

# Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence

David James Cantor\*

## ABSTRACT

This article reassesses the question of whether international human rights law fixes procedural parameters for the determination of refugee status. Based on a detailed jurisprudential analysis, the study shows that Human Rights Treaty bodies of both universal and regional aspiration contribute positively to clarifying the minimum procedural standards applicable to this aspect of refugee protection. Drawing on recent ground-breaking decisions, the study finds general agreement among these transnational human rights bodies that human rights guarantees do regulate the process of refugee status determination. Nonetheless, it equally illustrates that each treaty body frames the applicability of human rights standards to refugee status determination in a different way. The article concludes that the tension between these two dynamics of the treaty body jurisprudence – convergence in result but divergence in approach – raises certain questions about our wider understanding of the relationship(s) between refugee law and human rights law.

**KEYWORDS:** human rights, procedural guarantees, refugee law, refugee status determination

## 1. INTRODUCTION

Over the past two decades, international human rights treaty bodies have increasingly elucidated ways in which human rights law may contribute to refugee protection. Perhaps the most striking jurisprudential development is their consolidation of a broad, absolute, and non-derogable human rights-based principle of *non-refoulement*.<sup>1</sup> Such transnational developments have helped to fuel keen scholarly debate on the extent to which human rights guarantees – as progressively

\* Director of the Refugee Law Initiative and Reader in International Human Rights Law, School of Advanced Study, University of London. This research on transnational approaches to refugee protection in different regions was carried out with the generous support of a Future Research Leaders grant from the Economic and Social Research Council [grant number ES/K001051/1].

1 See, for example, J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007; also T. Clark & F. Crépeau, “Mainstreaming Refugee Rights: the 1951 Convention and International Human Rights Law”, *Netherlands Quarterly on Human Rights*, 17, 1999, 389–410.

interpreted by relevant treaty bodies – may represent a complementary source of legal protection for refugees alongside refugee law,<sup>2</sup> or even eclipse refugee law as the primary source of such protection.<sup>3</sup>

This article contributes to this debate by examining how recent human rights treaty body jurisprudence sheds light on the procedural aspects of refugee status determination. The topic is of some interest because, although the determination of refugee status is essential for the protection of refugees, international law treaties are silent as to its procedural parameters. A practical effect of this silence has been to make it more difficult to identify a firm legal basis on which to substantiate concerns as to the legality or otherwise of efforts by some States in recent decades to curtail existing refugee determination procedures, or access to them, based on the idea that claims are “manifestly unfounded”, or from a “safe country of origin”, or allow return to a “safe third country”, etc.

This article does not seek to add directly to the many existing studies critiquing such restrictive procedural devices.<sup>4</sup> Rather, it illuminates the debate only consequentially by revisiting the more basic underlying issue of whether, or how, international law standards regulate the process of refugee status determination. In so doing, the study deliberately addresses only State determination of individual refugee status under the Convention relating to the Status of Refugees and its Protocol.<sup>5</sup> Alternative forms of refugee status determination derived from this basic procedural model – i.e. under regional refugee law,<sup>6</sup> in group or mass influx situations,<sup>7</sup> and carried out by the United Nations High Commissioner for Refugees (UNHCR)<sup>8</sup> – are not directly considered here.

2 See, particularly, J. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005.

3 V. Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in R. Rubio Marin (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, 19–72.

4 For example, in relation to the European “safe country” procedural device alone, recent literature includes: C. Engelmann, “Convergence Against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)”, *European Journal of Migration and Law*, 16(2), 2014, 277–302; M. Stefanova, “The Safe Need Not Apply: The Effects of the Canadian and the EU Safe Country of Origin Mechanisms on Roma Asylum Claims”, *Texas International Law Journal*, 49(1), 2014, 121–144; M. John-Hopkins, “The Emperor’s New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency”, *International Journal of Refugee Law*, 21(2), 2009, 218–255; C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection”, *European Journal of Migration and Law*, 7(1), 2005, 35–70.

5 Convention relating to the Status of Refugees (Refugee Convention), 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967).

6 As, for instance, under the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), 1001 UNTS 45, 10 Sep. 1969 (entry into force: 20 Jun. 1974). For a commentary on the refugee concept under this regional instrument, see M. Sharpe, “The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions”, *McGill Law Journal*, 58, 2012, 95–147.

7 See, for example, J.-F. Durieux & A. Hurwitz, “How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees”, *German Yearbook of International Law*, 47, 2004, 105–159; J.-F. Durieux & J. McAdam, “Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies”, *International Journal of Refugee Law*, 16(1), 2004, 4–24; I. Jackson, *The Refugee Concept in Group Situations*, The Hague, Kluwer Law International, 1999.

8 See, for example, M. Alexander, “Refugee Status Determination Conducted by UNHCR”, *International Journal of Refugee Law*, 11(2), 1999, 251–289; M. Smrkolj, “International Institutions and Individualized

The article begins by showing how efforts by UNHCR policy and refugee law scholarship responding to the absence of treaty law standards for refugee status determination have ended up inferring such procedural standards from human rights law as often as from refugee law.<sup>9</sup> It contends that existing scholarship treats the issue of how human rights treaties may generate procedural standards for refugee status determination rather narrowly. For instance, the article identifies a bias towards using the universal standards of the United Nations (UN) human rights system to the detriment of considering relevant jurisprudence by regional human rights treaty bodies.

Against this background, this article proceeds to elucidate the ways in which not just universal but also regional human rights treaty bodies have begun interpreting their constituent legal instruments in relation to refugee status determination procedures.<sup>10</sup> It finds a surge of ground-breaking jurisprudence from these bodies in the past decade that now leaves us in little doubt that human rights guarantees circumscribe various important procedural aspects of refugee status determination.<sup>11</sup> Nonetheless, the article concludes that real differences of opinion between human rights treaty bodies on precisely how this legal interaction takes place may require us to reconsider broader notions of the relationship between refugee law and human rights law.<sup>12</sup>

## 2. REFUGEE LAW AND PROCEDURAL GUARANTEES FOR STATUS DETERMINATION

The determination of refugee status is a “technical requirement” that gives the impression of being governed only marginally by international refugee law *stricto sensu*.<sup>13</sup> Emphasis on state discretion in this regard is hardly surprising as the obligation on States to take domestic measures to determine who is a refugee is owed directly to other States Parties rather than to the individual refugee. Even so, this section charts a trend within the refugee protection field seeking to identify minimum guarantees for such processes, which also has the effect of focusing attention more directly on the individual refugee and relevant standards for her treatment within such procedures.

The Refugee Convention and its Protocol enunciate the international law obligations owed by States Parties to any persons who objectively fulfil the “refugee” definitions contained in these instruments.<sup>14</sup> Seen in light of the object and purpose of these treaties, the principle of “effective implementation” thus requires States Parties at a minimum to adopt some form of internal procedure through which refugees can be identified.<sup>15</sup> That determination of a person’s refugee status is required in order

Decision-Making: An Example of UNHCR’s Refugee Status Determination”, *German Law Journal*, 9, 2008, 1779–1804.

9 Section 2.

10 Section 3.

11 Section 3.5.

12 Sections 3.5 and 4.

13 United Nations High Commissioner for Refugees (UNHCR), *Note on Determination of Refugee Status under International Instruments*, UN Doc. EC/SCP/5, 24 Aug. 1977, para. 22.

14 Refugee Convention, Art. 1A(2); Protocol, Art. I(2).

15 G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, 529–530; UNHCR, Note on Determination of Refugee Status, para. 4; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol*

to properly fulfil a State's treaty obligations is confirmed implicitly by Article 9 of the Refugee Convention,<sup>16</sup> and also expressly in the African regional context by Article 1.6 of the OAU Refugee Convention.<sup>17</sup>

Yet, the appropriate form of procedures to determine refugee status falls within the discretion of each individual State, "having regard to its particular constitutional and administrative structure".<sup>18</sup> As such, procedures vary widely from country to country,<sup>19</sup> making the establishment of "identical procedures" impractical.<sup>20</sup> Even so, UNHCR has long argued for the existence of "certain common basic requirements",<sup>21</sup> which were formally affirmed in EXCOM Conclusion No. 8 of 1977 as follows:

- (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might me [*sic.*] within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his

*relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.1, 1979, para. 189; UNHCR EXCOM, *General Conclusion*, Conclusion No. 21 (XXXII), 1981, para. d, referring to "effective implementation".

16 Although Art. 9 deals directly with provisional measures essential to national security that a State may take against an individual in times of emergency, it implicitly recognizes that the benefits of refugee status require "a determination by the Contracting State that that [*sic.*] person is in fact a refugee".

17 Art. 1.6 states that: "For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee".

18 UNHCR, *Handbook on Procedures*, para. 189.

19 UNHCR, Note on Determination of Refugee Status, paras. 14 and 23; see also Goodwin-Gill & McAdam, *The Refugee in International Law*, 533–537.

20 UNHCR, Note on Determination of Refugee Status, para. 15.

21 *Ibid.*, paras. 15 and 23.

request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.<sup>22</sup>

Although non-binding, these practical standards aim to ensure the “impartiality and objectivity” of status determination in line with the widely accepted principle of equality before the law.<sup>23</sup>

Over subsequent decades, UNHCR doctrine has proposed additional elements and elaborations to these basic standards, encompassing both access to asylum procedures and the observance of due process within these processes.<sup>24</sup> One example, among many others, is that the failure to submit an asylum request within a certain time limit, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.<sup>25</sup> It is quite apparent that UNHCR doctrine has also shifted towards justifying the whole array of purported procedural standards as dictated by the principles of “fairness and efficiency” in asylum processes.<sup>26</sup>

The minimum standards for refugee status determination espoused by UNHCR have served as an important reference point for creating and updating national procedures in countries across the world. Nonetheless, UNHCR doctrine has emphasised their practical nature and avoided the suggestion that they have a hard legal basis in the international law pertaining to refugees. Indeed, its 1979 Handbook affirms that the provisions of the Refugee Convention “that define the legal status of refugees and their rights [...] have no influence on the process of determination of refugee status”.<sup>27</sup> Instead, to the extent that (quasi-)legal rationales are proposed, UNHCR doctrine tends to use diffuse language that is more resonant of general human rights guarantees, e.g. “equality before the law”, “fairness”, etc., to describe the legal source of the practical procedural guarantees.

