸⁷ See e.g., Erika Feller, Volker Türk, and Frances Nicholson, eds, *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003).

⁸⁸ For an excellent analysis of the interaction between the European Court of Human Rights caselaw and the Dublin Regulations in the current crisis, see Maryellen Fullerton, "Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law" (2016) 29:1 *Harv Hum Rts J* 57 [Fullerton]; For a comprehensive overview of the asylum jurisprudence of the European Court of Human Rights see Fundamental Rights Agency & Council of Europe, *Handbook on European Law relating to Asylum, Borders and Immigration* (EU FRA, 2014).

⁸⁹ Standard Eurobarometer 89, *supra* note 38.

⁹⁰ For United Nations High Commissioner for Refugees summary of the core legislative components of

is to insulate the human rights guarantees to refugees based upon the 1951 Convention and an array of other subsequent human rights conventions and EU instruments, in order to prevent them from being abridged or violated by domestic political agendas. Section 4 will identify the limits of this legalism. Section 5 will argue that when the refugee protection narrative fails to rigorously consider concerns about immigration control, security or integration, it cedes the intellectual terrain to other voices, leaving these issues to be monopolized by non-rights based narratives in the court of public opinion.

IV. Limits of Legalism for Refugee Protection in Contemporary Europe

As highlighted above, the protection narrative is, above all, a legal one. The ambition is to create legal structures within which refugee protection can be ensured. As the introduction of border controls between Sweden and Denmark in 2015 demonstrates, even highly developed regional or national refugee policies can buckle under strain: refugee law and practice is not hermetically sealed from society at large, as refugee legal scholars have long been aware.⁹¹ Yet, this crisis has revealed new dimensions of the limits of legalism, both at the EU and grassroots levels

A. Macro-level Challenges

Within the European framework of CEAS, codifying regional asylum rules and regulations was part of a deeper process of regional integration founded upon a high level of interdependence between Member States.⁹² The European crisis suggests that when refugee protection is highly codified within a system of complex political, financial and legal associations between states, and when protection obligations are systematically breached, the political effect can be seismic. For Merkel, indeed, finding a solution to the refugee crisis could “make or break the EU.”⁹³

The inclination of the human rights lawyer is to turn to legalism whereby protection is enhanced through the increasing codification of duties towards rights holders, refugees among them. But legal frameworks can fail. In the EU, refugee protection is extensively codified in a regime that is interconnected

refugee protection, see United Nations High Commissioner for Refugees, “A Guide to International Refugee Protection and Building National Asylum Systems: Handbook for Parliamentarians” (2017), online (pdf): <www.unhcr.org/3d4aba564.pdf> [perma.cc/HF69-4FSN].

⁹¹ Daley, *supra* note 2.

⁹² For an overview of the CEAS, see European Commission, “Common European Asylum System” (31 July 2018), online: <ec.europa.eu/home-affairs/what-we-do/policies/asylum_en> [perma.cc/CZS9-GEQC].

⁹³ See “EU leaders seek migration deal in Brussels”, *Deutsche Welle* (28 June 2018), online: <www.dw.com> [perma.cc/X3HE-G6F7].

with a myriad of other areas of EU law, be it visas, freedom of movement of workers, employer sanctions, data protection, trafficking, social welfare, equal treatment or any of the more than 35 other areas covered by EU legislation that affects refugees.⁹⁴ For those who see regional protection systems as the best hope for guaranteeing refugee rights, the speed with which the European refugee crisis so easily collapsed what was the most advanced regional legal framework for refugee protection in the world warrants consideration. Under the pressure of less than 2% of the world's refugee population, this elaborate system simply ceased to function. For embedded in the complex legislation are a myriad of incentives for states and migrants to undermine the law. Since the end of 2016, the erosion of compliance with EU asylum law has spilled over to threaten the most visible manifestation of the EU's fundamental freedoms, the Schengen area's border-free movement of persons between countries.⁹⁵ The European refugee crisis provides a case study in the collateral and unanticipated consequences that can arise when migration and asylum are regulated within a matrix of regional legal codification.⁹⁶

⁹⁴ E.g. European Union, "Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)" (2009), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0810&from=EN> [perma.cc/MAK8-EZ9F]; European Union, "Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community" (1968), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31968R1612&from=en> [perma.cc/9L6G-NG4X]; European Union, "Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals" (2009), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0052&from=EN> [perma.cc/PUU4-5ZSW]; European Union, "Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice" (2013), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0603&from=EN> [perma.cc/3E6E-TT5J]; European Union, "Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA" (2011), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en> [perma.cc/GF8V-QZ69]; European Union, "Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland)" (2004), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0883&from=EN> [perma.cc/8DDX-JB8J]; European Union, "Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin" (2000), online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN> [perma.cc/JCV8-4DBJ].

⁹⁵ European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen - A Roadmap" (2016), online (pdf): *EUR-Lex* <eur-lex.europa.eu/resource.html?uri=cellar:cff8990a-e1ee-11e5-8a50-01aa75ed71a1.0007.02/DOC_1&format=PDF> [perma.cc/AT43-X7GA].

⁹⁶ For a discussion of the symbiotic unfolding of the European refugee crisis with EU constitutional

To provide a rigorous analysis of the migration policy issues that attach to refugee law in the EU requires a greater interdisciplinarity in scholarship than is the current practice. There is a minor tradition of international refugee lawyers working across disciplinary boundaries, but this remains largely at the intersection of international relations and refugee law, rather than in the technical areas of economic and social policy.⁹⁷ An examination of the contents of the *International Journal of Refugee Law* highlights the black letter and doctrinal approach of the core legal scholarship on refugee protection. This approach to refugee law displays a faith in the power of the rule of law to protect refugee rights, with those working on EU asylum issues, not surprisingly, focused on international and EU legal obligations. This accords with the more general profile of European international legal scholars that emerges from Anthea Roberts' study of the profession. Unlike their US counterparts, who possess liberal arts undergraduate degrees in addition to a Juris Doctor, European legal education produces international lawyers who are far more likely to have undergraduate and postgraduate degrees exclusively in law.⁹⁸

B. Micro-level Challenges

Even if the protection narrative promotes a transcendent view of the role of refugee law, empirical research on the different rates of granting refugee status suggest that politics and opinion affect the way that protection seekers are received and refugee claims are evaluated. The dramatic differences in recognition rates of similarly profiled refugees across European Member States is often used to highlight the failure of the 1951 Convention and the EU Qualification Directive to provide domestic legal systems with a consistent interpretation of the criteria for determining who is a refugee.⁹⁹ These rates highlight the extent to which the harmonization of the asylum system has yet to be achieved in Europe. They show the difficulty of insulating regional standards towards refugees from the domestic context within which status determination occurs. Acknowledgment of this phenomenon is hardly new: during the Cold War it was commonly observed that asylum decisions in the west were correlated with the foreign policy objectives of the states determining status.¹⁰⁰

It is often assumed that harmonization would be a solution for the

governance, see Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, *Towards Understanding the Refugee law of Crisis* [forthcoming in 2019] (on file with author).

⁹⁷ Rosemary Byrne & Thomas Gammeltoft Hansen, "International Refugee Law between Scholarship and Practice" [forthcoming] (on file with author).

⁹⁸ Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017) at 221–226.

⁹⁹ Dimiter Toshkov & Laura De Haan, "The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognition rates" (2013) 20:5 J European Public Policy 661.

¹⁰⁰ Deborah Anker, "U.S. Immigration and Asylum Policy: A Brief Historical Perspective" (1990) 13 In Defense of the Alien 74.

varying levels of protection offered across Member States. This is premised on the same assumption that underlies practice in federal systems where uniform procedural standards and eligibility criteria across states provide the strongest insurance against different protection rates for similarly profiled asylum seekers.¹⁰¹ From this logic, the EU protection system should ideally aspire to operate like that of a federal state, such as Germany. With common asylum legislation and procedures applied across different regional asylum offices, one would expect consistent recognition rates. Yet, according to a 2017 study by Reidel and Schneider on German refugee status determination first instance decisions across 16 different Länder, recognition rates for the same nationalities vary significantly across regions. Where Saarland and Bremen had recognition rates of 69% and 55.7%, respectively, over the period from 2010 to 2015, Berlin and Saxony had rates of only 24.6% and 26.9%. Critically, these differences were as striking for the most important groups of asylum seekers. 75.5% of Iraqi asylum seekers were recognized in Lower Saxony, compared to 37.5% in Saxony-Anhalt. For Afghan asylum seekers, 34.4% were recognized in North Rhine-Westphalia, compared to 10% were in Brandenburg.¹⁰² Contrary to what might be assumed, the political persuasion of the parties in power was not correlated with refugee recognition rates in different parts of the country. However, there was a “systematic” positive correlation between the number individuals without a German passport residing in a given region and the rate of refugee recognition. Although acknowledging the limits of their sample size, the authors found that the number of xenophobic attacks lowered recognition rates in the following year, suggesting that for case officers the “preferences and moods that prevail in their land guide their decisions.”¹⁰³

These findings are a reminder that even in the most advanced legal systems, the ecosystem within which the law is implemented matters. Published in 2012, Taras’ important work on xenophobia and islamophobia provides a helpful backdrop for understanding the need to gain public support for refugee protection within Europe. He examined survey data that goes back to years before the numbers of migrant arrivals came anywhere near the record numbers of 2015, when over one million individuals crossed the Mediterranean to enter Europe. Taras concludes that “significant sections of European society are suspicious of and even hostile to their Muslim communities.”¹⁰⁴ In this environment, one might assume that even if a wider,

¹⁰¹ Hugo Storey, “Consistency in Refugee Decision-Making: A Judicial Perspective” (2013) 32:4 *Refugee Survey Quarterly* 112.

