



Strathmore University

Law School

**THE SCALES OF JUSTICE: AN ANALYSIS OF THE LEGALITY OF IN-COUNTRY
PROCESSING OF ASYLUM CLAIMS AGAINST ARTICLE 1.A(2) OF THE 1951
CONVENTION RELATING TO THE STATUS OF REFUGEES**

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DEDICATION

In remembrance of all asylum seekers who have perished or suffered in their pursuit of international protection, and in hopeful anticipation of better opportunities for those yet to seek refuge.

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DECLARATION

I, SELINA ACHIENG LWANGA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Mr. Allan Mukuki

ABSTRACT

“Domestic debates are mostly engaged with the ‘inhumanity’ or ‘softness’ of asylum systems towards applicants who have already arrived. Few observers ask questions about those who have not.”¹ The hopes and dreams of numerous asylum seekers are quashed amidst desperate journeys riddled with risks of theft, human trafficking, people smuggling etc. There lies a solution to this problem in the use of ‘in-country processing’ as a complementary pathway – however, this approach has been criticised on grounds of inconsistency with the requirements of the 1951 Refugee Convention. Upon further interrogation, it emerges that the rationale behind the inconsistency is the preservation of the principle of State Sovereignty. As such, this dissertation argues against the appropriateness of the principle of State Sovereignty in dealing with issues of global concern, such as the refugee crisis, within a globalised world. In doing so, it calls for the legal recognition of ‘in-country’ processing as a protected entry pathway in addressing the access crisis. Thus effectively, exempting the practice from the principle of State Sovereignty.

¹ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 1

LIST OF ABBREVIATIONS

ICJ	International Court of Justice
UNHCR	United Nations High Commissioner for Refugees
KNHCR	Kenya National Commission on Human Rights
PEP	Protected Entry Pathway
GDP	Gross Domestic Product
UDHR	Universal Declaration of Human Rights
MoU	Memorandum of Understanding
SRV	Socialist Republic of Vietnam
ODP	Orderly Departure Program
USA	United States of America

LIST OF LEGAL INSTRUMENTS

Convention Relating to the Status of Refugees, 22 April 1954, 189 UNTS 137

Protocol relating to the Status of Refugees, 4 October 1967, 606 UNTS 267

Vienna Convention on Diplomatic Relations, 24 April 1964, 200 UNTS 95

LIST OF CASES

Asylum Case, Colombia v. Peru (Judgment), 1950 I.C.J. 266, November 20 1950.

Island of Palmas Case, Netherlands v United States of America (Award), 1928 II R.I.A.A. 829, April 4 1928

CHAPTER ONE: AN INTRODUCTION TO ‘IN-COUNTRY’ ASYLUM PROCESSING

1.1 Introduction

The access crisis refers to the inability of asylum seekers to safely arrive at their countries of refuge. Meanwhile, Article 1 of the 1951 Convention relating to the status of Refugees defines the criteria for qualification as a refugee as, inter alia, “is outside the country of his nationality”² herein referred to as the ‘flight’ element. The 1950 ICJ decision in the case of *Colombia v Peru* highlights the centrality of the flight concept in the discourse surrounding refugee-hood. The court reasoned that the host country is extending to an asylum seeker protection against the normal process of its own immigration laws. However, for a country to extend such an offer is an attempt to insert one’s own law between the individual and the laws of the sovereign country.³ As such, the international community is reluctant to step in where flight has not occurred.

It is against this backdrop that scholars have argued that the use of in-country processing as a protected entry pathway has inherent limitations. However, this dissertation argues that the use of in-country processing as a protected entry pathway is necessary in addressing the access crisis – failure to which, the right to asylum under international law remains substantively unrealized. As such, this dissertation argues that in-country processing ought to be granted legal recognition despite arguments rooted in State Sovereignty.

1.2 Background

The aftermath of the World Wars saw the enlightenment of the international community to various issues including the vulnerability of refugees.⁴ Since then, the international community has, and continues to strive to adequately cater for the needs of refugees – hence the development of an entire regime of law in their protection. However, the access crisis has been long-overlooked by the international community or as Noll succinctly phrased the issue, “Domestic debates are mostly engaged with the ‘inhumanity’ or ‘softness’ of asylum systems towards applicants who have already arrived. Few observers ask questions about those who have not.”⁵

² Article 1, The 1951 Convention relating to the status of refugees, 22 April 1954, 189 UNTS 137

³ Asylum Case, *Colombia v. Peru* ICJ Judgment of November 20 1950

⁴ UNHCR, ‘The 1951 Convention relating to the status of refugees and its 1967 Protocol’, September 2011, 1

⁵ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 1

The access crisis refers to the inability of asylum seekers to safely arrive at their countries of refuge. This inaccessibility results in the increased rampancy of illegal migration and forcing asylum seekers to take dangerous and irregular routes at the risk of theft, human trafficking, people smuggling and death among other crimes.⁶ This problem has only recently garnered attention within the international community with the United Nations releasing the 2018 Global Compact on refugees with one of the main objectives being the expansion of access to third country solutions.⁷ In furtherance of this objective, the compact recognizes the potential of complementary pathways within the refugee system.

Complementary pathways are safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.⁸ As the name suggests, the utilisation of these pathways ought to apply in comport with the principle of additionality – i.e., in addition to, rather than in substitution of – the ‘durable’ solutions.⁹ The aforementioned definition is, however, extremely broad and covers a variety of pathways – to the extent that scholars have critiqued the practicality and desirability of a single definition.¹⁰ Nonetheless, there have been attempts at categorising them on various bases – of importance to this dissertation is the eligibility criteria. This categorization results in the classification of ‘needs-based’, which are dependent on an assessment of vulnerability, and ‘qualifications-based’ pathways which are dependent on an assessment of skills or work-experience.¹¹ This classification highlights a fundamental difference between the objectives of the respective pathways – some of which are intended to achieve humanitarian goals while others are more directed towards professional opportunities.¹²

Under the category of needs-based complementary pathways, and the subject matter of this dissertation, are Protected entry procedures (PEPs). These are mechanisms that allow individuals to apply for entry into another country for the purpose of accessing protection

⁶ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 2

⁷ Paragraph 7, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

⁸ UNHCR, ‘Three-Year Strategy on Resettlement and Complementary pathways’, June 2019, 7

⁹ Paragraph 95, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

¹⁰ Wood T, ‘The role of complementary pathways in refugee protection’, Reference Paper for the 70th Anniversary of the 1951 Refugee Convention, 2020, 3

¹¹ Wood T, ‘The role of complementary pathways in refugee protection’, Reference Paper for the 70th Anniversary of the 1951 Refugee Convention, 2020, 13

¹² Wood T, ‘The role of complementary pathways in refugee protection’, Reference Paper for the 70th Anniversary of the 1951 Refugee Convention, 2020, 13

under international refugee law.¹³ Their primary function is the facilitation of safe travels across international borders thus avoiding potentially dangerous and exploitative journeys¹⁴ by way of humanitarian visas.¹⁵ Protected entry procedures vary in design and scale. As such, a further classification arises – the criteria being the country of processing. Where the asylum procedures are processed within the country of origin, they are referred to as ‘in-country processing’. However, as earlier discussed, applicants of ‘in-country processing’ fail to meet the “flight” criteria of the Convention definition of a refugee thus raising questions about the legality of ‘in-country protected entry mechanisms’ with regards to Article 1.A(2) of the 1951 Refugee Convention.

1.3 Problem Statement

The unfortunate reality is that a perilous journey awaits a myriad of asylum seekers – many of whom will not see it through. Some will fall victim to thieves, others will be trafficked, others may die – some will survive, but at the behest and hefty price of the people smugglers. Evidently, there exists a need for the protection of asylum seekers in their journey to international protection – the best of which, bears inherent limitations. As such, this dissertation intends to evaluate whether the use of ‘in-country processing’ in expanding access to third countries is inconsistent with Article 1 of the Refugee Convention.

1.4 Justification

The inaccessibility of safe and legal pathways to international protection negatively impacts asylum-seekers by forcing them to resort to embarking on dangerous journeys in an attempt to arrive at safety.¹⁶ As such, this study will be useful to State Representatives in International fora, Members of Parliament and Policymakers, Adjudicators such as judges as they exercise their law making powers in the creation of laws that protect asylum-seekers from life threatening journeys. It will also be useful to bodies mandated with the task of protection and problem solving for refugees such as the UNHCR and the KNHCR. Finally, it shall also help

¹³ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 6

¹⁴ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 7

¹⁵ Wood T, ‘The role of complementary pathways in refugee protection’, Reference Paper for the 70th Anniversary of the 1951 Refugee Convention, 2020, 13

¹⁶ The United Nations Refugee Agency, ‘Desperate Journeys – Refugees and migrants arriving in Europe and at Europe’s borders’, January 2019, page 7, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

other researchers looking into the protection of asylum seekers as it seeks to bridge the gap of knowledge within existing literature thus building upon the body of knowledge.

1.5 Literature Review

1.5.1. On in-country processing

While the need for safe pathways to protection by asylum seekers is largely uncontested,¹⁷ there still exists wide debate surrounding the use of in-country processing as a potential solution to the dangerous journeys presented by the ‘flight’ condition. For instance, Noll posits that the introduction of protected entry pathways would allow states to bypass the issue of human smugglers by communicating directly with the potential migrant.¹⁸ Similarly, Kumin highlights that the use of in-country processing has the potential to solve multiple issues, inter alia, enhancing the safety of refugee journeys, easing the logistics of responsibility-sharing – by reducing the pressure of spontaneous arrivals, elimination of the ‘limbo period’ of awaiting asylum decisions as well as the promotion of human rights - specifically, the right to leave and the right to seek and enjoy asylum.¹⁹

From the above scholars, it is evident that the use of in-country processing has immense potential to revolutionise the asylum system as we know it and further enhance the promotion of the right to seek and enjoy asylum by enhancing accessibility. However, even in recognizing the immense potential of the mechanism, scholars accordingly acknowledge the associated risks such as the danger of increased restrictive asylum procedures by virtue of blocking irregular access to States, additionally, the ‘inevitable’ identification of the potential migrant to the country of origin therefore increasing danger whilst awaiting processing²⁰ and critiques about the process lacking transparency as visa decisions are discretionary and cannot be appealed. Lastly, it has also been argued that the mechanism is likely to benefit only a small number of persons.²¹ The reality of the disadvantages listed above are further

¹⁷ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 80

Higgins C, ‘In-country programs: the procedure and politics of an additional pathway to protection’ in *Research handbook on International Refugee Law*, Edward Elgar Publishing, 2019 Limited, page 44

¹⁸ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 12

¹⁹ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 80

²⁰ Noll G, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, Oxford University Press (2005)

²¹ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 81

elaborated upon by Frelick through his discourse on the United States' historical use of in-country processing in Haiti. He highlights that the US in 1992 lifted a ban on the forced repatriation of interdicted Haitians and based its judgement on the mere-existence of an in-country processing program. Furthermore, only a handful were able to avail themselves to that alternative.²² As such, he argues that the existence of an in-country processing program would negatively impact asylum seekers who leave irregularly from having a fair hearing while also not providing a viable alternative for people facing imminent threats.²³ As for the 'beneficiaries' of the program, since the applicant is already in the country of origin, they fall outside the scope of 'refugee status' and logically, cannot rely on non-refoulement upon denial within a country that in which they are already present.²⁴ As such, Frelick, Dastyari, Ghezelbash and many other scholars agree that in-country processing bears significant practical challenges to compliance with international obligations of States - as can be observed from the experiences in the United States and Australia. Dastyari argues that it is precisely due to these challenges that allow States to dispense with the safeguards that asylum seekers would otherwise be entitled to, that the use of in-country processing is appealing to States.²⁵

As such, the latter discussion puts into perspective the issue of associated risks - recognizing that despite its revolutionary potential, the use of in-country processing is a dual-edged sword in that it poses logistical challenges to the asylum system that further put the asylum seekers at risk of violation of otherwise afforded rights as well as heightening the risk of persecution within the country of origin. It is therefore imperative that any attempts to legitimise the use of in-country refugee processing ought to be preceded by utmost caution to mitigate the risks. Primarily, the status of the mechanism as complementary in nature must be emphatically considered. This is evident in the works of scholars such as Higgins and Noll who have advised that caution be exercised in the use of the pathway – specifically requiring that it be applied in a complementary, rather than substitutive, manner.²⁶ Similarly, Frelick argues that

²² Frelick B, 'In-country refugee processing of Haitians', *Refuge: Canada's Journal on Refugees*, Vol. 21, No. 4, 2003, page 3.