The scholarship is not entirely in accordance with the UNHCR doctrine. Thus, to take the most controversial procedural element as an example, Conclusion No. 8 of the UNHCR Executive Committee (EXCOM) is equivocal as to whether access to an independent and/or judicial remedy is required by international law, effectively leaving the question to the discretion of each State.<sup>28</sup> In contrast, it has been suggested by scholars that the practical need for a second, effective (i.e. independent) look at a rejected asylum claim is in fact implicit within the international law principle of effective implementation that underpins the refugee status determination process overall.<sup>29</sup>

22 UNHCR EXCOM, *Conclusion on Determination of Refugee Status*, Conclusion No. 8 (XXVII), 1977, para. e.

23 UNHCR, *Note on Determination of Refugee Status*, para. 16.

24 For a discussion, see R. Hofmann & T. Löhr, “Introduction to Chapter V: Requirements for Refugee Determination Procedures”, in A. Zimmermann (ed.), *The 1951 Convention Relating [sic] to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011, 1081–1128, at 1101–1125.

25 UNHCR EXCOM, *Conclusion of Refugees without an Asylum Country*, Conclusion No. 15 (XXX), 1979, para. i.

26 See, for example, UNHCR, *Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc. EC/GC/01/12, 31 May 2001.

27 UNHCR, *Handbook on Procedures*, para. 12(ii).

28 See UNHCR EXCOM Conclusion No. 8, para. vi.

29 Goodwin-Gill & McAdam, *The Refugee in International Law*, 537.

Some scholars have even suggested a basis for this element in refugee treaty law itself. Grounded in a plain text reading of Article 16(1) of the Refugee Convention, along with the drafters' intentions, they argue that the general right of access to the courts in Article 16(1) inheres even in a putative refugee seeking recognition by a State Party of her refugee status.<sup>30</sup> As such, a right of access to the courts exists to review or appeal a negative assessment of refugee status.<sup>31</sup> However, they equally acknowledge that Article 16(1) would require only that asylum-seekers have unimpeded access to whatever judicial remedies already exist in the State, and not that a new jurisdiction by the courts over any particular subject matter be established where one does not yet exist.<sup>32</sup>

For scenarios where the courts of a country may not have prior jurisdiction over refugee status determination procedures,<sup>33</sup> these authors have asked whether the human right to a fair trial expressed in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>34</sup> might resolve this "domestic jurisdictional stalemate".<sup>35</sup> The affirmative argument is put persuasively by Hathaway, who equally affirms the applicability of due process standards enunciated in Article 14(1) ICCPR to refugee status determination.<sup>36</sup> In contrast, Elberling suggests that neither Article 14(1) ICCPR nor parallel regional provisions on the human right to a fair trial apply to "matters of substantive law" such as refugee status determination.<sup>37</sup>

An alternative argument based also on the Refugee Convention might cite the Article 32(2) duty that a refugee's expulsion be "in pursuance only of a decision reached in accordance with due process of law". To the extent that refugee status determination may lead to expulsion, might these minimum due process guarantees thus apply?<sup>38</sup> This would be the case only if the Article 32(1) phrase "refugee lawfully in the territory" includes a refugee prior to the recognition of her status.<sup>39</sup> Even so, these due process guarantees would then apply only to expulsions "on grounds of

30 Hathaway, *The Rights of Refugees*, 645–646; see also B. Elberling, "Article 16 (Access to Courts/Droit d'Estre en Justice", in A. Zimmermann (ed.), *The 1951 Convention Relating [sic] to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011, 931–947, at 938–940 and 944–947.

31 Hathaway, *The Rights of Refugees*, 647; Elberling, "Article 16", 944.

32 *Ibid.*

33 The withdrawing or substantive curtailing of such access to the courts where it already exists for refugees would thus likely represent a violation of Article 16(1) of the Refugee Convention.

34 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976).

35 Hathaway, *The Rights of Refugees*, 647–656; Elberling, "Article 16", 946.

36 Hathaway, *The Rights of Refugees*, 652–656; Elberling, "Article 16", 946. This position has the added benefit of providing a legal basis for the emphasis increasingly placed by UNHCR on "fairness" in asylum procedures (see text accompanying footnote 26 ff. above).

37 Elberling, "Article 16", 946–947.

38 The relevant phrase provides that: "[...] the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority".

39 This interpretation is advanced by Hathaway, *The Rights of Refugees*, 666–668. A more cautious view is offered by U. Davy, "Article 32 (Expulsion/Expulsion)", in A. Zimmermann (ed.), *The 1951 Convention Relating [sic] to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011, 1277–1325, at 1301–1305. She acknowledges that the term "refugee" may include those awaiting formal recognition of their refugee status but suggests that the qualifier "lawfully" requires some form of authorised stay to be granted to them by a State under its domestic law.



national security or public order” (all other expulsions of refugees being unlawful) and could be waived by the State where “compelling reasons of security” require.<sup>40</sup> Their potential to underwrite procedural standards for refugee status determination is thus doubtful or, at best, very narrow in scope.

In conclusion, the international law principle of effective implementation requires refugee status determination to be carried out by States Parties to refugee law treaties and, towards that end, may also require certain procedural standards to be observed in the process. Although these are not spelt out, the minimum elements identified by EXCOM Conclusion No. 8 may offer a useful starting point as a matter of practice. In terms of refugee treaty law, the most that can be said is that Article 16(1) may require that States not withdraw existing rights of access to the courts by putative refugees to challenge negative administrative decisions on refugee status.

On their own, it is fair to conclude that these sources of international law provide only a relatively fragile legal basis for the elaboration of procedural standards for refugee status determination. Indeed, it is a notable feature of both UNHCR doctrine and scholarly argument on this point that a firm legal basis for such procedural standards is ultimately sought in the distinct but closely related corpus of international human rights law, particularly in purportedly universal expressions of the right to a fair trial as in the ICCPR. It is to these human rights standards – and their interpretation by human rights treaty bodies in the context of refugee status determination – that we now turn.

### 3. HUMAN RIGHTS LAW AS A SOURCE OF PROCEDURAL PROTECTION FOR REFUGEE STATUS DETERMINATION

In recent years, several important human rights treaty body judgments have reinvigorated the enquiry into whether procedural standards for refugee status determination may be derived from international human rights law. Clearly, given that refugee status determination is not referred to explicitly in any human rights treaty,<sup>41</sup> the nature of this enquiry turns rather on how general human rights provisions are interpreted to apply to the particular context of refugee status determination. The enquiry is thus squarely concerned with the role played by human rights treaty bodies in giving meaning to these provisions through their jurisprudence.

This section advances this enquiry through an analysis of how the main human rights bodies mandated to receive complaints about violations of treaties establishing civil and political rights address the issue of procedural standards for refugee status determination. It thus encompasses human rights treaty bodies of both universal and regional scope. The former focuses on the UN Human Rights Committee (HRC).<sup>42</sup> The latter encompasses: the Council of Europe’s European Court of Human Rights (ECtHR);<sup>43</sup> the African Union’s African Commission of Human and Peoples’ Rights (ACCommHPR);<sup>44</sup> as well as the Organization of American States’ Inter-American

40 See the terms of Art. 32(1)–(2) of the Refugee Convention.

41 It is referred to only very obliquely – as a duty on States to ensure that asylum-seeking children receive “appropriate protection and humanitarian assistance” – in Art. 22(1) of the Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990).

42 Section 3.1.

43 Section 3.2.

44 Section 3.3.

Court of Human Rights (IACtHR)<sup>45</sup> and Inter-American Commission on Human Rights (IACCommHR).<sup>46</sup>

At the outset, though, it is important to emphasise that the various human rights treaty bodies are not necessarily working from exactly the same script. Even for the civil and political rights instruments that form the focus of this study, there is a degree of variation in the rights that they protect as well as in the wording of the respective rights.<sup>47</sup> There are also important differences in the scope of interpretative functions and powers granted to monitoring bodies by their respective constitutive treaties.<sup>48</sup> The wider political and institutional culture within the different human rights treaty bodies also differs, as do the quality and clarity of their decisions. Finally, the types of refugee cases that arrive before the distinct human rights treaty bodies also show some variation.<sup>49</sup>

The implications for this analysis are that the jurisprudence of each human rights treaty body will be analysed separately in order to elucidate how it frames the procedural standards for refugee status determination in national systems. The principal interest here is on the ways in which the jurisprudence of these treaty bodies actually integrates the issue at present. As a result, interesting but separate questions as to the potential of other as yet unused human rights provisions or about the possibility of access to these international bodies as a remedy for the failure of national systems fall largely outside the scope of this study.

### 3.1. Human Rights Committee

The HRC is established by the ICCPR.<sup>50</sup> It provides interpretation of relevant provisions of the treaty through its Concluding Observations on periodic reports to it by States Parties,<sup>51</sup> General Comments on particular thematic issues,<sup>52</sup> and views on Inter-State complaints of violations of the treaty.<sup>53</sup> Where States are parties to the ICCPR Optional Protocol, the Committee is also authorised to receive and adopt views on complaints by individuals of violations of the treaty by those States Parties.<sup>54</sup> As ratification of these treaties is open to all UN Member States,<sup>55</sup> the

45 Section 3.4.1.

46 Section 3.4.2.

47 For instance, as shown in the analysis that follows, the right of asylum is present in certain treaties but not others, whereas the right to a fair trial, though expressed in all instruments, is worded very differently.

48 For instance, as shown in the analysis that follows, both the ACommHPR and the IACtHR are required by their respective treaties to have interpretative recourse to broader concepts of international law in interpreting the relevant provisions.

49 Thus, for example, the ACommHPR has tended to receive petitions concerning the mass violation of refugee rights, whereas the cases arriving before the IACtHR and the HRC involve individual refugees. These differences reflect, in part, the different procedural requirements for lodging a petition before one of these international instances. Another difference is that the refugee cases considered by the HRC and ECtHR tend to involve refugees from outside the region of the impugned State, whereas the other treaty bodies tend to deal with cases involving refugees from the impugned State's region of origin.

50 Arts. 28–39 ICCPR.

51 Art. 40 ICCPR.

52 This practice is derived from Art. 40 ICCPR.

53 Arts. 41–43 ICCPR.

54 Optional Protocol to the ICCPR, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976); see in particular Arts. 1 and 5.