¹⁰² Lisa Riedel & Gerald Schneider, “The Asylum Lottery: Recognition Rates Vary Strongly within Germany” (9 June 2017), online (blog): *EU Immigration and Asylum Law and Policy* <eumigrationlawblog.eu> [perma.cc/3UKQ-GW72].

¹⁰³ *Ibid.*

¹⁰⁴ Raymond Taras, *Xenophobia and Islamophobia in Europe* (Edinburgh: Edinburgh University Press, 2012) at 134.

deeper and stronger CEAS were constructed, there would still not be uniform standards of protection across Europe. There is only so much that that formal law can do to ensure fairness in refugee status determination.

V. Silences

Refugee scholarship has never been as abundant and robust as it is now. Its work is engaged with, and mediated to, the public by a mature and varied constellation of NGOs in the field. Organizations such as ECRE (European Consultation for Refugees and Exiles) and national refugee councils produce research publications that draw from refugee law scholarship.¹⁰⁵ The humanitarian situation for refugees in Europe has not been this serious since the aftermath of World War II, making the moral case for the protection narrative as compelling as it has been in decades. While there are shortcomings in the CEAS, there are many regional institutional actors involved in refugee rights according to their varying mandates. Central among these bodies are: the Council of the European Union, European Commission, European Parliament, European Court of Justice, EU Fundamental Rights Agency (FRA), EU European Asylum and Support Office (EASO) and the EU border agency (FRONTEX), as well as the Council of Europe and European Court of Human Rights.¹⁰⁶ Notwithstanding the limitations of these bodies, in principle, they can put additional pressure on states to comply with their obligations under international and EU law and lend legitimacy to the claims of rights-based refugee scholarship.

In this normative and institutional context, the human rights-based refugee protection narrative should be doing well rather than losing ground. If it is losing ground, this may not be on account of what it says, but what it ignores. To the extent that an advocacy agenda is responsible for the vacuums in the refugee law literature that I will discuss below, it is fostering a protection narrative that is disconnected from the anxieties of the communities that vote Member State governments into office. Whether from Hungary's Victor Orban, Italy's Matteo Salvini, France's Marine Le Pen or Austria's Sebastian Kurz, there are voices today in the European political arena that eagerly distort and discard the refugee rights protection narrative. A mobilizing space now exists for alternative anti-protection narratives that have become normalized in the political lives of Member States by politicians.¹⁰⁷ Nature hates a void

¹⁰⁵ See e.g. European Council on Refugees and Exiles, "ECRE Publications", online: <www.ecre.org/ecre-publications/> [perma.cc/ECA2-KBH8]; Danish Refugee Council, "Publications", online: <drc.ngo/about-drc/publications/publications> [perma.cc/87EX-KWZZ]; Refugee Council (UK), "Resources", online: <www.refugeecouncil.org.uk/resource-category/research/> [perma.cc/9QHY-DEF4].

¹⁰⁶ See United Nations High Commissioner for Refugees, "Working with European Institutions", online: <www.unhcr.org/working-with-the-european-institutions.html> [perma.cc/L7]4-8SN8].

¹⁰⁷ Jens Rydgren, "Immigration Sceptics, Xenophobes or Racists? Radical Right-Wing Voting in Six West European Countries" (2008) 47:6 *European J Political Research* 737; "Europe and Right Wing Nationalism:

and silences provide a space in which voices such as these will eagerly fill if allowed to do so.

A. Host Communities

Grounded in international human rights law, advocacy scholarship focuses on state, not popular, sovereignty. It offers a state-centric analysis of international legal obligations towards refugee rights that is then mediated into public discourse through civil society campaigns and the media. Legalism serves, in principle, if not always in practice, as a mechanism to insulate migrant rights from the passions of public opinion. This law-based approach to protection means that advocacy scholarship *de facto* excludes the public from influencing its narrative.

There is a strong literature on the sociological dynamics of integration, but legal literature that pivots between refugees and local grassroots communities is missing. A general insufficient engagement with the interrelationship between refugees and host societies has been recognized in the realm of EU high politics. The EU Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos observed, in February 2018, that the current concerns to reach a fair reform of the Dublin regulations may make discussions about inclusion and integration “sound like luxury discussions”. Yet, he cautioned that it is because the EU has left such long-term considerations out of the conversation in the past that “we are still paying the social and economic costs today.”¹⁰⁸

The array of rights issues that deal *inter alia* with exclusion, culture, gender and socio-economic context are addressed more often by the social sciences. The exclusive focus on the rights of a particular population that defines refugee legal scholarship is encouraged by the structure of an international human rights system. Human rights law is structured around treaty regimes devoted to designated populations, be they refugees, internally displaced people, women, children, persons with disabilities, etc.¹⁰⁹ While these multiple

A country-by-country guide”, *BBC News* (24 May 2019), online: <www.bbc.com/news/world-europe-36130006> [perma.cc/684V-XWGP].

¹⁰⁸ Dimitris Avramopoulos, “Europe’s Migrants are Here to Stay”, *Politico* (18 December 2017), online: <www.politico.eu> [perma.cc/QUF8-ASEE] [Avramopoulos].

¹⁰⁹ See 1951 *Convention*, *supra* note 7; African Union, “African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”)” (2009), online (pdf): <au.int/sites/default/files/treaties/36846-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_e.pdf> [perma.cc/YCZ9-L2DT]; United Nations General Assembly, “Convention on the Elimination of All Forms of Discrimination Against Women”, (1979) at 13, online (pdf): <www.ohchr.org/documents/professionalinterest/cedaw.pdf> [perma.cc/3R4H-NRZP]; United Nations General Assembly, “Convention on the Rights of the Child” (1989) at 3, online (pdf): <www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [perma.cc/5RHV-C9TC]; United Nations General Assembly, “Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly on 13 December 2006” (2007), online (pdf): <www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106>.

treaty regimes target wider and overlapping groups, the patchwork of identity based legal instruments encourages a focussed, segmented and often exclusive approach to rights advocacy. The impact of this on economically precarious communities within host populations is further compounded by the weak priority accorded to economic and social rights. While we have an International Covenant for Economic Social and Cultural Rights, those who are at the margins of economic deprivation are often overlooked. As Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights, observes, “despite a great deal of diplomatic and expert activity on the issue of economic and social rights, as well as an emerging body of case law and abundant scholarship, those rights nevertheless remain largely invisible in the law and institutions of the great majority of States.”¹¹⁰

Within the wider field of refugee studies, there is notable work on the impact and interrelationship between host populations and refugees.¹¹¹ However, Jeroen Doornik and Birgit Glorius observe that refugee studies research is also inclined to study these issues at the national level. They argue against obscuring subnational experiences, since the absorption of asylum seekers and refugees takes place at the local level.¹¹² Member States repeatedly fail to invest adequate resources, establish effective administrative procedures with sufficient legal safeguards and provide appropriate shelter and social services for protection seekers. This obviously has negative implications for local communities. Under-resourced local and national authorities may adversely impact members of host populations in different ways than vulnerable asylum seekers, but there are rights implications for both communities.¹¹³

The shift in language within the protection narrative that moves from refugee “burdens and responsibilities” to “opportunities” strategically edits out a focussed acknowledgement of the real costs on the ground.¹¹⁴ While protection seekers can bring resources to host communities, their arrival heightens financial demands on local municipalities. These pressures

pdf> [perma.cc/FDU4-CSQF].

¹¹⁰ See *UN Human Rights Council 2016 Report of the Special Rapporteur on extreme poverty and human rights*, UNGAOR, 32nd Sess, A/HRC/32/31 (2016) 1 at 4.

¹¹¹ Karen Jacobsen, “Livelihoods in Conflict: The Pursuit of Livelihoods by Refugees and the Impact on the Human Security of Host Communities” (2003) 40:5 *Intl Migration* 95 [Jacobsen]; Will Jones & Alexander Teytelboym, “The Local Refugee Match: Aligning Refugees’ Preferences With The Capacities And Priorities Of Localities” (2018) 31:2 *J Refugee Studies* 152 [Jones]; Aparna Hebbani, Val Colic-Peisker & Mairead Mackinnon, “Know thy Neighbour: Residential Integration and Social Bridging among Refugee Settlers in Greater Brisbane” (2018) 31:2 *J Refugee Studies* 82 [Hebbani].

¹¹² See e.g. Birgit Glorius & Jeroen Doornik, “Refugee Migration and Local Demarcations: New Insights into European Localities” (2016) 29:4 *J Refugee Studies* 429 [Glorius].