²³ Frelick B, 'In-country refugee processing of Haitians', *Refuge: Canada's Journal on Refugees*, Vol. 21, No. 4, 2003, page 2.

²⁴ Frelick B, 'In-country refugee processing of Haitians', *Refuge: Canada's Journal on Refugees*, Vol. 21, No. 4, 2003, page 5.

²⁵ Dastyari A, Ghezelbash D, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures', *International Journal of Refugee Law*, 32(1), 2020.

²⁶ Higgins C, 'Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees' Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 6,

the use of in-country processing as the exclusive option for asylum determination does not conform with international law.²⁷ Nonetheless, beyond the complementary nature of the mechanism, further measures must also be put in place to ensure that the asylum seekers are protected within the country of origin - failure to which the asylum system will simply be pointless.

The literature above shall be useful in this dissertation as it will provide the basis of the need for the use of in-country processing mechanisms as a solution to the access problem.

1.5.2. On inconsistency with Refugee Convention

Despite the recognition of the need for in-country processing as a protected pathway, most scholars including Raufer and Higgins among others, argue that the mechanism is in fact, inconsistent with the conditions required under Article 1A (2) of the Refugee Convention.

Most scholars concur that there lies a challenge within the ‘flight’ condition as required under Article 1.A(2). For instance, Kumin, along with many other scholars, acknowledges that the ‘flight’ condition is difficult, often dangerous or impossible, and frequently illegal²⁸. Nonetheless, Raufer refocuses the discussion by establishing the centrality of the ‘flight’ element to refugee status through a discussion of the 1950 ICJ decision in the case of *Peru v Columbia* in which the court reasoned that by use of in-country processing, the host country is extending to an asylum seeker protection against the normal process of its own immigration laws. However, for a country to extend such an offer is an attempt to insert one’s own law between the individual and the laws of the sovereign country. Thus proving that the international community is reluctant to step in where flight has not occurred. Furthermore, she highlights that even regional treaties, such as those of the Organization of African Unity and the Organization of American States, bear significant modifications in other respects yet maintain the requirement of crossing an international border.²⁹

It is therefore evident from the above discussion that the use of in-country processing is inconsistent with the Refugee Convention. However, this dissertation seeks to put into perspective the resultant exposure of asylum seekers to dangerous conduct that is arguably

Noll G, et al., ‘Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure’, European Commission, 2002, page 68.

²⁷ Frelick B, ‘In-country refugee processing of Haitians’, *Refuge: Canada’s Journal on Refugees*, Vol. 21, No. 4, 2003, page 3.

²⁸ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 80

²⁹ Raufer S, ‘In country processing of refugees’, 9(2), *Georgetown Immigration Law Journal*, 1995, page 9.

higher in violation of the essence of the International Human Rights Regime at large. This dissertation argues that it is entirely feasible - with exercise of extreme caution - to incorporate the use of in-country processing into the asylum system to strengthen the international asylum system.

On the other hand, however, Noll, presents a slightly different argument. While recognizing that in-country processing falls outside the scope of Article 1A(2) as well as contravening the principle of non-interference, he argues that there is no barrier to the use of in-country processing³⁰ - as has, and continues to be, used by countries such as Australia and the United States. However, the exercise of this mechanism bears risks such as the requirement of state consent, which effectively disregards the “protected” nature of protected entry mechanisms³¹. Furthermore, a technical result of this inconsistency would be that beneficiaries of in-country processing are not entitled to non-refoulement under Article 33 and other protected rights under the Convention.³² As such, the need for the legal recognition of the use of in-country processing, is further emphasised. Failure to which beneficiaries are left exposed to persecution by the country of origin.

Building upon the latter research question, the literature discussed in this section shall be useful in the evaluation of the inconsistency of the use of in-country processing and the Refugee Convention and the need for legal recognition of in-country processing.

1.5.3. On State Sovereignty in the face of Globalization

As highlighted in the 1950 ICJ decision discussed above, the critiques surrounding the inherent limitations of in-country processing have been grounded in the principles of State Sovereignty and the principle of non-interference. Sovereignty, as simply put by Beeson, is the independence of a State in the face of other States.³³ The discourse on sovereignty has linked regulation and geography through linking power with space in bounded state-territorial parcels. As a result, it sets up an inside-outside dichotomy³⁴ that forms the basis of the principle of non-interference.

³⁰ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 2

³¹ Noll G, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, Oxford University Press (2005)

³² Higgins C, ‘In-country programs: the procedure and politics of an additional pathway to protection’ in *Research handbook on International Refugee Law*, Edward Elgar Publishing, 2019 Limited, page 51.

³³ Beeson M, ‘Sovereignty under siege: Globalisation and the state in Southeast Asia’, *Third World Quarterly*, 24:2, 2003, page 4.

³⁴ Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 2.

However, despite its paramount status within international relations³⁵, the transformation of global dynamics - that is, globalisation, has resulted in what scholars have referred to as 'the decline of the State'.³⁶ Goskel defines globalisation as the integration of economic, social and cultural relations across borders³⁷ - a phenomenon which many scholars agree threatens to transform conventional understanding of sovereignty as we know it. Globalisation has come about as a result of an increase in the importance, volume, speed, and scope of cross-border flows of ideas, money, commodities and people.³⁸ As such, States now have increasingly less control over some activities within their own territory.³⁹ Thus, there appears to be a general consensus with regards to the fact that globalisation is increasingly transforming conventional understanding of sovereignty. However, the point of diversion amongst the scholars appears in the attitude with which they view this interplay - some view globalisation as a threat that sovereignty ought to be protected from, while others recognize the potential globalisation brings in addressing issues facing the international community.

Flowing from the discussion about globalisation, the view of sovereignty as a static concept would greatly disadvantage the effectiveness of the international community in responding to issues that require global cooperation to resolve such as environmental issues and economic issues. This dissertation argued that the access crisis squarely falls under the category of 'the increased flow of people' as per the understanding of underlying causes of globalisation. As such, the static notion of sovereignty continues to limit the potential enhancement of the realisation of the right to asylum thus resulting in an effectively disadvantageous to asylum seekers.

Reddy and O'Grady categorise academic approaches to the status of sovereignty in the face of globalisation into three main schools of thought: hyperglobalists, sceptics and transformationalists.⁴⁰

The hyperglobalist approach, taken by scholars such as Beeson, Albrow, Ohmae and Strange, posits that the growing interconnectedness arising from globalisation negates the significance

³⁵ Beeson M, 'Sovereignty under siege: Globalisation and the state in Southeast Asia', *Third World Quarterly*, 24:2, 2003, page 2.

³⁶ Goskel N, 'Globalisation and the State', *Perceptions: Journal of International Affairs* 9(1), 2004, page 2.

³⁷ Goskel N, 'Globalisation and the State', *Perceptions: Journal of International Affairs* 9(1), 2004, page 3.

³⁸ Hudson A, 'Beyond the borders: Globalisation, Sovereignty and Extra-territoriality', *Geopolitics* Vol.3 No. 1, 1998, page 2.

³⁹ Goskel N, 'Globalisation and the State', *Perceptions: Journal of International Affairs* 9(1), 2004, page 11.

⁴⁰ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 3.

O'Grady C, 'Understanding Sovereignty in a Globalised World' in *Globalisation and Seed Sovereignty in Sub-Saharan Africa*, International Political Economy Series, 2019.

of territorial boundaries. This view, however, assumes the notion of sovereignty is static.⁴¹ Meanwhile, sceptical scholars such as Gilpin, Hirst and Krasner argue that the impact of globalisation on state sovereignty is minute and greatly exaggerated. Furthermore, they posit that the state is not the victim of this process but rather the main architects behind it. As such, this view emphasises the central role played by States in the promotion of cross-border links.⁴² Lastly, the transformationalist view provides a middle ground that while globalisation has had a significant impact on the notion of sovereignty, the situation is not as sinister as the hyperglobalists argue. They reject the tendency to juxtapose sovereignty and globalisation – but rather view the role of the sovereign state in international relations as dynamic and merely adapting to the fast-paced globalised world.⁴³

From the discussion above, scholars leaning towards the hyperglobalist approach seem to be veering towards an impossible extreme in foreseeing the overall dissolution of the notion of Statehood. The notion of a State was, and remains to be, the most effective mechanism to address global issues. However, the sceptic scholars' argument has questionable grounding as the difference between global interactions in the 27th Century as compared to that of the 21st Century is so vast that allegations of negligible impact are arguably impossible. As such, transformationalist leaning is the optimal approach to addressing global issues in a constantly changing world. The view of State Sovereignty as a dynamic concept is ideal as it provides the requisite flexibility to the asylum system. However, caution must also be taken to ensure that the flexibility does not warrant arbitrary and discretionary violations within the international community.

Most scholars such as Reddy, Goskel and Hudson portray transformationalist leanings and simply call for a re-evaluation of the role of the sovereign state in a globalised world. Schrijver, for instance, recognizes that the nation state remains an indispensable instrument for the realisation of internationally agreed goals. They bear the role of implementation and monitoring the same.⁴⁴ Thus, it is evident from the above discussion that the majority of scholars agree that reliance on the notion of sovereignty is unsuitable in addressing issues

⁴¹ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 4.

⁴² Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 4.

⁴³ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 5.

⁴⁴ Schrijver N, 'The changing nature of State Sovereignty', *British Yearbook of International Law*, Vol. 70(1), 2000, page 33.

within a globalised world⁴⁵ such as unprecedented human migration⁴⁶ as highlighted by Hudson. Furthermore, and from a broader perspective, many scholars call for a unified international asylum system in addressing the refugee crisis. For instance, Ricci argues that a harmonisation of arrangements for the admission of refugees should be established at different levels – both national and international – in line with the suggestions of the Global Compact, would enhance the effectiveness of the States enforcement of the right to asylum. Similarly, Boed argues that in line with the principle of shared responsibility, a global system of burden-sharing should be devised and implemented. Thus, the use of in-country processing would be instrumental in achieving this goal as argued by Kumin.⁴⁷

Nonetheless, as many scholars have cautioned, it is important to exercise utmost care in the regulatory reformulation of the globalised world by strengthening institutions to mitigate the negative effects of globalisation such as increase in inequality.⁴⁸

All in all, the literature in this section will be useful in understanding the basis of inconsistency between the use of in-country processing with the Refugee Convention - as well as highlighting the need for a re-evaluation of the same.

1.6 Research Objectives

Overarching Research Objective

The main objective of the dissertation is to evaluate whether the use of ‘in-country processing’ in expanding access to third countries is inconsistent with Article 1.A(2) of the Refugee Convention.

Underlying Research Objectives

In doing so, this dissertation seeks to achieve the following sub-objectives:

1. To determine whether Article 1 of the 1951 Refugee Convention poses a barrier to the use of ‘in-country’ processing as a means to expand access to third countries.

⁴⁵ Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 18.

⁴⁶ Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 18.

⁴⁷ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 80

⁴⁸ Reddy S, ‘Globalisation and the Sovereignty of the Nation State’, *World Affairs: The Journal of International Issues*, 16(4), 2012, page 19.

2. To understand the rationale behind the “outside” criteria of Article 1 of the 1951 Refugee Convention.

3. To argue for the legal recognition of ‘in-country’ processing as a means to expanding access to third countries under Article 1 of the 1951 Convention.

1.7 Research Questions

Overarching Research Question

The main question of the dissertation is whether the use of ‘in-country processing’ in expanding access to third countries is inconsistent with Article 1.A(2) of the Refugee Convention.

Underlying Research Questions

In furtherance of the above objectives, this dissertation seeks to answer the following questions:

1. Does Article 1 of the 1951 pose a barrier to the use of in-country processing as a means to expanding access to third countries?
2. Why does Article 1 have the “external” criteria?
3. Can an exception be made to the “outside” criteria of Article 1 of the Refugee Convention?

1.8 Methodology

In essence, this study tests the compatibility of ‘in-country’ processing with Article 1 of the 1951 Refugee Convention. As such, this research will constitute:

i) Desk-based Research

The dissertation shall provide a doctrinal analysis of international refugee law relying on qualitative evidence from desk-based research from primary sources such as international treaties and conventions, case law, United Nations Resolutions and Human Rights Treaty Committees comments and recommendations. It will also rely on secondary sources such as books, journal articles, research papers and reports addressing the accessibility of safe and legal pathways to international protection.

ii) Case studies

The dissertation shall also rely on case studies from various countries such as Brazil, Australia, the United States of America, among others, which will be used to evaluate the

advantages and shortcomings of in-country processing. Furthermore, the dissertation shall rely on cases such as the case of Peru v. Colombia to show the stances of International Courts on the practice of in-country processing.

iii) Existing data

In general, the study will utilise a deductive approach from the existing literature through which each chapter shall establish a premise upon which the main claim will be built.