55 Art. 48 ICCPR.



resulting “jurisprudence” of the Committee arguably represents the most “universal” interpretation of human rights standards by a treaty body. However, there is discussion of whether the Committee’s views are strictly legally binding.<sup>56</sup>

Unlike the Universal Declaration on Human Rights on which it is based, it is notable that the ICCPR does not contain a right of asylum.<sup>57</sup> Nonetheless, as mentioned above, refugee law scholarship has suggested that the procedural standards articulated by the right to a fair trial in Article 14 ICCPR may apply to the process of refugee status determination.<sup>58</sup> This proposition was always questionable in light of the early jurisprudence of the HRC, which consistently refused to express a view on whether “immigration hearings and deportation proceedings”, or even a decision on “a refugee claim”, constitute the determination of “rights and obligations in a suit at law” engaging the protections of Article 14(1) ICCPR. Yet, the Committee has recently settled the question by outright rejecting any applicability of Article 14(1) ICCPR in a string of cases by asylum-seekers challenging the fairness of national refugee determination procedures.<sup>59</sup>

Even so, the HRC clearly views any expulsion that may expose an alien to Article 7 (or Article 6) ICCPR harm in the destination country as requiring proper evaluation by the expelling State.<sup>60</sup> In its views on several individual petitions by asylum-seekers, the Committee refers to the fact that national procedures are “clearly arbitrary or amounted to a denial of justice” as the basis for it proceeding *proprio motu* to evaluate the risk of Article 7 (or 6) breach through expulsion.<sup>61</sup> To the extent that refugee status determination involves an assessment of the risk of serious harm, the Committee’s views on individual petitions suggest that certain procedural parameters apply to the process of refugee determination by virtue of the Article 7 (or 6) ICCPR harm involved.

56 The Committee’s own views on this question can be found in HRC, *General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33, 5 Nov. 2008.

57 For a discussion, see M. Manly, “La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos” [“The Consecration of Asylum as a Human Right: Comparative Analysis of the Universal Declaration, the American Declaration and the American Convention on Human Rights”], in L. Franco (ed.), *El asilo y la protección internacional de los refugiados en América Latina* [*Asylum and the International Protection of Refugees in Latin America*], San José, Editorama, 2004, 126–160, 138–140.

58 See text accompanying footnote 33 ff. above, referring to Hathaway, *The Rights of Refugees*, and Elberling, “Article 16”.

59 See, for example, HRC, *P.K. v. Canada* (2007), Communication No. 1234/2003, paras. 7.4 and 7.5; HRC, *AC & Others v. Netherlands* (2008), Communication No. 1494/2006, para. 8.4; HRC, *X v. Denmark* (2014), Communication No. 2007/2010, para. 8.5. The exception may be where deportation constitutes a sanction as a result of criminal proceedings and thus may involve the “determination of a criminal charge” in the meaning of Art. 14(1) ICCPR.

60 Art. 6 ICCPR prohibits the arbitrary deprivation of life; Art. 7 ICCPR provides for freedom from torture, cruel, or inhuman or degrading treatment or punishment. This point is made also by S. Persaud, “Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights”, *New Issues in Refugee Research*, 132, November 2006, 14–18.

61 For a recent example involving a refugee claim, see HRC, *X v. Denmark*, para. 9.3. Where the risk is substantiated, the State Party is required to fully reconsider the case in line with the Art. 2(3) ICCPR obligation to provide an effective remedy (*ibid.*, para. 9.6) but no violation of this provision is found as a result of the inadequacy of domestic procedures first-time around.

This reading of the individual petition jurisprudence is reinforced by certain Concluding Observations adopted on asylum procedures under the Committee's state reporting mechanism. For instance, the Committee has stated that: "[...] in order to afford effective protection under articles 6 and 7 of the [ICCPR], applications for refugee status should always be assessed on an individual basis [...]"<sup>62</sup>

In another instance, referring to Article 7, the Committee has expressed concern about the "lack of a systematic adjudication procedure for asylum-seekers".<sup>63</sup> However, whether these provisions offer any additional due process guarantees in relation to first-instance decision-making is an open question.

Given the rights at play in this context, the views in other Concluding Observations equally seem to suggest that the Article 2(3) ICCPR obligation on States to provide an effective remedy for human rights violations requires that asylum-seekers be able to appeal first-instance decisions to an independent body.<sup>64</sup> Although the relevant bodies were courts in both of these Concluding Observations, it is not clear whether a judicial authority is always required in this context in order to comply with Article 2(3). Whatever the case, the jurisprudence indicates that such appeals must not be subject to unduly short time limits, even in accelerated asylum procedures,<sup>65</sup> and must have suspensive effect vis-à-vis the expulsion of the asylum-seeker.<sup>66</sup>

The Committee's understanding of refugee determination in terms of expulsion to harm raises the question of whether the Article 13 ICCPR due process guarantees for the expulsion of aliens "lawfully in the territory" apply to asylum procedures.<sup>67</sup> On its face, Article 13 governs the expulsion of recognized refugees with an authorised form of stay rather than asylum-seekers.<sup>68</sup> However, recent decisions by Committee take the protection offered by this more specialised provision as a decisive factor in finding that the more general due process standards of Article 14 ICCPR do not apply to refugee status determination, suggesting that it is governed instead by Article 13.<sup>69</sup> Indeed, in certain Concluding Observations, the Committee has referred to Article 13 as if it were a general source of procedural protection in refugee status

62 HRC, *Concluding Observations on Estonia*, UN Doc. CCPR/CO/77/EST, 31 Mar. 2003, para. 13.

63 HRC, *Concluding Observations on Thailand*, UN Doc. CCPR/CO/84/THA, 8 Jul. 2005, para. 17.

64 HRC, *Concluding Observations on Latvia*, UN Doc. CCPR/CO/79/LVA, 1 Dec. 2003, para. 9, and *Concluding Observations on Lithuania*, UN Doc. CCPR/CO/80/LTU, 4 May 2004, para. 7. Although the position is not entirely clear, it appears that the Committee views Art. 2(3) ICCPR as operating to require an effective remedy vis-à-vis first-instance asylum decisions, rather than considering refugee status determination in general "as a remedy in the sense of Article 2(3) against *refoulement*" as suggested by Persaud, "Protecting Refugees", 15–16.

65 HRC, *Concluding Observations on Latvia*, para. 9.

66 HRC, *Concluding Observations on Lithuania*, para. 7.

67 It is clear that this and other similar provisions were, in fact, modelled on the expulsion-related guarantees for refugees expressed by Article 32 of the Refugee Convention (as confirmed for Art. 13 ICCPR, for instance, by M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl, N.P. Engel, 2005, 291).

68 This is the case in HRC, *Anna Maroufidou v. Sweden* (1981), Communication No. 58/1979, where the petitioner was granted a residence permit on the basis of her successful asylum claim. This decision is thus not authority for the proposition that Art. 13 applies to refugee status determination as suggested by Persaud, "Protecting Refugees", 13, footnote 55.

69 HRC, *P.K. v. Canada*, paras. 7.4 and 7.5; HRC, *AC & Others v. Netherlands*, para. 8.4; HRC, *X v. Denmark*, para. 8.5.

determination,<sup>70</sup> such that lodging an asylum claim would make an alien “lawful” for the purposes of Article 13. Such jurisprudence again emphasises the extent to which the Committee sees refugee status determination ultimately as about expulsion.

The lack of clarity behind much of the Committee’s jurisprudential reasoning is especially pronounced in its Concluding Observations. Nonetheless, in this context, the Committee has referred to the protections against arbitrary expulsion in Article 13 ICCPR as guaranteeing an asylum-seeker access to a refugee status determination procedure,<sup>71</sup> a non-suspensive appeal from first-instance decisions,<sup>72</sup> and free legal assistance in both ordinary and accelerated asylum procedures.<sup>73</sup> Indeed, in a recent Concluding Observation, the Committee has cited Articles 6, 7, and 13 ICCPR in combination as guaranteeing all asylum-seekers access to a “fair and efficient” process of refugee status determination and criticised “insufficient procedural safeguards” such as delays in granting access to procedures after registration and lack of access to personal files by applicants.<sup>74</sup>

Overall, though, it is evident that the Committee views refugee status determination as intrinsically related to expulsion and, as such, governed by human rights standards concerning due process. Whether these standards result principally from the risk of arbitrariness in expulsion (and thus Article 13 ICCPR), from the consequential risk of exposure to serious harm (and thus Articles 7 and 6, combined with Article 2(3) ICCPR), or from a combination of both rationales, is not yet apparent. What is clear is that the Committee does not accept that the general fair trial standards in Article 14 ICCPR apply to these procedures, but rather views the expulsion of aliens as governed by its own set of procedural standards. These standards – as expressed in Article 13 – are usually understood as a lesser form of guarantees than Article 14.<sup>75</sup> However, as illustrated by the above analysis, the Committee’s jurisprudence combining Articles 2(3), 6, 7, and 13 strongly suggests that in respect of access to – and due process in – asylum procedures this difference is much less pronounced.<sup>76</sup>

### 3.2. European Court of Human Rights

The ECtHR is currently the sole human rights treaty body for the European Convention on Human Rights (ECHR).<sup>77</sup> Although the Court of Justice of the European Union has long drawn upon the provisions of the ECHR,<sup>78</sup> the present analysis thus focuses upon the jurisprudence of the ECtHR as the dedicated treaty body in the Council of Europe. This takes the form of judgments by the ECtHR on

70 See, for example, HRC, *Concluding Observations on Lithuania*, para. 15, and HRC, *Concluding Observations on Switzerland*, UN Doc. CCPR/C/CHE/CO/3, 29 Oct. 2009, para. 18.

71 HRC, *Concluding Observations on Lithuania*, para. 15.

72 HRC, *Concluding Observations on Estonia*, para. 13.

73 HRC, *Concluding Observations on Switzerland*, para. 18.

74 HRC, *Concluding Observations on Bulgaria*, UN Doc. CCPR/C/BGR/CO/3, 19 Aug. 2011, para. 16.

75 See, for example, Nowak, *U.N. Covenant*, 290–301, particularly at 296–300.

76 A similar conclusion is reached by Persaud, “Protecting Refugees”, 16.

77 See Arts. 19–31 of the European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953) as amended by Protocol Nos. 11 and 14. The European Commission on Human Rights, which also used to exercise international supervisory jurisdiction over this treaty, no longer exists.

