Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence

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Abstract

Refugee situations inevitably lead to the separation of families fleeing a country in which they are no longer safe. Thus, it may seem surprising that the main instruments of international refugee law make minimal mention of the family as a subject of protection. This Comment is intended to show that regardless of the absence of direct family rights protections for refugees in the Convention on the Status of Refugees, various other international instruments in combination, as interpreted by the European Court of Human Rights in particular, have established a right of family reunification for refugees. The European Court of Human Rights has developed a balancing test, weighing the state’s right to control its borders against the family’s interest in family unity, to determine whether family reunification is required by Article 8 of the European Convention on Human Rights. The refugee fulfills this balancing test, given the necessary implications of refugee status under the Convention Relating to the Status of Refugees and the factors upon which the European Court of Human Rights has put weight in family reunification cases. The substantial similarity between Article 8 of the European Convention on Human Rights and family unity provisions in other human rights instruments of more general application provides reason to find the European Court of Human Rights is persuasive in shaping the right to family reunification generally. By relying on the jurisprudence of the European Court of Human Rights rather than more narrowly tailored family reunification provisions found in human rights instruments, this Comment will show that the right to family reunification extends to all refugee families.

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I. INTRODUCTION

When discussing refugees in international law, scholars and commentators frequently note that refugees present tension between national sovereignty and human rights: although states have at least some obligations to refugees as subjects of international human rights law, it is also a basic tenet of sovereignty that nations have control over who enters their borders. The extent of refugees’ rights, then, places a limit on national sovereignty; there are some people towards whom states have obligations such that the states may not exercise their rights of national sovereignty to exclude. Frequently, this debate concerns the refugee him- or herself: under what conditions does a person fulfill the conditions necessary to place a limit on state sovereignty with respect to their borders? Much of the relevant case law and most of the relevant treaties on the subject of refugees have focused on this question. For example, the Convention Relating to the Status of Refugees and its Protocol (together, the Refugee Convention), the most important documents in defining the rights of refugees in international law, provide that a refugee may not be returned to the country from which he or she has fled. But, at the same time, the Refugee Convention provides that a nation need not provide asylum to a person who “has committed a serious non-political crime outside the country of refuge.” The conditions under which a person obtains refugee status, and the treatment required of states with respect to such a person, are the main focus of refugee law.

A related but less thoroughly treated topic has been states’ obligations to the refugee’s family after refugee status has been granted to that person. The Refugee Convention, for example, contains only one mention of the family in its

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1 See, for example, Gallya Lahav, International Versus National Constraints in Family-Reunification Migration Policy, 3 GLOBAL GOVERNANCE 349, 349 (1997) (explaining that “states are forced to deal with competing and contradictory interests: between state obligations to the individual ... versus competing national interests and fundamental state prerogatives”).


4 Defined in Refugee Convention, supra note 2, art. 1(A)(2), as amended by the Protocol, as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

5 Id. art. 33.

6 Id. art. 1(F).
main text. Given that the main instruments of international protection in this area neglect the family as a subject of protection, it might be argued that states do not have obligations to either the families of refugees or to the refugee with respect to his or her family. By expanding the scope of inquiry beyond the primary instruments of international protection of refugees, examining human rights instruments' provisions regarding the family and their judicial interpretation, this Comment seeks to identify a strong basis in human rights jurisprudence from which to conclude that a right to family unity has been established such that refugees who have been separated from their families as a result of their flight for asylum have a right to family reunification. Other scholars have reached a similar conclusion when examining non-refugee international instruments, but this Comment is intended to provide firmer ground on which to rest the right to family reunification, relying primarily on the developed jurisprudence of the European Court of Human Rights.

This Comment will proceed as follows. Section II will establish the right to family unity as a general guarantee of international law. Having demonstrated that there exists a general right to family unity, Section III will examine how this right is operationalized in international law through an examination of family reunification issues in general. After a general discussion of refugees in international law, Section IV will show, relying on the case law of the European Court of Human Rights, that the circumstances under which reunification have been denied are generally inapplicable to the unique circumstances that characterize the refugee. Significantly, a refugee is by definition involuntarily removed from his or her country of origin and therefore not able to avail him- or herself of family unity in his or her country of choice. The effect of both of these propositions is that denial of family unity, while not an absolute violation of human rights, would likely be a violation of human rights in the refugee context.

II. THE RIGHT TO FAMILY UNITY IN INTERNATIONAL LAW

This Section will demonstrate that the right to family unity has been established through various international instruments and therefore is a right (albeit of ambiguous content) in international law. This Section is not a comprehensive or exhaustive review of the available information supporting a right to family unity; instead, it is intended only to demonstrate that there is such

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7 Id. art. 12(2) (requiring contracting states to respect rights attaching to marriage acquired prior to the person obtaining refugee status).
8 See, for example, Kate Jastram & Kathleen Newland, Family Unity and Refugee Protection, in REFUGEE PROTECTION IN INTERNATIONAL LAW 559 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). See also discussion infra, Section III.A.
a right, evidenced across various instruments of international law. It will also show, importantly, that the right is expressed across various instruments in a substantially similar manner. There is general agreement that a right to family unity exists in international law. The importance of family unity to refugee rights has been recognized and explored by other commentators on the subject. Such a showing is important because refugee protection is not isolated from human rights law generally: “International refugee protection has shown a capacity to evolve and develop... through the contribution of a variety of international instruments, the work of intergovernmental bodies, including regional organizations, and jurists.”

A. Universal Declaration of Human Rights

Article 16 of the Universal Declaration of Human Rights (UDHR) enshrines the family as “the natural and fundamental group unit of society” such that it is “entitled to protection by society and the State.” It should be noted that the UDHR is a non-binding declaration, but it is nevertheless important in the determination of states’ duties. The UDHR “was originally intended to be a hortatory set of standards,” but “many of its provisions have now been accepted as customary international law.” Therefore, the inclusion of the family’s right to protection by the state in the UDHR is not insignificant; it indicates a general norm that states are expected to follow when dealing with issues regarding the family.

States must protect the family through “domestic provisions.” In practice, this means that there must be a legal basis for the existence of the family, and

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10 See, for example, Jastram & Newland, supra note 8; Lori A. Nessel, Forced to Choose: Torture, Family Reunification, and United States Immigration Policy, 78 TEMP. L. REV. 897, 907 (2005) [hereinafter Forced to Choose].


13 Id. art. 16(3).

14 Starr & Brilmayer, supra note 9, at 218.

that the state may not interfere with family unity without a legitimate purpose.\textsuperscript{16} Thus, there is both a positive and negative component to the rights established by Article 16: the state must have laws and processes available to ensure enjoyment of the family, and it must not prevent enjoyment of the family without a legitimate overriding objective. As we will see, because the state objective must be overriding, the balance of interests will vary based on the situation in which the state and family find themselves.

B. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights

The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) are treaties intended to guarantee certain rights to all people in the political and economic sphere. The ICCPR\textsuperscript{17} aims to express the “civil and political rights, as well as [the] economic, social and cultural rights” of every person.\textsuperscript{18} Articles 17 and 23 of this instrument jointly establish a right to family life.\textsuperscript{19} Article 17 provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his ... family” and that “[e]veryone has the right to the protection of the law against such interference.”\textsuperscript{20} Article 23 provides that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”\textsuperscript{21} Taken together, these articles obligate states to protect the family as a fundamental unit of society, recognizing the value of the family as a means to societal and personal wellbeing.\textsuperscript{22} The right to family unity can be deduced from the implications of these articles: if states must protect the family from unlawful interference, then the unity of the family, which exists only in the absence of unlawful interference, must be a civil right of every person. The

\textsuperscript{16} Id. at 342–43.

\textsuperscript{17} International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

\textsuperscript{18} Id. at Preamble.

\textsuperscript{19} Staver, supra note 9, at 78 n.45.

\textsuperscript{20} ICCPR, supra note 17, art. 17.

\textsuperscript{21} Id. art. 23.

\textsuperscript{22} Notably, this proposition has come under significant attack from feminist scholars. See, for example, Susan Moller Okin, Justice, Gender, and the Family (1978). Because this Comment will ultimately only concern itself with involuntary family separation, though, this important criticism is less forceful than in the general case. The assumption herein is that it is in the best interests of the refugee family to be reunited, although there are of course cases in which this is not true and there may even be a further argument that the family is not due the protection granted to it by the international community. This further argument, though, is beyond the scope of this Comment.
Refugee Family Reunification Rights

ICESCR, a twin document to the ICCPR, provides a particularly strong endorsement of the principle of family unity. Article 10 of the Covenant states that the "widest possible protection and assistance should be accorded to the family." The inclusion of family unity rights in documents setting out the civil, political, economic, social, and cultural rights of individuals is telling of its central importance as a general right, as these treaties address matters of great significance for the stability and well-being of all persons.

C. Regional Compacts

Various regional compacts have included a right to family life similar to the rights found in the UDHR and ICCPR. The American Convention on Human Rights, to which nineteen nations in the western hemisphere, including the US, are party, includes in Article 17 a provision identical to the one found in the UDHR. The African Charter on Human and Peoples' Rights, as well, contains a provision entitling the family to protection, but further explicitly places duties upon the state to assist the family. Finally, the European Convention on Human Rights and Fundamental Freedoms (ECHR50), the same document that establishes the European Court of Human Rights, guarantees "respect for . . . family life" by participating states. Not only, then, has the family come under protection of the more general human rights documents, but also those limited to more specific geographic areas.

D. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) is yet another important source of information about the state's obligations to the family. Although on its face it concerns only the rights of the child, this convention has been influential in shaping the state's obligations to the family because the rights of the child are intimately bound up with the rights of the family. This is evident in the text of the treaty, which contains extensive reference to the family,

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24 Id. art. 10(1).
29 See id. at Preamble (noting that the family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children" and that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment").
including several provisions relevant to family unity and reunification. Article 9, a particularly strong expression of the right to family unity inhering in children, provides that states “shall ensure that a child shall not be separated from his or her parents against their will” except when such separation is in the best interest of the child. Article 10, dealing explicitly with family reunification, requires states to deal with applications for reunification in a “positive, humane and expeditious manner,” limiting the valid reasons for prohibiting exit or entry to “national security, public order[,] . . . public health or morals or the rights and freedoms of others.” This provision sets a high bar for refusing reunification, and requires more from the state than passive allowance of immigration for reunification purposes.

Article 16, echoing the above human rights documents, provides a right for children to be free from unlawful interference with their family and entitles them to legal protection from such interference. This serves to reinforce the more general right to family unity, showing that the same type of right applies across various contexts. Article 22, explicitly concerning refugee children, obligates states to “trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.” Thus, in the context of refugee children, there is an explicit duty to assist in reunification. The CRC, then, is not merely an explication of children’s rights, but also an expression of the rights belonging to the family.

E. International Convention on the Protection of the Rights of All Migrant Workers and Their Families

Yet another international legal document that enshrines the family as a unit worthy of protection is the International Convention on the Protection of the Rights of All Migrant Workers and their Families (Migrant Workers Convention). Of particular concern is Section III of the Convention, entitled

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30 Id. art. 9(1).
31 Id. art. 10(1).
32 Id. art. 10(2).
33 Id. art. 16.
34 Id. art. 22(2).
35 See Starr & Brilmayer, supra note 9, at 225 (explaining that Article 3 of the CRC “suggests that protection of parental rights may permit some departures from the strict application of the best interests [of the child] standard,” therefore implicating rights beyond those held by children).
“Human rights of all migrant workers and members of their families,” which is structured in such a way as to suggest that the family is inseparable from the migrant worker. Article 14 contains a recitation of the migrant worker family’s right to protection from unlawful interference. Going further, though, Article 8 of the Migrant Workers Convention establishes a right of free movement, including the right of migrant workers and their families to leave any state, including their country of origin (subject to restrictions based on national security, public order, health, or morals, or the rights or freedoms of others) and of migrant workers and their families to return to their country of origin. The policy embodied in these rights—expressly granted jointly to the migrant worker and his or her family—is that the family should be maintained in a single unit even as the migrant worker is required to transition from nation to nation. A treaty expressing the rights of migrant workers as such would only have to establish the right of the migrant worker to move freely; the intended effect of extending this right to the migrant worker’s family is to ensure family unity during such movement.

The above instruments, though not an exhaustive list of international documents affirming the unity of the family, affirm family unity not merely as a valuable end but also as a right to which the family jointly and its members are entitled. The right to family unity is not contained in a single document or from a single international body, but has found clear expression both internationally and regionally in various instruments, leaving no doubt that the right exists in some form. States, then, are obligated to take measures to protect the family. This right could find expression in various means; in itself, the right to family unity is devoid of content until put into practice by states party to the above conventions. In the context of immigration, the right to family unity could be applicable not only to entry by family members but also deportation of a family member. Scholars have argued that states have shown more favorability to family unity when considering deportation than entry. For the purposes of this

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37 Id. at Part III.
38 Id. art. 14.
39 Id. art. 8(1).
40 Id. art. 8(2).
42 See Maria v. McElroy, 68 F.Supp.2d 206 (E.D.N.Y. 1999) (finding deportation without consideration of family separation a violation of Articles 23 and 17 of the ICCPR).
Comment, though, the relevant expression of this right is in the practice of family reunification.

