(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?

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Abstract
Europe’s extraordinary response to those fleeing the Russian invasion of Ukraine in February 2022 has prompted many criticisms of Europe’s treatment of other refugees, and indeed people of colour and members of ethnic minorities fleeing Ukraine. While stark, this differentiated response in not unusual: The global refugee regime treats different refugees differently, as a matter of course. Refugees often encounter racialized migration controls, and systems which privilege some refugees over others. The article seeks to clarify when these practices violate the international legal prohibitions on discrimination on grounds of race and nationality. To do so, it focuses on race discrimination in general international human rights law, clarifying the interaction between general human rights principles and instruments, and the specialist instrument in the field, the International Convention on the Elimination of all Forms of Racial Discrimination. We identify how differences in treatment on grounds of nationality may engage the prohibition on race discrimination both directly (in particular when nationality equates to national origin) or indirectly. Concerning nationality discrimination, the article focuses in particular on the added value of Article 3 of the 1951 Convention on the Status of Refugees, which obliges states to ‘apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.’ We examine Article 3 both within the overall scheme of the Refugee Convention and as a source to guide interpretation of international human rights norms.

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Introduction

In commentary on Europe’s extraordinary response to those fleeing the February 2022 Russian invasion of Ukraine, polarised views have been expressed on the question whether the starkly different treatment is legally discriminatory. Ukrainian nationals may enter the European Union (EU) without visas (since 2017), and the EU has for the first time triggered its Temporary Protection mechanism, meaning most of those who have fled Ukraine enjoy a quasi-automatic temporary right to stay, work and social benefits, effectively in an EU Member State of their choosing.1 The contrast with the EU’s ‘normal’ treatment of protection seekers could not be starker: Usually, protection seekers lack legal means to enter the EU, and so must do so irregularly, facing possible pushbacks, border violence, and detention. They cannot claim asylum where they wish, but rather are liable to further coercive measures under the Dublin System, and then asylum procedures with rights-restrictions built in, often protracted and with unpredictable outcomes.2

The exodus from Ukraine was also accompanied with documented reports of racialized violence against some individuals fleeing Ukraine,3 prompting a statement from the African Union urging all ‘to show the same empathy and support for all people fleeing war notwithstanding their racial identity.’4 Some European politicians have expressed their support for Ukrainian refugees in racialized terms,5 and even qualified the welcome for Ukrainians by explicitly denying welcome to Roma from Ukraine.6 Meanwhile, border violence and illegal pushbacks against other protection seekers continue across Europe. While those fleeing Ukraine enter Poland with relative ease, the Polish-Belarussian border remains the site of unlawful border violence against protection seekers from Syria and Afghanistan in particular.7 And Europe’s deeply ambivalent response to the last ‘refugee crisis’ triggered by arrivals of refugees from Syria in 2015 stands as a clear reminder that the Ukrainian response has been exceptional. Little wonder that the stark difference in treatment between the Ukrainians and the rest has been understood as racialized.

To some commentators, the differentiated treatment for those fleeing Ukraine is not racial discrimination, as offering special treatment to one nationality over others is par for the course in the refugee regime raising no questions of unlawful discrimination.8 Others concede the applicability of non-discrimination norms, but accept relatively easy justifications,9 or acknowledge the ambiguity of the international norms in this field.10 What is remarkable is perhaps the immediate cries of discrimination, given that the global refugee regime has long been pervaded by stark differences in treatment on grounds of nationality and deeply racialised practices.11 Differentiation between refugees is hardly new, yet despite its prevalence, has only been episodically considered by scholars of the refugee regime.12 Deeper legal assessment of these questions has been lacking, with the notable exception of the vital work of E Tendayi Achiume recentring race in international legal scholarship generally,13 and in refugee law in particular.14 We draw on her insights,
and our previous work critiquing legal interpretations attempting to silo race and nationality discrimination. This article focuses on the legal wrong of discrimination, an admittedly limited optic on the many harmful and pervasive manifestations of racism. But precisely because of the ubiquity of differentiation in the global refugee regime, we argue that doctrinal tools to identify unlawful discrimination are important.

Treating refugees differently on grounds of nationality is at least in part reflective of the constitutive nature of refugeehood, in that it reflects an assessment of the absence of state protection in a particular country. However, the refugee regime is also characterised by a range of other differentiation between refugees on grounds of their nationality, and indeed race. Inevitably, political factors, both national and international, drive differentiated state and public responses to different groups of people fleeing persecution and war. The best scholarship in political science successfully explains the differentiated response to different groups of refugees as a factor of ethnic affinity between host populations and refugee populations, and the geopolitical relationship between the host state and the state driving out refugees. Given that differentiation is so prevalent, we argue that a reading of international norms that is informed by a sound appreciation of the wrong of discrimination is urgently needed, in order to clarify when differences in treatment are prohibited, and when equal treatment is required as a matter of international law.

In principle, non-discrimination applies to nationals and non-nationals alike, and to states’ migration control practices in general. Nonetheless, both the text and interpretation of key human rights instruments acknowledge that states may control the entry and residence of non-nationals, and that non-discrimination cedes to migration control in at least some respects. In this regard it has been observed that ‘the principle of equality is significantly restricted in the field of immigration’. These legal questions pertaining to discrimination in migration controls, and in particular between refugees, are rarely litigated, but we draw on a range of legal sources to set out the contours of an emerging consensus in international law in order to offer a framework to analyse whether differences in treatment are reflective of assessment of country of origin conditions (and so inevitably part of determining refugeehood); unjustified discrimination on grounds of nationality; or in fact race discrimination, a practice international law demands be ‘eliminated’ rather than celebrated.

The article proceeds in two parts: Part I focuses on race discrimination in general international human rights law, clarifying the interaction between general human rights principles and instruments, and the specialist instrument in the field, the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). The arguments in this part have the widest possible personal scope of application, as they apply to all persons, irrespective of refugeehood. Part II turns to nationality discrimination, a practice that pervades international law and is not always treated with suspicion. And yet, when it comes to refugees, non-discrimination structures the entire Refugee Convention, and in particular Article 3 provides:

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.
Part II focuses on Article 3 both within the overall scheme of the Refugee Convention and as a source to guide interpretation of international human rights norms. Accordingly, the analysis in this part applies to Convention refugees, and to others by way of employing Article 3 as an interpretative tool to elucidate general human rights norms. No doubt there is much more to be said about other grounds, in particular religious discrimination and the intersections between religion, ethnicity and nationality in the global refugee regime. We do not assess the starkest discriminatory restriction shaping the Ukrainian refugee situation, that concerning gender. There is much more to be said about intersectional discrimination in this context also, but this article focuses on race and nationality.

In terms of our use of the term ‘refugee’, in this article, that connotes refugees latu sensu, and when we refer to ‘Convention refugees’, we say so. ‘Convention refugees’ are a distinct set of refugees characterised by a well-founded fear of persecution on specified grounds as defined in the Refugee Convention. Asylum seekers, who are to be treated as presumptive refugees in order for the Convention’s protections to be effective, are also envisaged by its provisions. Refugees latu sensu also include those who fall within expanded regional and national refugee definitions, that encompass those fleeing generalised risks. There are also important customary obligations in this field. The wider concept of ‘international protection beneficiary’ captures the range of individuals who have international legal claims not to be returned to face certain risks. We are attentive to the fact that in many contexts, even Convention refugees remain without formal recognition, and may stay based on alternative statues, but they are in law Convention refugees nonetheless.

Part I: When is treating refugees differently race discrimination?

Discrimination and grounds: Race and nationality contrasted

International human rights law generally enshrines open-ended prohibitions on discrimination that identify particular suspect grounds, generally prominently including race and ‘national origin.’ For instance, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)

Similar guarantees, identifying ‘race’ and ‘national origin’ as suspect grounds in a non-exhaustive list, are contained in the African Charter of Human and Peoples Rights; the American Convention on Human Rights; and the European Convention on Human Rights (ECHR). Notably, ‘race’ appears on all lists of named suspect grounds, in contrast to nationality.
Grounds reflect pre-existing social hierarchies (notably racial subordination, patriarchy, ableism) that international law seeks to challenge, as reflected in the fact that the grounds of race, sex and disability are also singled out with international treaties dedicated to the ‘elimination’ of discrimination on these grounds. Furthermore, there is consensus that the prohibition on race discrimination is a customary and *jus cogens* norm. When a suspect ground is at stake, unequal treatment can be assumed to be problematic, unless it seeks to redress the entrenched disadvantage via positive measures. In this respect in an important recent article, Niels Peterson clarifies that in interpreting the ICCPR, the Human Rights Committee (HRC) employs a ‘suspect grounds’ approach: If a suspect ground is identified, the discrimination will be difficult to justify, so the nature of the ground is generally decisive to the outcome of the claim. As is explored further below, there is widespread recognition that race discrimination attracts strong condemnation in international law, and is particularly difficult to justify.

Accordingly, identifying when ‘race’ is at issue is crucial. The ‘racial’ dimension of racial discrimination is understood broadly under the ICERD to include, ‘race, colour, descent, or national or ethnic origin.’ Regrettably, in its admissibility decision in *Qatar v. UAE*, the International Court of Justice (ICJ) framed the issue as being whether the term ‘national origin’ encompassed ‘current nationality’, holding that it did not. As we have argued elsewhere, the Court’s reasoning assumed that treatment based on race (which includes national origin) and nationality were mutually exclusive. This interpretation fails to acknowledge that there may be an overlap between nationality and national or ethnic origin, as is illustrated below. Indeed, some legal systems include ‘nationality’ in the definition of race, or treat ‘national origin’ and ‘nationality’ as synonymous in particular contexts. In that respect, the formulation in the Refugee Convention is noteworthy in that it refers to ‘country of origin’ – a neat encapsulation of the intersection between ‘national origin’ and ‘country of nationality.’ This tends to support our view of nationality and race as potentially and indeed frequently overlapping.

If differentiation can be shown to be directly on grounds of race or ethnicity, it will be generally difficult to justify. The 1973 European Commission on Human Rights ruling in *East African Asians v. UK* condemned as ‘degrading treatment’ under Article 3 ECHR, as well as an Article 14 ECHR violation, the application of legislation which was ‘directed at’ ‘British citizens of Asian origin.’ To identify the racial nature of the policy, the Commission took into account the surrounding historical circumstances and the explicit race-based statements in the legislative debate. While explicitly race-based immigration policies might seem like a relic of an earlier era (in this case that of decolonisation), there are striking continuities today. Indeed the case did not bring about any fundamental rethink of approach in immigration categories, and issues pertaining to the admission of the excluded groups continue to be litigated before the British courts.