78 See, for example, E.F. Defeis, “Human Rights and the European Court of Justice: An Appraisal”, *Fordham International Law Journal*, 31(5), 2007, 1104–1117, at 1115.

complaints from States or individuals that a State Party has violated the rights protected in the ECHR or in one of its additional Protocols.<sup>79</sup> These judgments are formally binding on States Parties to the pertinent case.<sup>80</sup> The general impact of its jurisprudence makes this Court among the most influential of all human rights bodies.

The conceptual approach developed by the ECtHR to the issue of procedural standards for refugee status determination is rooted in three important points of reference which the jurisprudence of the HRC equally shares. First, in terms of the treaty standards to be applied, the ECtHR has observed: “The right to political asylum is not contained in either the Convention or its Protocols.”<sup>81</sup> In other words, the ECHR – like the ICCPR that followed it – elides any reference to the question of asylum, a factor which arguably influences the approach taken to the procedural standards applicable to refugee status determination by each of these treaty bodies.

Second, the ECtHR finds that the general guarantees of the right to a fair trial in Article 6 ECHR do not apply to “decisions regarding the entry, stay and deportation of aliens [because they] do not concern the determination of an applicant’s civil rights or obligations” in the meaning of Article 6(1) ECHR.<sup>82</sup> In its leading *Maaouia* Judgment, the Court – like the HRC – cites the existence of special procedural guarantees for the expulsion of aliens in Article 1 of Protocol 7 ECHR as indicative of the fact that such processes are not governed by the general procedural guarantees in Article 6(1).<sup>83</sup> It also endorses earlier European Commission jurisprudence that frames the term “civil” in terms of “private” law,<sup>84</sup> as well as holding that the “incidental” effects of expulsion on other rights – such as family life under Article 8 ECHR – are insufficient to engage Article 6(1).<sup>85</sup>

Even if commentators have roundly criticised the reasoning in the *Maaouia* Judgment on all three prongs,<sup>86</sup> the Court has regularly reaffirmed its finding that Article 6(1) does not apply to “decisions regarding the entry, right to remain and deportation of aliens”.<sup>87</sup> Yet, unlike the HRC, the ECtHR has not yet considered the applicability of fair trial guarantees in a claim involving refugee status determination. One might thus be tempted to argue that such procedures fall outside the restrictive scope of the *Maaouia* ratio and remain subject to Article 6(1) because they are not a decision about entry, stay, or even expulsion, but instead concern the determination of an international civil and political status.<sup>88</sup> Where *refoulement* is actually at issue, it

79 See, respectively, Arts. 33 and 34 ECHR. The Court also has the power to deliver advisory opinions under Art. 46 ECHR but this power has rarely been used.

80 Art. 46(1) ECHR.

81 ECtHR, *Vilvarajah and Others v. United Kingdom* (Judgment) (1991) Application No. 13163/87 & Others, para. 102.

82 ECtHR, *Maaouia v. France* (Judgment) (2000) Application No. 39652/98, para. 40.

83 *Ibid.*, para. 37.

84 *Ibid.*, para. 35.

85 *Ibid.*, para. 38.

86 On the first, see ECtHR, *Maaouia v. France*, Dissenting Opinion of Judge Loucaides Joined by Judge Traja. On the second and third, see C. Ovey & R.C.A. White, *Jacobs & White: The European Convention on Human Rights*, 4th ed., Oxford, Oxford University Press, 2006, 167.

87 ECtHR, *Mamatkulov & Askarov v. Turkey* (Judgment) (2005) Application Nos. 46827/99 and 46951/99, para. 82.

88 This intriguing proposition remains to be tested properly before the Court, especially in light of the fact that its Art. 6(1) ECHR jurisprudence in relation to other procedures is also increasingly rowing back

might be added that the incidental effects of the process may indeed affect fundamental rights.

However, the Court's general approach to complaints involving refugee status determination frames the issue squarely as one of expulsion rather than determination of an international status. This is the third point on which some similarity with the approach of the HRC exists. Yet, the ECtHR draws the issue of procedural protection more narrowly than does the UN treaty body as concerning only expulsion to *serious harm* rather than arbitrary expulsion in general. Thus, unlike the HRC, the ECtHR does not view the specialised guarantees concerning the expulsion of aliens as automatically relevant to asylum claims. The Court probably would not view a claim for asylum as sufficient to make an alien "lawfully resident" for the purposes of Article 1 of Protocol 7 ECHR, absent applicable national law to that effect.<sup>89</sup>

The Court's jurisprudence on procedural standards for refugee status determination hinges not only on the risk of expulsion to harm contrary to Article 3 ECHR,<sup>90</sup> but also the Article 13 ECHR right to an effective remedy.<sup>91</sup> Indeed, within the parameters of its general Article 13 jurisprudence,<sup>92</sup> the Court has developed a firm line of authority on the type of the remedy required for arguable complaints about an alien's expulsion to a real risk of Article 3 ECHR harm. In order to be considered an Article 13 effective remedy in this context, a procedure must integrate these elements: access to a competent national authority; independent and rigorous scrutiny of the complaint; a particularly prompt response; and automatic suspensive effect of the expulsion measure.<sup>93</sup> Thus, in contrast to the ICCPR jurisprudence,<sup>94</sup> procedural guarantees deriving from the ECHR concept of "effective remedy" in the context of expulsion to harm govern initial decision-making as much as appeals.

Nonetheless, many *refoulement* cases before the ECtHR are based on complaints about the adequacy of refugee status determination procedures at the national level. As a result, a proportion of the Court's jurisprudence on expulsion to harm expressly

from an understanding of the term "civil" as referring to "private" law (see Ovey & White, *The European Convention*, chapter 8).

89 The term "lawfully resident" is taken by the Court to refer to national law (D.J. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, 2nd ed., Oxford, Oxford University Press, 2009, 747).

90 Similar in scope to Art. 7 ICCPR, Art. 3 ECHR provides for freedom from torture, inhuman or degrading treatment or punishment. The ECtHR has consistently held that Art. 3 ECHR forbids States from taking measures that would send an alien to a country where there are substantial grounds for believing that she would face a real risk of ill-treatment in the terms of Art. 3 (see, for example, ECtHR, *Soering v. United Kingdom* (Judgment) (1989) Application No. 14038/88).

91 Art. 13 provides that: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

92 In general, Art. 13 requires the provision of a domestic remedy to address the substance of an "arguable complaint" of ECHR rights violation and to grant appropriate relief (ECtHR, *Boyle and Rice v. United Kingdom* (Judgment) (1988) Application Nos. 9659/82 & 6958/82, para. 52). The form and scope of the remedy are not set: it need not always be judicial, nor satisfy the criteria of Art. 6(1), nor even be comprised of one single remedy – but must be capable always of "effectively" addressing and remedying the substance of the particular complaint both in law and in practice (Harris & Others, *Law of the European Convention*, 563–566).

93 ECtHR, *M.S.S. v. Belgium and Greece* (Judgment) (2011) Application No. 30696/09, para. 293.

94 See Section 2.1.



considers the adequacy of asylum procedures against the due process standards derived from Articles 13 and 3 ECHR. From these judgments on asylum procedures, it is possible to distil a more specific set of procedural elements required by the ECtHR in order for refugee status determination to be undertaken in conformity with Articles 13 and 3 ECHR. It is immediately apparent from this case-law that the “effective remedy” concept does much more work in grounding the relevant procedural standards than is the case in the parallel jurisprudence of the HRC.

The ECtHR reads Articles 13 and 3 as requiring that asylum-seekers have access to a thorough procedure within which their claim can be examined. Violations of these rights may thus result from lack of access to a procedure competent to carry out individualised assessment of their claim for asylum,<sup>95</sup> or serious difficulties in accessing this authority.<sup>96</sup> It may also be due to the “automatic and mechanical” application of procedural formalities concerning admissibility to the process, such as a requirement to submit an asylum claim within a short period of time.<sup>97</sup> Equally, a lack of access to information sufficient for asylum-seekers to gain effective access to the asylum procedures represents a “major obstacle” to the vindication of their rights.<sup>98</sup> The right to an effective remedy thus requires the existence of an accessible and competent set of asylum procedures.

Moreover, the Court has held that practical deficiencies in the asylum procedure that deny asylum-seekers a proper examination of their claims prior to expulsion will also violate Articles 13 and 3. A number of such shortcomings in the Greek asylum system identified in the *MSS* judgment included:

[ . . . ] no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively deprives the asylum-seekers of legal counsel, and excessively lengthy delays in receiving a decision.<sup>99</sup>

The Court also found that poor decision-making – as evidenced by unreasoned cut-and-paste first-instance decisions of which “almost all” were negative – rendered the Greek system ineffective in practice.<sup>100</sup> The removal of a “watchdog role” played by second-instance administrative bodies and UNHCR was a further cause for concern.<sup>101</sup> In practice, asylum-seekers also faced efforts by the police authorities to deport them prior to any decision on the merits of their claim.<sup>102</sup>

Finally, the jurisprudence shows that Articles 13 and 3 ECHR demand that asylum-seekers be able to challenge negative decisions taken by administrative

95 ECtHR, *Hirsi Jamaa and Others v. Italy* (Judgment) (2012) Application No. 27765/09, para. 202.

96 ECtHR, *MSS v. Belgium and Greece*, para. 301.

97 ECtHR, *Jabari v. Turkey* (Judgment) (2000) Application No. 40035/98, para. 40; see also ECtHR, *K.R.S. v. United Kingdom* (Admissibility) (2008) Application No. 32733/08, page 15.

98 ECtHR, *MSS v. Belgium and Greece*, para. 304; see also ECtHR, *Hirsi Jamaa & Others v. Italy*, para. 204.

99 ECtHR, *MSS v. Belgium and Greece*, para. 301; see also ECtHR, *Hirsi Jamaa & Others v. Italy*, para. 202.

100 ECtHR, *MSS v. Belgium and Greece*, para. 302.

101 *Ibid.*

102 *Ibid.*, para. 315.



authorities. Indeed, in the asylum context, the Court implicitly appears to require this remedy to take the form of a competent judicial authority, although this need only exercise a “judicial review” jurisdiction in order to provide a sufficient degree of control over the decisions of administrative authorities taken on the merits of an asylum case.<sup>103</sup> The appeal procedure must always have automatic suspensive effect vis-à-vis expulsion,<sup>104</sup> as a matter of legal guarantee rather than just practice.<sup>105</sup> The procedure must be accessible and swift in practice,<sup>106</sup> and the resulting decision must be binding on relevant national authorities.<sup>107</sup> Such procedural guarantees work to ensure that an arguable asylum claim is properly examined on its merits.