¹¹³ See Fundamental Rights Agency, “Thematic focus: Impact of asylum crisis on local communities” (2016), online: <fra.europa.eu> [perma.cc/C394-G2CT] [Thematic Focus]; Fundamental Rights Agency, “Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner” (2011), online: <fra.europa.eu> [perma.cc/GM3S-3Y7T].

¹¹⁴ See e.g. Türk & Garlick, *supra* note 78.

typically fall on education, health, social and community services or local policing.¹¹⁵ Accountability may rest clearly with host states that have not allocated available resources to the most affected communities; inadequate local infrastructure affects not only the rights of refugees, but also those of local communities. Should refugee law scholars seek to better understand the impact on the range of refugee and host community rights, a more genuinely inclusive approach to human rights research is needed.

With the increasing marginalization of the protection narrative apparent in their wavering legal commitment to refugees and the amplification of populist discourse on refugee policy, the EU human rights community has begun to revisit their communication strategies.¹¹⁶ Acknowledging that they failed to adequately address the concerns of marginalized demographic groups, there is now a heightened awareness of the need to engage with wider issues related to poverty.¹¹⁷ More generally, Alston argues that it is crucial for the human rights movement to concern itself with matters of resources, redistribution and fiscal and tax policies.¹¹⁸ The refugee protection narrative could benefit from this call for a more aggressive approach to economic and social rights for domestic constituencies alongside refugees. This would work in tandem with the need to address integration efforts within Member States more effectively.¹¹⁹ But responding to the call will require addressing issues that refugee legal scholarship has traditionally avoided.

Can the human rights community effectively recapture the human rights narrative and shape the approaches to refugee protection favored by voters in refugee receiving states? It is important to situate the European refugee crisis within the context of austerity and the economic precarity of many frontline receiving communities. Given austerity, there can be only a limited stock of social and economic supports for host communities that responds inelastically to increases in demand. In such circumstances, the quest to access

¹¹⁵ See e.g. Jacobsen, *supra* note 111 at 105; Thematic Focus, *supra* note 113; Fundamental Right Agency, "Current Migration Situation In The Eu: Community Policing" (2017), online: <fra.europa.eu/en/publication/2017/current-migration-situation-eu-community-policing> [perma.cc/X3PJ-5V3L] [Community Policing] (addressing combatting migrant fear and means to give voice to concerns of local community).

¹¹⁶ See e.g. Office of the UN High Commissioner for Human Rights and Office of the Council of Europe Commissioner for Human Rights, "International organisations commit to building broader support for human rights" (6 March 2018), online: FRA <fra.europa.eu> [perma.cc/F3TK-7NBP].

¹¹⁷ See e.g. European Union Agency for Fundamental Rights, "Fundamental Rights Report 2019" (2019) at 128-130, online (pdf): <fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf> [perma.cc/94YP-6ZfV]; European Union Agency for Fundamental Rights, "Asylum and migration into the EU in 2015" (2015) at 31-33, online (pdf): <fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf> [perma.cc/S2LW-JKA9]; European Civil Protection and Humanitarian Aid Operation, "Forced displacement: refugees, asylum-seekers and internally displaced people (IDPs)" (2019), online: <ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons_en> [perma.cc/Y9PH-VW6V].

¹¹⁸ Philip Alston, "The Populist Challenge to Human Rights" (2017) 9:1 J Human Rights Practice 1.

¹¹⁹ Avramopoulous, *supra* note 108.

social welfare, housing and other services by locals and protection seekers can become a zero sum game. For instance, a shortage of public housing in local communities can mean that refugee dispersal policies can diminish the overall stock of housing available or drive up rents in the private sector.¹²⁰ Ignoring such problems will not make them go away. Rights-based scholarship in collaboration with social scientists who can provide an empirical basis for complex economic and policy analysis can help to place the focus back on the government practices that are, in some instances, denying basic rights to all within a community, regardless of citizenship.¹²¹

Research on such issues remains oddly marginal within refugee legal scholarship. It is perhaps not surprising that it is the EU Fundamental Rights Agency (FRA) that has been most actively engaged in expanding the vantage points for looking at rights related to asylum. Situated at the nexus between the EU, civil society and Member States, FRA offers an example of how rights questions can be broadened to include the rights of a wider range of actors within discussions of the refugee crisis. Because the Agency does not publish its research in peer-reviewed international journals, instead independently publishing its own reports, its scientific work on migration has been slow to filter into wider scholarship in the field.¹²² Its mandate directs the FRA to provide evidence-based policy advice for the European Commission, other EU institutions and Member States.¹²³ Hence, its research is cognizant of the sensitivities of these actors, which may not always promote an aggressive advocacy research agenda. On the positive side, the prism through which the FRA explores rights issues is adapted to the concerns relevant to the EU and national governments, warranting closer attention to its work. Some of the fieldwork related to the refugee crisis looks at human rights issues affecting both migrant and local populations.¹²⁴ In order to produce a rights-based analysis that captures more accurately what is happening

¹²⁰ Alfonso Lara Montero & Dorothea Baltruks, "The Impact of the Refugee Crisis on Local Public Social Services in Europe" (2017) at 9, online: *European Social Network* <www.esn-eu.org/sites/default/files/publications/Refugee_Briefing_paper_FINAL.pdf> [perma.cc/9XEM-UJRR].

¹²¹ See e.g. Isabel Mota Borges, "The Eu-Turkey Agreement: Refugees, Rights and Public Policy" (2017) 18:2 *Rutgers Race & L Rev* 121 at 138.

¹²² Pursuant to European Union, "Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights" (2007) art 2, online (pdf): *EUR-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0168&from=EN> [perma.cc/6WUK-9UPX]: "The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".

¹²³ *Ibid*, art 2 (mandating the Agency "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights").

¹²⁴ Thematic Focus, *supra* note 113; Community Policing, *supra* note 115 (addressing combatting migrant fear and means to give voice to concerns of local community).

on the ground, the FRA's methodologies combine law and social science.¹²⁵ This interdisciplinary model is hardly unique to the FRA. The EU's Horizon 2020 research calls for funding proposals that reflect the policy imperative to promote interdisciplinary, policy-relevant research related to migration.¹²⁶ As suggested above, legal academics could gain from more interdisciplinary collaborations. While academic researchers lack the resources and access to policy channels of EU institutions, the independence of refugee legal scholars has the potential to produce more critical and innovative output looking at the ecosystem that is so adversely affecting the realization of refugee rights in Europe.

Channeling research within any narrative, however laudatory its aims might be, narrows the scope of inquiry. The necessary focus on refugee rights without engaging with how they impact wider policy concerns within nation states comes with the risk of messaging that there is a hierarchy of rights beneficiaries. For some, this perception could be sustained by the weak and delayed responses by human rights activists in the aftermath of the sexual assaults on New Year's Eve in 2016 in Cologne and other German cities. In a period of rising racism, xenophobic attacks, criminalization of migrants and manipulated representations of migrant crime rates, there were understandable reasons why advocacy scholars and NGOs wanted to avoid a vocal campaign for justice for the victims.¹²⁷ While the scale of what transpired is unclear, according to the report of the inquiry on the New Years Eve violence by the German Federal Criminal Police Agency, it is estimated that 1200 sexual crimes were perpetrated by roughly 2000 young men during the course of the public festivities.¹²⁸ As notable as the gravity and scale of the crimes perpetrated, was the delayed reporting of them by the mainstream German national media for several days.¹²⁹

Because the assaults were alleged to have been committed mostly by migrant men, there was a critical need for leading organizations working on the refugee crisis to frame a rights-based response. The two leading European bodies in this regard are the FRA and European Consultation on Refugees

¹²⁵ Rosemary Byrne & Han Entzinger, eds, *Evidence Based Advice for Human Rights Policy: The First 10 Years of the EU Fundamental Rights Agency* (Routledge, 2019) [forthcoming in 2019].

¹²⁶ The EU Horizon 2020 research funding calls on migration seek interdisciplinary teams to explore issues pertaining to global and European migration. See European Commission, "2018-2020 Calls on Migration" (2019), online: <ec.europa.eu/eurostat/cros/content/2018-2020-calls-migration_en> [perma.cc/XLJ6-J5RM].

¹²⁷ Laura Backes et al, "Fact Check: Is there truth to refugee rape reports?", *Spiegel Online* (17 January 2018), online: <www.spiegel.de> [perma.cc/H8QB-4NVG].

¹²⁸ Rich Noack, "Leaked Document says 2000 men allegedly assaulted 1200 German women on New Year's Eve", *The Washington Post* (11 July 2016), online: <www.washingtonpost.com> [perma.cc/SF4U-TKJT]; "Report: Over 1200 women assaulted in Germany on New Year's Eve", *Deutsche Welle* (10 July 2016), online: <www.dw.com> [perma.cc/G2PM-32J6].