The finding of degrading racist treatment in *East African Asians* contrasts sharply with the ruling in the much-criticised *Abdulaziz* decision, identifying sex discrimination but not race discrimination in British immigration rules that differentiated based on origins. The more recent important Grand Chamber ruling in *Biao v. Denmark* signals a shift in approach, in particular in assessing criteria which distinguish based on origins as racially discriminatory. The Court found in this particular case a difference in treatment between
naturalised and ‘born’ Danes to be based on ethnicity and that it was indirectly discriminatory, although it was arguably directly so.

Other examples of race-based decision-making emerge in administrative enforcement of migration controls, both at borders and within states. As the example of flight from Ukraine has exemplified, contemporary migration control practices include racial profiling and even violence, both correctly characterised as direct race discrimination. As Achiume has argued, in this respect, race itself acts as a border, so pervasive is the institutionalisation of race-based checks in migration control:

‘Race emerges as an illegality detection and production mechanism, as border infrastructure relied upon to presumptively exclude, subordinate, and immobilize through nonwhiteness, while presumptively including and facilitating the mobility through whiteness.’

The few successful legal challenges to racial profiling often turn on the (frankly shocking) candour of those designing and enforcing controls about the role of race. When the litigant in the leading HRC racial profiling case, Rosalind Williams, sought an explanation for her identity check, as the sole black woman on a crowded train platform in Spain, she was told it was due to her race. The HRC found that while identity checks (to identify illegal immigrants or to pursue other aims) pursued a legitimate aim, ‘physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics.’ The HRC’s framing stands in sharp contrast to that of the Spanish Supreme Court, which held that using race to profile individuals as likely ‘illegal immigrants’ was acceptable. The HRC explained that the harm of racial profiling lay not only in the impact on the dignity of those subjected to such checks, but also the contribution of such checks to the ‘spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.’

In Timishev v. Russia, the European Court of Human Rights (ECtHR) identified racial profiling on the basis of the documented practices, and the fact that the targeted checks on those of Chechen ethnicity were based on official police orders. As the impact was that individuals even perceived as belonging to that ethnic group were targeted, there was ‘a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one’s ethnic origin.’ The ECtHR reiterated that

‘Discrimination on account of one’s actual or perceived ethnicity is a form of racial discrimination …. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.’

The UK controls condemned as racially discriminatory by the UK apex court were underpinned by official policy to target Roma travellers. In addition, the Roma Rights
Centre, a strategic litigation non-governmental organisation, gathered supporting evidence.

Concerning a practice or policy that targets everyone of a certain nationality, we argue that the only correct assessment has to be contextual. While it cannot be the case that targeting a single nationality will always constitute race discrimination, the wider context may suggest that it does so under certain conditions. To illustrate, in Kenya, the finding that the Kenyan government’s decision to close two refugee camps constituted (amongst other issues) racial profiling and thus discrimination, the High Court of Kenya pointed to the gazette notice which ‘revokes the prima facie refugee status of asylum seekers from Somalia’. The identification of ‘a particular community’ notwithstanding that Kenya ‘hosts refugees from several other countries’ amounted to ‘discrimination and unfair treatment’. The Kenyan High Court explained that ‘racial profiling results in group condemnation and is discrimination of the worst kind’. When the Court of Justice of the European Union (CJEU) was confronted with a statement about an employer refusing to hire workers of certain nationality, it had no hesitation in accepting that as evidence of race discrimination. In some states, particular nationalities form distinct minorities, or indeed ethnic communities, so official antiracist action includes them, and indeed, they are protected by anti-discrimination norms as such.

Concerning policies and practices that target certain groups of nationalities, here too we urge a contextual historicised assessment, mindful of racialised colonial legacies. Many migration control policies and practices reflect a ‘global colour line’ in that some former colonial subjects are privileged in terms of their mobility while others are not. The legacy of British empire is particularly stark in this regard. To ignore history in deciding what is ‘race’ is to ignore the very origins of the concept in accounts of racial hierarchy and the racial subordination that was and is colonialism. As the European Commission on Human Rights accepted in the East African Asians case, measures to target ‘Asian’ persons living in East Africa were racial in nature. A vivid contemporary example of a problematic division between nationalities is the practice of certain European states in treating ‘Western’ and ‘non-Western’ nationals differently. Both the Netherlands and Denmark employ the distinction between these groups of nationals in various contexts. In an important intervention, two UN Special Rapporteurs argued that this distinction was based on ‘national origin’ (and so race).

At an even higher level of generality two important contributions, almost two decades apart, examine whether EU visa policies discriminate unlawfully on racial or other grounds. The countries whose nationals require a visa, those on the so-called ‘black list’, are predominantly in Asia and Africa, leading at least to the need to examine possible justifications for the differential impact. While Den Heijer has argued that recent practices of ‘visa liberalisation’ based on objective benchmarks immunise visa policies from claims of being discriminatory, he acknowledges that the placement of the large majority of countries on the so-called ‘black list’ dates from the intergovernmental Schengen era and has never been properly justified.
The meaning of discrimination

While neither the ICCPR nor the International Covenant on Economic, Social and Cultural Rights (ICESCR) include a definition of discrimination, the ICERD defines discrimination to mean ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life…’. This definition has been widely endorsed. Human rights law recognises various forms of discrimination, in particular both direct and indirect.

There has been a general trend to develop the concept of indirect discrimination within international human rights law. The Inter-American Court has applied this approach to difference in treatment between nationals and migrants, and on grounds of migration status, as well as in cases on reproductive rights. The ECtHR developed the concept in cases on Roma educational segregation, and in Biao, applied the approach to questions of nationality and migration. While there is a tendency to identify the origins of indirect discrimination in US domestic and EU law, it also has deep roots in the Inter-American system, and is now expressly codified in Inter-American instruments. Indeed, the Inter-American system also employs the concept of ‘structural discrimination’ to significant effect, to shape states’ non-discrimination obligations, and their positive duties to remedy historic disadvantage, in particular of racialised groups. While not wanting to flatten out the richness and distinctiveness of these regional approaches, we contend there is a clear consensus in international human rights law about indirect discrimination.

Justifications

Not all differentiation is discrimination, and in general, human rights bodies permit states to justify differences in treatment. There is some ambiguity and variation across international law on the question of justification. While the HRC on its face appears to accept the possibility of justification of any discrimination (irrespective of whether direct or indirect, or on which grounds), in practice attempted justifications for discrimination on suspect grounds tend to be rejected. Some systems have a more explicit justificatory hierarchy. Notably EU law treats direct discrimination as more difficult to justify, in particular admitting only predefined and limited justifications for direct race discrimination. As mentioned previously, the particular wrongfulness of race discrimination is frequently reflected in the statement of both the HRC and ECtHR that,

‘No difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, inter alia, a person’s ethnic origin is a form of racial discrimination.’

As is discussed further below, this position means that the legal analysis turns on whether a given norm or practice is based ‘exclusively or to a decisive extent’ on ethnicity. The Inter-American court takes the view that non-discrimination in general is a jus cogens
norm, but nonetheless clearly treats the enunciated grounds of discrimination more strictly.

In sharp contrast, under what conditions nationality discrimination will be regarded as justified or unjustified is more contentious, and here, regional human rights bodies tend to take divergent approaches. While nationality (as opposed to national origin) is not an enumerated ground in Article 2 ICCPR, the HRC has nonetheless required State parties to justify differences in treatment on grounds of nationality or citizenship. The ECtHR has since its ruling in Gaygusuz of 1996 stated that only ‘very weighty reasons’ could justify such differential treatment. Notwithstanding this statement, the ECtHR caselaw on nationality discrimination, while treating nationality discrimination as suspect, has changed significantly over time. To illustrate, early cases granted states virtually unlimited leeway to set up privileged status for groups of nationals, as exemplified in the caselaw on EU citizenship. When first confronted with the exclusionary edges of EU citizenship, the ECtHR simply accepted that the EU was ‘a special legal order’ and looked no further into the matter. However, in later cases it did demand equal treatment, including as between refugees and EU Citizens in Saidoun, drawing inter alia on Article 3 of the Refugee Convention. In contrast, the Inter-American system has accepted privileging certain nationalities as regards access to nationality, although it tends to insist on strict non-discrimination in other fields. Its approach to the significance of migration status is starkly different to that of the ECtHR. It often takes into account the structural vulnerability of irregular migrants, and at least in some contexts, insists on equal treatment irrespective of migration status.

Overall though, while nationality discrimination may fall foul of general non-discrimination guarantees, international human rights courts and bodies often find differentiation between nationals and non-nationals, and between categories of non-nationals, justified. For this reason, Part II sets out in detail the clear added value of the Refugee Convention in clarifying refugees’ entitlement to equal treatment.

Justifications: Legitimate aims

The crucial issue, in particular as regards nationality discrimination, is to sort out when it is justified, and when not. In general, a core purpose of antidiscrimination norms is to open up practices in light of their impact on disadvantaged groups. In this context, a crucial factor is the testing of the legitimacy of the official aim pursued by the practice, and the proportionality of the measure to achieve that aim. Here we offer some general observations about assessing justifications in the context of refugee protection and migration control. In Part II, we will illustrate that Article 3 Refugee Convention and the overall equality ethos of the Refugee Convention appreciably limit recourse to these justifications in the scenarios in which it is applicable or relevant.

Jean-Baptiste Farcy identifies correctly that in legal challenges to alleged discrimination in the context of immigration, courts generally assume the legitimacy of the official objective. This is well entrenched in particular in the ECtHR jurisprudence, which tends to assume that immigration control, as a measure that serves the general interests of the economic well-being of the state, pursues a legitimate aim. As has been noted also in
relation to general human rights claims in this context, if the legitimate aim is accepted at such a high level of generality, and expressed in such vague terms, the control measures themselves tend to be seen as inherently legitimate. There is a strong lineage of statist migration control assumptions in particular in the ECtHR system, but as has been powerfully and persuasively argued by other scholars, this move has no general purchase as a matter of international law. In particular, the InterAmerican system has taken the opposite starting point. Moreover, the statist migration control assumption has historical roots in colonialism generally, and more particularly states’ attempts to ensure racist exclusion was not subject to international scrutiny.