III. FAMILY REUNIFICATION GENERALLY

Family reunification is not only a refugee issue. There are many circumstances under which families can be separated among different nations and seek to be brought together again. Family reunification, for example, is a prominent issue among migrant workers. Therefore, in order to understand the broader issues of family reunification, we must examine international documents and jurisprudence in contexts beyond refugee situations. A review of the relevant law will show that it is not at all clear that the right to family unity implies a right to family reunification. For example, if a person voluntarily immigrates and then applies for family reunification in the state in which he or she has chosen to reside, the state could argue that denial of family reunification is compatible with the right to family unity because there is a viable alternative country in which the family can be united. Examining the law and practice of family reunification generally will clarify the circumstances under which family reunification has been deemed necessary or unavailable to applicants. This in turn will shed light on the implementation of family rights in refugee situations.

While the preceding Section showed that human rights documents create rights in family unity, this Section will examine the specific expression of the right to family unity through family reunification. Although family reunification is undoubtedly a possible means of protecting the family, it is a means that implicates "additional dimensions, including whether an immigrant's crossing of transnational borders to join a family member in the host state, or allowing an immigrant to remain in the host state's territory so as not to sever an existing family unit, should be permitted." Because family reunification is a matter of immigration, it involves a similar tension to that found in refugee law between national prerogatives in controlling borders and international human rights principles. As a result, "[f]amilies have had mixed results when utilizing international human rights instruments to argue for family reunification or family unity in the immigration context." This Section will therefore examine the results of legal challenges to a state's denial of family reunification. Although a brief note of state practice more generally will be made, the most illuminating

44 See Migrant Workers Convention, supra note 36, art. 44 (obligating states-party to facilitate family reunification).
45 Nessel, Families at Risk, supra note 43, at 1277.
46 Id. at 1279.
47 See Starr & Brilmayer, supra note 9, at 229 ("Customary international law, which binds all states, derives from two elements: state practice and opinio juris.").
souces of law, on which this Comment will most extensively rely, will be those in which the legal rule regarding reunification is made explicit. Therefore, judicial opinions are of great weight in providing an outline of the right to family reunification.\footnote{See id. at 230 (explaining that the modern view of customary international law places primary weight on opinio juris, \textit{which can be inferred from court decisions, declarations of international forums, and the content of treaties that have been ratified by a large number of states}).}

**A. Relevant Treaty Provisions**

Although several of the treaties relevant to family reunification have been listed above, it is worth identifying, without being overly duplicative, those treaties that specifically provide for family reunification, rather than affirming only the more broad principle of the unity of the family. The treaties below go beyond recognizing a right to family unity but further implement a specific result of such a right.

Article 44 of the Migrant Workers Convention obligates states party to “take measures they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses.”\footnote{Migrant Workers Convention, supra note 36, art. 44.} This provision leaves considerable leeway for the state to determine what measures are appropriate. For example, one scholar notes that while states sometimes grant temporary visa holders family reunification, they “generally have not done so for the undocumented.”\footnote{Nora V. Demleitner, \textit{How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers}, 32 HOFSTRA L. REV. 273, 277 (2004).} Thus, it is clear that states do not forfeit rights to control their borders in the case of migrant workers, especially those that are undocumented. The right to family reunification under the appropriateness standard is therefore limited by prerogatives of national policy, such as immigration control.

The requirements of the CRC are somewhat more stringent. Article 10 of that document requires states to deal with applications by a child for parents to enter and leave a country in a “positive, humane, and expeditious manner.”\footnote{C.R.C., supra note 28, art. 10.} This has been called an “innovative obligation,”\footnote{SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 189 (1999).} “arguably giving rise to a right to enter a foreign country.”\footnote{Starr & Brilmayer, supra note 9, at 224 (discussing DETRICK, supra note 52).} A clause requiring positive action on behalf of the state alters the traditional balance between state sovereignty and human rights, placing a higher burden on the state to show that it has a legitimate reason for
exclusion. This is a stark change from the status quo, in which states need not articulate or even have a reason for denying an applicant entry into their borders. That said, the CRC leaves the specific implementation of that positive obligation to the state's discretion. The language of the African Charter on the Rights and Welfare of the Child provides a more stern and clear requirement: states party "shall take all necessary measures to re-unite children with parents or relatives where separation is caused by internal or external displacement arising from armed conflicts or natural disasters." Although it is limited in persuasive power, as a regional instrument, this Charter provides a vision of a strict right to family reunification.

Given the strong expressions of family reunification rights in some international instruments, it might be argued that a general right has been established without further exploration of the right to family unity. In concluding that there is a general right to family reunification under international law, Kate Jastram and Kathleen Newland provide the CRC as the primary basis for the establishment of the right. This basis is unsatisfactory for a general right, though, because it does not implicate the concept of family generally as the subject of the right, but rather the unique circumstances of the child. Thus, this right emerges not from the right to family unity, but rather through concern for children in particular. As such, there are many refugee families that might escape a right justified on such narrow ground; families without children, families with children over the age of majority, and families with dependent elders, for example, would not be able to avail themselves of the right to family reunification derived from the CRC. Jastram and Newland are conscious of this limitation, finding the CRC sufficient "at least for reunification of unaccompanied/separated children and their parents." To find a right to family reunification for all refugee families, then, this Comment will proceed to find a more satisfying basis in the interpretations of more general provisions of international human rights treaties.

54 Starr & Brilmayer, supra note 9, at 224.
56 Jastram & Newland, supra note 8, at 577 (finding that "the core of the right to family reunification in international human rights law is found in the Convention on the Rights of the Child"; referencing the European Court of Human Rights, Jastram and Newland find that the Court "leaves an opening" for refugees).
57 With respect to majority-aged children and dependent elders, it is not necessarily the case that a state will recognize such families as eligible for reunification, even under a more general basis. Which families are eligible will likely be a matter of domestic policy. That said, a broader right rooted in the family itself is important to make uncontroversial spouse-only reunifications possible, and more expansive reunifications even arguable.
58 Id. at 579.
At present, then, although several human rights instruments reference family reunification directly, it appears that none in isolation establishes a general right for refugees that decisively trumps the state’s right to control its borders.