¹²⁹ Matthew Kartnitschnig, "Cologne puts German 'lying press' on the defensive", *Politico* (20 January 2016), online: <www.politico.eu> [perma.cc/8YX3-FX23].

and Exiles (ECRE), which is the umbrella organization for NGOs dealing with refugee rights across Europe.¹³⁰ Each body was well positioned to be a constructive actor in difficult discussions, with strong profiles of advancing law and policy positions informed by refugee rights research. The FRA did not issue a statement before January 13, and ECRE did not issue a statement condemning the attacks before January 19, 2016. The FRA's statement began with an assertion by the Agency's Director, Michael O'Flaherty, that there "is no hierarchy of rights holders."¹³¹ However, the statements from both bodies framed their strong condemnation of the assaults within the context of the broader phenomenon of violence against women in Europe, relying on FRA surveys conducted in 2012 and 2014.¹³² This seemed to ignore the potential qualitative novelty of what was reported to have transpired. Against the backdrop of unprecedented mass sexual violence in the European public space, and given a level playing field for rights, one might have expected the FRA and ECRE to go beyond a simple condemnation and call for measures that would bring justice and prevent such occurrences in the future. In the public mind, at least in Germany, this was arguably one of the defining moments in the European refugee crisis.¹³³ It is striking that the events of Cologne are largely invisible in advocacy scholarship.

Even within the feminist movement there is ambivalence about how to respond effectively to migrant-perpetrated sexual crimes.¹³⁴ Meanwhile, crimes committed by migrant men in Germany, often numerically exaggerated, have kept the issue alive.¹³⁵ In June 2018, Human Rights Watch issued a statement on violence against German women calling for a tough response for all perpetrators, including asylum seekers.¹³⁶ That a global human rights organization would think it necessary to issue such a self-evident press statement is a reflection of the sensitivity of the subject. While one cannot ascertain the reason for general silence on this issue, whether it be self-censorship from the left, skepticism about the official reporting of

¹³⁰ See European Union Agency for Fundamental Rights, "Areas of Work", online: <fra.europa.eu> [perma.cc/38C7-HU5Y]; See also European Council on Refugee and Exiles, "Our Work", online: <www.ecre.org/our-work/> [perma.cc/PE6K-HV9P].

¹³¹ European Union Fundamental Rights Agency, "FRA Calls for Action to End Widespread Violence Against Women throughout the EU" (13 January 2016), online: <fra.europa.eu> [perma.cc/7YKN-TME6]; European Council on Refugees and Exiles, "ECRE Statement on Cologne and its aftermath" (19 January 2016), online: ECRE <www.ecre.org> [perma.cc/6SFT-JM8S].

¹³² *Ibid.*

¹³³ Mariam Lau, "Cologne attacks create a defining moment for German tolerance", *Financial Times* (11 January 2016), online: <www.ft.com> [perma.cc/JQB7-U3LL].

¹³⁴ Anna Sauerbrey, "The German Feminists' Dilemma", *New York Times* (12 June 2018), online: <www.nytimes.com> [perma.cc/V75C-AS2P].

¹³⁵ See for instance, "Fact Check: Is There Truth To Refugee Rape Reports?" *Der Spiegel Online* (17 January 2018), online: <spiegel.de/international/germany/is-there-truth-to-refugee-sex-offense-reports-a-1186734.html> [perma.cc/X47X-VAYG].

¹³⁶ Hugh Williamson, "Protecting Women in Germany from Violence: Tough Responses Needed to All Perpetrators" (13 June 2018), online: *Human Rights Watch* <www.hrw.org> [perma.cc/5RNN-F365].

New Year's Eve events or other research priorities, it suggests that as with issues pertaining to deportation, advocacy scholarship remains constrained. One can assume that the continued vulnerability of migrants in Europe is what might inspire the relative silence of the human rights community in this context. Rather than a very delayed condemnation of the alleged crimes and a standard call for justice, more proactive responses to reports of mass sexual violence might have been expected from refugee advocates and civil society. Absent greater engagement from human rights NGOs, it is reasonable that some might perceive a hierarchy of right holders, with women on the lower rungs, notwithstanding protests to the contrary.¹³⁷ For human rights to become a genuine universal *lingua franca*, there needs to be a vigilant effort to convey a shared ownership of individual rights and duties.

A refugee crisis that has been compounded by financial crises and austerity challenges advocacy scholars to reconceive what a human rights approach to refugee protection ought to involve. An approach to human rights through the sole prism of refugee rights, with an exclusive focus on the protection concerns of migrants, is no longer sufficient. In the on-going search for more effective ways to counter the increasing threats to refugee protection, there is value in seeking additional vantage points for our scholarship. Human rights practice and municipal activism encourages us to look at refugee rights more frequently as part of a wider cross sectional analysis, and to drill down from the national to the local.

The UN Guiding Principles on Extreme Poverty provide an example of how the progressive development of human rights looks at cross cutting issues, obligations and vulnerable groups, as well recognizing the implications of the intersection of multiple identities which give rise to multifaceted and cumulative forms of discrimination.¹³⁸ This allows for the distinctive risks confronted by refugees and irregular migrants in accessing rights to be addressed in the same discourse that considers other issues and vulnerabilities that are shared with members of host communities.¹³⁹ The adoption of thematic approaches to rights, as is witnessed in types of UN practice, produces multi-dimensional discussions, ideally fostering a more inclusive approach to a wider range of fundamental rights and their holders.¹⁴⁰

¹³⁷ See *supra* note 131.

¹³⁸ Human Rights Council, Magdalena Sepúlveda Carmona, *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights*, 21st Sess, Agenda Item 3, UN Doc A/HRC/21/39 (2012) at para 8.

¹³⁹ *Ibid.* The principles note that persons living in poverty often experience disadvantage and discrimination based on race, gender, age, ethnicity, religion, language or other status, groups identified as particularly vulnerable to extreme poverty due to greater challenges accessing income, assets and services would include women, children, older persons, persons with disabilities, migrants, refugees, asylum seekers, internally displaced persons, minorities, persons living with HIV/AIDS and indigenous peoples.

¹⁴⁰ See e.g. Human Rights Council, Vernor Muñoz, *Report of the UN Special Rapporteur on the Right to Education: The right to Education of Migrants, Refugees and Asylum-seekers*, 14th sess, Agenda Item 3, UN

Drilling down to the grassroots level is an unnatural process in international and human rights law. The state centric focus, at international and national levels, creates blind spots to the more layered implementation of human rights duties at the municipal level, particularly in relation to economic and social rights. In addressing the significance of this trend, Oomen and Baumgärtel situate self-declared “human rights cities” at the “frontier” of international law. The authors posit that the “highly political question of the implementation of human rights norms is, in most cases, decisively influenced by the legal relations between national, sub-national and local entities.”¹⁴¹ Deepening our comparative understanding about what is happening legally at the local level in migration practices, they conclude, will likely “bring us closer to knowing about the conditions required for the successful implementation and enforcement of human rights.”¹⁴² This might allow research to explore different templates for protection that capture the dynamic interaction between national and local authorities and the rights claims of multiple communities.

B. Immigration and Deportation

The starting point of advocacy scholarship is the legal distinction between refugees and immigrants, including the interim obligations owed to asylum seekers prior to their designation as either one or the other. That refugee protection is embedded within human rights, and not immigration law, is a fundamental premise of the field.¹⁴³ The former is anchored to the exceptional international legal duties of states and the rule of law,¹⁴⁴ the latter to state sovereignty and the vacillating domestic politics of immigration.¹⁴⁵

Despite the legal distinction between refugees and other migrants, the consequences of receiving a refugee or an immigrant are virtually identical in Europe. On this fact, refugee advocacy scholarship is virtually silent. As the then President of the European Commission, Claude Juncker, observed in his 2017 State of the Union Address, only 36% of irregular migrants are ever

Doc A/HRC/14/25, 16 April 2010; Philip Alston, “Statement on Visit to the United Kingdom, UN Special Rapporteur on Extreme Poverty and Human Rights” (16 November 2018), online (pdf): *OHCHR* <www.ohchr.org> [perma.cc/AF4P-4AKG]; OHCHR, “End of mission statement of the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio, on her visit to Malaysia” (1 October 2018), online: *OHCHR* <www.ohchr.org> [perma.cc/E94B-SUYB].

¹⁴¹ Barbara Oomen & Moritz Baumgärtel, “Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law” (2018) 29:2 *Eur J Intl L* 607 at 608–609, 627.

¹⁴² *Ibid* at 627.

¹⁴³ James C Hathaway, “Refugee Law Is Not Immigration Law” (2002) University of Michigan Law School Scholarship Repository 38 at 41.

¹⁴⁴ Chris Woodruff, “Refugee Law: Improving Oversight and Accountability” (2014) 29 *Geo Immigr LJ* 147 at 164.

¹⁴⁵ John C. Eastman, “The Power to Control Immigration Is a Core Aspect of Sovereignty” (2017) 40 *Harv JL & Pub Pol’y* 9 at 11.

returned.¹⁴⁶ In 2016, the European Commission observed that although the EU Qualification Directive provided for a cessation of status when conditions in the country of origin are such that protection is no longer needed, in practice the granting of protection almost invariably leads to permanent settlement in the EU. Almost universally across Member States, permanent resettlement for refugees has been the norm.¹⁴⁷

Advocacy literature does not dispute the right of states to deport asylum seekers who have exhausted a fair domestic RSD. Many in the profession would recognize the persuasiveness of David Martin's argument that enforcement is essential for those in favor of a generous immigration policy.¹⁴⁸ In theory, deportation policies are the consequence of a functioning protection system. They mark the limits of the legal duties of contracting parties to the 1951 Convention, yet they are rarely analyzed in advocacy scholarship, and when they are it is rarely from the perspective of enforcement.¹⁴⁹ There is not one article in the entire history of the *International Journal of Refugee Law* that is devoted to deportation *per se*. It is not surprising that few academics want to add to the knowledge base for deportation policies for rejected asylum seekers. Presuming that empathy is a common trait amongst those drawn to human rights work, few scholars are unaware of the suffering experienced by many of those whose protection claims are deemed to not meet the stringent criteria of the 1951 Convention.¹⁵⁰ It is obvious that the deportation of individuals often results in hardship and painful separations between families, friends and communities, regardless of whether an individual's motives for migrating were to escape abject poverty, unstable political and economic unrest or to simply enjoy a better life in Europe.