It would be entirely apt for adjudicatory bodies examining apparently discriminatory practices to demand more of states in terms of justification, in particular when justifications elide into racist exclusion. For example, when it comes to their nationality laws, a field over which states have relatively wide discretion, some human rights courts have accepted that states may treat certain nationals more favourably in accessing nationality. For example, the Inter-American Court of Human Rights ruled that Costa Rica’s preferential treatment of nationals of Central American countries, Spaniards and Ibero-Americans was acceptable, in light of ‘closer historical, cultural and spiritual bonds.’ We would suggest that such rulings illustrate that international law does recognise fairly wide state discretion over nationality matters, a matter itself shifting considerably. Moreover, and most relevant to this article, these claims relate to discretion in determining access to nationality, and not to other aspects of migration control.

**Justifications: Proportionality, stereotypes and stigma**

Once a legitimate aim is identified, proportionality analysis demands that the relationship between the aim and the means (the measure in question) are assessed. Depending on the ground and context, the intensity of assessment may alter. And as clarified at the outset, where distinctions are based on principally race or ethnicity, no justifications apply. Moreover, in many instances blanket measures against particular nationalities and groups of nationalities are unlikely to be proportionate, given that such measures entail generalisations about risks posed that are highly unlikely to hold as regards all the members of the group.

An important insight from anti-discrimination law and theory concerns stereotyping. For some, stereotyping is a central wrong of discrimination, or relatedly the stigmatisation that negative stereotypes generate is central to an appreciation of the harm of discrimination. An anti-stereotyping approach is emerging in the equality caselaw of the ECtHR, as Liv Henningsen has recently identified. Anti-stereotyping generally appears at the stage of assessing possible justifications. Even in this limited role, this approach is powerful in the migration context where policies are often based on rank generalisations. All too often, when states seek to justify certain migration control practices, it is evident that they are based on national, racialised and other stereotypes. In some cases, states invent policy justifications post hoc, which tends to reveal their spuriousness.

For instance, in their important discussion of nationality bans in US and Israeli immigration and asylum law, Tally Kritzman-Amir and Jaya Ramji-Nogales noted that the
‘first shared feature of the nationality bans is their factual grounding in unsubstantiated national security arguments’ exemplifying ‘laws and policies based on emotion rather than … evidence.’ Sound anti-discrimination adjudication tends to reject such assumptions; in other words is anti-stereotyping. The anti-stereotyping approach is evident in *Biao*. It will be recalled that the case turned on whether the treatment was based on ethnicity. Once this was accepted (on the bases of the likely profiles of those disproportionately impacted), the Court deemed it unnecessary to examine the legitimacy of the aim pursued, as the fact that the policy was based on stereotypes meant it could not be viewed as proportionate. In *Roma Rights* the state similarly claimed that it targeted Roma because of certain assumptions about their likely behaviour. The Court rejected this approach based on stereotypes, even if those stereotypes had some basis in fact. Its reasoning demonstrated that antidiscrimination law’s power comes from demanding evidence in support of policy choices.

**ICERD’s apparent migration exceptionalism**

As noted at the outset, non-discrimination and human rights law generally accommodate states’ migration control prerogatives. The central purpose of this article is to demonstrate that refugees (*latu sensu*) are nonetheless protected against discrimination on grounds of race and nationality in many contexts. In that respect, a consideration and clarification of the key provisions of ICERD is important, as these provisions are often wrongly invoked to insulate all state migration control action from scrutiny. Article 1(2) ICERD explicitly excludes distinctions between citizens and non-citizens from the definition of racial discrimination in stating:

> ‘This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.’

Yet the Committee on the Elimination of Racial Discrimination has characterised this provision in its General Recommendation XXX, and its other pronouncements, as providing only ‘for the possibility of differentiating between citizens and non-citizens,’ and warned states that the provision should not undermine ‘the basic prohibition of discrimination.’ Most relevant for the present analysis, the Committee has reiterated that states must ‘[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin.’ As such,

> ‘differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’

Article 1(3) of ICERD also seems to carve out space for states’ migration and membership prerogatives, providing:
‘Nothing in this Convention may be interpreted as affecting in any way the legal provisions of state parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.’

Both provisions, Articles 1(2) and 1(3), demand reasoned interpretation. As we previously argued, concurring with Achiume, General Recommendation XXX ‘states a conclusion, but does not provide a reasoned justification for the interpretation put forward, nor a clear framework for analysis’. Yet, the conclusion is legally correct, and reasons to support it are available by reference to the ordinary rules of treaty interpretation.

First, on its face Article 1(2) pertains to discrimination ‘between citizens and non-citizens.’ A plain reading of this provision is that it exempts from scrutiny provisions that treat citizens of a state in one way and non-citizens in another where the true basis for differentiation is citizenship and not race. However it says nothing about a distinction, exclusion, restriction or preference directed to specific groups of non-citizens. In other words it does not self evidently exclude from scrutiny provisions that discriminate within the broad category of non-citizens. Second, reading Article 1(2) in the context of the remainder of the treaty, strongly refutes the notion that non-citizens were intended to be excluded altogether in light of Article 5 (‘guarantee the right of everyone’) and article 6 (‘everyone within their jurisdiction’). It would have been far more straightforward to refer only to citizens- not everyone- if this was the intention.

The ICJ, contrary to the CERD Committee’s position, adopted the widest interpretation of the Article 1(2) exception, not, as is orthodox in the context of human rights, the narrowest interpretation of a rights-limiting exception. This appears difficult to reconcile with the object and purpose of the treaty- again part of the primary rule of treaty interpretation- in light of the Preamble’s declaration that ‘the existence of racial barriers is repugnant to the ideals of any human society.’ Rather, the ICJ relied on the drafting history to support its position. Yet while the drafting history certainly reveals anxieties by states to limit obligations in relation to non-citizens, Article 1(2) was also ‘underpinned by ideals of decolonisation’. These provisions were very much informed both by newly independent states and former colonial metropoles seeking to insulate their nation building from scrutiny under ICERD. As to the terms of Article 1(2), Thornberry observes that ‘there was scant specific discussion on the language of the article’. In particular there is nothing in the drafting history to suggest that states were seeking to retain the right to distinguish between groups of non-citizens or to discriminate on intersecting grounds of citizenship and race.

In any event, subsequent agreement, practice and developments in international law, all within the primary rules of treaty interpretation, are significant in this context. Indeed, while not explicitly expressed in these terms, subsequent developments in international law were at least implicitly put forward by the CERD Committee in its second paragraph of General Recommendation XXX:

Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human
Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

Leaving aside the question whether the phrase ‘basic prohibition of discrimination’ was intended to invoke the notion of general principles or even custom, at the very least the Committee regards subsequent normative developments as relevant to an interpretation of Article 1(2). The Committee has since articulated its methodology for developing General Recommendations and is clear that it adopts an evolutionary or ‘living instrument’ approach to its interpretative work. In the case of General Recommendation XXX, the Committee organised a thematic discussion on non-citizens and racial discrimination, which involved input from states, NGOS, international organisations and other UN special procedures, as well as reference to parallel and evolving norms. There is no evidence of any dissent, including from states, nor of any contemporaneous or subsequent objection to General Recommendation XXX on completion. This analysis goes some way to answering the call for ‘a reasoned justification for the interpretation put forward’ in General Recommendation XXX; developing ‘a clear framework for analysis’ is more challenging.

The practice of the Committee reveals that it does scrutinise migration control practices, but leaves much unclear. Our analysis of all concluding observations over a 5-year period reveals that particular border practices of concern to the Committee include the application of ‘safe third country’ policies, expulsion/deportation, detention, fair asylum procedure including procedural safeguards, inappropriate transit zones, denial of entry of asylum seekers to the state by border guards, and restrictions on freedom of movement. Recommendations have included that Bulgaria ‘take a human-rights based approach and integrate a non-discrimination perspective into its migration governance’, that Finland ‘[e]nsure that its current laws and any further restrictions concerning the removal of non-citizens from its jurisdiction do not discriminate in purpose or effect on the grounds of race, colour, ethnic or national origin’, and that Canada ‘[r]escind or at least suspend the Safe Third County Agreement with the United States of America to ensure that all individuals who attempt to enter the State party through a land border are provided with equal access to asylum proceedings’. However the Committee is rarely clear on the ground of discrimination at play or how/why it is contravened. In one (relatively rare) concluding observation the Committee referred to the ‘intersectionality of religion and ethnicity’ in relation to the ‘feelings amongst some members of ethno-religious communities, in particular Muslim communities, of discrimination, exclusion and isolation’ based inter alia on ‘citizenship-stripping legislation’ in the Netherlands. This is however an exception to the Committee’s general practice of somewhat elliptical reasoning.

Most recently, the Committee has issued a ‘Statement’, under its Early Warning and Urgent Action Procedure, on ‘Racial Discrimination against persons fleeing from the armed conflict in Ukraine’ in which it has expressed ‘alarm’ in relation to ‘reports of discriminatory treatment of people attempting to flee Ukraine into neighbouring countries, in particular people of African, Asian, Middle Eastern and Latin American descent…’ and accordingly
Calls upon all States parties to the ICERD, in particular those neighbouring Ukraine, to continue to allow access to their territories to all persons fleeing the conflict without discrimination on grounds of race, colour, descent, or national or ethnic origin and regardless of their immigration status.

These statements leave much legal uncertainty, in part as regards how to identify when race is at issue. In our view, clarity matters because, contra the ICJ, race and nationality are not mutually exclusive. Nonetheless, there is an important distinction between these grounds conceptually and normatively. Conceptually, it matters when nationality is a proxy for race, and when it is not. For now, suffice to say that invoking ICERD in the migration control context will inevitably involve confronting Articles 1(2) (and perhaps 1(3)). However, those provisions have no analogues in general human rights law, or most importantly for the present analysis, in the Refugee Convention.