1.9 Chapter Breakdown

Chapter One is an introduction to the chapter of study. It shall provide the backdrop against which the rest of the study shall be presented.

Chapter Two will delve into the capabilities approach as the theoretical framework of this study.

Chapter Three seeks to determine whether Article 1 of the 1951 Refugee Convention poses a barrier to the use of ‘in-country’ processing as a means to expanding access to third countries – It will involve an analysis of the 1950 case between Colombia and Peru.

Chapter Four aims at understanding the rationale behind the “external” criteria of Article 1 of the 1951 Refugee Convention.

Chapter Five shall provide a conclusion to the study in arguing for the legality of the use of ‘in-country’ processing as a means to expanding access to third countries under Article 1 of the 1951 Convention.

CHAPTER TWO: THE CAPABILITY APPROACH

2.1. Introduction

This chapter of the dissertation seeks to establish the capability approach as the lens through which subsequent discussions shall be viewed. At its core, the capability approach posits the assessment of what individuals within a system are able to do is the criterion by which the development of a system is measured. Essentially, the overriding objective of development is the expansion of human capabilities⁴⁹ - Thus, the notions of freedom and choice are central to the theory. The capability approach was originally espoused by Amartya Sen for its intended use within the field of welfare economics as opposed to economic measures such as GDP to assess the well-being of a nation state. However, the theory has since seen various interdisciplinary applications and as a result, there exist multiple variations of the theory – most notably, that of Martha Nussbaum where the theory is applied in the assessment of justice within social systems and institutions depending on the availability of capabilities before individuals within the system. As such, this chapter shall argue that the lack of legal recognition of in-country asylum processing as a protected entry pathway amounts to a failure in justice within the international community. It shall do so firstly by extensively discussing the theory as espoused by Sen as well as its use by Nussbaum. Thereafter, the chapter shall establish a nexus between the theory and human rights with a particular focus on the right to asylum. The chapter shall then conclude by highlighting the need for the legal recognition of in-country asylum processing as a protected entry pathway for asylum seekers – failure to which the system continues to perpetuate injustice as per the understandings of the capability approach.

2.2. The Capability Approach

Ingrid Robeyns defines the Capability Approach as a broad normative framework for the evaluation and assessment of individual well-being and social arrangements, the design of policies and proposals about social change in society.⁵⁰ The theory was originally espoused in the early eighties by Amartya Sen in his quest to arrive at a holistic index of assessing

⁴⁹ Clark D, ‘The Capability Approach: Its Development, Critiques and Recent Advances’ Global Poverty Research Group, page 10

⁵⁰ Robeyns I, “The Capability Approach: A Theoretical Survey.” *Journal of Human Development*, Vol. 6, No. 1, 2005. Page 3 - <https://doi.org/10.1080/146498805200034266> on 25 January 2024.

personal well-being within the field of welfare economics.⁵¹ As such, Sen was searching for a holistic criterion upon which the status of ‘development’ can be conferred upon States. The answer to which he found to be equality of ‘capabilities’ and ‘functionings’ – the two fundamental concepts upon which the theory is built.

2.2.1 The Capability Approach as posited by Amartya Sen

As earlier mentioned, Sen developed the capability approach in an attempt to provide an alternative assessment of well-being beyond the narrow economic lens of traditional welfare economics. As such, the framework sought to go beyond the understanding of well-being as a result of factors of production controlled by an individual and commodities consumed by the individual.⁵² Sen’s extended framework included three categories – characteristics, capabilities and functionings. He argues that the essential aspect in the definition of well-being is found in what a person manages to do or be i.e. their achievements – he referred to these as ‘functionings’. Furthermore, and in facilitation of the functionings, the concept of the advantage of the person i.e. the opportunities available to them – thereafter referred to as ‘capabilities’ – arose.⁵³ As such, subject to this theory, an individual’s well-being should be measured through freedom – freedom to choose from a variety of capabilities to arrive at one’s desired functionings. On this basis, a country, in which the girl child is excluded from accessing educational institutions such as when the Taliban set restrictions on female education in Afghanistan,⁵⁴ would be considered less developed than a country in which all children have a right to education – regardless of the country’s Gross Domestic Product (GDP). Thus, this theory effectively sets freedom as the criteria against which the development of a society can be assessed as opposed to an over-focus on the economic growth index in Sen’s world of welfare economics.

⁵¹ Schokkaert E, “The Capabilities Approach.” *Social Science Research Network*, 2008, Page 2 - <https://doi.org/10.2139/ssrn.1084821>, on 25 January 2024.

⁵² Gasper D, ‘Sen’s Capability Approach and Nussbaum’s Capabilities Ethic’ *Journal of International Development*, Vol.9, No.2, 1997, page 3.

⁵³ Schokkaert E, “The Capabilities Approach.” *Social Science Research Network*, 2008, Page 2 - <https://doi.org/10.2139/ssrn.1084821>, on 25 January 2024.

⁵⁴ Fetrat S, ‘One Year On, the Taliban Still Attacking Girl’s Right to Education’, *Human Rights Watch* <https://www.hrw.org/news/2023/03/24/one-year-taliban-still-attacking-girls-right-education>, March 24, 2023

As for characteristics, Sen argues that individuals do not want a commodity for itself but rather for the combination of characteristics or qualities it provides.⁵⁵ For instance, education enables knowledge which enables an individual to make useful contributions to society, which avails them career opportunities, which puts money on their table which enables them to afford food etc. As such, there exists a ripple effect in the qualities provided by various commodities. Thus, the characteristics of a pattern of consumption provide a consumer with the ability to do a range of things i.e. a range of capabilities.⁵⁶ It is important to note, however, that the focus on capabilities does not deny the important contribution that resources can make to an individual's well-being. For instance, inequalities in resources can be a significant cause of inequalities in capabilities as seen in the case of gender inequalities. It has been argued that the gender gap in the ownership and control of property is the single most critical contributor to the gender gap in economic well-being, social status and empowerment.⁵⁷

From the earlier definition, it is evident that the theory has been applied across a vast array of disciplines. The influence of the capability approach has transcended the world of economics and quickly inspired a multi-disciplinary effort to understand the relationship between 'well-being', freedom and development.⁵⁸ Resultantly, the theory has seen an increase in interpretations and applications by various academics – most notably, and most relevant to this dissertation, is Martha Nussbaum's application of the theory in assessing the justice of social arrangements.

2.2.2 The Capability Approach as posited by Martha Nussbaum

Nussbaum, on the other hand, reconstructs the theory through the lens of moral-legal-political philosophy. As such, she sought to develop a partial theory of justice through the capability approach.⁵⁹ As such, Nussbaum argues that societies are just to the extent that they guarantee

⁵⁵ Gasper D, 'Sen's Capability Approach and Nussbaum's Capabilities Ethic' *Journal of International Development*, Vol.9, No.2, 1997, page 3.

⁵⁶ Gasper D, 'Sen's Capability Approach and Nussbaum's Capabilities Ethic' *Journal of International Development*, Vol.9, No.2, 1997, page 3.

⁵⁷ Robeyns I, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities', *Feminist Economics*, 2003, page 9.

⁵⁸ Schokkaert E, "The Capabilities Approach." *Social Science Research Network*, 2008, Page 3 - <https://doi.org/10.2139/ssrn.1084821> on 25 January 2024.

⁵⁹ Robeyns I, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities', *Feminist Economics*, 2003, page 13.

each citizen an entitlement to their basic capabilities⁶⁰ - she does so by building upon the same conceptual apparatus of capabilities to functionings as a framework. However, Nussbaum and Sen's approaches to the theory are rather differentiated. For instance, Sen argues against the endorsement of a singular list of capabilities whereas Nussbaum creates her own list of central human capabilities.⁶¹ Furthermore, in Nussbaum's approach, the assessment of value is decided by an ethical procedure in which dignity plays a central role.⁶² Nussbaum relies on the concept of dignity in three ways – to underlie her capability list, to ground animal entitlements and as an exception the freedom of choice in capabilities.

With regards to the first usage, Nussbaum argues that dignity is best understood in relation to other notions – particularly: respect, agency and equality. As such, she argues that in creating a list of basic capabilities, specific arguments ought to be made proving that a given liberty is implicated in the idea of dignity.⁶³ For instance, the ability to use the senses to think is rooted in the rational capacity of the human being viewed from an anthropological sense. This usage is most important to this dissertation. Secondly, she uses the notion of dignity to extend capability entitlements to non-human animals relying on Aristotle who argued that all complex forms of life possess something wonder-inspiring. Thus, dignity, functioning and flourishing exist in animals as much as they do in humans.⁶⁴ Lastly, It is important to note that Nussbaum recognizes that there is sometimes a need to take up a paternalistic approach and promote people's functionings directly – bypassing their own choices.⁶⁵ As such, she uses the concept of dignity to justify the act of bypassing certain capabilities with the aim of prohibiting choices individuals make to humiliate or debase themselves.⁶⁶ It is against this

⁶⁰ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 1 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶¹ Robeyns I, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities', *Feminist Economics*, 2003, page 9.

⁶² Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 1 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶³ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 3 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶⁴ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 4 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶⁵ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 2 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶⁶ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 4 - <https://doi.org/10.1017/CBO9780511979033.030>

backdrop that Nussbaum created the basic list of central human capabilities composed of 10 categories as follows: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; and (10) control over one's environment⁶⁷ - all of which are grounded in the freedom of man which is rooted in dignity. Specific details with regards to this list will be substantively discussed later in the chapter.

In conclusion, the capability approach theory posits that individuals ought to have the freedom of choice with regards to who they want to be or what they want to do. According to Nussbaum, this means that the evaluation of the justice of a system is dependent upon its facilitation of capabilities and functionings. As such, a just society is not responsible for people's happiness but for the opportunities to make themselves happy.⁶⁸ Subsequent discussions within this dissertation will be guided by Nussbaum's approach to the theory in that it will be used to assess the justice of the International approach to the right to asylum.

2.3. Nexus between Capability Approach to Human Rights

Upon careful consideration of Nussbaum's list of central human capabilities, it becomes increasingly clear that there exists some overlap between the components of the list and fundamental human rights as we know them. However, before delving into this discussion, an understanding of human rights through Sen's view will be discussed.

In his application of the theory, Sen classifies freedom into two categories; 'opportunity freedom' and 'process freedom'. Opportunity freedom refers to the range of favourably valued and attainable life opportunities whereas process freedom concerns the individual's role in decision making.⁶⁹ At this point, it is important to point out the concept of 'favourable value'. Sen describes functionings as 'things an individual has reason to value', as such, he set the quality of being 'valuable' as the criterion for identifying functionings and the necessary capabilities. However, he opposed the endorsement of a single list of core human capabilities by leaving the decision on which functionings are valuable as a subjective individual experience. He however argues that in a situation where both opportunity and

⁶⁷ Nussbaum M, "Human Rights and Human Capabilities," *Harvard Human Rights Journal*, 20, 2007, page 4.

⁶⁸ Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 2 - <https://doi.org/10.1017/CBO9780511979033.030>

⁶⁹ Gasper D, 'What is the capability approach? Its core, rationale, partners and dangers' in *Development Ethics*, 1st Edition, 2015, page 15.

process freedoms meet a threshold of importance, they can be characterised as human rights.⁷⁰ Needless to say, the nexus provided by Sen is too vague and flexible to justify the creation of a partial theory of justice. As such, Nussbaum reconstructed the theory – providing clarification of ambiguities, vagueness and absence of definitions. It is through this reconstruction that the argument that the capabilities approach views human rights as entitlements to capabilities – an argument that is entirely plausible given the common motivation that is the freedom and dignity of the individual.⁷¹

As earlier discussed, Nussbaum argues that societies are just to the extent that they guarantee each citizen an entitlement to their basic capabilities.⁷² She then goes further to create a concrete list of capabilities as shown above. Below is an elaboration of the components of the list: (1) life: being able to live to the end of a human life of normal length (2) bodily health: being able to have good health (3) bodily integrity: being able to move freely from place to place and having one's bodily boundaries treated as sovereign (4) senses, imagination and thought: being able to use the senses, to imagine and think and reason in a way informed and cultivated by an adequate education (5) emotions: being able to have attachments to things and people outside ourselves (6) practical reason: being able to form a conception of the good and to engage in critical reflection about the planning of one's life (7) affiliation: being able to live with and towards others (8) other species: being able to live with concern for animals, plants and the world of nature (9) play: being able to enjoy recreational activities and (10) control over one's environment: (i) Political – being able to participate effectively in political choices (ii) Material – being able to hold property.⁷³

Upon a side by side comparison between Nussbaum's list and a list of recognized rights within a country's constitution, significant overlap is evident suggesting a coherent nexus between the capability approach and human rights. The third category – bodily integrity – is of particular relevance to this dissertation. Bodily integrity is described to include, *inter alia*, the ability to move freely from place to place. It is upon this basis that rights such as freedom of movement and residence, *inter alia*, the right to leave a country as enshrined in various

⁷⁰ Vizard P, Fukuda S, Elson D, "Introduction: The Capability Approach and Human Rights", Journal of Human Development and Capabilities: Vol 12, No 1, Page 3 - <https://doi.org/10.1080/19452829.2010.541728> 25 January 2024.