B. European Court of Human Rights

The most abundant source of law on family reunification comes from the decisions of the European Court of Human Rights (hereinafter ECtHR). This Section will examine some of the leading decisions on family reunification in the European Union, using the rationales provided in these cases, insofar as they are interpretations of the relevant legal documents, to present a clearer picture of family reunification’s status in international law. These cases are especially helpful because they represent much of the developed doctrine regarding family reunification, and the treaties are either of international application or are so substantially similar to those with international application that the reasoning is persuasive nonetheless.  

It is necessary to note, as an initial matter, that the ECtHR distinguishes between two types of cases regarding the interference with family and private life: entry into a country by non-citizens to join a person lawfully residing in that country (the family reunification context) and removal of a person from a country in which he or she already has a family (the deportation context). Because the former is the only context strictly relevant to family reunification, an in-depth analysis of the latter cases is not necessary here. Notably, though, the ECtHR places a higher burden on states deporting a person than on those denying entry. Although with respect to the right to family unity, the difference between deportation and entry may be more formalistic than substantive, the Court has more readily conceived of deportation as interference within the meaning of Article 8 of the European Charter of Human Rights.

1. Abdulaziz, Cabales, and Balkandali v. the United Kingdom.

The ECtHR decided the first of the important family reunification cases in 1985. Abdulaziz, Cabales, and Balkandali v. the United Kingdom came before the Court after three women applied for family reunification so their husbands

59 Compare ECHR50, supra note 27, art. 8 with ICCPR, supra note 17, art. 17 and UDHR, supra note 12, art. 16.
63 Id. at 442.
could join them in the UK. Despite the fact that the women were lawfully and permanently settled in the UK, their applications for reunification were rejected. The applicants then filed a complaint alleging that the refusal to allow their spouses to join them permanently in the UK amounted to a violation of the European Convention of Human Rights, which guarantees non-interference with the family. The Court accepted the argument that Article 8 applied to immigration, stating that "immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8." Importantly, the Court noted that it was not the rights of those being refused entry that would be violated, but those applying for entry. Moreover, the Court found that Article 8's non-interference language may include "positive obligations inherent in an effective 'respect' for family life" although nations are given a "wide margin of appreciation" in putting the article into effect, such that the state's obligation varies from case to case. That being the case, the court found that a denial of reunification did not violate Article 8 because the applicants failed to show that there were obstacles to establishing family life in their own or their husbands' home countries. As the Court stated: "The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country."

Thus, the legal standard established in *Abdulaziz* was that, for a violation of Article 8 to exist where reunification is denied, (1) there needs to be an existing or intended family life; and (2) there must be obstacles preventing establishment of family life in another country. This standard is applied, though, with deference to state decisions regarding their borders, effectively establishing a balancing test under which the state's aims in excluding the applicant are

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65 Id. ¶ 10.
66 Id. ¶ 58.
67 Id. ¶ 59.
68 Id. ¶ 60: The applicants are not the husbands but the wives, and they are complaining not of being refused leave to enter or remain in the United Kingdom but, as persons lawfully settled in that country, of being deprived (Mrs. Cabales), or threatened with deprivation (Mrs. Abdulaziz and Mrs. Balkandali), of the society of their spouses there.
69 Id. ¶ 67.
70 Id. ¶ 68.
71 Id.
weighed against the level of difficulty faced by the applicant in returning to his or her own or her spouse's country of origin.\textsuperscript{72}

2. Gül v. Switzerland.

The ECtHR heard its next significant case concerning family reunification, Gül v. Switzerland,\textsuperscript{73} in 1996. In that case, a mother and father living in Switzerland (the father because he had fled his home country of Turkey for political reasons and the mother because she was granted a humanitarian visa to get treatment there for her severe epilepsy) applied for reunification with their son, living in Turkey.\textsuperscript{74} When the application was denied, the parents complained that such denial violated their rights under Article 8 of the ECHR.\textsuperscript{50} Following the lead of Abdulaziz, the court again stated that although Article 8 places positive obligations on the state (that is, it does not merely protect families from interference by the state but also requires the state to take action to correct for disturbances of family unity), Article 8 does so with a margin of appreciation, allowing the state to balance the interests of the individual against that of the community.\textsuperscript{76} Because a genuine family life was in existence, the Court asked "to what extent it is true that Ersin's move to Switzerland would be the only way for Mr Gül to develop family life with his son."\textsuperscript{77} The Court found that insufficient obstacles had been shown: Mr. Gül was unable to prove in the first instance that he was a political refugee, and had visited his son in Turkey in recent years; Mrs. Gül failed to show that sufficient medical care could not be found in Turkey.\textsuperscript{78} Therefore, having failed to show that the second prong of the above legal standard was fulfilled, the Güls were denied a remedy under the right to family life.\textsuperscript{79}

3. Ahmut v. the Netherlands.

The ECtHR considered another family reunification case, Ahmut v. the Netherlands,\textsuperscript{80} that same year. In this case, a father applied to be reunified with his nine-year-old child after the child's mother died in Morocco, the child's country

\textsuperscript{72} Lambert, supra note 62, at 440–41.
\textsuperscript{74} Id. ¶¶ 6–10.
\textsuperscript{75} Id. ¶ 28.
\textsuperscript{76} Id. ¶ 38.
\textsuperscript{77} Id. ¶ 39.
\textsuperscript{78} Id. ¶ 41.
\textsuperscript{79} Id. ¶ 42 (although "it would admittedly not be easy for them to return to Turkey, there are, strictly speaking, no obstacles preventing them from developing family life in Turkey.").
of origin. Although the child was initially cared for by his grandmother, she fell ill and was no longer able to care for him, prompting the reunification application. As in the above cases, the state rejected the application, leading to a complaint on Article 8 grounds. The Court once again disagreed, finding no violation of the right to family unity found in the European Convention of Human Rights.

The Court emphasized the fact that Ahmut had chosen to live in the Netherlands, away from his son, and therefore denial of family reunification would not change the status of their family unity at all. (The Court ignored, perhaps unfairly, that Ahmut had since remarried in the Netherlands, and now had a wife and three stepchildren.) Therefore, when balancing the parties' interests, the Court found insufficient reason to conclude that Ahmut's interests outweighed those of the state in controlling immigration. Moreover, the court noted that the child had strong links, including family relations, still residing in Morocco.

Although the Court in Gil and Ahmut ostensibly applied the same legal standard that was expressed in Abdulaziz, critics have viewed these cases as a "narrowing of the right to family reunification." The Gil and Ahmut decisions imply that, in order for a person to successfully appeal a rejection of family reunification, it must be impossible or at least extremely difficult for them to continue elsewhere the family relation they experienced prior to migration. Not only does this impose a high "obstacle" requirement, but it further requires that the obstacle not be one the migrant would have or in fact did accept when migrating.