Before turning to the Refugee Convention, we pause to consider a final question, namely, is there a case for importing these same limitations into consideration of race and migration/non-citizens in relation to other treaties? The notion that rights-restricting limitations found in one human rights treaty should or could be imported into other treaties where no such explicit limitations apply is unsupported by legal principle. This conclusion variously follows from the fact that the assumption of obligations by States through treaties constitutes the primary purpose of a given instrument(s); that the parties must be generally presumed to have intended that those instrument(s) be effective; and that courts will accordingly, in general, interpret strictly exceptions to a principal provision imposing obligations on a State.120

Conclusion of part I: Contours of consensus

The preceding sections have demonstrated that international law takes a different approach to race and nationality discrimination, but that both may be challenged as a human rights violation. A key question, often a decisive one, is whether treatment is based on race or nationality. Here the understanding of race, as including ethnicity and national origin, is vital. Some forms of differentiation on grounds of nationality may even be direct race discrimination. Moreover, sometimes, treating individuals differently on grounds of nationality may be indirect race discrimination. The key question would then become an assessment of any potential justifications: Again, depending on the ground at issue, the context (and the degree of state discretion in the field), the nature of the discrimination, the intensity of the assessment of putative justifications may vary. However, under any legally sound assessment of justifications, policies and practices based on stereotypes will be particularly difficult to justify.

Part II

Part I illustrated that in general, international law permits states much wider scope to use nationality as a basis for decisions than race. Indeed, the extent to which nationality is a suspect ground is genuinely contested. In those cases where only and purely nationality is
at stake (and nationality is not acting as a proxy or indirectly for race or national origin), we illustrate in this part that the Refugee Convention itself sets out important standards of equal treatment, that are both important in themselves, and ought to be used to guide interpretation of general human rights norms.

**The Refugee Convention and non-discrimination**

The Refugee Convention responds to a deeply wrongful form of differentiated treatment: persecution for reasons of race, religion, and nationality (amongst other grounds). This understanding of the wrong that triggers refugee protection is also reflected in Article 33(1), which prohibits States from expelling or returning refugees to ‘the frontiers of territories where [their lives or freedom] would be threatened on account of race, religion, [and] nationality’ (again amongst other grounds). The foreseen remedy for this discriminatory harm is ‘status’, to be enjoyed without discrimination. As well as its general prohibition on discrimination in Article 3, the Refugee Convention establishes two distinct standards as regards nationality discrimination: Some rights in the Refugee Convention are to be accorded to refugees to the standard accorded to ‘aliens generally’, and indeed its Article 7 sets that standard as a default. Other rights are to be extended on a non-discriminatory basis with nationals – ‘national treatment’. This structural entitlement reflects the fact that international refugee law works within the international order of states, nationality and migration control, and yet conditions rights to leave, enter and reside in other states.

Although the least litigated of the non-discrimination norms considered in this article, Article 3 is the most relevant and arguably the most far-reaching, providing:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

There is no exception or limitation to this provision, and Article 42 prohibits any reservation to be entered in relation to it. On its face Article 3 explicitly prohibits discrimination between groups of refugees on the three named grounds (race, religion, and country of origin), reflecting the conceptual and institutional shift embodied in the 1951 Refugee Convention. By contrast to earlier multilateral treaties which protected specific populations such as ‘Russian, Armenian and assimilated refugees’ (in the case of the 1933 Convention) or ‘Refugees coming from Germany’ (in the case of the 1938 Convention), the 1951 Refugee Convention’s regime is not restricted to particular refugee groups, but rather to all who meet the definition. Article 3 is a non-discrimination guarantee reflective of this structural shift.

Indeed a review of the debate within the Conference of Plenipotentiaries illuminates and reinforces the clear and non-negotiable meaning of Article 3 which is evident on its face. An analysis of the debate within the Conference of Plenipotentiaries, which took place over several sessions, highlights three key points. First, and perhaps most relevantly in a contemporary setting, Article 3 applies without any territorial or jurisdictional limitation; second, it is not conditioned or limited in circumstances such as mass
influx, national security or public order; and third, it was intended to ensure universal protection for refugees.

As to the territoriality point, the draft Convention on the Status of Refugees, which had been prepared by the Ad Hoc Committee and presented to the Conference of Plenipotentiaries, contained the phrase ‘within its territory’ in relation to article 3.¹²� This was assumed to have been included ‘to make it clear that the rule did not apply to immigration’;¹²９ and indeed this concern was reiterated by delegates of ‘certain countries of immigration’.¹³⁰ Yet this was immediately challenged when the Conference of Plenipotentiaries turned to Article 3. The delegate of the World Jewish Congress observed that Article 3 ‘established a rule of prime importance for refugees’ and that on its ‘present wording it might appear that the obligation to avoid discrimination only rested on the State in which the refugee is resident’.¹³¹ The problem was however that refugees ‘often had interests in other States, as was recognised in article 9 and article 11, paragraph 3’.¹³² The Israeli delegate made a similar point, noting that the territorial limit would be ‘difficult to reconcile… with those articles that contained extra-territorial provisions, especially article 23 entitled “Travel documents”’.¹³³ The French delegate concurred, noting a concern that retaining the phrase ‘within its territory’ ‘seemed to suggest that the State was perfectly entitled to discriminate against persons wishing to enter its territory, that was to say, against persons not yet resident in its territory…[and] it would be abnormal, in a convention for the protection of refugees, to proclaim the legality of an attitude which was, after all, negation of the right of asylum’.¹³⁴

Ultimately the issue was referred to a Style Committee consisting of delegates from six states to discuss the text of Article 3 and submit an approved draft to the Conference for final determination.¹³⁵ The report of the Committee noted that the difficulties with this provision were, on the one hand concern that the French version, which did not have a territorial restriction, ‘might be interpreted as prohibiting systems of selective immigration on the basis of quotas assigned to particular countries’;¹³⁶ while on the other the English version could be interpreted as permitting discrimination outside the territory of a contracting state and that a ‘document drawn up under the auspices of the United Nations ought not to be susceptible of such an interpretation’.¹³⁷ Specifically it was felt that the phrase ‘within its territory’, might ‘if restrictively interpreted- exclude the operation of the non-discrimination clause in regard to those Articles of the Convention whose effect is extra-territorial’.¹³⁸ It was noted that the Convention ‘does not deal either with the admission of refugees (in countries of first or second asylum) or with their resettlement (in countries of immigration)’.¹³⁹ The members of the Committee ‘were in full agreement in their adherence to the principle of non-discrimination, in their desire to reach an acceptable (preferably a unanimous) solution which should cover the whole Convention, and in their determination not to “legislate” beyond the Convention’.¹⁴⁰ As a result they put forward six choices of text to the Conference of Plenipotentiaries, which voted to accept the current form of words by 21 votes to none, with 3 abstentions.¹⁴¹ It is notable that the delegate from Yugoslavia abstained because his earlier amendment, which ‘aimed at preventing every type of discrimination, had not been adopted; he was unable to vote for a text which, while forbidding discrimination on account of race and country of origin, left the way open to other forms of discrimination’.¹⁴²
This examination of the travaux makes clear that any attempt to ‘read down’ or interpret Article 3 by reference to the location of state action, and in particular to exclude external border control activity from its reach, is not justifiable. As such, where an article of the Convention is engaged, such as the protection against refoulement, protection against penalisation for unlawful entry, or ‘free access to the courts of law’, a state is prohibited from discriminating against a refugee on the basis of race, religion or country of origin regardless of where the relevant activity takes place.

Second, the drafting history reveals that proposals to insert limitations to accommodate state concerns such as mass influx and public order were rejected, thus making it clear that no implied limitations can justifiably be read into Article 3. The Egyptian delegate proposed an amendment to Article 3 to insert, at the end of the text, the phrase ‘subject to the requirements of public order and morals’. In explaining the rationale for the proposal, the Egyptian representative explained that ‘Egypt was fully aware of the dangers of mass immigration, and considered it essential that the Contracting States should be in a position, if necessary, to adopt all requisite measures for the maintenance of public order’. While there was some support for this or a similarly worded restriction, the prevailing view was that it was not appropriate to limit the non-discrimination norm in this manner. The Yugoslavian representative felt Article 3 was already too narrow, while the UK representative (with whom the German and Yugoslavian representatives agreed) opined that ‘the addition of the Egyptian amendment would only serve to weaken the text’. Likewise the Dutch representative argued that it ‘would be dangerous to add a provision to article 3 which would to some extent emasculate it, and which in any case seemed unnecessary’. Accordingly the Egyptian amendment was rejected by 14 votes to 4, with 4 abstentions.

Third, delegates were clear as to the rationale for the version ultimately adopted, namely that it provides that ‘all refugees, whatever their race, religion or country of origin, should be given the same treatment’. In the context of a debate about an Australian proposal to condition Article 3 by allowing for the imposition of conditions on entry for refugees, the Canadian delegate argued that ‘while meeting the peculiar position of an immigration country, [it] would seriously impair the general strength of the Convention itself’; thus he urged a rejection of the ‘attempt to write into the instrument a provision which would weaken the position of refugees throughout the world’. The Australian proposal was rejected by 6 votes to 5, with 11 abstentions. The debate on Article 3 as a whole reveals a clear commitment to universal access to and protection by the Convention regardless of race, religion or country of origin.

Notwithstanding this, there was of course a clear exception to universality in the 1951 Convention as originally drafted, namely its temporal and geographical restrictions. The 1951 Convention could be confined to those who had fled events in Europe prior to 1951. But the Convention was Janus-faced: it was backward looking in its immediate impact, but the drafters anticipated future refugees and a possible global scope. Indeed, the geographical limitation was optional, and only Turkey still maintains it. The eurocentricity of the original convention is readily apparent, and indeed, was poignantly criticised at the time of drafting. The famous intervention by the Indian delegate, Lakshmi Menon, in the 1950 General Assembly debate explains India’s
abstention at length, noting that Europe’s postwar displaced population had been resettled across the globe, leaving only the so-called ‘hard core’ who would benefit from the status of refugees in Europe. She noted that mass resettlement of Europe’s refugees and displaced persons was possible ‘because they had been Europeans, and countries such as Australia had opened their doors to them.’ And in a statement that continues to resonate today, she stated

‘Because the immigration policy of many countries was based on racial prejudice, India had sought to settle the problem of its own refugees, who numbered millions, without international aid.’