In spite of the huge resources expended on deportation within the EU, and the likelihood that these will rise in the future, advocacy scholars have

¹⁴⁶ See Claude Juncker, "A Stronger and More Effective European Return Policy, State of the Union Address" (13 September 2017), online (pdf): <ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-returns-policy_en.pdf> [perma.cc/TGY5-NYTD]. In 2013, the Commission reported a 39.2 rate of enforcement of return orders within the EU. European Union: EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, COM(2015) 240, 13 May 2015, at 9-10.

¹⁴⁷ EC, *Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues To Europe*, COM(2016) 197 final, 6 April 2016 at 5.

¹⁴⁸ David Martin, "Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System" (2015) 30 *JL & Pol* 411 at 412-427 [Martin].

¹⁴⁹ *Ibid* (Martin's perspectives are shaped by high level appointments in US administration, including serving as General Counsel to the US Immigration and Naturalization Service).

¹⁵⁰ Under the 1951 Convention a refugee is any person who "...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." See *1951 Convention*, *supra* note 7, art.1.A.2. See Davor Sopf, "Temporary Protection in Europe After 1990: The "Right to Remain" of Genuine Convention Refugees" (2001) 6 *Wash UJL & Pol'y* 109 at 137

produced no body of research on deportation. This research void highlights the invisible line of demarcation across which human and refugee rights scholars hesitate to cross. However, the barrier prevents advocacy scholarship from addressing potential human rights issues relating to legally justified deportation, as well as the anxieties fueling resistance within host states to the good faith compliance with international obligations to receive asylum seekers. Once again, silence does not make the issue go away: deportation remains a default position for many states, with German Chancellor Angela Merkel calling in September for “repatriation, repatriation and once more, repatriation”.¹⁵¹

Advocacy scholars typically call for more legal channels of entry to Europe.¹⁵² Full engagement with immigration is, however, left to other disciplines. Protection scholars work in a parallel, but far from overlapping, research community from the densely populated field of immigration and integration social scientists. When social scientists enter the sequestered domain of refugee law and policy established by the 1951 Convention, it is often without the benefit of a rights-based perspective. Development economist, Paul Collier, is one scholar whose work on migration and the crisis has attracted considerable policy attention. His work illustrates the consequences of international human rights lawyers exiting the stage in the policy arena. Collier provides an important critique of the failings of international refugee law to provide a viable global solution to the accelerated movement of people from the global south to the global north, with pointed references to “moral” rather than legal duties.¹⁵³ From a lawyer’s perspective, this approach risks subtly shelving six decades of international refugee and human rights law that has carefully constructed refugee protection around the hard legal obligations of states. Despite all the limitations of the international refugee system, it has anchored refugee protection to the hard legal obligations of the 1951 Convention, directing governments to receive those in flight from persecution when closing borders would have been politically expedient. More collaborative discussions with colleagues in the social sciences might offer insurance against the dismissal of a legal, rights based framework when scholars reconsider international responses to forced migration.

There has been a vast financial investment in fortifying the EU’s external borders on land and at sea in recent years. The 2018 budget for Frontex,

¹⁵¹ Andreas Rinke & Erik Kirschbaum, “Merkel, under pressure, stresses need to deport failed asylum-seekers”, *Reuters* (1 September 2016), online: <www.reuters.com> [perma.cc/E5VX-NM58].

¹⁵² European Union Agency for Fundamental Rights, “Legal entry channels to the EU for persons in need of international protection: a tool box” (February 2015) at 3–6, online (pdf): <fra.europa.eu> [perma.cc/N3NG-ZH4D].

¹⁵³ Paul Collier, “Beyond The Boat People: Europe’s Moral Duties To Refugees,” *Social Europe* (15 July 2015) <www.socialeurope.eu/beyond-the-boat-people-europes-moral-duties-to-refugees> [perma.cc/7ARV-VGL3].

the EU's external border agency, was 320 million euros, more than double the agency's 142 million budget in 2015.¹⁵⁴ At the same time, recent asylum history has seen a cycle of creating barriers to entry into the EU followed by the quick proliferation of alternative routes and methods to circumvent the new restrictions, which leads to new rounds of asylum law reforms.¹⁵⁵ The protection narrative highlights both the trend of ineffective policies attempting to block migrants and the collateral harms they impose on refugees, who are often victimized by the experience of attempting to gain access to an increasingly inaccessible EU. The EU-Turkey agreement of 2016 constitutes one of the main barriers introduced to further limit entry by asylum seekers into the EU.¹⁵⁶ The deal allows Greece to automatically return asylum seekers to Turkey who are entering into the jurisdiction irregularly. The European Court of Justice refused to scrutinize its compliance with EU law and the Fundamental Rights Charter, holding that it did not have jurisdiction to scrutinize an agreement between heads of Member States, since it was not executed by an EU institution.¹⁵⁷ Given that the implementation of this deal results in the *de facto* return of all protection seekers to Turkey, with its uneven protection record for refugees, there is a wide consensus that it would violate international refugee law.¹⁵⁸ Nonetheless, statistics show that there has been a virtual halt to refugees travelling from Turkey across the Aegean Sea to Greece, dramatically reducing the death toll. According to the European Commission, the number of deaths fell from 1,145 prior to the agreement to 80 in the year that followed its adoption.¹⁵⁹ There are serious concerns regarding the procedures and conditions in Greece, the safety of Turkey and the possible recourse by migrants to alternative routes, including the deadly central Mediterranean crossing.¹⁶⁰ The northern Greek-Turkey land border that falls outside of the

¹⁵⁴ The EU external border agency, the budget for Frontex has steadily increased from an initial 6 million euros in 2005. "Key Facts: What are the main tasks of Frontex, the European Border and Coast Guard Agency" (2019), online: <frontex.europa.eu/faq/key-facts/> [perma.cc/9UXB-CUM3].

¹⁵⁵ Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, "Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics" in Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, eds, *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (London: Kluwer Law International, 2002) 5.

¹⁵⁶ European Council, Press Release, "EU-Turkey statement", online: <www.consilium.europa.eu> [perma.cc/ZTT3-7J2I] (18 March 2016).

¹⁵⁷ See Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NE, NG and NM v European Council* (ECJ lacks jurisdiction to take and hear actions regarding the EU-Turkey statement as it was adopted by heads of Member States and not by EU institutions).

¹⁵⁸ See Kondylia Gogou, "The Eu-Turkey deal: Europe's year of shame" (20 March 2017), online: *Amnesty International* <www.amnesty.org> [perma.cc/B4DP-Y6PV]; see also the ruling of the European Court of Human Rights in *B.A.C. v. Greece*, No 11981/15 (13 October 2016) (holding a potential violation of Art. 3 of the ECHR if applicant returned to Turkey from Greece without an assessment of his personal circumstances).

¹⁵⁹ European Commission, "Eu Turkey Statement: One Year On" (March 2017), online (pdf): <ec.europa.eu> [perma.cc/HC8Q-R2YF].

¹⁶⁰ See Human Rights Watch, "Greece: Events of 2018 - Part of the EU Chapter" (18 September 2018), online: <www.hrw.org/world-report/2019/country-chapters/greece> [perma.cc/K37U-6NHC]; United

terms of the EU-Turkey deal became the alternative route by 2018, with over 10,000 crossings in the first half of the year and reports of conditions within detention facilities putting vulnerable protection seekers at risk.¹⁶¹ Moreover, Spijkeboer argues strongly that “there is no identifiable relation between the EU-Turkey Agreement and the number of migrants crossing the Aegean Sea from Turkey to Greece” as the oft cited decline in numbers preceded the EU-Turkey deal.¹⁶² The deal, however, did offer a diversion that allowed Member States to lay claim to managing migration while saving lives, even if support for this claim could be challenged.

Spijkeboer’s empirical data relieved legal scholars of a more complicated discussion. What if the scenario were different and a bad faith consideration of Turkey’s protection record as a safe country of asylum actually could claim to have saved refugee lives? Adherence to legal principles, for better or for worse, inhibits international refugee lawyers from engaging with the complexity of illicit compromises that drive trade-offs that states make on the ground.