These decisions give content to the right to family unity, important particularly because legal clarification of the right's scope and contours is conspicuously absent outside what little can be gleaned from state practice. The legal standard that appears gives states wide latitude in deciding who will enter

81 Id. ¶ 7-11.
82 Id. ¶ 17, 21.
83 Id. ¶ 59.
84 Id. ¶ 73.
85 Id. ¶ 70 ("Salah Ahmut is not prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, nor is there any obstacle to his returning to Morocco.").
86 Id. ¶ 10.
87 Id. ¶ 69.
88 Fatima Kahn, Reunification of the Refugee Family in South Africa: A Forgotten Human Right?, 28 REFUGE 77, 82 (2011); see also Nessel, Forced to Choose, supra note 10, at 912 (criticizing the European Court of Human Rights' "narrow[ ] framing" of the case); Demleitner, supra note 50, at 288 (noting that Ahmut followed Gil's interpretation of the Abdulaziz balancing test, despite strong dissents).
89 See Section III.C below.
their borders, with the exception of those who have no other means of establishing or continuing a family life elsewhere.

C. State Practice

Scholars have identified some general trends from the available information about state practice with respect to family reunification. In the US in particular, family reunification is the main form of immigration: "in 2002, 63.3% of the immigrants admitted to the United States were admitted based on family ties." More recently, "in 2011, four out of five immigrants given green cards established their eligibility as family members of US citizens or lawful permanent residents." Thus, in the US, family reunification is the norm rather than the exception. The US is the world leader in percentage of immigrants entering via family reunification, though. Across the twenty-four countries surveyed by the Organization for Economic Co-operation and Development, there appeared no general policy or trend with respect to family reunification, with the number of family reunification immigrants as a percentage of the total immigrant population ranging from Denmark's 7.4 percent to Korea's 54.2 percent (excluding the United States' aforementioned percentage). Therefore, there appears to be no general state practice with respect to family reunification. Moreover, even if a trend could be identified, without more information we cannot know whether this practice is merely national policy or in response to international norms.

Given the above, it is clear that there is no general right to family reunification in international law: the states retain the right, in the usual case, to deport or exclude persons seeking residence in their country. This has been the conclusion of scholars examining the subject. Despite the lack of a general right, though, the right to family reunification exists in the more specific circumstances of the scattered refugee family.

90 Nessel, Forced to Choose, supra note 10, at 934–35.
93 Id.
94 See Jastram & Newland, supra note 8, at 592 (reviewing various state reunification frameworks and practices).
95 See Staver, supra note 9, at 78 (observing that "there is no general right to family reunification in international law"); see also Starr & Brilmayer, supra note 9, at 215 (referring to the "glimmerings" of a customary norm against family separation).
IV. FAMILY REUNIFICATION IN THE REFUGEE CONTEXT

A. Refugee Law Generally

This Section will provide a brief overview of refugees and refugee law generally, and then demonstrate that the unique circumstances in which refugees find themselves remove the strongest legal justification for the denial of family reunification. Placing the refugee in context as a legal entity, combining refugee law generally with the aforementioned humanitarian principles and human rights law as expressed in the European Court of Human Rights, will show that the refugee’s family reunification claim (barring countervailing circumstances such as a criminal activity by a family member) activates the state’s positive obligation to uphold the principle of family unity regardless of the state’s traditional role in controlling its borders.


The Refugee Convention,96 entered into force in 1951, was created as a means of guaranteeing rights to refugees; the refugee problem was a natural candidate for resolution by international law rather than national legislation because it required states to undertake obligations to non-nationals outside of the immigration context.97 The major protection granted to refugees under the Refugee Convention is non-refoulement: the principle that “no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture.”98 The principle of non-refoulement, then, acts as a constraint on the sovereign rights of the state to choose who enters its borders: a refugee who enters its borders cannot be expelled like any other entrant, even if their entry is illegal, but must be dealt with according to the Refugee Convention.99

The Refugee Convention and its Protocol100 provide the relevant definitions and manner in which states party must handle refugee situations. Article 1 of the Refugee Convention, as modified by the Protocol, defines the term “refugee:” “the term ‘refugee’ shall apply to any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality,
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membership of a particular social group or political opinion, is outside the
country of his nationality and is unable or, owing to such fear, unwilling to avail
himself of the protection of that country."101 A person who has fulfilled this
definition, then, may not be expelled or returned to his or her home country.102

The state must then grant the refugee in its territory certain rights of equal
treatment, as provided in various sections of the Refugee Convention.103 While
family rights are not mentioned specifically in the Refugee Convention, it is
important to observe that the instrument exists to confer refugee status, and
therefore legal recognition of a situation of particular hardship towards which
states must be sensitive, and that it is not the case that the Refugee Convention
is exhaustive of the rights due to a refugee.104

2. The United Nations High Commissioner on Refugees.

The Refugee Convention provides only broad strokes, containing
"significant gaps and ambiguities," and is therefore insufficient in itself to ensure
refugee protection.105 Thus, the Refugee Convention also stipulated that states
party to the instrument cooperate with the United Nations High Commissioner
for Refugees (UNHCR), the international body entrusted with supervising the
application of the provisions of the Refugee Convention.106 UNHCR is unable
to bind states to its judgments and interpretations, as the Refugee Convention
requires only that they "undertake to co-operate" with UNHCR, but the
organization carries considerable weight in ensuring effectiveness and refugee
protection.107 The UNHCR is therefore at least partially responsible for the
"development of international refugee law and . . . ensuring the effectiveness of
international refugee law."108

3. Other human rights instruments.

The main sources of international refugee law, then, are twofold: the
Refugee Convention provides the "comprehensive provisions pertaining to the
legal status and rights as well as basic standards of treatment applicable to

101 Refugee Convention, supra note 2, art. 1.
102 Id. arts. 32, 33.
103 See, for example, id., art. 22 (requiring states to provide equal treatment with respect to education).
104 Id. art. 5 ("Nothing in this Convention shall be deemed to impair any rights and benefits granted
by a Contracting State to refugees apart from this Convention.").
105 Corinne Lewis, UNHCR AND INTERNATIONAL REFUGEE LAW 37 (2012).
106 Refugee Convention, supra note 2, art. 35.
107 Lewis, supra note 105, at 43.
108 Id. at 47. See also id., Chapter 5.
refugees,"^109 while UNHCR acts as a guide for further development and refinement of those provisions.\textsuperscript{110} That said, the Refugee Convention and UNHCR are not the only sources of international refugee law. Although originally conceived as separate areas of law, "this separation has gradually given way to a realization of the essential connections between human rights and the refugee problem."\textsuperscript{111} Therefore, refugee protection gains meaning, and refugees themselves gain protection "through the contribution of a variety of international instruments, the work of intergovernmental bodies, including regional organizations, and jurists."\textsuperscript{112}