This statement reflects the widespread acknowledgement at the time of drafting that a Refugee Convention focusing only on Europe was problematic. And yet, the Convention’s potential to evolve into a global instrument was anticipated by its core provisions. For that reason, when the 1967 Protocol was drafted, few structural or textual changes to the 1951 Convention were required. The Protocol was very much triggered and enabled by newly independent African states’ moves to create a regional refugee instrument for the continent, and UNHCR’s desire to ensure those moves complemented the 1951 Convention. The 1967 Protocol, whose purpose was explicitly to remove such restrictions, proclaims in its Preamble that, ‘it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951…’

Despite the central importance of Article 3’s prohibition of discrimination to the refugee regime it has rarely been the subject of judicial examination. Likewise it is rarely featured in scholarship, and where it has been considered, there is a tendency to minimise its relevance by taking a narrow approach to its interpretation that leaves it little work to do. Described as ‘symbolic’, ‘rather than adding to the practically enforceable rights for refugees’; some have concluded that it is essentially unnecessary either because international law such as art 26 of the ICCPR has ‘neutralised’ and ‘superseded’ Article 3, or because ‘refugees today are thoroughly protected against discrimination’. Yet the analysis above in Part I makes it clear that, at least in relation to discrimination on the basis of nationality, international human rights law all too often accepts differentiation.

**Interpreting article 3**

The scope of Article 3 is limited and it is clear that the suspect grounds are narrower than more recent human rights instruments, perhaps most notably with the omission of sex or gender being a deliberate one. Yet, the inclusion of the suspect ground of country of origin is crucial.

In terms of the definition of race, refugee law has generally taken a broad socially constructed view of race in relation to the persecution grounds, a position consistent with the ICERD definition of discrimination. It is clear that a similar approach is appropriate in relation to Article 3. The most relevant ground for present purposes is that of ‘country of origin’, a phrase that reflects the recognition that formal nationality for
refugees may be contested, or even lost, and that stateless persons who meet the refugee definition are protected. A refugee’s need for protection is assessed against his or her country of nationality or of former habitual residence (in the case of stateless persons); hence ‘country of origin’ is sufficiently broad so as to protect refugees with and without a nationality from discrimination. It is worth noting that an identical provision is found in Article 3 of the 1954 Convention relating to the Status of Stateless Persons.

As is the case in relation to other explicit non-discrimination norms at international law, Article 3 is silent as to whether it includes both direct and indirect discrimination. Yet given the evolutionary approach to interpreting the Refugee Convention generally, Article 3 ought to be read to include indirect discrimination. Of course many contemporary practices directly differentiate on the basis of the country of origin of refugees, making direct discrimination particularly salient in this context also. On the other hand, Article 3 applies only to ‘the provisions of this Convention,’ so its scope of application is limited. Whether it applies to certain state practices depends on a prior determination that the Convention is applicable, and states sometimes successfully argue that their extraterritorial migration control actions are outside the Convention. For instance, in the Roma Rights case, the United Kingdom House of Lords deemed Article 3 inapplicable to the actions of the UK that prevented would-be asylum seekers from leaving their country of origin.\textsuperscript{167} While this decision is explicable on the basis that a person who has not left their country cannot be a refugee, it is important to recognise that refugee status is declaratory not constitutive and thus once a person factually meets the conditions for refugeehood, they are potentially within the scope of the ‘provisions of this Convention’.

Guidance as to interpreting such an ‘accessory’ non-discrimination norm is appropriately drawn from Article 14 ECHR. In that context, the Grand Chamber of the ECtHR has explained that the application of art 14 ‘does not necessarily presuppose the violation of one of the substantive articles guaranteed by the [European Convention]. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of ‘one or more of the [Convention] articles.’\textsuperscript{168} British courts have drawn two propositions from this reasoning. First ‘if circumstances fall within the scope of [a relevant article] then they also fall within its ambit’. Second, where ‘a state takes positive action which, while not required by [the Convention]….demonstrates its respect for [the relevant article],’ this will fall within the ambit of the Convention provision.\textsuperscript{169} Applying this reasoning to Article 3 of the Refugee Convention, it is not necessary for example to establish that a ‘non-entrée’ practice actually contravenes a provision, such as Article 31 or 33, in order for Article 3 to be enlivened, as long as the practice ‘falls within the ambit’ of a relevant article. The extent to which ‘positive action’ is captured is a live issue. For example, one could argue that, while not required by the Convention, resettlement accords with the recognition in the Preamble that the protection regime depends on ‘international cooperation’ and is thus sufficiently connected with the Convention so as to attract the operation of Article 3.
**Justifications**

While Article 3 does not explicitly provide for justifications of discrimination, in line with the evolutionary approach to interpretation, it would seem appropriate to adopt the structure of analysis consistent with contemporary discrimination law theory, namely to consider whether a differentiation amounts to unlawful discrimination by reference to whether 1) it pursues a legitimate aim and 2) the means are proportional to achievement of that aim. It is in respect of this issue that the *sui generis* nature of refugee law has particular force. As explained in Part I, as a general proposition, courts have all too often accepted states’ aims and objectives as legitimate in the migration context and failed to subject them to adequate scrutiny. In the context of refugee protection we suggest that many of the ostensible justifications for migration controls have been ruled out as a matter of international law by the very commitments in the Refugee Convention. For a start, the tendency to cast migration control itself as a pure exercise of sovereignty is difficult to justify given that 148 states have exercised their sovereignty to ratify the Refugee Convention/Protocol and commit to treat refugees equally.

To open an analysis of measures pertinent to refugees with sovereignty rather than obligations is inapt, to put it mildly. Likewise, as regards common justifications based on mass influx or public order, it is clear the drafters of the Convention ruled these out. National security, another common purported aim to justify migration policies, is also problematic in refugee law. The Refugee Convention explicitly accommodates states’ security concerns in several provisions.170 It is difficult in this context to suggest a blanket measure that differentiates on the basis of country of origin is justified on national security grounds which by definition does not take account of the conditions set for exclusion by the Refugee Convention.

This issue has been addressed by courts. When the Kenyan government announced closure of two refugee camps in part ‘owing to national security’, the High Court of Kenya found the measure to be unconstitutional on the basis of (inter alia) it constituting an act of discrimination against refugees of Somali origin. In assessing this aspect of the case the Court observed that the government had failed ‘to investigate and identify any refugees who may be involved in criminal activities’ but rather had purported to ‘condemn all refugees of Somali origin’.171 The stigmatisation of such ‘racial profiling’ proved particularly troubling to the Court.

A further powerful anti-stereotyping approach concerns constitutional challenges in Canada against restrictive measures (limiting both substantive and procedural rights) targeting asylum seekers from certain states.172 Notably, the Canadian courts cited Article 3 of the Refugee Convention, treating nationality, ‘country of origin’ and national origin as synonymous in these particular cases. The courts in assessing both sets of restrictions noted that the logic of ‘deter[ring] abuse of our refugee system by people who come from countries generally considered safe’ served to ‘further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and “non-refugee producing.”’173 Moreover, it perpetuates a stereotype that refugee claimants from [designated] countries are somehow queue-jumpers or “bogus” claimants who only come here to take advantage of Canada’s refugee system and its generosity.174 On this
basis, the treatment was deemed discriminatory in violation of Section 15 of the Canadian Charter. While the ruling concerns that provision, it is noteworthy for both the invocation of Article 3 of the Refugee Convention, and the anti-stereotyping approach.

This set of cases is also noteworthy for the degree of close scrutiny to which the measures were subjected. In assessing the validity of a provision that subjected refugees from certain designated countries of origin to a long waiting period of 3 years, the Federal Court accepted that Canada has ‘a pressing and substantial objective’ in effecting reform to the system based on resources. However the Court emphasised that the government needed to justify not reform as a whole but the particular ‘infringing measure’. Moreover the Court took the proportionality assessment seriously, inquiring into ‘reasonable alternatives’ that would be less rights impairing.

In our view the invocation of Article 3 is important on its own terms but should also inform the interpretation of generalist non-discrimination norms in a refugee setting. We explain the basis for this in the next section.

Reading IHRL in light of the Refugee Convention

The Refugee Convention’s standards should also guide interpretation of non-discrimination norms in the general human rights treaties when the treatment of refugees, *latu sensu*, is at issue. Firstly, as the Refugee Convention specifically identifies discrimination on grounds of ‘race, religion or country of origin’ as problematic, the question of grounds is more straightforward under the Refugee Convention than under general human rights law. It would appear that there is no sharp line between race and country of origin, as both forms of discrimination are prohibited in the same manner. Second, when examining possible justifications for different treatment in terms of both their aims and proportionality, the balance weighs strongly in favour of refugees once the rationale for their particular status and protection in international law is integrated into general human rights law.

This interpretative approach, namely referring to pertinent specifically tailored treaties as a method of illuminating more broadly stated treaty obligations, is an established and indeed legally obligatory practice. In a recent example the HRC in *Zhou* referred to the more specifically framed obligations in the 1961 Convention on the Reduction of Statelessness in order to flesh out the concrete steps required by states to comply with ICCPR Article 24(3)’s obligation to respect that ‘every child has the right to acquire a nationality’. The InterAmerican human rights system routinely engages with global human rights standards (for instance in its definition of discrimination). In *Biao v Denmark* the Grand Chamber of the ECtHR took into account domestic trends and the European Convention on Nationality, noting that there was a trend towards “a European standard” (§ 132) of rule of equal treatment of all groups of nationals regardless of whether they were citizens by birth or have acquired nationality subsequently. The ECtHR has also on occasion taken into account the national treatment obligation in the Refugee Convention when confronted with claims to equal treatment by refugees in the context of welfare benefits, treating it as one of many reasons why the difference in treatment was not justified in the particular case.
In spite of this interpretive technique being dubbed ‘systemic integration’, the practice of interpretative bodies is episodic and variable rather than systematic, verging on the ad hoc. For example in Hode and Abdi v. the United Kingdom the UK sought to argue that its aim was to treat migrant students and workers better than refugees, as it wanted to attract the former to the UK, but it was accepting refugees as a matter of international obligation, and not seeking to compete with other states to attract them. The Court rejected this claim on the facts, but it would have been helpful to reject the legitimacy of the aim that seems so directly to undermine the basic legal commitment to accord refugees the same treatment as ‘aliens generally’, a core commitment under the Refugee Convention.

**Identifying wrongful nationality discrimination against refugees**

In this section, we identify prominent instances of differentiation between refugees on grounds of nationality, and offer some initial thoughts as to whether they violate either Article 3 of the Refugee Convention, or IHRL read in light of that provision. A thorough examination is beyond the scope of this article but we suggest that a recognition of the significance of Article 3 provides a sharper framework for analysis in assessing the validity of a range of current practices. As discussed in Part I, if the difference in treatment is on grounds of race, then we would contend it is highly likely to violate international human rights law in any event. However, if the difference in treatment is on grounds of nationality (and not national origin or indirectly on grounds of race) then the Refugee Convention’s principled stance makes a tangible difference to the rights of refugees. We outline briefly here a number of practices that, while not self-evidently unlawfully discriminatory, are at least in need of interrogation on this basis.