⁷¹ Vizard P, Elson D, et al., 'The Capability Approach and Human Rights' Vol 12:1, Journal of Human Development and Capabilities, 2011, page 1

⁷² Claassen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 1 - <https://doi.org/10.1017/CBO9780511979033.030>

⁷³ Nussbaum M, "Human Rights and Human Capabilities," Harvard Human Rights Journal, 20, 2007, page 4.

constitutions for instance under Article 39 of the Constitution of Kenya, 2010. This connection will be discussed later into the chapter.

2.3.1. Application in International Human Rights Law

With a good understanding of the Capability Approach and its connection to human rights, this chapter can now apply the theory with regards to international law. The theory, as Nussbaum has developed it, is an approach to the protection of human rights – the main goal being to enable individuals to function in a variety of areas of central importance.⁷⁴ It is needless to say that the list of central human capabilities also bears significant overlap with the rights recognized under the UDHR. However, the application of the theory with regards to international law poses a challenge with regards to established principles of state sovereignty and non-interference.

Nussbaum argues that the production of capabilities requires material and institutional support thus rejecting the notion of a distinction of rights as first as opposed to second generation or socio-economic as opposed to political. All rights, understood as entitlements to capabilities, have material and social preconditions and all require government action.⁷⁵ It is important to remember that within this theory, entitlements to capabilities are grounded in freedom rooted in dignity – as such, the resultant human rights have legitimacy and validity within the ethical domain rather than being mere by-products of legal and institutional arrangements. As such, this emergence of a capability-based understanding of human rights provides a stronger foundation for the notion of positive obligation.⁷⁶ This focus on capabilities clarifies that the goal is not merely ‘negative liberty’ or the absence of state interference but the full ability of people to be and choose these very important things.⁷⁷ As such, from this lens, it can be argued that the right to asylum does not merely entail a negative liberty of the State to interfere with an individual fleeing the country, but a recalibration of the system to entail a positive obligation for States to consider the safety of asylum seekers in their quest for international protection. Thus, following the argument that a just society is not responsible for people’s happiness but for the opportunities to make

⁷⁴ Nussbaum M, "Human Rights and Human Capabilities," Harvard Human Rights Journal, 20, 2007, page 2.

⁷⁵ Nussbaum M, "Human Rights and Human Capabilities," Harvard Human Rights Journal, 20, 2007, page 2.

⁷⁶ Vizard P, Fukuda S, Elson D, "Introduction: The Capability Approach and Human Rights", Journal of Human Development and Capabilities: Vol 12, No 1, Page 3 - <https://doi.org/10.1080/19452829.2010.541728> 25 January 2024.

⁷⁷ Vizard P, Fukuda S, Elson D, "Introduction: The Capability Approach and Human Rights", Journal of Human Development and Capabilities: Vol 12, No 1, Page 5 - <https://doi.org/10.1080/19452829.2010.541728> 25 January 2024.

themselves happy,⁷⁸ the inaccessibility of protected entry pathways for asylum seekers in their quest for international protection amounts to an unjust system.

The presence of positive obligations within international human rights law challenges the status quo of non-interference. However, as Fredman argues, the articulation of positive obligations in international human rights law would amount to a transformation of the regime away from a paradigm based on non-interference and non-intervention. This argument aligns with the discussion of the insufficiency of state sovereignty in addressing issues within a globalized world. As such, she calls for a radical revision of the regime as we know it.⁷⁹

2.3.2. Application to ‘in-country’ asylum processing as protected entry pathway

Lastly, this chapter seeks to specifically view the main research problem under the lens of the capability approach. For an asylum seeker, the valued functioning would be the attainment of ‘refugee status’. The achievement of that functioning would be rooted in the capability category of bodily integrity entailing freedom of movement – this is seen in the universal acceptance of the right to asylum. However, while some might argue that the mere enshrinement of the right to flee amounts to an adequate facilitation of the opportunity freedom for an asylum seeker, the risks faced by asylum seekers amidst their journeys expose them to a violation of other categories in the central human capabilities list – namely, life, bodily health and emotions among others. As such, this inconsistency in the protection of asylum seekers effectively renders the asylum regime as we know it, unjust by the metric of the capabilities approach. Thus, necessitating the introduction of protected entry mechanisms such as in-country processing to mitigate the limitation of capabilities in this context.

2.4 Conclusion

This chapter of the dissertation sought to establish the capability approach as the lens through which subsequent discussions within this dissertation shall be viewed. It entailed a detailed discussion of the theory which established that at its core, the capability approach posits the assessment of what individuals within a system are able to do is the criterion by which the development of a system is measured. It has further elaborated on the use of this theory in

⁷⁸ Claasen R, ‘Human dignity in the capability approach’ in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015, page 2 - <https://doi.org/10.1017/CBO9780511979033.030>

⁷⁹ Fredman, S, ‘Human Rights Transformed: Positive Rights and Positive Duties’, Oxford Legal Studies Research Paper No. 38/2006, Oxford University Press, Oxford.

assessing the level of justice within a social system or institution depending on the availability of capabilities before individuals within the system. It is through this lens that the chapter argues that the lack of legal recognition of in-country asylum processing as a protected entry pathway amounts to a failure in justice within the international community. As such, this chapter concludes by calling for the legal recognition of in-country asylum processing as a protected entry pathway for asylum seekers – failure to which the refugee system continues to perpetuate injustice as per the understandings of the capability approach.

CHAPTER THREE: STATUS QUO OF ‘IN-COUNTRY PROCESSING’ UNDER ARTICLE 1A (2) OF THE 1951 REFUGEE CONVENTION

3.1. Introduction

The legal framework regulating the international treatment of refugees consists mainly of the 1951 Convention relating to the Status of Refugees (*herein referred to as the ‘Refugee Convention’*) and its 1967 Protocol (*herein referred to as ‘Protocol’*). Article 1 of the Refugee Convention is arguably the most important provision in that it sets the qualifying criteria by which the recognition of ‘refugee status’ is accorded. This is done in recognition of a State’s need, to admit within their territories only persons in genuine need of protection.⁸⁰ In doing so, Article 1 of the Convention outlines the basis upon which protection to refugees is to be granted (inclusion elements), denied (exclusion elements), or discontinued (cessation elements)⁸¹ - thus, it effectively sets the foundations upon which the entire International Refugee System is built.

As such, this chapter of the dissertation aims at elucidating the status of ‘in-country’ processing with regards to the Refugee Convention and its Protocol. It will do so through two main parts - Part I, which will centre upon developing an understanding of the inconsistency between the practice of ‘in-country’ processing and the requirements of the Refugee Convention - specifically, the key inclusion element of being ‘outside the country of nationality or habitual residence’ as recognized under Article 1A (2). Thereafter, Part II shall address the legal and social issues emerging from the aforementioned inconsistency. As such, the chapter will conclude by emphasising on the need for the legal recognition of ‘in-country’ processing as a protected entry pathway in response to the prevailing access crisis.

PART I

3.2. “Outside the country of nationality or habitual residence”

According to Article 1A(2) of the 1951 Refugee Convention, the term “refugee” shall apply to: any person who, ‘as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is

⁸⁰ Weis P, ‘The Refugee Convention, 1951: The Travaux preparatoires analysed with a Commentary’, United Nations High Commissioner for Refugees, 1990, page 2.

⁸¹ UNHCR, ‘The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention’, April 2001.

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.⁸² Stemming from this definition, it emerges that the internationally accepted standard for qualification for refugee status is created by the convergence of three factors: persecution, unwillingness or inability of a country to provide protection against the persecution, and flight by the persecuted due to this lack of protection⁸³ - commonly known as the inclusion elements.

This dissertation is concerned particularly with the flight element i.e. being ‘outside the country of nationality or habitual residence’. Customarily, this element has been regarded as highly uncontroversial by virtue of being an easily determined factual issue.⁸⁴ Consequently, there is barely any explanatory discourse surrounding the element - save for clarification about the concept of refugee *sur place*.⁸⁵ This dissertation, however, questions the necessity of the requirement of being outside one’s country of nationality.

The UNHCR Handbook, in interpreting the element, states that it is a general requirement to which there are no exceptions - placing categorical emphasis on the fact that international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.⁸⁶ The International Court of Justice (ICJ) further sheds light on this interpretation in its 1950 decision in the *Asylum Case* between Colombia and Peru where it was faced with the question of whether a country of origin had an obligation to allow an asylum seeker safe passage out of its borders in cases of diplomatic asylum.⁸⁷ In its determination, the ICJ explained that under ordinary circumstances, an asylum seeker is already outside the territory of the country of origin, thus, a decision to grant asylum does not derogate from the sovereignty of that State. However, where the asylum seeker is still within the country of origin, a decision to grant asylum amounts to a derogation from the state sovereignty of the country of origin.⁸⁸ Thus, it is evident that arguments in defence of the

⁸² Article 1.A(2), The 1951 Convention relating to the status of refugees, 22 April 1954, 189 UNTS 137

⁸³ Raufers S, ‘In country processing of refugees’, 9(2), Georgetown Immigration Law Journal, 1995, page 7.

⁸⁴ UNHCR, ‘The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention’, April 2001, page 9.

⁸⁵ UNHCR, ‘The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention’, April 2001, Page 9, para. 33. “The concept of refugee *sur place* recognizes that the refugee need not necessarily have left the country for fear of persecution, but can also have already been outside the country prior to changes warranting a well-founded fear of persecution.”

⁸⁶ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, December 2011, Page 25.

⁸⁷ *Asylum Case*, Colombia v. Peru, ICJ Judgment of November 20, 1950.

⁸⁸ *Asylum Case*, Colombia v. Peru, ICJ Judgment of November 20, 1950, Page 6.

element of 'being outside one's country of nationality' are grounded in the sanctity of the foundational principles of International Law - specifically, the principle of state sovereignty and, as it logically flows, the principle of non-interference.

The ICJ further explained that a host country, in granting asylum to an applicant still within their country of origin, is extending to the asylum seeker a protection against the normal process of its own immigration laws whilst the asylum seeker is still subject to the laws of the country of origin.⁸⁹ This concept of conflicting claims to sovereignty within a state was predicated upon the notion of the 'extraterritoriality' of embassies which has since been replaced by the concept of 'inviolability' pursuant to the 1961 Vienna Convention on Diplomatic Relations.⁹⁰ Prior to the latter Convention, embassies were considered to be sovereign territory of the sending state, thus granting them extraterritorial status.⁹¹ This, in turn, meant that the host country had limited jurisdiction over the embassy premises and its activities leaving embassies to enjoy significant immunity from the laws of the host country. Thus, the facts of the case having taken place within the 1950's, it can be feasibly construed that this conception of absolute extraterritoriality underlays the entitlement by the receiving state in demanding that the beneficiary of diplomatic asylum be allowed safe passage out of its borders.

Over time, however, the concept of inviolability emerged as a more nuanced approach to diplomatic immunity. It replaced the notion of absolute extraterritoriality with the understanding that, while embassies were not subject to the jurisdiction of the host country in most cases, they were also not necessarily exempt from its laws.⁹² As such, embassies are merely regarded as having special protected status which grants them immunity from certain forms of interference such as unwanted search and seizure, but still subjects them to the laws and regulations of the host country. This reformed conception of embassies clarifies the issue of sovereignty claims thus, further cementing the rationale behind the international community's reluctance to intervene as it can effectively be seen as an attempt to insert one's own law between an individual and the laws of their country thus, effectively undermining its sovereignty.⁹³

⁸⁹ Asylum Case, Colombia v. Peru, ICJ Judgment of November 20, 1950, Page 6.

⁹⁰ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', December 2011, Page 25, footnote 11.

⁹¹ Heijer M, 'Diplomatic asylum and the Assange Case', Leiden Journal of International Law, Vol. 26, No. 2, 2013, page 4

⁹² Heijer M, 'Diplomatic asylum and the Assange Case', Leiden Journal of International Law, Vol. 26, No. 2, 2013, page 4

⁹³ Rauffer S, 'In country processing of refugees', 9(2), Georgetown Immigration Law Journal, 1995, page 7.