The interrelation of some international instruments with refugee protection is obvious. For example, the CRC, Article 22, provides that refugee children must be given protection commensurate with the standard set forth in the CRC as well as other human rights documents, and provides more robust family reunification rights than are found in the text of the Refugee Convention.\textsuperscript{113} The supplementary refugee protection in such cases is obvious. Even where refugees are not explicitly mentioned, human rights documents alter states’ obligations consistently with the Refugee Convention. This is supported as a matter of treaty interpretation by the Vienna Convention on the Law of Treaties.\textsuperscript{114} Article 31 provides that interpretation of a treaty is not limited to its text.\textsuperscript{115} This provision means that "account shall also be taken of any subsequent agreement between the parties, or any subsequent practice bearing on the interpretation of the treaty, as well as ‘any relevant rules of international law applicable in the relations between the parties.’\textsuperscript{116} The rights accorded to refugees in the treaty, then, are not exclusive of other rights possessed by refugees as subjects of human rights law. That is, the failure of Refugee Convention to provide for one right or another does not mean that such right is not available to refugees if it is granted in a separate agreement.

Therefore, when determining the rights of the refugee generally, there are three sources of authority: first, the text of the Convention Relating to the Status of Refugees and its Protocol; second, the interpretations and guidelines

\textsuperscript{109} KOURULA, supra note 11, at 37.
\textsuperscript{110} Beyond its legal importance, it should also be mentioned that UNHCR also serves to provide assistance to refugees in need. As of 2000, UNHCR was "providing protection and assistance to at least twenty-two million people in 124 countries." Donkoh, supra note 11, at 263.
\textsuperscript{111} KOURULA, supra note 11, at 23.
\textsuperscript{112} Donkoh, supra note 11, at 263.
\textsuperscript{113} C.R.C., supra note 28, art. 23.
\textsuperscript{115} Id. art. 31.
\textsuperscript{116} GOODWIN-GIL & MCADAM, supra note 98, at 8.
promulgated by UNHCR in its official capacity as supervisor of Refugee Convention’s implementation; and finally human rights instruments that otherwise grant rights to refugees. Drawing on all three sources to determine the extent of the refugee’s right to family reunification indicates that although there may be no general right to family reunification in international law, considerable evidence supports the existence of a right to family reunification for refugees.

B. The Refugee and the Family

1. Family unity and the refugee situation.

The situation of the refugee is not merely a matter of great suffering and stress for the refugee, who is necessarily outside his or her home country out of fear for his or her safety or well-being, but also affects the refugee’s family. “An almost universal consequence of refugee experiences is the destruction of the family unit.”117 Refugee situations are born of strife and conflict. Some of the most infamous incidents in recent memory, from the ethnic cleansing in Rwanda to the conflicts in Kosovo to the invasion of Iraq, have been the cause of considerable outflow of asylum seekers.118 The Refugee Convention itself was intended to be a temporary response to the scattering of peoples after World War II, and its application was extended through its Protocol after recognition that its protections were needed to cope with situations entirely separate from World War II but with the same tragic effects, namely displacement and persecution.119

Such displacement and persecution forces families to scatter and seek shelter elsewhere, activating their rights under the Refugee Convention, and other relevant human rights law, in the process. As a result, it is often only one member of a family who finds shelter in a country outside the country of origin.120 In such a case, it is cold comfort to find protection from persecution only to be left alone and without one’s family, worsening the refugee’s situation: not only has becoming a refugee cast him or her out of the home country, but it

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119 Donkoh, supra note 11, at 262.
120 See Jastram & Newland, supra note 8, at 559:

It is common knowledge . . . that because they lack legal means to enter many countries of asylum, many husbands . . . will leave their wives and children at home or in a country of first asylum in order to attempt the journey alone. If they are stopped in transit, the families concerned are usually left in desperate straits.
has also deprived him or her of the enjoyment of family life. Refugees are especially susceptible to such a fate precisely because becoming a refugee involves a flight from danger: in such a situation, separation is often the safest path from persecution and danger, especially when only one family member is subject to persecution. The issues of family unity and refugee protection, then, are not merely intertwined by coincidence but by the very necessities of the refugee situation. The pain of separation is compounded by the fact that integration into the country of refuge is made much harder by the absence of family support. Thus, the principle of family unity is implicated in refugee situations by the unique features of the refugee.

2. The refugee’s legal right to family unity and reunification.

a) The Vienna Convention and non-Refugee Convention refugee rights.

This Section will expand upon Sections II and III, arguing that the legal principles and standards explicated therein indicate that there is a right to family reunification in the refugee context. Absent countervailing circumstances, such as a family member of the applicant being a serious non-political criminal in the country of origin, the state is under a positive obligation to allow the applicant’s family members to enter the country of refuge for purposes of family reunification.

First, it must be pointed out that the main text of the Refugee Convention lacks any provision relating to a right to family unity or reunification. Thus, it might be argued that the state cannot have positive obligations to a refugee with respect to family, because the statute providing the ostensibly comprehensive protection to refugees omits the family entirely. This argument is misguided, though.

As an initial matter, although there is no mention of the principle of family unity in the main text of the Refugee Convention, the Conference of Plenipotentiaries, in adopting the treaty, unanimously chose to include a Recommendation regarding the principle of the unity of the family. The Recommendation recognized family unity as “an essential right of the refugee,” noting that “the rights granted to a refugee are extended to members of his family” and thereby recommending that states take “necessary measures for the protection of the refugee’s family.” Although the Recommendation is non-binding, it is evidence of the purpose of the treaty, which is not insignificant.

121 See generally Wilmsen, supra note 117.
122 Refugee Convention, supra note 2, Recommendation B.
123 Id.
124 Kahn, supra note 88, at 80.
under the Vienna Convention, if the meaning of the treaty is “ambiguous or obscure.”

Second, the absence of explicit mention of rights in the Refugee Convention does not foreclose the existence of those rights. Once again, the Vienna Convention is instructive: Article 31 provides that subsequent agreements provide context for the purpose of the treaty. Thus, agreements such as the ICCPR, the CRC, and others discussed in Section II above affect the way in which we must understand the obligations undertaken by parties to the Refugee Convention. Because each of these human rights documents includes a right to family unity, we cannot interpret the Refugee Convention as excluding such a right. This would, in effect, mean that refugees are due fewer human rights than non-refugees (because, as the argument would go, refugees are due only rights granted to them under the Refugee Convention and not, say, the ICCPR). Such an interpretation would not only ignore the context of subsequent agreements unequivocally expressing a right to family unity, but would contravene the pervasive principle of equality of treatment contained in the very text of the Refugee Convention.