The applicability of the minimum procedural guarantees for asylum claims under Articles 13 and 3 ECHR has been confirmed even in relation to challenging procedural facts. For example, the Court has held that summary procedures for pre-admission screening of an asylum claim – such as those applied to “manifestly unfounded” claims presented at the border – remain subject to these standards.<sup>108</sup> Similarly, it has concluded that these standards apply to States exercising “jurisdiction” outside their national territories over asylum claimants in situations such as boat interceptions on the high seas.<sup>109</sup> Finally, the Court has confirmed that States must be alert to such procedural deficiencies in other countries when participating in burden-sharing arrangements of the kind envisaged in the Dublin system.<sup>110</sup>

Even if the ECtHR’s jurisprudence suggests that the determination of refugee status may not engage the general due process protections of Article 6(1), the procedural standards that it has elaborated under Articles 13 and 3 ECHR are hardly inferior. Yet, it is important to recognize that they are ultimately created by subsuming the process of refugee status determination under the concept of expulsion to harm and, specifically, “the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised”.<sup>111</sup> Accordingly, in its own words, the Court

[ . . ] does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Conventions. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.<sup>112</sup>

103 ECtHR, *Vilvarajah & Others v. United Kingdom*, para. 126.

104 ECtHR, *Jabari v. Turkey*, para. 49.

105 ECtHR, *Gebremedhin v. France* (Judgment) (2007) Application No. 25389/05, para. 66; see also ECtHR, *Çonka v. Belgium* (Judgment) (2002) Application No. 51564/99, para. 83. Now a firm feature of the asylum case jurisprudence of the Court, this requirement did not appear in earlier cases (see ECtHR, *Vilvarajah and Others v. United Kingdom*, para. 125).

106 ECtHR, *MSS v. Belgium and Greece*, paras. 318–320; see also ECtHR, *K.R.S. v. United Kingdom*, p. 15 denouncing the “automatic and mechanical application” of procedural requirements for any appeals process from adverse decisions at first instance.

107 See, *mutatis mutandis*, ECtHR, *Chahal v. United Kingdom* (Judgment) (1996) Application No. 22414/93, para. 154.

108 ECtHR, *Gebremedhin v. France*, paras. 58–67.

109 ECtHR, *Hirsi Jamaa & Others v. Italy*, paras. 76–82 and 197–207.

110 ECtHR, *MSS v. Belgium and Greece*, paras. 344–361.

111 ECtHR, *Jabari v. Turkey*, para. 50.

112 ECtHR, *MSS v. Belgium and Greece*, para. 286; see also para. 298.

The Court's rationale for procedural protection is thus rooted exclusively in the need for a forward-looking effective remedy to counteract *refoulement*. Unlike the approach of the HRC, any wider concern about the potential for "arbitrariness" within expulsion proceedings is irrelevant to the equation, certainly to the extent that it is captured by Article 1 of Protocol 7 ECHR.<sup>113</sup> Moreover, the grounding of these standards in the "effective remedy" concept means that reference to the "refugee" concept or the rights associated with that status is precluded, because Article 13 applies only to ECHR rights and these do not include the right of asylum.

### 3.3. African Commission on Human and Peoples' Rights

The ACommHPR is the treaty body tasked by the African Union (formerly the Organization of African Unity) with oversight of the African Charter on Human and Peoples' Rights (ACHPR).<sup>114</sup> The ACommHPR may receive and consider petitions by States or other authors alleging the breach by a State Party of the rights expressed in the ACHPR.<sup>115</sup> In deciding such petitions, the ACommHPR must "draw inspiration" from wider international law on human and peoples' rights, and take other sources of international law binding upon States Parties into consideration "as subsidiary measures to determine the principles of law".<sup>116</sup>

The ACommHPR's approach to elucidating the procedural standards applicable to refugee status determination is markedly different from that of the HRC and ECtHR. One might expect that this results from the fact that the ACHPR gives expression to the right of asylum. In particular, Article 12(3) provides: "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions." The ACommHPR has interpreted this provision as "including a general protection of all those who are subject to persecution, that they may seek refuge in another state".<sup>117</sup> As such, one might expect that the Commission would derive procedural protection for refugee status determination from this provision. However, in the one case where the Commission sustained a violation of Article 12(3) – due to mass expulsion of Rwandan refugees on grounds not permitted by international law – the question of procedural protection was not dealt with under Article 12(3) ACHPR.<sup>118</sup>

In the Rwandan refugee case, as elsewhere, the Commission has instead dealt with procedural protection for aliens under the "right to a fair trial" provision in Article 7(1) ACHPR.<sup>119</sup> This provision is framed differently to the "fair trial"

113 Note, however, that where an expulsion is arbitrary due to its collective nature and thus violates the freedom from collective expulsion expressed in Art. 4 of Protocol 4, then an effective remedy in the terms of Art. 13 ECHR is required (see, for example, ECtHR, *Çonka v. Belgium*, paras. 77–85, and ECtHR, *Hirsi Jamaa and Others v. Italy*, paras. 197–207).

114 See Arts. 30–44 of the African Charter on Human and Peoples' Rights (ACHPR), 1520 UNTS 217, 27 Jun. 1981 (entry into force: 21 Oct. 1986).

115 The inter-state procedure is regulated by Arts. 47–54 ACHPR; provision for the consideration of petitions by other authors is made in Arts. 55–57 ACHPR.

116 See Arts. 60 and 61 ACHPR, respectively.

117 ACommHPR, *Organisation mondiale contre la torture & Others v. Rwanda* (1996) Communication Nos. 27/89, 46/91, 49/91, 99/93, para. 31.

118 *Ibid.*

119 *Ibid.*, paras. 34–35.

provisions in the ICCPR and ECHR in that it provides for the right of every individual to “have his cause heard”,<sup>120</sup> including: “The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations, and customs in force [...]”.<sup>121</sup> Where the case involves the expulsion of aliens “legally admitted in a territory of a State party”, as in the Rwandan refugee case, then the due process guarantees against arbitrary expulsion expressed in Article 12(4) ACHPR are often also applied in tandem.<sup>122</sup>

Unlike the HRC and the ECtHR, the ACommHPR thus seems to view general fair trial guarantees in Article 7(1) as applying to decisions involving the entry, stay and expulsion of aliens, regardless of the existence of more specialised provisions regarding expulsion of aliens in Article 12(4). It has held that Article 7(1) requires “unfettered” access to the competent national courts in order to challenge the “regularity and legality” of the decision.<sup>123</sup> Interestingly, it has read the Article 12(4) protections against the “arbitrary” expulsion of legally admitted aliens in near identical terms,<sup>124</sup> as requiring “due process of law” and the right to be heard by a competent court.<sup>125</sup> In short, the ACommHPR treats governmental decisions concerning the entry, stay, and expulsion of aliens as presumptively subject to the general “fair trial” standards that govern the procedural protection of other fundamental rights.<sup>126</sup>

The ACommHPR jurisprudence in this area has focused on access to the courts rather than the decision-making of first-instance bodies. On the latter point, it has confined itself to affirming that Article 12(4) requires that expulsion decisions must be adopted in a manner that is consistent with other ACHPR provisions and binding human rights instruments to which the State is party.<sup>127</sup> More generally, the Commission makes no attempt to further specify the procedural elements required of administrative authorities by Article 7(1) or Article 12(4) ACHPR in this context.

For this reason, it is particularly interesting that in an Ethiopian refugee case – its only extant decision specifically addressing refugee status determination – the

120 Art. 7(1) ACHPR.

121 Art. 7(1)(a) ACHPR.

122 See ACommHPR, *Organisation mondiale contre la torture & Others v. Rwanda*, para. 31. The exception is where serious questions exist as to the legality of the alien’s presence in the country, in which case Art. 12(4) ACHPR does not apply (see, for example, ACommHPR, *Rencontre Africaine pour la Défense des Droits de l’Homme (RADDHO) v. Zambia* (1996), Communication No. 71/92).

123 See, respectively, ACommHPR, *Kenneth Good v. Botswana* (2010), Communication No. 313/05, para. 169, and ACommHPR, *Union interafricaine des droits de l’homme & Others v. Angola* (1997) Communication No. 159/96, para. 19.

124 ACommHPR, *Organisation mondiale contre la torture & Others v. Rwanda*, para. 31.

125 See, respectively, ACommHPR, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connaateh and 13 Others) v. Angola* (2008), Communication No. 292/04, para. 63, and ACommHPR, *Kenneth Good v. Botswana*, para. 205.

126 Although implicit in the jurisprudence, it is possible to conceive the violation of fundamental rights in these cases in two main ways, namely as resulting from: (1) the character of the expulsion measure, i.e. as based on a lack of respect for the due process rights of legally admitted aliens under Art 12(4) or on its “mass” character contrary to Art 12(5); and/or (2) the effects of the expulsion in interfering with the alien’s enjoyment of rights in the host State, such as the rights to property (Art 14), work (Art 15), education (Art 17), and family (Art 18). For a case adopting both approaches, see ACommHPR, *Union interafricaine des droits de l’homme & Others v. Angola*.

127 ACommHPR, *Kenneth Good v. Botswana*, para. 204.

Commission finds that Article 7(1) ACHPR requires administrative authorities determining asylum claims to meet the procedural standards set out in UNHCR EXCOM Conclusion No. 8 (1977).<sup>128</sup> Although this includes a mechanism for reconsideration of negative first instance decisions by the same committee or another authority, the Commission also makes clear that, “in the event of the failure of such administrative mechanisms”, access to a judicial remedy is required by Article 7(1).<sup>129</sup> In other words, the general right to a fair trial in the ACHPR not only sets standards for administrative asylum procedures by reference to UNHCR doctrine but also demands access to national courts for the lodging of appeals.