Thus, having established its roots in the principle of State Sovereignty, the centrality of the ‘outside’ element becomes understandably salient to the compliance with the requirements of diplomatic relations among States. This perspective is further buttressed by the consistency of the ‘outside’ element across regional treaty definitions, such as those of the Organization of African Union and the Organization of American States, despite the existence of other modifications to the 1951 Convention definition⁹⁴ as well as evidence that the drafters of the Convention intentionally excluded individuals still within their countries of origin in order to garner wide State ratification.⁹⁵

As such, the legitimacy of the element stemming from grounding in the foundational precepts of International Law⁹⁶ serves as an explanation as to why it is heavily and unequivocally guarded as discussed above and consequently why the international community is reluctant to step in where the ‘outside’ requirement is yet to be satisfied. Thus, having sufficiently understood the ‘outside’ requirement of Article 1 of the Refugee Convention as well as its rationale, it is against this backdrop that the practice of ‘in-country’ processing shall be viewed.

3.2. The Practice of ‘In-country’ Processing

The practice of in-country processing arises where protected entry procedures, i.e. mechanisms that allow asylum seekers to apply for entry into another country for purposes of accessing refugee protection under international law,⁹⁷ are implemented within an asylum seeker’s country of origin.⁹⁸ Discussions surrounding the utility of such a mechanism have grown rampant in the wake of the challenge of accessibility of international protection due to risks of theft, human trafficking, people smuggling, death etc. In the year 2018 alone, 2,275 asylum seekers died at sea in their quest to arrive in Europe via the Mediterranean Sea. This inaccessibility is what has been termed as the access crisis.⁹⁹ At the onset of the 21st Century, Noll made reference to protected entry procedures (as a complementary pathway) when he considered resettlement alone as too mono-dimensional and too limited to bring adequate

⁹⁴ Raufers S, ‘In country processing of refugees’, 9(2), Georgetown Immigration Law Journal, 1995, page 9.

⁹⁵ Fragomen Jr. A, ‘The Refugee: A Problem of Definition’, Case Western Reserve Journal of International Law, Vol. 3 Issue 1, 1970, Page 14.

⁹⁶ United Nations General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN doc A/RES/2625(XXV) (adopted 24 October 1970).

⁹⁷ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 4.

⁹⁸ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 10.

⁹⁹ The United Nations Refugee Agency, ‘Desperate Journeys – Refugees and migrants arriving in Europe and at Europe’s borders’, January 2019, page 6

relief to the access crisis.¹⁰⁰ An opinion that gained popularity seeing as the Global Compact on Refugees by the United Nations set out ‘expanding access to third country solutions’ as one of their objectives¹⁰¹ and provided for the use of complementary pathways in furtherance of the same.¹⁰² It is important at this point to note that asylum seekers are not a homogenous group – there lie differences in their capacities due to the varying levels of human, social and financial capital they possess.¹⁰³ For some, the ‘outside’ requirement is of little consequence to their quest for international protection, for others, it is the ‘end all be all’ of their quest. This variance undoubtedly has a substantial impact on the solutions available to them as well as the level of support required. As such, Wagner and Katsiaficas classify asylum seekers into three different profiles and their corresponding third country solutions: those with strong networks and financial means thus needing little to no support to access existing legal pathways, those with limited capital and weak networks hence needing targeted support to strengthen their networks and allow flexibility regarding access to third countries, namely via complementary pathways, and those with high protection needs because of limited to no relevant capital or networks thus continuing to rely primarily on resettlement¹⁰⁴

Based on the analysis by Wagner and Katsiaficas, the first and last categories are excluded from the purview of this dissertation. The middle category, however, qualifies as the intended demographic – as such, the use of the term ‘*asylum seekers*’ henceforth, applies to this category. As highlighted above, there exist a group of asylum seekers with capital and networks that are too weak to facilitate independent access to solutions abroad. As such, they need targeted support in place of the networks.¹⁰⁵ This targeted support manifests itself by way of complementary pathways – hence their increasing popularity within the global agenda. However, as this chapter has established, their legal status is wanting.

Complementary pathways are safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met.¹⁰⁶ It is a relatively new concept within the field of international protection and has developed in response to the access crisis thus garnering support from the United Nations

¹⁰⁰ Noll, G. (2003). New issues in refugee research: From ‘protective passports’ to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate (Working Paper 99). UNHCR.

¹⁰¹ Paragraph 7, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

¹⁰² Paragraph 85, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

¹⁰³ Wagner M, Katsiaficas C, ‘Networks and mobility: a case for complementary pathways’, Bonn International Center for Conversion (BICC), 2021, Page 4.

¹⁰⁴ Wagner M, Katsiaficas C, ‘Networks and mobility: a case for complementary pathways’, Bonn International Center for Conversion (BICC), 2021, Page 5.

¹⁰⁵ Wagner M, Katsiaficas C, ‘Networks and mobility: a case for complementary pathways’, Bonn International Center for Conversion (BICC), 2021, Page 6.

¹⁰⁶ UNHCR, ‘Three-Year Strategy on Resettlement and Complementary pathways’, June 2019, 7.

as well as many scholars who have called for improved access to safe and legal pathways to protection.¹⁰⁷ Recent developments pertaining to refugee discourse within the international community reflect a recognition of the associated risks of the ‘outside’ requirement and point towards protected entry procedures as a solution to the same.

Protected Entry Procedures have been of particular interest to scholars addressing the access crisis. These are procedures that seek to facilitate the safe travel of asylum seekers by obtaining travel authorization thus facilitating their safe travels - as opposed to the alternative of taking potentially dangerous or exploitative irregular journeys.¹⁰⁸ On a more nuanced level, the use of ‘in-country’ processing, as described above, practically negates the need for the dangerous and irregular asylum journeys altogether. The most successful employment of the mechanism thus far can be seen in the Orderly Departure Program in Vietnam. Under the ODP hundreds of thousands of Vietnamese were granted permission to leave their country and settle abroad between 1979 and the late 2000s. The program was based upon a Memorandum of Understanding (MoU) signed between UNHCR and the Socialist Republic of Vietnam (SRV) in May 1979, with support from the United States. The program facilitated the admission of more than 520,000 people into the United States. As such, some academics and commentators have raised the ODP as an example of how the international community could use in-country processing as one component of a comprehensive response to future large-scale displacement.¹⁰⁹

In more recent times, and on a smaller scale, the practice has also been employed by Australia through its ‘In-country Special Humanitarian Visa’. Australia provides access to protection for people who are subject to persecution yet are still within their home countries by opening up this visa to applicants who may self-refer from any country. However, the visa is commonly awarded to individuals who fall within designated priority areas and their cases referred to by the UNHCR and other organisations. Between 2017 and 2018, the program had 1,078 beneficiaries out of the 5,794 applications.¹¹⁰ While at the very least serving as proof of concept, the country has been criticised for having inadequate regulation and a concerning

¹⁰⁷ The United Nations Refugee Agency, ‘Desperate Journeys – Refugees and migrants arriving in Europe and at Europe’s borders’, January 2019, page 7, *UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees*, 2018

¹⁰⁸ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 4.

¹⁰⁹ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 13.

¹¹⁰ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 12.

lack of transparency in the priority areas designed by the government, thus having a disadvantageous effect on applicants who self-refer.¹¹¹

Nonetheless, it is evident from the above examples that the practice has immense potential in both large-scale as well as small -scale solutions. The beneficiaries of these programs were spared the arduous and desperate journeys that expose them to risks such as theft, human trafficking, death etc. all at the risk of being denied asylum. It is by virtue of this direct correspondence between the ‘access crisis’ and the solutions posed by the use of ‘in-country’ processing that the mechanism is under high consideration, as well as scrutiny, for potential usage. However, the practice has been faced with wide criticism surrounding its ‘inherent limitations’ i.e. its inconsistency with the ‘outside’ element of Article 1 of the Refugee Convention.¹¹²

The 1950 ICJ case discussed earlier presented a case of diplomatic asylum which, while admittedly differing from the practice of ‘in-country’ processing, shares the common feature of aiming to offer international protection to persons still within the borders of their country. As such, they share the same contention surrounding the inconsistency with the principles of State Sovereignty and Non-Interference.¹¹³ Thus, the reluctance of the international community to intervene prior to the fulfilment of the ‘outside’ element in cases of diplomatic asylum, translates into the basis upon which the criticism of ‘inherent limitation’ is born. Simply put, the inconsistency between the internal nature of operations of ‘in-country’ processing and the ‘outside’ requirement of Article 1 of the Refugee Convention effectively bar the legal recognition of the mechanism as a competent complementary pathway within the international refugee framework.

PART II

3.3. Effects of the inconsistency

Part I of the chapter has illustrated that there exists an inconsistency between the practice of ‘in-country’ processing and the ‘outside’ requirement of Article 1(A)2 of the Refugee Convention. This part of the chapter seeks to provide an assessment of the consequences of this inconsistency.

¹¹¹ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 12.

¹¹² Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 10.

¹¹³ Vark R, ‘Diplomatic asylum: Theory, Practice and the case of Julian Assange’, *Sisekaitseakadeemia Toimetised*, Vol. 11, 2012, page 4.

Firstly, the inconsistency established above does not necessarily amount to illegality, but it does remove the beneficiaries of ‘in-country’ processing outside the scope of the Refugee Convention.

This can be construed through the argument that there exists no barrier to the use of the mechanism, however, where a State chooses to implement protected entry procedures within a country of origin, the State is regarded as offering protection to those who do not meet the Convention definition of a refugee.¹¹⁴

This exclusion raises fundamental legal challenges for the beneficiaries of this mechanism. For instance, the subsequent exclusion from protection against the violation of recognized rights under the Convention.¹¹⁵ This is because if the beneficiaries fall outside the scope of the Convention definition of a refugee, which was carefully drafted with the recognition of a State’s need to admit within their territories only persons in genuine need of protection in mind,¹¹⁶ then such beneficiaries are not deemed as ‘persons in genuine need of protection’. This rationalised exclusion effectively translates into the presumption that such persons need not be accorded the rights recognized within the Convention, thus leaving said beneficiaries exposed to human rights violations within the host country. Furthermore, and of equally grave concern, this inconsistency serves as a deterrent factor to asylum seekers as their exclusion from the scope of the Convention, as discussed above, is a great disadvantage. Thus, the best option for such persons is to embark on the dangerous and illegal journeys at the risk of theft, human trafficking, people smuggling, death etc.

Furthermore, this lack of recognition operates in tandem with the risk of abuse or misuse of the pathway. For instance, The United States’ use of ‘in-country’ processing in Haiti within the early 1990s serves as a cautionary tale. In the early 1990s, the US Supreme Court lifted an injunction on the forced repatriation of interdicted Haitians. The mere existence of an in-country processing program was used as a justification for the return of interdicted Haitians without screening. This was done under the guise of being ‘an alternative to boat departure’, the reality is only a handful of people were able to avail themselves of it.¹¹⁷ As such, it is evident that when left unregulated the mechanism can result in the inadvertent increase in restrictive border control policy - further perpetuating the access crisis. However,

¹¹⁴ Higgins C, ‘Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees’ Policy Brief 8 Kaldor Centre for International Refugee Law, 2019, page 8.

¹¹⁵ Higgins C, ‘In-country programs: the procedure and politics of an additional pathway to protection’ in Research handbook on International Refugee Law, Edward Elgar Publishing Limited, 2019, page 51.

¹¹⁶ Weis P, ‘The Refugee Convention, 1951: The Travaux preparatoires analysed with a Commentary’, United Nations High Commissioner for Refugees, 1990, page 2.

¹¹⁷ Frelick B, ‘In-country refugee processing of Haitians’, *Refuge: Canada’s Journal on Refugees*, Vol. 21, No. 4, 2003, page 3.

being a relatively new concept, there is still time to forge the mechanism in the right direction. If anything, it is the failure to do so will result in the misuse of the mechanism as seen in this case.

As such, from the above discussion there is a clear need for the legal recognition of the use of ‘in-country’ processing as a protected entry pathway to enhance access to third country solutions despite its inconsistency with Article 1A (2) of the Refugee Convention. The last chapter elucidated an understanding of rights through the lens of capabilities and functionings. Capabilities being what persons have the ability to do and the latter being what the persons manage to achieve. In this instance, the asylum seekers’ desired functioning is the attainment of ‘refugee status’. As such, the relevant capability is the ability to attain such status. For the 2,275 asylum seekers that died at sea in their quest to arrive in Europe via the Mediterranean Sea in 2018, as well as many others who have fallen victim to the same, or any of the other risks discussed above, this capability was inaccessible - and this inaccessibility shall continue to be perpetuated in the absence of the legal recognition of ‘in-country processing’ as a protected entry pathway. Furthermore, this effectively translates into an inadequacy in the realisation of the right to asylum and ought to be redressed with utmost urgency. As has been illustrated above, both beneficiaries and asylum seekers who opt to take the dangerous journeys are at risk of numerous human rights violations. Thus, the failure of the international community in addressing this pressing issue is the continuous perpetuation of a crisis against one of the most vulnerable groups on earth.