**Access to protection**

The contemporary refugee regime is characterised by a set of containment practices which mean that when refugees flee, they tend to find it legally difficult to travel beyond countries in the immediate neighbourhood of their countries of origin. The visa and carrier sanction policies of the EU and states in the global north reflect a ‘global mobility divide’ that bears down particularly heavily on those who flee persecution and conflict. There has been some consideration about whether visa listing systems are discriminatory, but this issue warrants more careful examination in light of Article 3 Refugee Convention. The nationality differentiation inherent in EU visa listing has brought striking benefits to those fleeing Ukraine (at least those with Ukrainian nationality), when compared to the more typical scenario concerning access to protection. In other contexts, states frequently respond to the flight of protection seekers by imposing a visa requirement in order to limit the numbers of those who can escape. Indeed, some EU states have suspended processing of visa applications from Russian nationals for this reason. These decisions often target would-be refugees on grounds of nationality, and so warrant scrutiny under Article 3. While the racially discriminatory character of visa requirements has been explored above, we would argue for a deeper assessment of how visa imposition conditions access to protection in light of Article 3.
Some states impose nationality bans that act as a bar to accessing asylum. If these purport to bar access to claiming asylum altogether, they are highly likely to violate Article 3 Refugee Convention. Another practice is treating certain states of origin as presumptively safe, imposing various additional evidential or procedural hurdles in these cases, or even preventing the examination of asylum claims from certain states. As discussed above, when confronted with Canada’s particular variant of such a system, the Canadian courts, drawing on Article 3 Refugee Convention, and their own strong anti-stereotyping approach, found a violation of equal treatment. In contrast, SCO listing has been accepted as a matter of EU law, based on an interpretation of the relevant EU secondary legislation. In the EU case of HID the CJEU refused to look beyond the text of the permissive procedural rules in EU secondary law, and simply asserted that EU law did not preclude Member States ‘from examining by way of prioritised or accelerated procedure certain categories of asylum applications defined on the basis of the criterion of nationality or country of origin.’ In our view, this case, and the many national cases which only review the particular nationality designation (but not the discriminatory system itself) are not giving due attention to human rights general principles or Article 3 of the Refugee Convention.

Scholars have characterised resettlement as a ‘legal abyss’, to the extent that it sets up highly selective discretionary practices, with little oversight or legal accountability. Some resettlement states appear to understand the process to operate outside the Refugee Convention, and selection of refugees for resettlement based on nationality, national origin and religion appears to be frequent. It could be argued that Article 3 is applicable, as resettlement is the gateway to the enjoyment of Convention status with the rights that are foreseen in that instrument. This would tighten up the analysis of the discriminatory selection criteria that pervade resettlement, which are rarely litigated.

Further examples of differentiation in the allocation of protection arise out of the special international regime for Palestinian refugees. A vivid example emerges in the context of the Syrian conflict which also displaced many Palestinians who had made their home in Syria for generations, but did not have Syrian nationality. This meant they faced a range of entry restrictions when seeking to flee to neighbouring countries. While it is assumed that the special legal status of Palestinians is exhaustively regulated by Article 1D of the Refugee Convention, some of the disadvantages imposed on Palestinians ought to be reconsidered in light of Article 3 of the Convention, and indeed to the extent that they constitute race discrimination, under general human rights law.

**Aznar protocol**

The EU’s Aznar Protocol can be understood as a safe country of origin mechanism writ large. A Protocol to the EU Treaties, which effectively prevents asylum claims from EU Member States being examined in other EU Member States, the Protocol’s tension with Article 3 of the Refugee Convention has been widely noted. Indeed the Protocol is accompanied by a Declaration clarifying that it ‘does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its
obligations under the Geneva Convention of 28 July 1951 relating to the status of refugees. As well as its patent discrimination based on country of origin, it may be argued that the Protocol has an indirectly discriminatory effect on Roma asylum seekers.

The Aznar Protocol was prompted by the then Spanish government’s concern about asylum claims by Spanish nationals (generally of Basque ethnicity) who sought protection in other EU Member States. In turn, the existence of the Protocol was invoked by Canada in justifying its Designated Country of Origin system, which was originally motivated by trying to deter asylum applications from EU nationals in Canada – invariably of Roma ethnicity, from the very states whose cumulatively discriminatory practices prompted the ECtHR to develop its approach to indirect discrimination. The clear links between ethnically targeted measures and the reliance on country of origin differentiation suggest that states underestimate the import of Article 3.

**Nationality-based alternatives to refugee protection: Temporary protection for Ukrainians**

Globally, most refugees are recognised not through individualised RSD but rather through group-based designations that deem all those fleeing a certain conflict or persecutory setting as refugees. Such designations may focus on previous place of residence, but also frequently on nationality. Indeed, even in individualised RSD assessments, nationality-based generalisations are commonplace in order to develop presumptions of inclusion (and indeed exclusion) in the assessment of who is a refugee.

In some instances, these general assessments lead to the offer of a particular status to those fleeing a particular country, such as the Ukrainian TP decision of 4 March 2022. Article 3 relates to how states apply the provisions of the Refugee Convention. Accordingly, on one view, the decision to trigger TP is precisely not to apply the Refugee Convention, for now, but still leave the right to apply for asylum available. However, this argument ignores the fact that many of those fleeing are acknowledged to be (as yet unrecognised) Convention refugees. On this other view, TP is a conditional residence right that enables refugees (and others) to avail of a form of protection without undergoing formal asylum procedures, and so may be framed as an implementation of the Refugee Convention. Given that the Convention does not stipulate any particular procedures for recognition of refugees, the wide discretion to recognise refugees in diverse ways is foreseen in the Convention. In this context, what is key is the impact of the differential treatment, which would still have to be assessed under Article 3. At the very least, this would be a means to secure the protection of those of other nationalities fleeing the same conflict, at least to the extent that they are also ‘refugees.’

**Overall conclusion**

The contrast of visa-free access to the EU and temporary protection with immediate work and (some) mobility rights has created a chasm between Ukrainian protection seekers and others. Indeed, Ukrainians’ mobility means that millions are able to engage in ‘pendular movements’ (as UNHCR had put it) back and forth from Ukraine to the EU. In contrast
to ‘normal’ asylum-seekers, whose physical and material resources are depleted by dangerous journeys, and then met with the degrading asylum process and its carceral confinements, Ukrainians’ mobility rights seem to be enduring. The cumulative effect of the legal regime that has emerged to respond to those fleeing Ukraine places them at a considerable advantage when compared to other protection seekers – not merely a dual standard, but a dual system. While litigation around non-discrimination norms may not be the best tool to assess the systemic impact, each of the constitutive elements may be open to challenge. It may be easier to challenge the racialised border enforcement than the geopolitical assessment that led to visa-free access for Ukrainian nationals. But to the extent that both are equally racialised, non-discrimination norms ought to subject both sets of policies to intensive scrutiny.

Perhaps the most significant contribution of the article is to argue that at least where refugees are at issue, nationality may not be a ‘mostly bulletproof mechanism for racialized exclusion and differentiation.’ In light of the legal analysis, we suggest that a range of practices in the global refugee regime, both inclusive and exclusive, warrant close assessment under Article 3 of the Refugee Convention. In some cases, inclusive practices for particular groups of refugees are framed as depending on their political and discretionary character, and non-discrimination norms cast as a threat to the ‘generosity’ that underlies them. To this claim, we would demand some supporting evidence, and suggest that discretion is often a mask for forms of selection that should be rejected. And yet, we are mindful of the limitations of non-discrimination, and the possibility that imposing legal duties of equal treatment may become a pretext for levelling down, or even lead to withdrawal of certain benefits altogether, or the creation of even more opaque processes. Using law to challenge discrimination has many inherent limitations, but legal argumentation is also an important tool for refugees themselves demanding inclusion, and for those who advocate on their behalf.

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Notes

1. Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, 7 August 2001; Council of the European Union, COUNCIL IMPLEMENTING DECISION (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INIT, OJ L 71, 4 March 2022.

2. See further Costello C (2020) Overcoming Refugee Containment and Crisis. German Law Journal 21(1): 17.

3. Human Rights Watch (2022a) Moldova: Romani Refugees from Ukraine Face Segregation. Available at: https://www.hrw.org/news/2022/05/25/moldova-romani-refugees-ukraine-face-segregation (25 March 2022); Human Rights Watch (2022b) Ukraine: Unequal Treatment for Foreigners Attempting to Flee: Pattern of Blocking, Delaying Non-Ukrainians. Available at: https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee (4 March 2022).

4. African Union (Cabinet of the Chairperson) (2022) Statement of the African Union on the reported ill treatment of Africans trying to leave Ukraine. Statement. Available at: https://au.int/en/pressreleases/20220228/statement-ill-treatment-africans-trying-leave-ukraine (28 February 2022).

5. In a now notorious statement, Bulgarian Prime Minister Kiril Petkov stated that, “[t]hese are not the refugees we are used to… these people are Europeans” and “These people are intelligent, they are educated people…. This is not the refugee wave we have been used to, people we were not sure about their identity, people with unclear pasts, who could have been even terrorists….” Brito R (2022) Europe welcomes Ukrainian refugees — others, less so. In: AP News. Available at: https://apnews.com/article/russia-ukraine-war-refugees-diversity-230b0cc790820b9bf8883f918fc8e313.

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8. Skordas A (2022) Temporary Protection and European Racism. Available at: https://www.asileproject.eu/temporary-protection-and-european-racism/; Thym D 2022 Refugee policy: “Preferentially helping Ukrainians is not racism” for The Limited Times. Available at: https://newsrnd.com/life/2022-03-03-refugee-policy-%22preferentially-helping-ukrainians-is-not-racism%22.HybVGVLAg5.html (4 March 2022).

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26. Article 26 (1966) International Covenant on Civil and Political Rights 19 December 1966 999 UNTS 171, 23 March 1976.

27. Article 2 Organization of African Unity (OAU) (1981) African Charter on Human and Peoples’ Rights (“Banjul Charter”) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 21 October 1986.

28. Article 1 Organization of American States (OAS) (1969a) American Convention on Human Rights “Pact of San Jose, Costa Rica” 18 July 1978. Article II of the American Declaration states that ‘All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.’ In Inter-American Commission on Human Rights (2015) Towards the Closure of Guantanamo, Report, […] the IACHR notes that national origin is not expressly referenced in the text of the non-discrimination clause contained in the American Declaration, although it falls under ‘any other factor.’