C. Security

As Garcia has observed, in the post 9/11 world the reception of a refugee has been transformed into a potential security threat. At least with regard to migrants fleeing communist regimes, refugee policies during the Cold War were perceived to bring benefits, even if primarily ideological.¹⁶³ Article 33(2) of the 1951 Convention denies the benefit of non-refoulement to a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”¹⁶⁴ Likewise, the refugee definition under Article 1(f) of the 1951 Convention excludes those who have committed serious non-political and

Nations High Commissioner for Refugees; UNHCR, “Desperate Journeys-Refugees and migrants arriving in Europe and at Europe’s borders” (2018), online: <www.unhcr.org/desperatejourneys/> [perma.cc/YM2U-Z2HP]; European Commission, “Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions”, 22 European Political Strategy Centre Notes (7 February 2017), online (pdf): <ec.europa.eu/commission/sites/beta-political/files/irregular-migration-mediterranean-strategic_note_issue_22_0_en.pdf> [perma.cc/8TJV-3XPC].

¹⁶¹ Council of Europe, “Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Greece from 10 to 19 April 2018” (1 June 2018), online (pdf): <rm.coe.int/16808afaf6> [perma.cc/YM77-JEUZ]; Human Rights Watch, “Greece: Asylum Seeking Women Detained with Men” (7 June 2018), online: <www.hrw.org> [perma.cc/3KFB-CC8A].

¹⁶² Thomas Spijkerboer, “Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?” (28 September 2016), online: <www.law.ox.ac.uk> [perma.cc/3757-V3WL].

¹⁶³ María Cristina García, *The Refugee Challenge in Post-Cold War America* (New York: Oxford University Press, 2017).

¹⁶⁴ 1951 Convention, *supra* note 7, art 33(2).

international crimes.¹⁶⁵ After 9/11 the reliance on these exclusionary provisions by the authorities in the west occupied a growing share of the scholarship on security and refugee protection, reflecting the concern about the risks attached to procedures lacking transparency and due process.¹⁶⁶

The main focus of advocacy scholarship on those suspected of terrorism within the asylum system has been on fundamental safeguards in the state procedures for excluding these individuals from refugee protection.¹⁶⁷ Given the absence of transparency and due process that accompanies issues related to security, this is a vital role for refugee legal scholars to fulfill. Yet, an expanded, proactive approach that would address the underlying national security concerns more sympathetically is largely absent. This, in part, reflects another facet of the adversarial nature of the protection narrative, which creates clearly delineated roles. Governments are responsible for achieving a balance between refugee rights and national security, advocacy scholarship reacts and critiques. Whether by persuading policy makers or courts, the presumed aim of this polarized contestation is that a rights-based equilibrium in law and practice will emerge.

Refugee scholarship correctly portrays the security concerns raised in the context of inward migration as overstated. The low number of migrants who have entered into the EU via the door offered by asylum and immigration legislation and subsequently engaged in terror attacks is the most common support for this position.¹⁶⁸ Boswell *et al* argue that narratives that link asylum and terrorism will not be sustainable if police intelligence “reveals that most terrorist suspects are nationals of that country.”¹⁶⁹ Nonetheless, the casting of asylum seekers as potential threats to national security has gained considerable currency in public opinion. A 2016 Pew Research Center survey found that the “refugee crisis and the threat of terrorism are very much related

¹⁶⁵ *Ibid*, art 1(f); see also UN High Commissioner for Refugees, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (2003), online: <www.refworld.org/docid/3f5857d24.html> [perma.cc/9K58-6B2G].

¹⁶⁶ Elspeth Guild & Madeline Garlick, “Refugee Protection, Counter-Terrorism, and Exclusion in the European Union” (2010) 29:4 *Refugee Survey Q* 63; Geoff Gilbert, “Terrorism and international refugee law” in Ben Saul, ed, *Research Handbook on International Law and Terrorism* (Northampton: Edward Elgar, 2014) 470; Elspeth Guild, “Terrorism and migration law” in Ben Saul, ed, *Research Handbook on International Law and Terrorism* (Northampton: Edward Elgar, 2014) 486; Michael Kingsley Nyinah, “Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice” (2000) 12:1 *Intl J Refugee L* 295.

¹⁶⁷ E.g. Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses” in Erika Feller, Volker Türk and Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press 2003) 425.

¹⁶⁸ See e.g. Manni Crone, Maja Felicia Falkentoft & Teemu Tammikko, *An Extraordinary Threat: Europe’s Refugee Crisis and the Threat of Terrorism* (Copenhagen: Danske Institute for International Studies, 2017), online (pdf): <www.econstor.eu/bitstream/10419/197642/1/890885621.pdf> [perma.cc/8L7L-NJ8R] (noting that the “great majority” of terrorist attacks in Europe over the past decade have been committed by EU citizens and between January 2016 and April 2017 four asylum seekers were involved in four terrorist attacks).

¹⁶⁹ Christina Boswell, Andrew Geddes & Peter Scholten, “The Role of Narratives in Migration Policy-Making: A Research Framework” (2011) 13:1 *British J Politics & Intl Relations* 1 at 6.

to one another in the minds of many Europeans". 50% and above of those surveyed in eight of ten European states believed incoming refugees increased the likelihood of terrorism.¹⁷⁰ The empirical argument that security fears are exaggerated in proportion to the number of foreign terrorists entering the EU will never be terribly effective, since terrorism operates precisely through the exaggeration of public fears. Arguments about the statistically negligible number of asylum seekers who have been connected to terror acts means little to the public whose anxiety stems from the awareness that a negligible number of individuals can succeed in spreading terror through random and extreme violence.

An example of how to adapt the protection narrative so that it addresses security concerns has been put forward, not by an academic, but by a veteran UNHCR lawyer, former Assistant High Commissioner for Refugees Erika Feller. In 2006, she countered the attacks on refugee admission policies on security grounds by pointing out that asylum seekers are subject to the highest level of official scrutiny in comparison to other migrants, as they are registered and traced throughout the RSD process.¹⁷¹

Protection literature focuses upon the proportionality of restrictive measures in light of security concerns. In pointing out the safeguards inherent in RSD, Feller has proactively engaged with the apprehensions surrounding asylum and security by demonstrating how they can be addressed within the framework of refugee law.

Security risks from inward migration may come from the behavior of Member States that puts asylum seekers that move irregularly across borders off the radar. Under the terms of the Dublin Regulation for allocating responsibility for asylum claims, the failure of frontline states to register claimants who move irregularly onwards to other Member States frees them from responsibility for these claims at a later stage.¹⁷² In the absence of solidarity amongst Member States, the failure to effectively register asylum seekers serves as a self-help strategy for frontline states in the absence of sufficient assistance from the EU and Member States.¹⁷³ Unregistered claims also means that family reunification processes under Dublin III for unaccompanied minor

¹⁷⁰ Richard Wike, Bruce Stokes, & Katie Simmons, "Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs" (11 July 2016), online: *Pew Research Center* <www.pewresearch.org> [perma.cc/XZ33-4D2R].

¹⁷¹ Erika Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come" (2006) 18:3/4 *Intl J Refugee L* 509 at 520.

¹⁷² See e.g. European Council on Refugees and Exiles, "To Dublin or not to Dublin?: ECRE's Assessment of the Policy Choices Undermining the Functioning of The Dublin Regulation, with Recommendations for Rights-Based Compliance" (2018) at 3-4, online (pdf): <www.ecre.org> [perma.cc/5LFS-XM2J].

¹⁷³ EC, *Commission Regulation (EC) 604/2013 of 26 June 2013 Proposal for a Regulation of the European Parliament and of The Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, OJ L 180/31.

migrants are not triggered, as well as other mechanisms that should enhance protection for asylum seekers on the ground.¹⁷⁴ By subverting the requirement to register refugees entering their jurisdiction, Member States are arguably creating security risks for both their own citizens and neighboring Member States. Given the importance of security as an issue in public opinion,¹⁷⁵ advocacy scholarship could afford to engage legal and humanitarian analysis with a more frontal-focused discussion of security, be it when advancing the benefits of RSD systems, or the need for a more effective system of registering and caring for unaccompanied minors. Anxieties about national security have proven to be powerfully corrosive to human rights in periods of terrorism.¹⁷⁶ Diminished attention to these concerns risks pushing the messages of advocacy scholarship and its protection narrative to the periphery of public policy discourse, whereas dealing with them head-on might bolster support for a reformed and more effective asylum system in Europe.

D. Societal Transformations

The protection narrative is grounded in international human rights law, yet fails to acknowledge that its entanglement with sovereign powers is of a different order than that of most mainstream human rights protections. Human rights law does intervene deeply and disturb domestic orders, mandating extensive changes in domestic constitutional laws ranging from issues of sexuality, national security and democracy to education, privacy and beyond.¹⁷⁷ Yet, even against this backdrop, international refugee law is

¹⁷⁴ For the rights of unaccompanied minors under Dublin III, see Dublin III, *supra* note 27 (an unaccompanied child shall have his application examined in the Member State where a parent, responsible adult, sibling, adult aunt, uncle, or grandparent is legally present, provided this is in his 'best interest' (Article 8(1)(2)), a Member State may assume responsibility to examine an application and request a transfer 'to bring together any family relations' on 'humanitarian grounds' (Article 17(1)(2)). For the response of the UK courts system to the tension between non-compliance with the Dublin Regulation by minors and the right to family life under Article 8 of the European Convention on Human Rights, see Bernard McCloskey, "Third-Country Refugees: The Dublin Regulation/Article 8 ECHR Interface and Judicial Remedies" (2017) 29:4 Intl J Refugee L 641; *Secretary of State for the Home Department v ZAT*, [2016] EWCA Civ 810 at paras 85, 92, 95.