3.4. Conclusion

This chapter of the dissertation sought to elucidate the status in-country processing under the 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol. It attempted to do so through two main parts - Part I, which centred around developing an understanding of the inconsistency between the practice of ‘in-country’ processing and the requirements of the Refugee Convention - specifically, the key inclusion element of being ‘outside the country of nationality or habitual residence’ as recognized under Article 1A (2). The section, in comparing ‘in-country processing’ with diplomatic asylum, concluded that the complementary pathway is in fact inconsistent with the Refugee Convention and further that the inconsistency was based on the principles of state sovereignty and non-interference. Ergo, for an asylum seeker to qualify for refugee status, the individual is required to have already fled from their country of origin. It is at this point that the ‘unproblematic nature’ of the flight element is proven to be a façade. It is widely recognized that asylum seekers are faced with

difficult, often dangerous or impossible, and frequently illegal journeys to their country of destination.¹¹⁸ These journeys are tainted with risks of theft, human trafficking, people smuggling and death among other crimes. Furthermore, this inaccessibility results in an increase in rampancy of illegal migration¹¹⁹ – a phenomenon that the international community can be presumed to be alive to given the prohibition of the rejection of asylum claims on the grounds of illegal entry as enshrined under Article 31 of the Refugee Convention.¹²⁰

Thereafter, Part II addressed the issues emerging from the aforementioned inconsistency such as the exclusion from the 1951 Convention rights, deterrence from the use of the pathway as well as its potential for abuse by states in the justification of further restrictive border control policies. Based on the aforementioned, this chapter concludes that the absence of legal recognition of ‘in-country’ processing as a protected pathway, as viewed from the lens of the capability approach, results in the inadequate realisation of the right to asylum and further exposes an already vulnerable group to risks of human rights violations. As such, the legal status of the mechanism ought to be reconsidered in light of the effects discussed above and its potential to revolutionise the asylum system.

It is against this background that the chapter recommends a re-evaluation of the principles of state sovereignty and non-interference with respect to the refugee regime and weighed against the negative effects as discussed above - arguing in the creation of an exception of the principle of non-interference that enables the global implementation of ‘in-country’ processing to enhance the safety of asylum seekers throughout the world. As such, the next chapter shall challenge the sufficiency and appropriateness of the principles of State Sovereignty and non-interference in addressing issues of global concern within a globalised world.

¹¹⁸ Kumin J, ‘In-country ‘refugee’ processing arrangements: a humanitarian alternative?’ in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007, page 80

¹¹⁹ Noll G, ‘From “protective passports” to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate’, United Nations High Commissioner for Refugees Working Paper No. 99, 2003, 2

¹²⁰ Article 31, The 1951 Convention relating to the status of refugees, 22 April 1954, 189 UNTS 137

CHAPTER FOUR: SOVEREIGNTY IN THE FACE OF GLOBALISATION

4.1. Introduction

Chapter Three of this dissertation tabled a nuanced discussion on the inconsistency between the requirements of Article 1 of the Refugee Convention and the growing practice of ‘in-country’ processing as a protected entry pathway. This exploration highlighted the reluctance of the international community to intervene in refugee matters prior to the fulfilment of ‘outside’ requirements despite the imminent risks faced by asylum seekers.¹²¹ At the heart of this reluctance lies the deeply entrenched principle of international law that is State Sovereignty. As explained in the 1950 determination of the International Court of Justice (ICJ), the respect for the principle of state sovereignty serves as a cornerstone guiding diplomatic international relations. However, in a world increasingly interconnected by the forces of globalisation, the suitability of traditional sovereignty in addressing transnational issues comes into question.¹²²

As such, this chapter of the dissertation aims at delving deeper into the notion of sovereignty, interrogating its historical evolution and assessing its relevance within the context of an increasingly globalised world. It shall do so in two parts. Part I will interrogate the nature of state sovereignty through an analysis of its historical development. Thereafter, Part II shall interrogate the compatibility of global governance in addressing issues within the increased globalisation of society.

Thus, by scrutinising the nature of state sovereignty through a historical lens and evaluating its compatibility with the realities of a globalised world, this chapter shall illuminate the emerging complexities in the international treatment of asylum seekers. Thus, setting the stage for a consideration of the potential of global governance as a viable alternative to the age-old notions of state sovereignty. Ultimately concluding that it is the best way forward for the international treatment of asylum seekers – with particular regard to the practice of ‘in-country’ protected entry pathway.

PART I

Part I of this chapter will interrogate the nature of state sovereignty through an analysis of its historical development and scholarly criticisms of the same.

¹²¹ Raufar S, ‘In country processing of refugees’, 9(2), Georgetown Immigration Law Journal, 1995, page 9.

¹²² Asylum Case, Colombia v. Peru, ICJ Judgment of November 20, 1950, Page 6.

4.2. State Sovereignty

The origins of the notion of ‘state sovereignty’ trace back to 1648 at the signing of the Peace of Westphalia – the Treaty of Munster.¹²³ The conclusion of the treaty saw the end of an eighty-year war and marked the formal international recognition of the sovereignty of the Republic of the Seven United Netherlands.¹²⁴ It is important to bear in mind that modern sovereignty was somewhat established prior to 1648 as sovereign equality was first practised at the 1555 Peace of Augsburg.¹²⁵ However, the impact of the peace treaties was to transcend the confines of Europe thus earning recognition as the birth year of the sovereign state.¹²⁶

The peace treaties intended to establish an order of equal, independent, sovereign states – thus rejecting any superior power be it personal, institutional or ideological, with respect to ethics or the law.¹²⁷ In essence, they created an order in which states are defined by their mutually recognized internal authority and their external independence. Hence the understanding of sovereignty came to be understood as the independence of a State in the face of other States.¹²⁸ This understanding is further elaborated upon in an arbitral decision in the 1928 *Island of Palmas* case where it was succinctly stated that sovereignty in relations between states signifies independence. This in regard to a portion of the globe, is the right to exercise therein the functions of a State to the exclusion of any other State.¹²⁹

The notion of sovereignty has since grown to play a central role in the realm of international relations.¹³⁰ This is apparent in the fact that most, if not all, other institutions and principles of modern international law rely directly or indirectly upon considerations of sovereignty.¹³¹ For instance, the problematic nature of the inconsistency that has been the subject of this dissertation is rooted in violation of the principle of non-interference which stems from the

¹²³ Beeson S, ‘Sovereignty’, Max Planck Encyclopedia of Public International Law, Oxford University Press, 2012, page 3.

¹²⁴ Schrijver N, ‘The changing nature of State Sovereignty’, British Yearbook of International Law, Vol. 70(1), 2000, page 3.

¹²⁵ Beeson S, ‘Sovereignty’, Max Planck Encyclopedia of Public International Law, Oxford University Press, 2012, page 4.

¹²⁶ Schrijver N, ‘The changing nature of State Sovereignty’, British Yearbook of International Law, Vol. 70(1), 2000, page 3.

¹²⁷ Schrijver N, ‘The changing nature of State Sovereignty’, British Yearbook of International Law, Vol. 70(1), 2000, page 3.

¹²⁸ Beeson M, ‘Sovereignty under siege: Globalisation and the state in Southeast Asia’, Third World Quarterly, 24:2, 2003, page 4.

¹²⁹ *Island of Palmas case*, in *Reports of International Arbitral Awards*, Vol. 2, 1949, para 829.

¹³⁰ Beeson M, ‘Sovereignty under siege: Globalisation and the state in Southeast Asia’, Third World Quarterly, 24:2, 2003, page 1.

¹³¹ Beeson S, ‘Sovereignty’, Max Planck Encyclopedia of Public International Law, Oxford University Press, 2012, page 2.

understanding of State Sovereignty.¹³² As such, it is considered as the basic constitutional doctrine of the law of nations.¹³³ However, the principle has been subject to criticisms of impotence with some scholars arguing that it is a ‘word which has an emotive quality yet lacking meaningful specific content.’¹³⁴

Whilst such criticisms may be rooted in the much contested ‘equality of states’ that is theoretically presumed from the notion yet questionably practised in reality for instance in the blatant disregard of the principle by states that refuse to recognize the sovereignty of other states such as the Russian narrative against Ukraine¹³⁵ as well as other colonial and imperialist regimes. The criticisms could also stem from the argument that the term sovereignty lacks clear and universally acceptable parameters due to inconsistencies in its application. The word sovereignty is derived via the old French word ‘*soverainete*’ from mediaeval Latin ‘*supremitas*’. As such, the understanding of sovereignty is often equated to supremacy and absolute authority thus having the potential to result in extreme interpretations of the concept thus the emergence of a rich variation of the qualifications of sovereignty – such as territorial, internal, external, absolute, relative, functional etc. across time periods and contexts.¹³⁶ Beeson argues that historical variations of the concept differ in three main aspects – the subject of sovereignty, the nature of sovereignty and the source of sovereignty.¹³⁷

Schrijver and Goskel argue that the aforementioned variability is proof of the dynamic nature of sovereignty as a concept.¹³⁸ The nature of sovereignty is an extremely contentious matter – especially in light of the increasing globalisation of the world. Thus emerges another criticism about the suitability of state sovereignty, as traditionally understood, may be insufficient in addressing modern challenges that transcend national borders. Evidence of this insufficiency is the fact that modern international law includes a broader circle of participants such as international organisations – thus going beyond the traditional state-centric

¹³² Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 2.

¹³³ Schrijver N, ‘The changing nature of State Sovereignty’, *British Yearbook of International Law*, Vol. 70(1), 2000, page 6.

¹³⁴ Schrijver N, ‘The changing nature of State Sovereignty’, *British Yearbook of International Law*, Vol. 70(1), 2000, page 6.

¹³⁵ Howlett M, ‘Expert Comment: Three decades on, Ukraine, a sovereign country, is fighting a war for independence’, University of Oxford, <https://www.ox.ac.uk/news/2023-02-22-expert-comment-three-decades-ukraine-sovereign-country-fighting-war-independence> on 22nd February 2023.

¹³⁶ Beeson S, ‘Sovereignty’, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012, page 2.

¹³⁷ Beeson S, ‘Sovereignty’, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012, page 2.

¹³⁸ Goskel N, ‘Globalisation and the State’, *Perceptions: Journal of International Affairs* 9(1), 2004, page 2.

participation in international law. This gradual shift can be seen in the critical role of NGOs in the conclusion of the Landmines Convention¹³⁹ in which several non-governmental organisations, with the support of like-minded countries such as Canada, and Norway, commenced negotiations among 90 states in 1997 outside the framework of the UN Disarmament Conference. This process was successfully concluded in December 1997 when 121 States signed a new treaty totally prohibiting anti-personnel landmines.¹⁴⁰ Another factor necessitating the reconsideration of the nature of state sovereignty can be found in the fact that the law is being increasingly shaped by considerations of universal values such as a sense of humanity and human rights as opposed to the prior exclusive focus on peace – as can be construed from the origins of sovereignty.¹⁴¹

As mentioned above, the discourse on sovereignty links regulation and geography through linking power with space in bounded state-territorial parcels – hence setting up an inside-outside dichotomy. It is against this backdrop that the notion of external sovereignty, and the principle of non-interference, arise as the understanding that a State is not subject to the legal power of another State. Thus raising, among many issues, the inconsistency between the practice of ‘in-country’ processing and the foundational precepts of public international law as is the core issue of this dissertation. However, the discussion above highlights the importance of the flexibility of the concept of sovereignty – allowing it to evolve to suit different scenarios accordingly. This necessity becomes increasingly clear when viewed through the lens of globalisation.

Globalisation is the spread and intensification of cultural, economic and social relations across international borders.¹⁴² In essence, it signifies the increase in the importance, volume, speed and scope of cross-border flow of ideas, money, commodities and people.¹⁴³ Some have argued that the term may be the ‘leitmotif’ of our age.¹⁴⁴ Nonetheless, the importance of the understanding of modern globalisation as a phenomenon arising from exponential increment must not be understated. This is due to the fact that globalisation, in itself, is not an entirely new concept – its presence is evident even in the ancient days when man travelled across vast

¹³⁹ Schrijver N, ‘The changing nature of State Sovereignty’, *British Yearbook of International Law*, Vol. 70(1), 2000, page 18.