It will be apparent that the approach adopted by the ACommHPR to the issue of procedural standards for refugee status determination is utterly distinct from those of the HRC and ECtHR. First, the structure and reasoning of its Ethiopian refugee decision expressly de-links the issue of procedural guarantees for status determination from the question of *refoulement* to harm or, indeed, expulsion under Article 12(4).<sup>130</sup> Second, and relatedly, the Commission frames refugee status determination as subject to the general due process guarantees of the right to a fair trial,<sup>131</sup> rather than placing it in a separate regime attracting an arguably lesser set of expulsion-related guarantees. Third, despite its lack of reference to the right of asylum, it gives body to the general fair trial standards by reference to UNHCR doctrine, in line with its particular interpretative powers under Articles 60–61 ACHPR.

### 3.4. Inter-American human rights system

The IACommHR and IACtHR both form part of the human rights system created by the Organization of American States (OAS). For this article, the decision has been to analyse them separately in order to illustrate the convergences and divergences between their respective approaches to the procedural standards governing refugee status determination. This approach is justified by the fact that the case-law on point from each respective body largely draws on different Inter-American human rights frameworks.

The author has examined the human rights framework developed by the IACommHR for the protection of asylum-seekers and refugees extensively elsewhere.<sup>132</sup> As a result, the

128 ACommHPR, *Curtis Francis Doebller v. Sudan* (2009) Communication No. 235/00, para. 165. Although the Commission refers to “EXCOM decision No 69”, it is clear from the context that it is referring to the standards in EXCOM Conclusion No. 8 (see para. 143 of the Commission’s decision).

129 *Ibid.*

130 Refugee status determination is addressed in paras. 164–165 of the decision. The separate *refoulement* complaint is dealt with, and dismissed on its own terms by the Commission in paras. 155–163 of the decision. Its findings on Art. 12(4) are contained in paras. 167–168 (*ibid.*).

131 This can be justified on the basis of the Commission’s broad general approach to the applicability of Art. 7(1) ACHPR. In more specific terms, the fact that Art. 7(1) describes its field of application *ratione materiae* as fundamental rights recognized by “conventions, laws, regulations and customs” suggests that entitlement to the rights recognized in the Refugee Convention through the process of refugee status determination provides an adequate formal basis for its textual applicability.

132 D.J. Cantor & S. Barichello, “Protection of Asylum Seekers under the Inter-American Human Rights System”, in A. Abbass & F. Ippolito (eds.), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, Farnham, Ashgate, 2014, 267–294; also, D.J. Cantor & S. Barichello, “The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection”, *International Journal of Human Rights*, 17(5)–(6), 2013, 689–706.

analysis of the Commission's jurisprudence provided here is deliberately concise and comparative in character. In contrast, the approach taken by the IACtHR is assessed in greater detail. This reflects the greater topical interest attached to the fact that the IACtHR only delivered its first judgment on asylum issues relatively recently,<sup>133</sup> and that the judgment is still available only in Spanish, limiting accessibility to an English-speaking audience.

### 3.4.1. *Inter-American Commission on Human Rights*

The IACommHR is an OAS Charter body that was given certain treaty body powers by the American Convention on Human Rights (ACHR).<sup>134</sup> Its functions are thus simultaneously conferred by its Statute (for all OAS Member States) and by the ACHR (for States Parties).<sup>135</sup> Its "jurisprudence" takes the form of views expressed in country and thematic reports and decisions on complaints from States and individuals.<sup>136</sup> As most asylum cases have involved States not party to the ACHR, the relevant jurisprudence is based on the Commission's application of the American Declaration on the Rights and Duties of Man (ADHR),<sup>137</sup> which articulates the specific standards envisaged by the broad human rights obligations expressed in the OAS Charter.<sup>138</sup>

The IACommHR, like the ACommHPR, accepts that the general procedural guarantees of the right to a fair trial in Article XVIII ADHR apply to decisions involving the entry, stay, and expulsion of aliens. However, the IACommHR arguably goes further in explicitly affirming that certain elements of the due process guarantees ordinarily applicable to criminal trials expressed by Article XXVI ADHR also apply to the expulsion of aliens.<sup>139</sup> These minimum elements include:

[T]he right to be assisted by a lawyer if they wish or by a representative in whom they have confidence, sufficient time to ascertain the charge against them, a reasonable time in which to prepare and formalize a response, and to seek and adduce responding evidence. Hearings must be conducted in public to the extent required by due guarantees and fairness [ . . . ].<sup>140</sup>

133 See Section 3.4.2.

134 See Arts. 34–40 of the American Convention on Human Rights (ACHR), 1144 UNTS 123, 21 Nov. 1969 (entry into force: 18 Jul. 1978). The Commission was created originally by the 1967 Buenos Aires Protocol, which introduced the present Art. 106 into the OAS Charter.

135 OAS General Assembly, *Resolution No. 447 (IX-0/79): Statute of the Inter-American Commission on Human Rights*, 31 Oct. 1979.

136 Arts. 19–20, *Commission Statute*; Arts. 44, 50–51 ACHR.

137 American Declaration on the Rights and Duties of Man (ADHR), adopted by Final Act of the Ninth International Conference of American States (Pan American Union), *Resolution XXX*, 30 Mar.–2 May 1948, 1 *Annals of the OAS* 130 (1949).

138 See Inter-American Court of Human Rights (IACtHR), *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* (Advisory Opinion), (1989), Ser. A, No. 10.

139 Inter-American Commission on Human Rights (IACommHR), *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116/Doc 5 rev 1 corr (2002), 22 Oct. 2002, para. 403.

140 *Ibid.*



Moreover, legal aid must be provided where required to ensure effective exercise of the right to judicial protection.<sup>141</sup> Such access to judicial remedies will be particularly required where rights such as the freedom from torture are at play as a result of threatened expulsion or *refoulement*.<sup>142</sup>

Alongside the applicability of the general protections of Articles XVIII and XXVI to procedures leading to expulsion of an asylum-seeker, the IACommHR has also developed a much more specific set of procedural guarantees relating to the process of refugee status determination. These are derived not from Articles XVIII and XXVI ADHR, but rather from the right of asylum that is expressed in Article XXVII ADHR. Thus, in contrast to the approach of the ACommHPR, the IACommHR has chosen to develop the most specific standards relating to asylum procedures under the right of asylum itself.

For the IACommHR, the right of asylum in Article XXVII ADHR gives rise to a corresponding obligation on States to provide protection to any person within their jurisdiction who objectively fulfils the international law definition of a refugee.<sup>143</sup> This obligation is hedged about by certain procedural parameters that the IACommHR draws from the refugee field. Indeed, on the Commission's reading, "international refugee law" is purported to have evolved to the point where it recognizes the right of an asylum-seeker to a hearing to determine whether she fulfils the refugee definition.<sup>144</sup> Based on this understanding, the Commission asserts the right of an asylum-seeker to access to a State's asylum procedures, even if the State's jurisdiction is extra-territorial, as in the interceptions of asylum-seekers on boats on the high seas.<sup>145</sup>

The Commission has also developed the content of this principle of "hearing the person" into a set of minimum procedural protections derived principally from UNHCR soft law guidance.<sup>146</sup> In broad terms, these encompass: the right to have the claim determined by a competent, impartial, and independent authority; the right to a fair process of hearing the claim, including access to legal aid where required in order to vindicate rights within the refugee system as a whole; the right to receive a proper decision, including the possibility of review; and the right not to be *refouled* pending determination of the claim for asylum (and following recognition).<sup>147</sup>

141 IACommHR, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, OAS Doc. OEA/Ser.L/V/II.106/Doc 40 rev, 28 Feb. 2000, (*Report on the Situation within the Canadian System*), paras. 127 and 174. Such representatives must have the ability to give legal advice and representation during removal proceedings, including on the availability of judicial remedies (IACommHR, *Loren Rieve et al. v. Mexico* (1999) Case 11610, Commission Report No. 49/99, para. 75).

142 IACommHR, *Report on the Situation within the Canadian System*, paras. 127 and 174. See also IACommHR, *Haitian Centre for Human Rights et al. v. USA* (1997) Case 10675, Commission Report No. 51/96 (*Haitian Interdictions case*), para. 180.

143 IACommHR, *Report on the Situation within the Canadian System*, para. 60.

144 IACommHR, *Haitian Interdictions case*, para. 155. The source for this affirmation, and the question of whether international custom (if such it is) constitutes an "international agreement" in the terms of Art. XXVII ADHR, are not explicitly addressed by the Commission.

145 IACommHR, *Haitian Interdictions case*, para. 163.

146 See, for example, the IACommHR, *Report on the Situation within the Canadian System*.

147 For more details on these elements and references to the relevant Commission jurisprudence, see Cantor and Barichello, "Protection of Asylum Seekers", 277–280.



In short, the right of asylum in Article XXVII ADHR is shaped by the IACommHR to provide an asylum-seeker with access and due process rights vis-à-vis national refugee status determination procedures.

Even if the Commission asserts that the “strictest adherence” to these procedural standards is ultimately required by the nature of other rights that may be jeopardised by the *refoulement* of a refugee, such as the right to life and the freedom from torture,<sup>148</sup> the standards themselves are derived directly from the Article XXVII ADHR right of asylum. In this respect, the far-reaching and innovative procedural standards for refugee status determination developed by the IACommHR have a distinct rationale and source of legal genesis from those moulded by the HRC, ECtHR, and ACommHR.

### 3.4.2. Inter-American Court of Human Rights

Unlike the IACommHR, the IACtHR is entirely a treaty creation of the ACHR.<sup>149</sup> Its jurisprudence is created through the issuance of advisory opinions,<sup>150</sup> as well as through judgments on complaints of violations of the rights protected in the ACHR that are referred to either by States Parties or the IACommHR.<sup>151</sup> The Court has jurisdiction only to apply the ACHR, although it may interpret these provisions in light of other treaties binding the State party to a case,<sup>152</sup> the ADHR, and “other international acts of the same nature”,<sup>153</sup> and “rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government”.<sup>154</sup> The Court’s judgments are binding on the State Party to a case.<sup>155</sup>

The IACtHR only recently adopted its first decision on asylum issues in the ground-breaking judgment on the *Familia Pacheco Tineo v. Bolivia* (*Pacheco Tineo Family v. Bolivia*) case.<sup>156</sup> Nonetheless, the approach taken in that judgment builds on a more Court-extensive jurisprudence in recent years concerning the human rights of migrants under the ACHR, especially those who are irregular.<sup>157</sup> That jurisprudence offers an important foundation for developing procedural protection for migrants by finding that the determination of a person’s rights and obligations of a “civil, labor, fiscal or any other nature” that forms the basis for the detailed

148 See, for example, *Report on Terrorism and Human Rights*, para. 394.

149 Arts. 52–60 ACHR.

150 Art. 64 ACHR.

151 Arts. 61–63 ACHR.

152 Art. 29(b) ACHR.

153 Art. 29(d) ACHR.

154 Art. 29(c) ACHR.

155 Arts. 67–68 ACHR.

156 IACtHR, *Familia Pacheco Tineo v. Bolivia* (Judgment) (2013) Ser. C, No. 272. Note that, since the preparation of this article, the IACtHR has also promulgated *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion) (2014) Ser. A, No. 21. Although there is not enough space to undertake a detailed analysis here, this advisory opinion further builds upon the Court’s construction of human rights obligations in the refugee status determination context as set out initially in the judgment on *Pacheco Tineo Family v. Bolivia*.