¹⁷⁵ See Wike, Stokes & Simmons, *supra* note 170.

¹⁷⁶ See Christopher C. Joyner, "The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties" (2004) 5:3 International Studies Perspectives 240 at 243-245.

¹⁷⁷ The jurisprudence of the European Convention on Human Rights (ECHR) illustrates the breadth and depth of transformation that can flow from human rights law. Under Article 32 of the ECHR, the European Court of Human Rights enjoys exclusive and final jurisdiction to interpret the European Convention, and under Article 46, Contracting Parties undertake to abide by the final judgment of Court. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Arts. 32 & 46; See e.g. *Norris v Ireland*, No 10581/83 (26 October 1988) (criminalization of homosexual acts between consenting adult men breach of Article 8 of ECHR); *Ocalan v Turkey* (GC), No 46221/99 (12 May 2005) (imposition of death penalty upon convicted terrorist following unfair proceedings is violation of Article 3 ECHR); *SAS v France* (GC), No 43835/11 (1 July 2014) (ban on the wearing in public of clothing designed to conceal one's face does not

arguably far more intrusive into national sovereignty.

The growing body of human rights instruments creates duties and entitlements of the state *vis a vis* individuals and national societies. Arguably, the impact of international refugee law on domestic jurisdictions arguably is greater than many other areas of human rights protection because refugee arrivals affect the makeup of host communities. Hence issues of immigration and integration have come to permeate debates over refugee admissions. Although seldom addressed in refugee law scholarship, each is amenable to a rights-based discussion. In highly subjective discussions about the related issue of national identity, however, legal rights are peripheral. Populists have managed to advance national identity as an emotive and central tenet of anti-refugee and immigrant platforms.¹⁷⁸ The binary between refugees and immigration versus national identity has become not only mainstreamed in some instances, but also institutionalized in significant governance structures. In one of his first acts as President of France in 2009, President Sarkozy delivered on his campaign promise to create a Ministry of National Identity. The message of the newly branded Ministry of Immigration, Integration, National Identity and Mutual Development in 2009 was a tension between inward migration and national identity.¹⁷⁹ In 2019, then President-elect of the European Commission, Ursula von der Leyen, announced the creation of the Vice-Presidency for “Protecting our European Way of Life,” a post that includes immigration within its remit.¹⁸⁰

The concerns of the protection profession fall largely outside of the wider sociology of immigration, integration and cultural identity. International refugee law speaks through the human rights law vernacular, focusing on legal entitlements, state duties and the rule of law, while appealing to the moral and humanitarian sensibilities of those it aims to influence. Increasingly however, populists portray the receiving and integrating of refugees as an act of cultural transformation. From the perspective of the populist right in Europe, this ultimately can be framed as flowing from the policies and interests of external actors, with EU and European politicians primarily to blame.¹⁸¹ In spite of a committed discourse of the benefits of pluralism, changes however minimal, in the ethnic, religious and cultural composition of respective Member States

breach Arts. 8,9 & 14 ECHR).

¹⁷⁸ While acknowledging its different variants, Eichengreen defines populism as a political movement marked by anti-elite, authoritarian and nativist tendencies, see Barry. Eichengreen, *The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era* (Oxford: Oxford University Press, 2018) at 1 [Eichengreen].

¹⁷⁹ Peter Gatrell, *The Unsettling of Europe: How Migration Shaped a Continent* (Basic Books, 2019) 362.

¹⁸⁰ European Commission, Press Release, “The von der Leyen Commission: for a Union that strives for more” (10 September 2019), online: <europa.eu /rapid/press-release_IP-19-5542_en.htm> [perma.cc/NGJ3-L4QV].

¹⁸¹ Eichengreen, *supra* note 178 at 163.

give rise to different forms of what Orgad terms, 'demographic anxiety'.¹⁸²

If refugee protection largely leads to permanent resettlement, which the European Commission acknowledges has been almost uniformly the case in the past when it comes to the implementation of asylum policy in Member States,¹⁸³ then refugee law is confronted with the effects of demographic anxiety in a way that other branches of human rights law are not. There are powerful arguments to be made about the benefits of pluralism and immigration in aging societies. Yet, the protection narrative does not rigorously engage with the possibility that long-term migration could impose significant cultural transformations within Member States.

In contemporary Europe, advocacy scholars write about protection under the specter of attitudes towards cultural identity and diversity. The 2016 Pew Global Attitudes survey revealed striking contrasts between American and European perspectives on diversity. Whereas 58% of Americans saw diversity as making the country a better place to live, in no EU country surveyed did more than 40% say that having an increasing number of people from many different races, ethnic groups and nationalities made their country a better place to live. The survey further found that in the two EU frontline refugee-receiving Member States, Greece and Italy, more than half said that increasing diversity makes the country a worse place to live.¹⁸⁴ The preservation of national identity is thus at the core of populist counter-narratives to refugee protection in Europe. Lawyers speak about treaty obligations, but the distinction in the public mind between refugee protection and immigration has become blurred by virtue of the number of individuals arriving and remaining within Member States.¹⁸⁵ With asylum and immigration conflated in this manner, populists can then aim to dismantle the already weak protection framework that the CEAS has put in place. In this political environment it is hard to see how the classic standalone approach to refugee rights will transform thinking: silence will not make the issue go away.

As legal specialists, advocacy scholars focus on the 1951 Convention, separating policy work on refugee law from that of other social science scholarship focused upon the impact of immigration on host communities. This silence makes it impossible to engage with the transformative impact of refugee policies on host communities and cultural identities. There is a lot of work on the integration of refugees, but this is typically undertaken by sociologists.¹⁸⁶ Just as the EU has left the development of integration policies

¹⁸² Orgad, *supra* note 45 at 53.

¹⁸³ Avramopoulous, *supra* note 108.

¹⁸⁴ See Wike, Stokes & Simmons *supra* note 170 at 12-14.

¹⁸⁵ Heaven Crawley & Dimitris Skleparis, (2018) "Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe's 'migration crisis'" (2018) 44:1 *Journal of Ethnic & Migration Studies* 48 at 48-49.

¹⁸⁶ See Peter Scholten, Han Entzinger & Rinus Penninx, "Research-Policy Dialogues on Migrant Integration

largely to the discretion of national governments (although the Commission has played an increasing role in supporting and advancing integration initiatives),¹⁸⁷ so have refugee lawyers left the understanding of those policies to social scientists.¹⁸⁸ This narrow focus within the legal profession on the remit of refugee law reflects the broader disciplinary compartmentalization of studies on forced migration. These disciplinary boundaries ultimately undermine the ability, not only to understand the migration experience in its entirety, but to reshape the protection narrative so that it can become more effective in a changed environment.

The adversarial framing of the protection narrative has meant that it often reacts to debates that touch on the core anxieties of voters, rather than constructively engaging with them. The silences that this creates is compounded by a filtered human rights approach to the field that scholars have adopted, which views the political environment through the confined prism of refugee rights and the law. This risks creating the dangerous impression that there is a hierarchy of human rights beneficiaries, while the silences create a political void that is being filled by other political, and often hostile, voices within the European political arena.¹⁸⁹

VI. Politics Speaking Back to Law

This section is not about how governments have engaged with protection seekers. The failure of the EU and Member States to adhere to refugee protection obligations and the overall corrosion of protection standards are well documented in monitoring reports.¹⁹⁰ Rather, this section looks at how populist politics attack the underlying authority of the protection narrative.

Although acceptance of the refugee protection narrative by governments has varied across time and space, advocacy scholars understandably remain anchored to the legitimacy that flows from formal sources of international and EU refugee law. International and EU obligations are then mediated and promoted by professional experts and elites in civil society. This process

in Europe: Comparison and Conclusions" in Scholten et al, eds, *Integrating Immigrants in Europe: Research-Policy Dialogues* (Cham: Springer International Publishing, 2015) 315 at 316 (noting a common feature across European states is the absence of interest to inform policy making with the increasing body of integration research available).

¹⁸⁷ European Commission, "European Policy Framework for Migrant Integration" (13 July 2017), online: <ec.europa.eu> [perma.cc/67P9-EPQ2].

¹⁸⁸ Peter Scholten et al, eds, *Integrating Immigrants in Europe: Research-Policy Dialogues* (Cham: Springer, 2015) at 2.

¹⁸⁹ "Europe and Right Wing Nationalism: A country-by-country guide", *BBC News* (24 May 2019) online: <www.bbc.com/news/world-europe-36130006> [perma.cc/9NVQ-6U5L].

¹⁹⁰ Tony Bunyan, ed, "The refugee crisis in the med and inside the EU: a humanitarian emergency" (July 2019), online: *Statewatch Observatory* <www.statewatch.org/eu-med-crisis.htm> [perma.cc/7FMB-8B4Q] (Offering a comprehensive collection of reports on the crisis, the Observatory covers the arrival of refugees and migrants, the reactions and failures within the EU, both governmental and within communities).

of advancing international human rights law by a transnational cadre of academics and professionals has traditionally added to, not detracted from, the credibility of the profession.