¹⁴⁰ Schrijver N, ‘The changing nature of State Sovereignty’, *British Yearbook of International Law*, Vol. 70(1), 2000, page 15.

¹⁴¹ Schrijver N, ‘The changing nature of State Sovereignty’, *British Yearbook of International Law*, Vol. 70(1), 2000, page 25.

¹⁴² Goskel N, ‘Globalisation and the State’, *Perceptions: Journal of International Affairs* 9(1), 2004, page 3.

¹⁴³ Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 1.

¹⁴⁴ Lang M, ‘Globalization and Its History’, *the Journal of Modern History*, Vol. 78, No. 4, 2023, page 1.

lands for trade, agriculture and other forms of commerce. Its modern characteristic, however, is derived from the contributions of modern science and technology.¹⁴⁵

It is therefore evident that the primacy of the state-centric international structure does not conform with globalisation's facilitation of a multi-centric world of transnational actors and transboundary problems.¹⁴⁶ Climate change, for instance, has been identified as a common concern for humankind yet it is a problem which ought to be resolved within national jurisdictions despite the transboundary nature of its causes and effects. As such, the achievement of any substantial improvement of this crisis would require major efforts of political will to change production and consumption patterns, thus, requiring comprehensive and intensive collaboration not only between governments and multilateral institutions but also scientific and consumer organisations amongst others.¹⁴⁷

As such, there is growing concern regarding the impact of this phenomenon on the status and relevance of state sovereignty in the modern age. Scholarly perspectives on this issue can be broadly categorised into three main schools of thought – the hyperglobalists, the sceptics and the transformationalists. As the term would suggest, hyperglobalist thinking is tainted by extremism. Hyperglobalists posit that the growing interconnectedness arising from globalisation entirely negates the significance of territorial boundaries – thus, effectively contributing to the demise of state sovereignty.¹⁴⁸ It is clear that this view assumes that the concept of sovereignty is static as well as clearly underestimating the salient role of the state in organising society at large.

Sceptical scholars, on the other hand, argue that the impact of globalisation on state sovereignty is in actuality, minute and greatly exaggerated. While this may seem like an underestimation of the impact of globalisation, its plausibility stems from the argument that the state is not the victim of this process but rather the main architects behind it.¹⁴⁹ As such, this view recognizes the central role played by States in the promotion of cross-border links.

¹⁴⁵ Nkang J, Eneji T, 'An Appraisal of Globalization and its History', *Multidisciplinary Research Journal*, Vol. 11, No. 3, 2019, page 6.

¹⁴⁶ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 3.

O'Grady C, 'Understanding Sovereignty in a Globalised World' in *Globalisation and Seed Sovereignty in Sub-Saharan Africa*, International Political Economy Series, 2019.

¹⁴⁷ Schrijver N, 'The changing nature of State Sovereignty', *British Yearbook of International Law*, Vol. 70(1), 2000, page 15.

¹⁴⁸ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 4.

¹⁴⁹ Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012, page 4.

When viewed from this lens, concerns over globalisation as neo-colonialism arise as while globalisation has been identified as an agent of growth in the Global North, to the Global South it has been an agent of underdevelopment – thus having inconsistent impact on states. Globalisation has been critiqued as an extension of the instrumentalities of Western Capitalism and imperialism.¹⁵⁰ As such, modern globalisation has the potential effects of pronounced inequality, oppression and exploitation of the less powerful countries - a neo-imperial tool of the West.¹⁵¹ Thus, caution ought to be exercised to mitigate these risks and create an equal international community.

Lastly, the transformationalist view provides a middle ground that while globalisation has had a significant impact on the notion of sovereignty, the situation is not as sinister as the hyperglobalists argue. They reject the tendency to juxtapose sovereignty and globalisation – but rather view the role of the sovereign state in international relations as dynamic and merely adapting to the fast-paced globalised world.¹⁵² This dissertation aligns itself with this school of thought – recognizing that as social processes change, the spatial organisation of power and social relations may be expected to adjust accordingly.¹⁵³ As such, the transboundary nature of factors such as environmental issues or recognition of the access crisis ought to warrant a paradigm shift within the international community. The inadequate treatment of such issues serves as a testament to the limits of public international law - specifically, the notion of state sovereignty as a static concept, thus, negating the sceptic understanding that the impact of globalisation is minute. It is important to emphasise that this dissertation calls not for the obsolescence of state sovereignty but merely for flexibility in its application where necessary as so as to ensure the efficiency of public international law in addressing a variety of issues. As Cicero once said, “Strict law is often a great injustice”. The injustice in this case being, as has been numerous referred to, the plight of asylum seekers in taking up dangerous and desperate journeys in hopes of attaining international protection. Thus, the failure in adequate protection of asylum seekers against such journeys amounts to inadequate security of the internationally recognized right to asylum - especially when viewed through the lens of the capability approach as well as in the eyes of Cicero.

¹⁵⁰ Nkang J, Eneji T, ‘An Appraisal of Globalization and its History’, *Multidisciplinary Research Journal*, Vol. 11, No. 3, 2019, page 12.

¹⁵¹ Nkang J, Eneji T, ‘An Appraisal of Globalization and its History’, *Multidisciplinary Research Journal*, Vol. 11, No. 3, 2019, page 19.

¹⁵² Reddy S, ‘Globalisation and the Sovereignty of the Nation State’, *World Affairs: The Journal of International Issues*, 16(4), 2012, page 3.

¹⁵³ Hudson A, ‘Beyond the borders: Globalisation, Sovereignty and Extra-territoriality’, *Geopolitics* Vol.3 No. 1, 1998, page 3.

Thus, this dissertation rejects the hyperglobalist allegations of the imminent decline of the state as they maintain a central role in the implementation and accountability governance directives.¹⁵⁴ The notion of the state as a key player in international law was a brilliant decision as the state is the most efficient manner in which the world at large can move towards shared goals by implementing them internally. Furthermore, it is predicated on pre-existing boundaries which form the basis of the concept and help create an order upon which further developments in international law may flow - for instance, the development of an alternative means of addressing issues of a transboundary nature. However, being wary of the sceptic criticisms of the potential harm arising from globalisation, the mechanism of addressing such issues ought to be carefully crafted.

PART II

Part II shall interrogate the compatibility of global governance in addressing issues within the increased globalisation of society.

4.3. Global Governance

Having established that the notion of state sovereignty is inadequate in addressing issues of global concern, the task that remains is finding an alternative approach of governing this increased interconnectedness and interdependence. Thus enters the notion of global governance. Global governance refers to the management of relations between states. Governance, in this sense, entails ensuring that the art of governing is morally defensible and efficient. It does not imply the existence of one supreme institution but rather a set of interlocking but separate bodies that share a common purpose.¹⁵⁵ Thus, whilst not entirely clearing the concerns about the potential abuse of globalisation as a neo-colonial tool, there is space within the framework of global governance to provide for a system of checks and balances through the creation of different bodies with a common purpose but possibly different mandates within the same.

Koenig-Archibugi rightly notes that the best starting point for examining the demand of global governance is the state.¹⁵⁶ In doing so, he attributes the insufficient government performance of functions to three factors – interdependence, resource deficiency and

¹⁵⁴ Hudson A, 'Beyond the borders: Globalisation, Sovereignty and Extra-territoriality', *Geopolitics* Vol.3 No. 1, 1998, page 18.

¹⁵⁵ Halliday F, 'Global Governance: Prospects and Problems', *Citizenship Studies*, Vol. 4 No. 1, 2000, page 1.

¹⁵⁶ Koenig-Archibugi M, 'Mapping Global Governance' in *Governing Globalization: Power, Authority and Global Governance*, Polity Press, Cambridge UK, 2003, page 1.

unwillingness, the first two being problems of capacity whilst the last is a problem of motivation.¹⁵⁷ Even from this point in the discussion, there is an evident overlap between the capacity-related factors and the notion of globalisation and an even bigger overlap between all the factors and the international approach to dealing with refugees. The factors of resource deficiency and unwillingness are fairly straightforward thus negating the need for further elaboration. However, he particularly explains the interdependence factor as ‘the presence of external effects barring governments from adequately performing their tasks because of factors originating outside their jurisdiction’. He further states that since in many instances the external effects are reciprocal, it then becomes appropriate to view these effects as an interdependence.¹⁵⁸ Thus, in tandem with the other factors, generating a demand for governance above the level of individual states.

This demand for governance above the level of individual states is evident in the refugee regime in that – the ‘outside’ requirement of Article 1 of the 1951 Refugee Convention effectively amounts to ‘the presence of external effects barring governments from adequately performing their tasks because of factors originating outside their jurisdiction’. Refugee journeys typically involve a minimum of two states – a sending state, and a receiving state. By virtue of this mere factor, the nature of refugee law is inherently transboundary. Furthermore, flowing the discussion of the capabilities approach in Chapter two, the risks associated with the outside requirement effectively raises questions about the sufficiency of the protection of the international right to seek asylum as well as a general disregard for the universal values of human dignity and safety of the asylum seekers. As such, the external effects are barring the States from effectively securing the right to seek and enjoy asylum. Notwithstanding the fact that the pooling of resources among states would enhance the creation of a safer asylum system and the unwillingness of many States to open up their borders to many in need for international protection. It suffices that the demand elements discussed are present within the refugee system.

Thus, the potential of global governance in addressing the problem of dangerous and desperate journeys is evident – as well as in other issues of a similar nature. This is due to its ability to seemingly bypass the requirements of state sovereignty where necessary without annihilating the international system in its entirety. Despite this potential, Halliday among

¹⁵⁷ Koenig-Archibugi M, ‘Mapping Global Governance’ in *Governing Globalization: Power, Authority and Global Governance*, Polity Press, Cambridge UK, 2003, page 3.

¹⁵⁸ Koenig-Archibugi M, ‘Mapping Global Governance’ in *Governing Globalization: Power, Authority and Global Governance*, Polity Press, Cambridge UK, 2003, page 3.

other scholars duly recognize that the promotion of global governance is simultaneously a necessary and daunting task.¹⁵⁹ This is not only because of the challenges in convincing key actors as well as the world at large about the need for flexible application of state sovereignty, but also because of the foreseeable risks of creating such a system predicated upon the already arguably unjust international system (as has been extensively discussed under the Third World Approaches to International Law debate). Scholars have raised numerous concerns over globalisation as a form of neo-colonialism or a tool by the West for the continued facilitation of imperialist regimes. As such, this raises concerns about the ability of global governance in the facilitation of a system in which such risks are mitigated.¹⁶⁰ Nonetheless, this change remains necessary as the safety of people [in this case, asylum seekers] shall be the highest law - as was also said by Cicero.

The debate surrounding the inherent inequality of global governance ought to be faulted onto the establishment of the entire system of international as is - thus, the creation of a system that does not bear this inherent flaw would require the rebuilding of public international law from ground one - a task that is arguably impossible in this time and one that would bear great risks in the short-term (both for asylum seekers and for the world at large) as opposed to the possibility of amending the flaws within the system in equalising efforts such as addressing the challenge of permanent members of the United Nations Security Council. Thus, this dissertation finds that if caution is exercised, the world can look forward to a refugee system in which asylum seekers need not assume the risks of death in order to survive – a rather ironic phenomenon. The best chances of this, however, lie in the implementation of global governance in addressing the refugee crisis. As for the inherent flaws of the system of public international law, the noble quest for a substantive recognition of the equality of states continues.

4.4. Conclusion

This Chapter sought to delve deeper into the notion of sovereignty i.e. independence in the face of other states, as the rationale behind the reluctance of intervention by the international community in asylum issues prior to the satisfaction of the ‘outside’ element. In doing so, it challenged the suitability of sovereignty in addressing issues within a globalised world as summarised below.

¹⁵⁹ Halliday F, ‘Global Governance: Prospects and Problems’, *Citizenship Studies*, Vol. 4 No. 1, 2000, page 15

¹⁶⁰ Reddy S, ‘Globalisation and the Sovereignty of the Nation State’, *World Affairs: The Journal of International Issues*, 16(4), 2012, page 19.

Firstly, the chapter interrogated the nature of state sovereignty through its historical development. In this interrogation, the chapter elucidated that sovereignty ought to be understood as a dynamic concept as its application varies over different moments in its historical development. It further highlighted that this dynamic understanding of state sovereignty allows for the evolution of the notion to suit changes in the modern world such as the increased globalisation of the 21st Century. This was proven through a discussion of various shifts in international relations such as the shift from states as the exclusive actors to the involvement of international organisations and non-governmental organisations in shaping the law – as evidenced by the Ottawa process.