Finally, Article 5 of the Refugee Convention provides that “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.” Further, the United Nations High Commissioner on Refugees, in the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, has found that Recommendation B grants refugees rights to family unity. Therein, the UNHCR provides that “the minimum requirement [for

125 Vienna Convention on the Law of Treaties, supra note 114, art. 32. Although not pressed here, because it is not necessary but rather supplementary to this Comment’s conclusion, it is open to argument that Article 12(2) of the Refugee Convention, supra note 2, which guarantees that “[r]ights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State,” is ambiguous with respect to the right to family unity and requires supplementary tools such as Recommendation B as a means of interpretation.

126 Vienna Convention on the Law of Treaties, supra note 114, art. 31(2).

127 See, for example, Refugee Convention, supra note 2, arts. 4 (guaranteeing treatment “at least as favourable as that accorded to nationals” with respect to religion), 13 (guaranteeing treatment “as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances” with respect to property), 16 (guaranteeing refugees equal access to courts).

128 Id. art. 5.

benefits of the principle of family unity] is the inclusion of the spouse or minor children.\textsuperscript{130} Thus, the official organ of the United Nations, with whom the parties to the Refugee Convention agreed to cooperate in implementation, has clearly endorsed the principle of family unity for refugees. As a result, when one or more members of a family have become a refugee, the entire family benefits from the principle of family unity.\textsuperscript{131}

Despite the Refugee Convention’s silence on the subject, the refugee family does not lack for rights to family unity. Because Section III showed clearly that no general right to family reunification exists, though, it must be demonstrated that the refugee fits into a narrow exception to the general rule that family reunification is not a right.

\textit{b) Application of ECtHR jurisprudence to the refugee context.}

Given the contours of the right to family reunification explicated in the European Court of Human Rights decisions, we can expect that refugees, by virtue of being refugees, are entitled to family reunification generally. In the cases of \textit{Abdulaziz}, the Court upheld the state’s reunification denial primarily because the parties were effectively choosing between two states in which they would reside after marriage.\textsuperscript{132} This rationale is inapplicable to the case of refugees. A refugee is necessarily outside of his or her country against his or her will.\textsuperscript{133} Therefore, it is not the case that the refugee is merely choosing to live in a state in which he or she would prefer to experience family life; instead, the refugee is \textit{forced} to be in the country of refuge and is by necessity not in the country of choice, in contrast to the plaintiffs in \textit{Abdulaziz}. Thus, the rationale for finding a balance in favor of the state’s control over its borders given in that case is not persuasive when applied to the refugee.

A finding that \textit{Abdulaziz} is inapplicable to the refugee situation is not sufficient to show a right to family reunification, though, because the standard was twice narrowed after that ruling. The subsequent narrowing of the \textit{Abdulaziz} holding, however, has similarly not foreclosed the refugee’s right to family reunification.

First, in \textit{Gül v. Switzerland}, recall that the Court found the question of reunification turned on to what extent family life was impossible absent family reunification.\textsuperscript{134} In finding that family life in Turkey was indeed possible, the Court put weight on the fact that Mr. Gül failed to receive refugee status in

\textsuperscript{130} \textit{Id.} ¶ 185.

\textsuperscript{131} \textit{Id.} ¶ 186.

\textsuperscript{132} Abdulaziz, Cabales, and Balkandali, \textit{supra} note 64, ¶ 68.

\textsuperscript{133} Refugee Convention, \textit{supra} note 2, art. 1.

\textsuperscript{134} Gül v. Switzerland, \textit{supra} note 73, ¶ 39.
Switzerland based on his treatment in Turkey. The implication, of course, is that had Mr. Gül been deemed a refugee, he would have been eligible for family reunification: the finding that he was not a refugee means, legally, that he is able to return to Turkey or is not legitimately afraid for his safety there. In accord with the Refugee Convention, Mr. Gül’s trips to Turkey weighed heavily against him. For a bona fide refugee, neither of these findings would be available: first of all, the applicant is, by stipulation, a refugee; and second, in virtue of being a refugee, it is necessary that the applicant could not or would not visit his or her home country. This is because, of course, the refugee by definition has great obstacles in his or her way from enjoying family life in the country of origin. Thus, the “obstacle” requirement expressed in Gül v. Switzerland, even as a stricter requirement than that found in Abdulaziz, is necessarily met by the refugee.

The final narrowing of reunification rights came in Ahmut v. the Netherlands. In this case, the deciding factor during the Court’s usual balancing test was the fact that Ahmut had made a conscious decision to live apart from his child, and was therefore ineligible for protection under Article 8 because maintenance of the status quo, as willingly entered into by the applicant, was not seen as interference. It was crucial that Ahmut had opted for a relation of family life, that is, separation, that a denial of family reunification would not abrogate. The Court noted that the principle of family unity does not guarantee a right to choose the most suitable place to develop a family life, implying that the principle of family unity does guarantee that there will be at least some viable place to develop a family life. Again, the refugee necessarily fills the exception traced in Ahmut. Crucially, the refugee is in the country of refuge unwillingly: it is a basic and necessary fact that refugees are in flight from their homes, not, like Ahmut, simply choosing to live in a place they deem more suitable. Moreover, it would be unthinkable that the refugee’s being apart from his or her family is somehow an acceptable status quo into which the refugee entered willingly; the refugee is and should be an exceptional status, and therefore denying family reunification would indeed upset the status quo (that is, the enjoyment of family unity, as it was prior to the attainment of refugee status). Therefore, the Ahmut case does not provide any rationale for denying family reunification to refugees.

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135 Id. ¶ 41.
136 Refugee Convention, supra note 2, art. 1(C)(1) (denying refugee status to those who have voluntarily re-availed themselves of the protection of their home country).
137 Gül v. Switzerland, supra note 73, ¶ 41.
138 Ahmut v. the Netherlands, supra note 80, ¶ 70.
139 Id.
140 Id. ¶ 71.
The refugee, then, fulfills the strict test for family reunification set out in the above three cases by virtue of his or her refugee status. Although the Court states that “extent of a State’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest,” the refugee is a special case who carries “particular circumstances” with him or her by definition. Those particular circumstances, a euphemism when applied to refugees, are an inability, against his or her will, to carry on family life in the country of origin because of significant barriers to return. In such a case, the ECtHR’s jurisprudence on family reunification counsels in favor of family reunification. Although the Court endorses a balancing test, the interest in the state controlling its borders are outweighed by the impossibility of enjoying a widely recognized human right (that is, to family unity) anywhere but the country of refuge.