29. Article 14 Council of Europe (1950) European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 4 November 1950 ETS 5, 3 September 1953 The regional human rights systems also contain additional instruments on non-discrimination, but as our analysis aims to identify the contours of a global consensus, these are not considered in this article. For example, art 4 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), ECHR Protocol 12, Organization of American States (OAS) (2013) Inter-American Convention against racism, racial discrimination and related forms of intolerance 5 June 2013 UNTS 3225, 11 November 2017.

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35. See, for example, *Canadian Doctors for Refugee Care v. Canada (Attorney general) 2014 FC 651 (CanLII) (‘Canadian Doctors’); YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration 2015 FC 892 (‘First DCO case’).* See further Ferenc Feher, Richard Sebok and the Canadian Association of Refugee Lawyers et al v. the Minister of Public Safety and Emergency Preparedness 2019 FC 335

36. See discussion of Article 3 in Part II.

37. Thornberry P (1980) Seven years on: East African Asians, immigration rules and human rights. *The Liverpool Law Review* 2: 136; European Convention, Nos 4403/70-4530/70, p. 5, para 199.

38. Thornberry (1980). See eg Patel, Modha and Odedra v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17.

39. Per Achiume (2022) at 492, ‘Abdulaziz v. United Kingdom, offers a striking example of the excessive tolerance of the European human rights system for nationality and national origin discrimination’.

40. *Biao v Denmark* application no. 38590/10, ECtHR, judgment 24 May 2016.

41. *Ibid.*

42. Möschel M (2017) The Strasbourg Court and indirect race discrimination: Going beyond the education domain. *The Modern Law Review* 80(1): 121, 125–126; De Vries K (2016) Rewriting Abdulaziz: The ECtHR Grand Chamber’s ruling in Biao v. Denmark. *European Journal of Migration and Law* 18(4): 467, 477.

43. Möschel (2017) 125–126; De Vries (2016) 477.

44. Achiume (2022) at 485.

45. Williams R (2010) for Open Society Foundations. Available at: https://www.opensocietyfoundations.org/voices/rosalind-williams-challenging-ethnic-profiling-europe (24 March 2010).

46. Human Rights Committee, Rosalind Williams Lecraft v Spain Communication No. 1493/2006 (CCPR/C/96/D/1493/2006), para 7.2.

47. STC 13/2001, of 29 January 2001. We thank Professor Marian Ahumada for bringing this ruling to our attention.

48. Ibid.

49. Application nos. 55762/00 and 55974/00, ECtHR, judgment 13 December 2005, para 54.

50. Ibid para. 56.

51. *Regina v. Immigration Officer at Prague Airport and Another; Ex parte European Roma Rights Centre and Others* [2004] UKHL (Judicial Committee) 55.

52. *Kenya National Commission on Human Rights & Anor v. Attorney-General & Others* [2017] EKLH at 15.

53. Ibid.

54. Ibid.

55. *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, case no. C-54/07, CJEU (Second Chamber), judgment 18 June 2008. Admittedly, the CJEU has sought
to silo race and nationality in later caselaw. See further S Atrey (2018) ‘Race discrimination in EU Law after Jyske Finans’, Common Market Law Review, 55(2), 625-642.

56. The list of ethnic groups in the UK, for examples, includes several groups defined by nationality, including for example Indian, Pakistani, Bangladeshi, Chinese and Irish. https://www.ethnicity-facts-figures.service.gov.uk/style-guide/ethnic-groups

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59. Note 37 above

60. Third-Party Intervention of 22 April 2022 by the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E Tendayi Achiume) and the U.N. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context (Balakrishnan Rajagopal).

61. Cholewinski R (2002) Borders and discrimination in the European Union, Report, ILLPA, London; den Heijer M (2018) Visas and Non-discrimination. European Journal of Migration and Law 20(4): 470.

62. International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, T.I.A.S. No 94–1120, 660 UNTS 195.

63. Inter-American Commission on Human Rights, Compendium on Equality and Non-Discrimination: Inter-American Standards, OEA/Ser.L/V/II.171, Doc. 31, 13 February 2019.

64. The HRC endorsed the concept in Althammer et al. v. Austria, UN Doc. CCPR/C/78/D/998/2001, 8 August 2003. See Petersen (2021).

65. Nadige Dorzema et al. v. Dominican Republic, IACHR, judgment 24 October 2012.

66. Artavia Murillo and others (‘In Vitro Fertilization’) v. Costa Rica, Ser C No. 257, IACHR, judgment 28 November 2012.

67. DH and Others v. the Czech Republic [GC] [2007] (57325/00), ECtHR, judgment 13 November 2007.

68. Biao v Denmark application no. 38590/10, ECtHR, judgment 24 May 2016

69. Article 1(2) of both the Inter-American Convention against all forms of Discrimination; Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance. See, for example, H Collins & T Khaitan Foundations of Indirect Discrimination Law (Bloomsbury 2018) 1.

70. Compendium on Equality and Non-Discrimination: Inter-American Standards (2019).

71. Ochoa JLC and MA Contreras (2015) Inter-American and European Human Rights Journal 8(1–2): 80; Petersen (2021)

72. ‘Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’. UN Human Rights Committee (HRC), 10 November 1989 at [13].
73. Petersen (2021)
74. *Biao v Denmark*, citing *Timishev v Russia* App nos 55762/00 and 55974/00, ECHR 2005-XII at [58] and *DH and Others* at [176].
75. For an assessment, see Dembour M-B (2015) The Voice of the Inter-American Court: Equality as Jus Cogens (Advisory Opinions 16/99 and 18/03). *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press, pp.
76. *Compendium on Equality and Non-Discrimination: Inter-American Standards* (2019).
77. *Ibrahima Gueye et al. v. France* (1989) decision of the Human Rights Committee, Communication No. 196/1985, U.N. Doc. CCPR/C/1935/D/1196/1985, judgment 6 April 1989 at para 9.4.
78. *Gayusuz v. Austria*, 39/1995/545/631, ECtHR, judgment 23 May 1996.
79. ECtHR, *Moustaquim v. Belgium*, 18 February 1991 (Appl.no. 12313/83), at para. 49.
80. See, for example, ECtHR, Dhabhi v. Italy, 8 April 2014 (Appl.no. 17120/09).
81. *Saidoun v. Greece*, application no 40083/07, ECtHR, Merits and Just Satisfaction, judgment 28 October 2010.
82. *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, Inter-American Court of Human Rights (IACRTHR), 19 January 1984, available at: https://www.refworld.org/cases,IACRTHR,44e492b74.html [accessed 8 July 2022].
83. Inter-American Court of Human Rights (IACRTHR), ADVISORY OPINION OC-18/03, “Juridical Condition and Rights of Undocumented Migrants”, 17 September 2003.
84. *Biao v Denmark* citing *Zakayev and Safanova v. Russia*, no 11870/03, at 40, 11 February 2010; *Osman v. Denmark*, no 38058/09, at 58, 14 June 2011; *JM v. Sweden* (dec.), no 47509/13, at 40, 8 April 2014; and *FN v. the United Kingdom* (dec.), no 3202/09, at 37, 17 September 2013.
85. Dembour (2015).
86. The burgeoning literature includes Monghia R (2018) *Indian Migration and Empire: A Colonial Genealogy of the Modern State*, Durham and London: Duke University Press; Soomro *Speaking of Silences: A Genealogy of Freedom of Movement in International Law* 188 (PhD Dissertation, Freie Universität Berlin) (on file with author).
87. Inter-American Court of Human Rights (IACRTHR), *Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, (OC-4/84), 19 January 1984 at paras 57–60.
88. *Id*.
89. Spiro PJ (2011) A new international law of citizenship. *American Journal of International Law* 105(4): 694–746; Foster M and T Baker (2021) Racial discrimination in nationality laws: A doctrinal blind spot of international law? *Columbia Journal of Race and Law* 11(1): 83.
90. Eg Exclusion from a benefit based on the operation of prejudice or a stereotype, particularly where wrongful, See, eg, Réaume D (2013) Dignity, Equality, and Comparison. In: D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law*. Oxford: Oxford University Press, pp. 7–29. Section 15(1) of the Charter is set out in *Withler v. Canada (AG)* [2011] 1 SCR 396, at [61] where the Supreme Court of Canada stated as follows: ‘The substantive equality analysis under s. 15(1)...proceeds in two stages: (1) Does the law create a
distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?’

91. See, eg, Solanke I (2017) Discrimination as Stigma: A Theory of Anti-discrimination Law, Oxford: Hart Publishing

92. Henningsen LN (2022) The emerging anti-stereotyping principle under article 14 ECHR: Towards a multidimensional and intersectional approach to equality. European Convention on Human Rights Law Review 3(2): 185

93. On gender stereotypes, see in particular Briddick C (2020) Precarious workers and probationary wives: How immigration law discriminates against women. Social & Legal Studies

94. Eg Hode and Abdi v. The United Kingdom, application no 22341/09 ECtHR, Fourth Section, judgment 6 November 2012.

95. Kritzman-Amir T and J Ramji-Nogales (2019) Nationality bans. University of Illinois Law Review 2019(2): 563. Notably, they bracket out whether these bans violate international law.

96. The Grand Chamber noted in particular that the presuppositions underlying the 28-year rule were influenced by negative stereotypes against the lifestyles of Danish nationals of non-Danish ethnic origin, especially their supposed marriage patterns (§ 126).

97. Eg Lord Hope in Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others [2004] UKHL (Judicial Committee) 55, judgment 9 December 2004 at [82].

98. International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, T.I.A.S. No 94–1120, 660 UNTS 195

99. CERD Committee, (2005) General Recommendation XXX on discrimination against non-citizens, Sixty-fifth session, 5th August 2004, our emphasis.

100. Ibid at [9].

101. General Recommendation XXX at [4].

102. International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, T.I.A.S. No 94–1120, 660 UNTS 195

103. Costello and Foster (2021)

104. Article 31, Vienna Convention on the Law of Treaties (VCLT).

105. Article 31, VCLT.

106. See also Thornberry P (2016) The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary, Oxford: Oxford University Press.