As such, the chapter interrogated the compatibility of the dynamic nature of state sovereignty in light of the increasing globalisation of society. It highlighted that in instances where state sovereignty is ineffective in addressing issues stemming from transboundary transactions or phenomena such as climate change – or more relevantly, the access crisis, the notion of global governance gains momentum. In light of the above discussion, the chapter concludes that the notion of state sovereignty is insufficient in addressing issues of global concern such as the protection of asylum seekers against desperate and dangerous journeys.

Consequently, the chapter recommends that ‘in-country’ protected entry pathways be exempted from the principle of State Sovereignty. Further, that the mandate be left under the purview of global governance as it is the best suited alternative mode of governance in this instance since. However, in execution of this recommendation, the dissertation emphasises that caution is exercised in mitigating the risks of neo-colonialism and that intricacy in ensuring that bypassing the notion of state sovereignty in certain instances need not result in the total demolition of the international legal system as we know it.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This final chapter will conclude this study on the inconsistency of the practice of in-country processing with the requirements of the 1951 Refugee Convention. It shall do so by summarising the key research findings in relation to the research questions - that is, addressing the principle of state sovereignty as the rationale behind the ‘outside’ requirement of Article 1 of the 1951 Refugee Convention as well as critically analysing the impact of an increasingly globalised world on the suitability of state sovereignty. Thereafter, the chapter

shall delve into a discussion detailing the value and contribution of the findings of this research as seen through an argument in defence of in-country processing despite its inherent limitations. It will also address generalisation as a limitations of the study and propose opportunities for future research. It shall then wind down by concluding the discussions of the chapter and the dissertation at large.

5.2. Overview of the Study

5.2.1. Research questions

This study was a qualitative doctrinal analysis that sought to evaluate the consistency of ‘in-country’ asylum processing with the ‘outside’ requirement of Article 1.A(2) of the 1951 Convention relating to the Status of Refugees. Article 1.A(2) consists, *inter alia*, of a requirement that a refugee ‘is outside his country of nationality’. This requirement results in the embarkment of dangerous and often illegal journeys faced by many asylum seekers in their quest for international protection - also known as the *access crisis*. As such, scholars have turned into consideration of ways through which the safety of asylum seekers can be enhanced. Thus, the mirror-image solution to the problem of dangerous and illegal journeys stemming from a requirement that the refugee has already fled from their country of origin into their destination country, is the legitimization of such journeys which is provided by in-country asylum processing. The practice of in-country processing arises where protected entry procedures, i.e. mechanisms that allow asylum seekers to apply for entry into another country for purposes of accessing refugee protection under international law are implemented within an asylum seeker’s country of origin. As such, the research question arose as a consideration of in-country processing as a solution to the access crisis.

However, the use of in-country processing as a protected entry pathway has been under scrutiny in its consideration as a solution to the access crisis due to ‘inherent limitations’ by virtue of its internal operations on foreign soil contrary to the principle of state sovereignty. As such, the central questions of this research were:

- (i) What is the rationale behind the “outside” requirement of Article 1 of the 1951 Refugee Convention
- (ii) Whether in-country processing can be exempted from the “outside” criteria of Article 1 of the Refugee Convention.

5.2.2. Findings of the study

The findings of this research indicate that the practice of ‘in-country’ asylum processing is in fact inconsistent with the requirements of the 1951 Convention relating to the Status of Refugees. This is due to the internal nature of ‘in-country’ protected entry pathways as opposed to the Article 1 requirement that the asylum seeker ‘be outside his country of nationality’. Furthermore, this research finds that the rationale behind the ‘outside’ requirement is rooted in respect for the principle of state sovereignty and the subsequent principle of non-interference. Consequently, it is highly safeguarded by the international community.

However, this research further finds that this inconsistency results in the exclusion of the use of in-country processing as a protected entry pathway from the established international refugee protection framework. This exclusion has numerous negative effects on the refugee system in that prospective asylum seekers compromise their safety from crimes such as human trafficking and risks such as death by sea – as well as beneficiaries of the pathway who risk exclusion from the protected rights as recognized in the 1951 Refugee Convention. Chapter Two of the dissertation viewed this access crisis through the lens of the capability approach in which the justice of a system is measured on an assessment of what individuals within the system are able to do. As such, this research finds that the difficulty or inability of asylum seekers to travel safely and legally arrive at international protection amounts to a failure in justice within the international response to the access crisis. As such, in light of this discussion and the increasing rate of globalisation, this dissertation calls for a harmonisation of this inconsistency through the incorporation of ‘in-country processing’ as an exception to the principle of state sovereignty. It is by this analysis that this research calls for the use of global governance in the regulation of international asylum systems - so as to facilitate a level of global coordination (responsibility-sharing) by which the safety and certainty of refugee journeys can be enhanced.

5.3. Contribution of the Study

This research hopes to have contributed to the existing body of knowledge surrounding refugee issues – more specifically with regards to addressing gaps in the consideration of the potential of complementary pathways to international protection. This dissertation sought to present an argument in favour of the use of ‘in-country’ processing as a protected entry

pathway despite its ‘inherent’ limitations as termed by various academics. As such, this research is unique in that it attempts to integrate the understanding of refugee migration into the conversation surrounding globalisation and global governance thus providing a feasible and specific way forward to the heavily recognized ‘need for a harmonised asylum system’. The adoption of such an approach would aid in the prevention of dangerous and illegal journeys that expose asylum seekers to various human rights violations.

5.4. Limitations

This research has shown that due to the requirements of state sovereignty, the use of ‘in-country’ processing as a protected entry pathway is inconsistent with the requirements of the Refugee Convention. Therefore, the dissertation calls for the exemption of refugee migration from the requirements of state sovereignty and instead fall within the ambit of global governance. However, further research on the use of global governance as a solution and its potential in enhancing the protection and safety of asylum seekers is needed.

Furthermore, this research is limited in terms of generalisation in that the dissertation only looks into the United Nations Refugee Framework due to time constraints. As such, further research on different refugee systems such as the Common European Asylum System (CEAS) and their treatment of complementary pathways such as protected entry pathways is needed due to the current limitations of the study.

5.5 Conclusion

This study on the inconsistency between the practice of ‘in-country processing’ and the requirements of the 1951 Refugee Convention has elucidated the inadequacies of adherence to the principle of state sovereignty in an increasingly globalised world. Furthermore, it has proposed the employment of global governance in issues in which state sovereignty is limited in its capacity to sufficiently address, that is, transboundary issues such as environmental crises and migration crises. As such, this dissertation hopes to have contributed to the existing body of knowledge by addressing gaps in the consideration of the potential of complementary pathways to international protection - specifically, ‘in-country’ PEPs and the arguments of ‘inherent’ limitations. The chapter has also acknowledged generalisation of asylum systems as a limitation of this research and called for further analyses on differing systems such as the Common European Asylum System (CEAS) as well as a need for further research on the application of global governance to refugee migrations.

5.6. Recommendations

Thus, in light of the extensive discussions in the above and the dissertation at large, this dissertation is of the opinion that the recommendation below ought to be made in the interest of adequately securing the right to asylum:

1. The practice of ‘in-country’ processing of asylum claims be exempted from the application of State Sovereignty. This is in light of the aforementioned inconsistency between in-country processing and the requirements of the Refugee Convention and the subsequent exclusion of beneficiaries from the international refugee framework. Having elucidated the risks arising from the ‘outside’ requirement, the legal recognition of ‘in-country’ processing is necessary for the enhanced protection of asylum seekers. As has been discussed in chapter four, this is possible through the application of global governance in addressing the access crisis. Thus, the conclusion of an additional protocol extending application of the framework to in-country protected entry pathways would be instrumental in sufficiently addressing the access crisis.

BIBLIOGRAPHY

Chapter in Book

Claasen R, 'Human dignity in the capability approach' in *The Cambridge Handbook of Human Dignity Interdisciplinary Perspectives*, Cambridge University Press, 2015

Gaspar D, 'What is the capability approach? Its core, rationale, partners and dangers' in *Development Ethics*, 1st Edition, 2015,

Higgins C, 'In-country programs: the procedure and politics of an additional pathway to protection' in *Research handbook on International Refugee Law*, Edward Elgar Publishing Limited, 2019

Koenig-Archibugi M, 'Mapping Global Governance' in *Governing Globalization: Power, Authority and Global Governance*, Polity Press, Cambridge UK, 2003.

Kumin J, 'In-country 'refugee' processing arrangements: a humanitarian alternative?' in *Innovative Concepts for Alternative Migration Policies*, Amsterdam University Press, 2007.

O'Grady C, 'Understanding Sovereignty in a Globalised World' in *Globalisation and Seed Sovereignty in Sub-Saharan Africa*, International Political Economy Series, 2019.

Journal Articles

Beeson M, 'Sovereignty under siege: Globalisation and the state in Southeast Asia', *Third World Quarterly*, 24:2, 2003.

Beeson S, 'Sovereignty', *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012.

Clark D, 'The Capability Approach: Its Development, Critiques and Recent Advances' *Global Poverty Research Group*.

Dastyari A, Ghezelbash D, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures', *International Journal of Refugee Law*, 32(1), 2020

Fragomen Jr. A, 'The Refugee: A Problem of Definition', *Case Western Reserve Journal of International Law*, Vol. 3 Issue 1, 1970

Fredman, S, 'Human Rights Transformed: Positive Rights and Positive Duties', *Oxford Legal Studies Research Paper No. 38/2006*, Oxford University Press, Oxford.

Frelick B, 'In-country refugee processing of Haitians', *Refuge: Canada's Journal on Refugees*, Vol. 21, No. 4, 2003.

Goskel N, 'Globalisation and the State', *Perceptions: Journal of International Affairs* 9(1), 2004.

Halliday F, 'Global Governance: Prospects and Problems', *Citizenship Studies*, Vol. 4 No. 1, 2000.

Heijer M, 'Diplomatic asylum and the Assange Case', *Leiden Journal of International Law*, Vol. 26, No. 2, 2013

Hudson A, 'Beyond the borders: Globalisation, Sovereignty and Extra-territoriality', *Geopolitics* Vol.3 No. 1, 1998.

Lang M, 'Globalization and Its History', *the Journal of Modern History*, Vol. 78, No. 4, 2023.

Nkang J, Eneji T, 'An Appraisal of Globalization and its History', *Multidisciplinary Research Journal*, Vol. 11, No. 3, 2019

Noll G, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', Oxford University Press (2005)

Nussbaum M, "Human Rights and Human Capabilities," *Harvard Human Rights Journal*, 20, 2007.

Raufer S, 'In country processing of refugees', 9(2), *Georgetown Immigration Law Journal*, 1995.

Reddy S, 'Globalisation and the Sovereignty of the Nation State', *World Affairs: The Journal of International Issues*, 16(4), 2012.

Robeyns I, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities', *Feminist Economics*, 2003.

Schokkaert E, "The Capabilities Approach." *Social Science Research Network*, 2008.

Schrijver N, 'The changing nature of State Sovereignty', *British Yearbook of International Law*, Vol. 70(1), 2000.

Vark R, 'Diplomatic asylum: Theory, Practice and the case of Julian Assange', *Sisekaitseakadeemia Toimetised*, Vol. 11, 2012

Vizard P, Fukuda S, Elson D, "Introduction: The Capability Approach and Human Rights", *Journal of Human Development and Capabilities*: Vol 12, No 1, January 2024.

Wagner M, Katsiaficas C, 'Networks and mobility: a case for complementary pathways', *Bonn International Center for Conversion (BICC)*, 2021

Working papers, Discussion Papers and Research Papers

Higgins C, 'Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees' Policy Brief 8 Kaldor Centre for International Refugee Law, 2019

Noll G, 'From "protective passports" to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate', United Nations High Commissioner for Refugees Working Paper No. 99, 2003.

Noll G, et al., 'Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure', European Commission, 2002.

Wood T, 'The role of complementary pathways in refugee protection', Reference Paper for the 70th Anniversary of the 1951 Refugee Convention, 2020

United Nations Documents

The United Nations Refugee Agency, 'Desperate Journeys – Refugees and migrants arriving in Europe and at Europe's borders', January 2019.

UN High Commissioner for Refugees (UNHCR) Global Compact on Refugees, 2018

UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention', April 2001.

UNHCR, 'Three-Year Strategy on Resettlement and Complementary pathways', June 2019

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', December 2011

Weis P, 'The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary', United Nations High Commissioner for Refugees, 1990

Internet Sources

Fetrat S, 'One Year On, the Taliban Still Attacking Girl's Right to Education', Human Rights Watch <https://www.hrw.org/news/2023/03/24/one-year-taliban-still-attacking-girls-right-education>, March 24, 2023