In the ECtHR cases explored above, in other words, the balancing test invariably weighed the ability of the family to enjoy family unity in another area against the right of the state to police its borders and admit or deny entry as it pleases. If the state could legitimately deny entry to anyone, in any situation, then it would be mysterious as to how the ECtHR’s test was a balancing test at all: the state would need merely to invoke the right to control its borders, and the applicant’s claim would be trumped automatically. Clearly, this is not how the balancing test works, and there must be some situations in which a country’s interests in controlling its borders are overridden by the interests of the family seeking reunification. It is at this point that the Refugee Convention becomes important: having been granted legal status as a refugee, the applicant is legally recognized as not having a home country in which family unity can be enjoyed. The voluntariness of family separation has been yet another concern in the ECtHR balancing test, but similarly to the argument given above, the refugee is necessarily separated from his or her family involuntarily. In such a case, in which the state’s interest is balanced against the interests of a family completely unable to enjoy family unity elsewhere, it seems as though granting family reunification is the only logical option if the balancing test is to maintain its character as a balancing test at all. If the state could invoke its right to control its borders in any case involving immigration, then the ECtHR jurisprudence would quite simply have not developed a balancing test at all, despite its own characterization and the overall operation of the cases involving family reunification. Therefore, under the balancing test developed by the ECtHR, the

\[141 \text{Id. ¶ 67.}\]
individual's status as a refugee is critical to ensuring that family reunification is categorically granted, all other things being equal.\textsuperscript{142}

This Comment has assumed that the European Court of Human Rights' jurisprudence on the right to family reunification is persuasive or instructive in shaping the right worldwide. This is because the Court is a major institution in international human rights law and is interpreting a provision of a human rights document (Article 8 of ECHR)\textsuperscript{143} that, although contained in a regional compact, is substantially similar to those found in international human rights instruments.\textsuperscript{143} Thus, it is reasonable to argue that although ECtHR's judgments are not binding precedent for other international or national courts outside states party to the ECHR, that such judicial bodies as well as other institutions implementing policy with respect to refugees will find its reasoning persuasive when interpreting similar provisions of international human rights treaties. This assumption is useful, moreover, because of the dearth of jurisprudence regarding family reunification elsewhere. Putting weight on the European Court of Human Rights' decisions assumes that their conclusions are substantially similar to those other judicial bodies would reach. Although state practice is instructive as to the development of customary norms in international law,\textsuperscript{144} and there is reason to believe that state practice in the most influential nations with respect to immigration favors family reunification,\textsuperscript{145} it has been discounted it here because

\textsuperscript{142} That is, assuming that some other state prominent interest is not activated. For example, if a member of the family with which the refugee is seeking reunification is a known terrorist or war criminal, thereby implicating the state's right to protect public health and security, it would not be the case that reunification is necessarily the correct outcome. This is not problematic, though, because it does not implicate the same rights and balancing test as the usual case and is therefore an entirely separate issue from the one discussed above.

\textsuperscript{143} See Bertrand G. Ramarchan, \textit{The Fundamentals of International Human Rights Treaty Law} 173–75 (2011) (arguing that all human rights treaties in United Nations system be interpreted with a "dimension of universality" reflecting their intimate connection with the UDHR); see also J.G. Merrills, \textit{The Development of International Law by the European Court of Human Rights} 17 (1988) (arguing that the decisions of the E.C.t.H.R. have significance for substantive human rights law, especially where there is overlap in treaty provisions); Allen E. Shoenberger, \textit{Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World—The European Court of Human Rights}, 27 WHITW. L. REV. 357, 357 (2005) (noting the United States Supreme Court's citation to E.C.t.H.R. in \textit{Lawrence v. Texas}).

\textsuperscript{144} See Starr & Brilmayer, \textit{supra} note 9, at 228–29.

\textsuperscript{145} See Goodwin-Gill & McAdam, \textit{supra} note 98, at 148
state practice in this area has been opaque. Outside the European Court of Human Rights, it is difficult to discern on what basis family reunification is being granted, as it is compatible with national as well as international imperatives.

As a final matter, an important counterargument that might be leveled against this broad conception of refugee family reunification rights should be addressed. It might be said that states, knowing that they will probably have to grant entry to more family members if they grant refugee status to one person, will be more reluctant to deem persons refugees, and therefore overall protection of refugees will decrease as a result of this right. This argument is empirical, and data is unavailable to confirm or discredit it; moreover, there are reasoned arguments that allowing family reunification will not harm but rather support the national interest by making refugee integration more effective.146

V. CONCLUSION

Various instruments in international law recognize the right to family unity. Because the right to family unity has been consistently recognized, directly or indirectly, in such instruments, it is beyond doubt that such a right exists. There is significant room for uncertainty, though, in the content of this right. One possible expression of the right to family unity is a more specific right to family reunification: given that a family has been separated, it could be argued, the right to family unity implies that they are due positive efforts by the state to bring them together in the state of the family's choosing. The jurisprudence in this area, though, makes clear that a general right to family reunification does not exist. However, refugees present an interesting special case for family reunification as an expression of family unity, because the situation by which refugees are defined necessarily implicates involuntary separation from a family and inability to return to the country of origin. Given these unique factors that are constitutive of refugee status, as provided in the Refugee Convention, it would be impossible to argue that, all other things being equal, a balancing test could find that the state's interest in controlling its borders outweighs the refugees' right to family unity. Therefore, on the assumption that most jurisdictions would follow a similar line or jurisprudence to the one developed in the ECtHR, which is reasonable given its developed jurisprudence on the matter and the absence of family reunification jurisprudence in other international bodies, it follows that refugees have a broader right to family reunification than the general population.

Thus, the United States' general practice of allowing family reunification for refugee families, see Nessel, Families at Risk, supra note 43, at 1274, is persuasive.146

See generally Wilmsen, supra note 117.
Family reunification for refugees, of course, raises further questions as to the extent of the rights and obligations arising out of it. What constitutes "family" for the purposes of family reunification? That is, while it seems uncontroversial that a child be reunited with his or her parents or two spouses reunited, what is the state's duty to, for example, dependent grandparents? And what efforts are required of the state to reunify families? While it may be the case that the passive act of allowing immigration is the full extent of the state's duty, it may also be reasonable to think that the state may be required to perform some further positive act to reunify families, such as offering assistance in locating scattered family members or cooperating with other governments to ensure safe passage. These questions are beyond the scope of the Comment, but are nonetheless interesting issues that would certainly arise in the practice of refugee family reunification and are worthy of further examination.