157 This jurisprudence includes: IACtHR, *Juridical Condition and Rights of the [sic.] Undocumented Migrants* (Advisory Opinion) (2003) Ser. A, No. 18 (*Juridical Condition and Undocumented Migrants*); IACtHR, *Vélez Loor v. Panama* (Judgment) (2010) Ser. C, No. 218; and IACtHR, *Nadege Dorzema et al. v. Dominican Republic* (Judgment), (2012) Ser. C, No. 251.

guarantees in the right to a fair trial in Article 8(1) ACHR applies to any act of State that could affect a person,<sup>158</sup> including acts concerning migration law and policy.<sup>159</sup> In this respect, the approach of the Court coheres with that of the IACommHR and stands in sharp contrast with those of the HRC and ECtHR.

Like the IACommHR, the IACtHR further finds that, in procedures that could lead to the expulsion of an alien, the content of the minimum due process guarantees is “substantially similar” to those specified for criminal proceedings by Article 8(2) ACHR.<sup>160</sup> In addition to being individual and non-discriminatory in character, these procedures must thus observe such minimum guarantees as: the provision of information to the alien about the reasons for her expulsion and her rights; possibility for the alien to explain the reasons why she should not be expelled and to seek and receive legal advice, interpretation, and consular assistance as necessary; opportunity to seek revision of negative decision by a competent authority; and any final expulsion of the alien can take place only after notification of a reasoned decision in line with the law.<sup>161</sup>

This framework of procedural protection thus turns on the potential vulnerability of migrants to arbitrariness at the hands of a State,<sup>162</sup> which attracts the broadly framed general due process guarantees of Article 8(1) ACHR and even certain others similar to those in Article 8(2). The concept of preventing expulsion to harm – or *refoulement* – contained in Article 22(8) ACHR is subsumed within this wider framework rather than constituting its inherent rationale.<sup>163</sup> Indeed, the Court locates the state duty to interview an alien alleging a risk of *refoulement* squarely within the broader due process guarantee to afford an alien to explain the reasons why she should not be expelled.<sup>164</sup> In contrast to the jurisprudence of the HRC and the ECtHR, the prohibition on *refoulement* in Article 22(8) does not constitute the rationale behind the applicable due process guarantees, but is instead simply a ground on which expulsion may be unlawful.

Moreover, like the IACommHR, the IACtHR draws a clear distinction between the context of expulsion and that of refugee status determination. Indeed, in the *Pacheco Tineo* case, the Court follows the well-established line of Commission jurisprudence by framing refugee status determination as falling squarely under the right of asylum, expressed in the ACHR at Article 22(7). In that case, the Court advances a specific understanding of the concept of asylum, arguing that with the adoption of the Refugee Convention and its Protocol: “[. . .] the institution of asylum assumed a specific form and modality at the universal level: that of refugee status.”<sup>165</sup>

Even if the Court acknowledges that the refugee concept has been further developed by subsequent regional and national instruments, the clear implication is that references to “asylum” such as in Article 22(7) ACHR are to be understood

158 IACtHR, *Constitutional Court v. Peru* (Judgment) (2001) Ser. C, No. 71, paras. 69–70.

159 IACtHR, *Juridical Condition and Undocumented Migrants*, paras. 118–119.

160 IACtHR, *Pacheco Tineo Family v. Bolivia*, para. 132.

161 IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, paras. 161 and 175.

162 IACtHR, *Juridical Condition and Undocumented Migrants*, para. 114.

163 IACtHR, *Pacheco Tineo Family v. Bolivia*, para. 136.

164 *Ibid.*, para. 136.

165 *Ibid.*, para. 139.

principally as referring to international refugee law. Secondly, of course, it may also refer to other more specific and non-universal modalities of asylum, such as the Inter-American *non-refoulement* provision contained in Article 22(8) ACHR,<sup>166</sup> but the principal point of reference is international refugee law.

As in the expulsion context, the Court is also careful to separate the issue of *non-refoulement* from that of refugee status determination and its associated procedural guarantees.<sup>167</sup> In the Court's view, the only implication for refugee status determination of the concept of *refoulement* is that it forbids asylum-seekers from being rejected at the border or expelled without an adequate and individual assessment of their claims.<sup>168</sup> The issue of refugee status determination is thus framed as a distinct act of a State and rightly recognized as one that has declarative and not constitutive effect vis-à-vis "refugee" status.<sup>169</sup> Even so, the Court suggests that this declarative act by one State requires other States Parties to take the person's refugee status into account should they adopt migratory measures against her and must take special care in verifying this status.<sup>170</sup>

Following the Commission, the Court reads the right of asylum in Article 22(7) ACHR as guaranteeing asylum-seekers a "right to be heard" by the State in which asylum is sought.<sup>171</sup> This is taken to mean that asylum-seekers – whether seeking refugee status or the more limited form of asylum under Article 22(8) ACHR – must be assured access to asylum procedures that allow a correct examination of their claim.<sup>172</sup> In contrast to the Commission, the Court finds that these procedures benefit from guarantees deriving from Articles 8 and 25 ACHR, "according to the administrative or judicial nature of the relevant procedure in each case".<sup>173</sup> Even if States have discretion to decide the precise form of their asylum procedures, they must still accord with principles of due process, non-discrimination, predictability, coherence, and objectivity at every stage in order to avoid "arbitrary decisions".<sup>174</sup> Thus, whereas the Commission views such procedural protection as inherent in the right of asylum,<sup>175</sup> the Court derives them from the applicability of general procedural guarantees.

However, like the Commission, the Court draws on international refugee law in order to provide more detailed guidance on how these principles apply in due process terms to refugee status determination. Recourse to the more specialised corpus of international refugee law to interpret and specify the scope of ACHR provisions is allowed by Articles 22(7) and 29(b) ACHR.<sup>176</sup> Yet, the Court does not limit "International Refugee Law" to conventional sources but rather affirms an "important evolution" in this body of law that encompasses also "the directives, concepts

166 *Ibid.*, paras. 142 and 152.

167 *Ibid.* The former is dealt with in section B.2.b of the judgment and the latter in sections B.2.a and B.2.c.

168 *Ibid.*, para. 153.

169 *Ibid.*, para. 145.

170 *Ibid.*, para. 150.

171 *Ibid.*, para. 154.

172 *Ibid.*, paras. 155 and 159.

173 *Ibid.*, para. 155.

174 *Ibid.*, para. 157.

175 See Section 3.4.1.

176 IACtHR, *Pacheco Tineo Family v. Bolivia*, para. 143.

and other authorised pronouncements of organs such as UNHCR”.<sup>177</sup> Here, as in the Commission’s jurisprudence, the soft law sources (“directives and criteria of UNHCR”) are used rather than conventional ones to elucidate the relevant due process standards applicable to refugee status determination.<sup>178</sup> The Court is careful to expressly negate any claim that this interpretative exercise creates an assumed hierarchy between human rights law and refugee law.<sup>179</sup>

The resulting due process standards for refugee status determination affirmed by the Court combine the basic procedural guarantees outlined in EXCOM Conclusion No. 8 (1977) with more recent concepts of UNHCR doctrine.<sup>180</sup> Thus, States Parties to the ACHR have the following obligations:

- (a) They must guarantee the applicant the necessary facilities, including the services of a competent interpreter, as well as, where appropriate, access to legal advice and representation, for submitting her case to the authorities. In this sense, the applicant should receive the necessary guidance as to the procedure to be followed in a language and form that she can understand and, where appropriate, the opportunity to contact a representative of UNHCR;
- (b) The application must be examined, with objectivity, within the framework of the procedure established for that purpose by a clearly identified competent authority, which requires a personal interview to be carried out;
- (c) Decisions adopted by the competent organs must be properly and expressly reasoned;
- (d) With the objective of protecting at-risk rights of the applicants, all stages of the asylum procedure must respect data protection of the applicant and the application and the principle of confidentiality;
- (e) If the applicant’s refugee status is not recognised, she must be provided with information about how to appeal for a formal reconsideration of the decision, according to the prevailing system, and given a reasonable time to do so;
- (f) The appeal [*recurso de revision o apelación*] must have suspensive effect and must allow the applicant to remain in the country pending a decision on her case by the competent authority and even while any challenge is pending, unless it has been established that her claim is manifestly unfounded.<sup>181</sup>

However, the Court also affirms that, independently of any possibility of administrative review, judicial remedies may also be sought in line with Article 25 ACHR,

177 *Ibid.*, para. 143.

178 *Ibid.*, para. 159.

179 *Ibid.*, para. 143.

180 The standards are derived principally from those expressed in EXCOM Conclusion No. 8 (XXVIII) (1977) and UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2005, available at: <http://www.refworld.org/pdfid/432ae9204.pdf> (last visited 1 Sep. 2014).