107. Thornberry (1980) at 142–22.

108. Ibid 144.

109. Committee on the Elimination of Racial Discrimination, Guidelines on the elaboration of general recommendations*, CERD/C/504, 10 September 2021. ‘While elaborating a general recommendation, the Committee should take into account the evolution of its own practice, the appearance of new forms of racial discrimination and new challenges in the implementation of the Convention both in law and in practice, so as to bring States up to date with regard to the understanding of their obligations under the Convention and how to fulfil them.’ See thematic discussion on General Rec XXX in Committee on the Elimination of Racial Discrimination, Summary recording of the 1624th meeting, CERD/C/SR.1624, 5 March 2004 at [3]–[4].
110. UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination: Sixty-fourth Session (23 February–12 March 2004), Sixty-fifth Session (2–20 August 2004)*, A/59/18, 1 October 2004.

111. Summary recording of the 1624th meeting (2004).

112. Our analysis covered the period 2016-2021.

113. *Concluding Observations on the Combined Twenty-First to Twenty-Third Periodic Reports of Canada* UN Doc CERD/C/CO/21–23 (13 September 2017); *Concluding Observations on the Second to Fifth Periodic Reports of Serbia* UN Doc CERD/C/SRB/CO/2–5 (3 January 2018).

114. *Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of Poland* UN Doc CERD/C/POL/CO/22–24 (24 September 2019).

115. *Concluding Observations on the Combined Twenty-first to Twenty-Second Periodic Reports of Bulgaria* UN Doc CERD/BGR/CO/20–22 (31 May 2017).

116. *Concluding Observations on the Twenty-Third Periodic Report of Finland* UN Doc CERD/C/FIN/CO/23 (8 June 2017).

117. *Concluding Observations on the Combined Twenty-First to Twenty-Third Periodic Reports of Canada*.

118. *Concluding Observations on the Combined Tenty-Second to Twenty-Fourth Periodic Reports of the Kingdom of the Netherlands*, UN Doc CERD/C/NLD/CO/22–24 (16 November 2021).

119. Committee on the Elimination of Racial Discrimination, *Racial Discrimination against persons fleeing from the armed conflict in Ukraine: Statement 1 (advanced unedited version)*, 17 March 2022, available at: [https://www.ohchr.org/en/treaty-bodies/cerd/decisions-statements-and-letters#b](https://www.ohchr.org/en/treaty-bodies/cerd/decisions-statements-and-letters#b).

120. Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (Longman, 9th ed, 1992) 1279. On this basis, we would suggest that an account that starts with CERD’s migration exceptionalism and builds a general account on that basis is based on weak legal foundations. Eg Orgad L (2021) When Is Immigration Selection Discriminatory? *AJIL Unbound* 115: 345–349.

121. Grundler M (2022) ‘Treatment Accorded to Aliens Generally’- Article 7(1) of the 1951 Refugee Convention as a Basis for Visa-Free Access to States Parties’ Territory? An Examination of the Prohibition of Nationality Discrimination in the Refugee Convention. *International Journal of Refugee Law* 33(3): 469–496.

122. See for example Refugee Convention, Article 22.

123. Article 1; see League of Nations (1933) *Convention Relating to the International Status of Refugees* Treaty Series Vol. CLIX No. 3663.

124. League of Nations (1938) *Convention concerning the Status of Refugees Coming From Germany* 10 February 1938 League of Nations Treaty Series, Vol. CXCHII, No. 4461.

125. Other than the temporal and geographical limits which were removed in 1967.

126. Article 32 of the VCLT permits recourse to the travaux inter alia ‘in order to confirm the meaning resulting from the application of article 31...’. United Nations (1969c) *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969, UNTS vol. 1555, p. 331, entered into force 27 January 1980 (VCLT).

127. There were other points too, for example the conference removed the phrase ‘or because he is a refugee’ such that article 3 does not protect against discrimination qua refugeehood but only between refugees. See Hathaway JC (2021) *The Rights of Refugees Under International Law*,...
2nd edn, Cambridge: Cambridge University Press for thorough discussion of this point. There was also a suggestion that the grounds be broadened to reflect the wider range of grounds in the UDHR, see A/CONF.2/SR.5 at 9. Also the Australian delegate tried to push for exemptions that would permit certain conditions of entry to be imposed on refugees: see A/CONF.2/SR.5 at 14–17.

128. There was a discrepancy between the English and French drafts; thus the English draft was focused on in the debate.

129. A/CONF.2/SR.4 at 13 (Mr Reigner, World Jewish Congress).

130. See Mr Chance (Canada) at A/CONF.2/SR.5 at 4 and Mr Warren (USA) at A/CONF.2/SR.5 at 5: ‘There was no subject on which Governments were more sensitive or jealous regarding their freedom of action than on the determination of immigration policies’.

131. A/CONF.2/SR.4 at 13 (Mr Reigner, World Jewish Congress).

132. A/CONF.2/SR.4 at 13 (Mr Reigner, World Jewish Congress).

133. A/CONF.2/SR.5 at 7.

134. A/CONF.2/SR.4 at 18–19 (Mr Rochefort, France).

135. A/CONF.2/71 Report of the Style Committee, 11 July 1951.

136. Style Committee report at 2.

137. Style committee report at 2.

138. Style report at 2, , citing ‘as, for instance, Article 7, 11 (par. 3), 19 (par.2) and 23’.

139. Ibid at 3.

140. Ibid at 3.

141. Assembly UG, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-fourth Meeting, A/CONF.2/SR.24, 27 November 1951 at 21.

142. A/CONF.2/SR.24 at 21.

143. Article 33.

144. Article 31.

145. Article 16.

146. A/CONF.2/SR.5 at 12.

147. A/CONF.2/SR.5 at 12.

148. See Greek and Colombian representatives at A/CONF.2/SR.5 at 12–13.

149. A/CONF.2/SR.5 at 13.

150. A/CONF.2/SR.5 at 14.

151. A/CONF.2/SR.5 at 14.

152. A/CONF.2/SR.5 at 14.

153. A/CONF.2/SR.4 at 17 (Mr Robinson, Israel), discussing proposal to remove the phrase ‘or because he is a refugee’ as this would confuse things.

154. A/CONF.2/SR.5 at 17.

155. A/CONF.2/SR.5 at 17.

156. Cited inter alia by Krause U (2021) Colonial roots of the 1951 Refugee Convention and its effects on the global refugee regime. Journal of International Relations and Development 24(3): 599–626 at 607.

157. At para 24.

158. At para 25.
159. At para 28.
160. Barsky RF (2020) From the 1965 Bellagio Colloquium to the Adoption of the 1967 Protocol relating to the Status of Refugees. *International Journal of Refugee Law* 32(2): 340–363; Davies SE (2007) Redundant or essential? How politics shaped the outcome of the 1967 Protocol. Ibid 19(4): 703–728.
161. See in particular Marx R and W Staff (2011) Part Two General Provisions, Article 3. In: A Zimmermann, F Machts and J Dörschner (eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press, pp. 643–656 for a thorough but also very narrow treatment. Hathaway (2021) provides the most expansive view including of its potential relevance.
162. Marx and Staff (2011) at [53].
163. Chetail V (2021) Moving Towards an Integrated Approach of Refugee Law and Human Rights Law. In: C Costello, M Foster and J McAdam (eds) *The Oxford Handbook of International Refugee Law*. Oxford and New York: Oxford University Press, pp. 202–220 at 218.
164. Marx and Staff (2011) at [54].
165. Edwards A (2010) Transitioning gender: Feminist engagement with international refugee law and policy 1950–2010. *Refugee Survey Quarterly* 29(2): 21–45. We note that the OAU Convention provides in Art 4: ‘Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.’
166. Hathaway JC and M Foster (2014) *The Law of Refugee Status*, 2nd edn, Cambridge: Cambridge University Press.
167. Note that in *Roma Rights*, the House of Lords found that Article 3 was not invoked because the Roma had not left the Czech Republic and were therefore not at risk of non-refoulement.
168. *Stec v. United Kingdom* (2005) 41 EHRR SE 18 at [38], cited in R (on the application of JCWI) v. SSHD [2020] EWCA Civ 542 [2020] EWCA Civ 542 at [82].
169. R (on the application of JCWI) v. SSHD at [82], [85]-[87]. This case concerned Art 8 ECHR.
170. 1951 *Convention Relating to the Status of Refugees*, Article 1F and Article 33(2).
171. *Kenya National Commission on Human Rights & Anor v. Attorney-General & Others* [2017] EKLH
172. On the first DCO case, see generally Costello C (2016) Safe country? Says who? *International Journal of Refugee Law* 28(4): 601–622.
173. *Ferenc Feher, Richard Sebok and the Canadian Association of Refugee Lawyers et al v. the Minister of Public Safety and Emergency Preparedness* at [290].
174. Ibid
175. *Ferenc Feher, Richard Sebok and the Canadian Association of Refugee Lawyers et al v. the Minister of Public Safety and Emergency Preparedness* at [290].
176. Ibid at [291].
177. Ibid at [294].
178. Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT) requires that a treaty shall be interpreted by taking into account any relevant rules of international law applicable to the relations between the parties.
179. D.Z. v NETHERLANDS, UN Doc. CCPR/C/130/D/2918/2016
180. Biao v Denmark
181. Saidoun and Fawsie v. Greece, 28 October 2010, ECtHR (application nos. 40083/40007 and 44080/40007).
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183. Steffen Mau, Fabian Gülzau, Lena Laube and Natascha Zaun (2015) The Global Mobility Divide: How Visa Policies Have Evolved over Time, Journal of Ethnic and Migration Studies, 41:8, 1192–1213, DOI: 10.1080/1369183X.2015.1005007.
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187. Turani and Anor v Secretary of State for the Home Department [2021] EWCA Civ 348, judgment 15 March 2021 (15 March 2021) concerned a claim brought by Palestinian refugees from Syria (PRS) regarding their exclusion from resettlement opportunities in the UK. The claim was originally framed as one pertaining to direct race discrimination, but later framed (as the UK scheme was expanded to include not only Syrian nationals) in terms of indirect discrimination as the scheme operated exclusively for refugees nominated by UNHCR, while Palestinian refugees fall under UNRWA’s mandate. In a decision lacking any serious assessment of proportionality, the Court of Appeal found the difference in treatment justified by the emergency and humanitarian character of resettlement.
188. See further Costello (2016), note 166.
189. HID and BA v. Refugee Applications Commissioner and Others, Case C-175/11, CJEU (Second Chamber), EU:C:2013:2045, judgment 31 January 2013.
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