For populists, international law and its elite promoters are viewed with cynicism, if not outright rejected.¹⁹¹ Neither the international legal obligations nor the experts enjoy a national popular mandate. Member States have consented to assume legal duties towards refugees in ratifying the 1951 Convention relating to the Status of Refugees. Yet, these obligations can be framed as merely those assumed long ago by governments unaccountable to contemporary voters. Furthermore, if popular support becomes the test for the legitimacy of the duties towards refugees that are part of EU asylum law, then they can easily be cast as illegitimate by politicians in the ten new Member States that acceded to the EU in the new millennium. These states can argue that their respective government's adherence to the EU asylum *acquis* was the price for admission to the EU, rather than the outcome of a genuinely democratic process.¹⁹²

The refugee crisis has provided a context in which to challenge the legitimacy of the EU legal system itself. When, in 2016, the European Court of Justice dismissed complaints from Hungary and Slovakia against the Commission for its mandatory relocation scheme for refugees, the Hungarian Foreign Minister Péter Szijjártó concluded that "[p]olitics has raped European law and values."¹⁹³ When EU justice is presented as nefarious by the highest echelons of national governments, compliance with EU obligations can be cast as an anti-nationalist act. As such, offering assistance to migrants in submitting an asylum application or applying for residency has been made a criminal offense following the adoption, in 2018, by the Hungarian Parliament of S353/A which amends the national criminal code.¹⁹⁴

A tepid implementation of EU legal obligations is another way that states resist external legal obligations towards refugees. From the perspectives of voters within Italy and Greece, upholding the international rule of law and complying with the Dublin III regulation is most likely to serve the interests of

¹⁹¹ See e.g. Frederick V. Perry, "The Assault on International Law: Populism and Entropy on The March" (2018) 46:1 *Syracuse J. Int'l L. & Com* 59 at 62–63.

¹⁹² See Rosemary Byrne, Gregor Noll & Jens-Vedsted-Hansen, "Understanding Refugee Law in an Enlarged European Union" (2004) 15:2 *European J Intl L* 355. May 1, 2004 the following ten countries acceded to the European Community: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, Malta and Cyprus. This was followed by the accession of Bulgaria and Romania on January 1, 2007. Croatia joined on July 1, 2013.

¹⁹³ Jennifer Rankin, "EU Court dismisses complaints by Hungary and Slovakia over refugee quotas", *The Guardian* (6 September 2017), online: <www.theguardian.com/world/2017/sep/06/eu-court-dismisses-complaints-by-hungary-and-slovakia-over-refugees> [perma.cc/RM7B-EMNK].

¹⁹⁴ S353A 2012, Act C of 2012 on the Criminal Code (Hungary), "Hungary: Criminal Code" (2012) online: *refworld* <www.refworld.org/docid/4c358dd22.html> [perma.cc/EUG4-ZT6D]; (Act C of 2012, S353/A 2012) "On World Refugee Day Hungary Makes it Illegal to Help Refugees and Migrants", *Open Society Foundations* (20 June 2018), online: <www.opensocietyfoundations.org> [perma.cc/K45L-CYS9].

other Member States at the expense of frontline receiving Member States.¹⁹⁵ As we have seen, sloppy registration procedures by frontline states under Dublin III subvert the EU regulation, insulating front line states from accepting responsibility to ‘take charge’ of asylum claims of those who had transited through their territory.¹⁹⁶ This is a logical strategy. As Mary Ellen Fullerton points out, in 2014, Italy received 28,904 requests to take responsibility for determining the merits of asylum claims filed in other European states, a figure that she notes is five times as many as the number of requests presented by Italy to other states under the Dublin regulation.¹⁹⁷ The conclusion of the much criticized 2017 bi-lateral agreement for cooperation between Italy and the Libyan coastguards is a legally and morally compromising form of self-help, as is the periodic practice of Italy and other coastal states of denying the disembarkment at their shores of boats carrying migrants.¹⁹⁸

While the authority of law diminishes, advocacy scholars are losing their hold on the high humanitarian ground. Admittedly, the xenophobic and racist positions of many far-right parties mean that they barely engage with humanitarian concerns when discussing closing borders and criminalizing immigration. However, the transformation of the Mediterranean into the most lethal sea in the world, and misery experienced in the camps of Calais, facilitates claims to a more noble agenda.¹⁹⁹ In public debates, populist politicians justify denying entry to protection seekers as, in part, a humanitarian act.²⁰⁰ In advancing policies for humanitarian objectives, governments and populist politicians are moving into a space that has long been claimed by advocacy scholars and their civil society partners.²⁰¹

Advocacy scholars are unlikely to transform the complex political ecosystem within which they work. Yet, by changing what their protection narrative includes, and excludes, they are likely to be more effective within

¹⁹⁵ The overall number of relocations to other Member States remains minimal. As of 24 July, 2018, the total number of relocations stands at 24,676 (16,803 from Greece; 7,873 from Italy). European Commission, Press Release, “Migration: Record month for relocations from Italy and Greece” (26 July 2018), online: <ec.europa.eu/commission/presscorner/detail/en/IP_17_2104> [perma.cc/Z9QE-JUWR].

¹⁹⁶ Dublin III, *supra* note 27.

¹⁹⁷ Fullerton, *supra* note 88 at 81–82.

¹⁹⁸ Anja Palm, “The Italy-Libya Memorandum of Understanding: the baseline of a policy approach aimed at closing all doors to Europe?” (2 October 2017), online: *EU Immigration and Asylum Law and Policy* <emigrationlawblog.eu> [perma.cc/SX36-2WTX]; “Libya: Shameful EU policies fuel surge in detention of migrants and refugees” (16 May 2018), online: *Amnesty International* <www.amnesty.org> [perma.cc/58FS-984Z]. See “The Voyage of the Aquarius: Italy’s Matteo Salvini refuses to let a boat full of migrants land”, *The Economist* (12 June 2018), online: <www.economist.com> [perma.cc/246M-U6WV]; Eugenio Cusumano & Kristof Gombeer, “In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers” (2018) *Mediterranean Politics* 1.

¹⁹⁹ Cf Oxfam et al, “EU Border Closures Worsen Humanitarian Crisis With People Used As Bargaining Chips” (17 March 2016), online: *Oxfam* <www.oxfam.org> [perma.cc/HM7F-QAUX].

²⁰⁰ See Eleanor Paynter, “Europe’s refugee crisis explains why border walls don’t stop migration,” *The Conversation* (30 January 2019), online: <theconversation.com> [perma.cc/XN22-A9KV].

²⁰¹ See also Little, *supra* note 50 at 534–535

the new political landscape in Europe.

VII. Conclusion

The European refugee crisis has provided the context within which the protection narrative of advocacy scholarship has most visibly lost its traction. The narrative itself demonstrates the limits of refugee law scholarship in steadfastly sticking to a narrow, and perhaps self-defeating, advocacy agenda.

A human rights approach to refugee law was the most significant advance in refugee protection, and so it should remain. This approach, however, should be adapted so as to be more effective in the new political environment of Europe struggling with many crises. Working within a fragile rights regime, refugee law academics, at times, push scientific enquiry into the domain of advocacy scholarship, tailoring questions to fit within the field's established narrative. In order to be more persuasive, a human rights approach to refugees should widen the lens to look at their rights in tandem, and at times in tension, with the rights of host communities. Exploring refugee rights issues alongside those related to domestic and grassroots resources, infrastructure, security, integration and policing could produce a narrative that is more nuanced and relevant to the concerns of receiving populations. The research questions asked could be expanded, leading to more interdisciplinary work between refugee lawyers and social scientists. This would not only ensure that a broader range of questions are asked in refugee legal scholarship, but that social scientists working on refugee issues fully engage with legal human rights perspectives. More interdisciplinary research would increase the diversity of voices and perspectives in the field, and be more likely to capture the complex realities facing the voters that refugee advocacy scholars seek to persuade. Refugee law scholarship needs to stop skirting difficult issues for fear of their political exploitation. This well intended restraint is leaving spaces to be filled by non-rights and non-evidence based perspectives.

Europe provides ample examples of what David Martin describes as extreme positions on immigration. However, as for those that hold such views, Martin argues, "[t]he point is not to convert those people. It is to shrink their effective audience by winning and holding the support of the political middle."²⁰² This requires a new protection narrative that will break through the crisis discourse and target, rather than dismiss, audiences who are anxious about the effects of migration. As Müller states, "[t]alking with populist is not the same as talking like populists".²⁰³ To achieve this, researchers must be prepared to ask difficult questions and accept complex, and occasionally discomfiting, answers. Navigating research questions in

²⁰² Martin, *supra* note 148 at 418.

²⁰³ Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016) at 103.

which rights intersect with the complex anxieties of host communities, and better understanding resistance on the ground, does not mean promoting or adopting the viewpoints that underlie these concerns. Refugee legal academics could produce an even more policy-relevant body of scholarship that persuades at a time when refugee protection is but one of many European crises. For this, advocacy scholars must depart from the strictures of their past narrative and adopt a more inclusive human rights approach to research.