181 IACtHR, *Pacheco Tineo Family v. Bolivia*, paras. 159(a)–(f), author’s translation to English.

which must provide a rapid, appropriate, and effective means of challenging a possible violation of the rights recognized in Articles 22(7) and 22(8) ACHR.<sup>182</sup>

Rooted in the facts of the *Pacheco Tineo* case, the Court usefully addresses a number of additional due process aspects of refugee status determination in line with Articles 22(7), 8 and 25 ACHR. First, it adopts UNHCR doctrine that certain minimum guarantees apply even in accelerated procedures for “manifestly unfounded” claims, including: a hearing, determination by the competent authority of the purportedly unfounded or abusive nature of the claim, and a possibility of review of the negative decision before expulsion.<sup>183</sup> Second, the Court makes clear that due process guarantees apply equally to cessation measures, whether individual or mass in character.<sup>184</sup> Third, it holds that a State has a special duty of caution, diligence, and care in addressing fresh claims for asylum, especially if the applicants appear to have had their refugee status recognized by another State.<sup>185</sup> Finally, in accordance with the special protection due to children under Article 19 ACHR, a State must create appropriate and secure procedures for determination of their refugee status,<sup>186</sup> and their best interests prevail in any decision that could affect them directly or indirectly.<sup>187</sup>

The procedural guarantees for refugee status determination that the IACtHR reads into the ACHR are far-reaching. In short, it views the procedural protections of Articles 8 and 25 as applying to refugee status determination, a procedure which is required by the right to seek and be granted asylum in Article 22(7). As, in the Court’s view, refugee status constitutes the principal universal form of asylum in the modern world, the procedural standards developed in refugee law may be used as *lex specialis* to interpret the applicable procedural parameters under the ACHR. By framing UNHCR guidance as part of “international refugee law”, the Court effectively takes UNHCR soft law standards concerning status determination by States and gives them hard form as defining the scope and content of human rights due process guarantees. By implication, these procedural guarantees may then be applied also to other more narrow forms of asylum protected under Article 22(7), such as the *non-refoulement* guarantee under Article 22(8) ACHR.

It will be clear from the foregoing analysis that the IACtHR roots the procedural guarantees for refugee status determination in the right to seek and be granted asylum in light of general due process protections. Of course, the risk that fundamental rights – such as life, integrity, and personal freedom – may be violated as consequences of an erroneous determination, including through *refoulement*, requires that these due process guarantees should be strictly observed in refugee status

182 *Ibid.*, para. 160.

183 *Ibid.*, para. 172. These criteria reflect those expressed in Executive Committee for the Programme of the United Nations High Commissioner for Refugees, *Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, EXCOM Conclusion No. 30 (XXXIV), 1983, para. e. It is to be presumed that Art. 25 ACHR also applies to the extent that the violation of fundamental rights is in issue.

184 IACtHR, *Pacheco Tineo Family v. Bolivia*, para. 177.

185 *Ibid.*, para. 179.

186 *Ibid.*, para. 224.

187 *Ibid.*, para. 179. See also IACtHR, *Rights and Guarantees of Children*.

determination.<sup>188</sup> One implication is that, if a State seeks to expel an asylum-seeker to a third country other than their State of origin, it must ensure that the person will be able to accede to appropriate international protection through “just and efficient” asylum procedures in that country in order that indirect *refoulement* does not occur.<sup>189</sup> Overall, the Court is clear that the relevant due process guarantees derive principally from the general imperative to determine refugee status rather than from the concept of *non-refoulement*.

### 3.5. Convergence and divergence within the human rights treaty body jurisprudence

The surveyed jurisprudence of this selection of universal and regional treaty bodies leaves little doubt that international human rights law provides important and generally far-reaching procedural parameters for the process of refugee status determination. Indeed, there is quite considerable degree of convergence between the different bodies of jurisprudence as to the minimum access and due process guarantees that govern refugee status determination procedures, at least at the first-instance stage. Moreover, even the more conservative of these treaty bodies – such as the ECtHR – expressly join in affirming that these human rights-based procedural guarantees apply directly to challenging factual contexts in which national courts have sometimes (incorrectly) found refugee law to be inapplicable, such as on the high seas.<sup>190</sup>

One point of particular interest concerning these minimum procedural elements for refugee status determination is that the jurisprudence of the human rights treaty bodies affirms the requirement for an independent review of first-instance decisions by administrative authorities. What is more, the majority of the jurisprudence gives the clear impression that – at least where the issue of *refoulement* is at play (and sometimes even where it is not) – this remedy must take the form of an appeal to a competent court. In this respect, it would also seem that where legal advice and representation is required in order to make use of these judicial remedies, then adequate provision must be made by national authorities to allow asylum-seekers to access such services.

Even so, it is immediately evident that a range of different approaches is taken by the different human rights treaty bodies to situate the topic of refugee status determination. On the one hand, there is commonality between the approaches of the HRC and the ECtHR. They both apply treaties that do not provide for a right of asylum and view the general due process guarantees in the right to a fair trial as inapplicable to decisions on the entry, stay and expulsion of aliens. Refugee status determination is assimilated to expulsion and the applicable procedural guarantees are instead derived primarily from the risk of harm to which expellees may be subjected.<sup>191</sup> Conceptually,

188 *Ibid.*, para. 157. The erroneous refusal of refugee status may result in the violation of such rights in ways other than *refoulement* as the asylum-seeker is liable to a range of other formal measures such as detention and other informal privations in the country in which asylum had been sought.

189 *Ibid.*, para. 153.

190 See, for example, the widely criticised decision on applicability to this context of the Refugee Convention by the Supreme Court of the United States in *Sale v. Haitian Centers Council* (1993) 509 U.S. 155.

191 In the jurisprudence of the HRC, such guarantees may also be derived from the wider need to protect against other kinds of arbitrariness in the expulsion context.



refugee status determination – and any associated procedural guarantees – is thus reduced to protection against *refoulement*.<sup>192</sup>

On the other hand, this jurisprudence may be contrasted broadly with that of the other regional human rights treaty bodies, namely the ACommHR and the IACommHR and IACtHR. These bodies are characterised by applying international instruments that provide explicitly for the right of asylum and each of them also views the general due process guarantees in the right to a fair trial as applying to decisions involving aliens. Refugee status determination is seen as a process that attracts procedural guarantees in its own right, regardless of any immediate or eventual risk of *refoulement*. Moreover, the applicable standards are largely based directly on those proposed by extant UNHCR doctrine, although these are supplemented by other intrinsic considerations such as access to a judicial remedy.

There is, however, interesting divergence between the legal rationales provided by each of these three bodies. For the IACommHR, the primary legal basis for the procedural standards for refugee status determination is the right of asylum itself; in other words, the ADHR right to “seek and receive asylum” inherently implies some level of procedural protection. In contrast, the Inter-American Court views the guarantees for refugee status determination as deriving from the general standards in the right to a fair trial, which are triggered by “determination” of the ACHR right of asylum. Similarly, for the African Commission, the procedural standards derive principally from the general procedural standards in the right to a fair trial, but it is not yet clear which “fundamental right” is seen as being at play to trigger its application.

Finally, both broad jurisprudential approaches have their own potential benefits and drawbacks. For instance, that of the HRC and the ECtHR has the advantage that the procedural guarantees apply without reference to external standards, such that they should be available to a wider range of persons resisting *refoulement* to harm but who are unable to substantiate a claim under either refugee law or the concept of asylum.<sup>193</sup> Conversely, it is unclear if these procedural standards apply to refugee status determination in cases where *refoulement* is not actually imminent, as where the asylum applicant already has an authorised form of stay in the country or where a government lacks capacity to effect removals. Similar considerations apply in reverse to the approach of the African Commission and IACommHR and Court.

#### 4. CONCLUSION: REFRAMING THE RELATIONSHIP(S) BETWEEN REFUGEE AND HUMAN RIGHTS LAW

This article demonstrates one thematic area in which the jurisprudence of human rights treaty bodies contributes positively to the international legal framework for the protection of refugees. It shows that, particularly in ground-breaking decisions of recent years, the jurisprudence of both universal and regional transnational bodies serves not only to confirm that international human rights law provides an important

192 Or, again, for the HRC, other forms of arbitrariness in the expulsion of aliens.

193 For instance, it is an open question from the jurisprudence of the ECtHR (or other relevant bodies) whether protection under the Art. 3 ECHR *non-refoulement* doctrine constitutes a form of asylum. In the Americas, however, a parallel question as regards the Art. 22(8) ACHR *non-refoulement* provision was answered recently in the affirmative (see discussion of the IACtHR, *Pacheco Tineo Family v. Bolivia* (Judgment) in the text above).

set of procedural parameters for refugee status determination, but also to specify more precisely the content of these guarantees. As such, the article offers a fresh standpoint from which to review the compatibility with human rights law of alternative forms of refugee status determination as well as the adoption of new restrictive procedural devices by States.

On first glance, the study also seems to confirm the hypothesis that human rights law is overtaking refugee law as a source of legal protection for refugees.<sup>194</sup> Not only do UNHCR refugee protection standards refer to human rights concepts, but the human rights jurisprudence surveyed here also provides a solid set of procedural guarantees for refugee status determination. However, caution should be exercised here not least, because in contrast to international refugee law – which is based on core treaty standards of universal aspiration in relation to which other regional instruments frame themselves as “complementary” – international human rights law is much more uneven. For instance, the ICCPR may represent a civil and political rights treaty of universal aspiration. Yet, it coexists with a range of regional treaties that cover similar rights and conceptual ground but in different terms and without any attempt at establishing complementarity between their different regimes.

One might expect that human rights treaty bodies would work towards creating coherence between these different transnational human rights orders. However, at least on the topic of elucidating procedural guarantees in the context of refugee status determination, the study shows clearly that the jurisprudential approaches diverge considerably between relevant bodies. One implication of the tension between these two dynamics of the treaty body jurisprudence – convergence in the resulting standards but divergence in juridical approach – is that there may not be, in fact, one single or simple answer to the question of how human rights law and refugee law interact. Rather, we must be alert to the possibility that different configurations of the relationship will emerge in different regions and for different thematic aspects of refugee protection.

The final point, then, concerns the specific place of refugee law and policy in relation to defining the scope of human rights-based procedural protection for refugee status determination. Clearly, three of the relevant treaty bodies draw the greater part of the relevant procedural elements explicitly from UNHCR soft law standards for refugee protection. Moreover, even for the two remaining treaty bodies, which do not expressly cite UNHCR doctrine, the language of their decisions quite often recalls the phrasing of the UNHCR soft law.<sup>195</sup> We might conclude, thus, that in this thematic area the tendency – albeit clearer among some treaty bodies than others – is moving towards reaffirming the conceptual primacy of refugee law and policy rather than human rights law as the source of procedural protection for refugees.

194 As suggested by Chetail, “Are Refugee Rights Human Rights?”.

195 For the ECtHR, this may parallel the way in which it has sometimes drawn on the language of standards from the field of international humanitarian law to define the scope of human rights in times of conflict without expressly acknowledging it as a source (see, for example, ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia* (Judgment) (2005) Application Nos. 57950/00, paras. 174–200).