

THE REFUGEE LAW READER

CASES, DOCUMENTS, AND MATERIALS

Editor-in-Chief

Maryellen Fullerton

Editorial Board

Rosemary Byrne

Bhupinder Chimni

François Crépeau

Madeline Garlick

Elsbeth Guild

Lyra Jakuleviciene

Boldizsár Nagy

Luis Peral

Jens Vedsted-Hansen



Hungarian Helsinki Committee



SIXTH EDITION
BUDAPEST – NEW YORK 2011



THE REFUGEE LAW READER

CASES, DOCUMENTS, AND MATERIALS
6TH EDITION – BUDAPEST – NEW YORK – 2011

Editor-in-Chief

Maryellen Fullerton

Editorial Board

Rosemary Byrne

Bhupinder Chimni

François Crépeau

Madeline Garlick

Elspeth Guild

Lyra Jakuleviciene

Boldizsár Nagy

Luis Peral

Jens Vedsted-Hansen

Published by the Hungarian Helsinki Committee, Budapest

ISBN: 978-963-89380-5-3

The printing of this booklet was made possible by the generous support of the
European Refugee Fund.

Design: Judit Kovács, Createch, Budapest

Cover photo: Boldizsár Nagy

November 2011

This is a printed version of the syllabus for The Refugee Law Reader, an on-line ‘living’ casebook (www.refugeelawreader.org). The Refugee Law Reader is a collaborative project among experts in the field that offers a fully developed course curriculum and access to over 10,000 pages of legal instruments, documents and specialist commentary.

The Refugee Law Reader has been designed to easily adapt to the wide range of teaching and research needs of professionals. This booklet aims to facilitate navigation within the web site and to assist in seeing the structure of the curriculum as a whole. It also seeks to assist users with the selective adaptation of the course structure and access to the extensive legal material available in The Reader.

CONTENT

About The Reader and Its Use	13
About The Reader	13
Accessing Source Material	16
Adapting The Reader to Specific Course Needs	17
Technical Advice	19
Acknowledgments	20
Reader Feedback	23

Section I

Introduction to International Refugee Law: Background and Context	25
I.1 History of Population Movements: Migrants, Immigrants, Internally Displaced Persons and Refugees	26
I.1.1 The Concepts	26
I.1.2 The Theories	27
I.1.3 The Actual Movements	28
I.2 The Legal and Institutional Framework for Refugee Protection	30
I.2.1 The Evolution of the International Refugee Regime	30
I.2.2 The Universal Standard: The 1951 Geneva Convention Refugee Definition and the Statute of the UNHCR	31
I.2.2.1 Prior Definitions: Group Specific: Geographically and Temporarily Limited	31
I.2.2.2 1951 Geneva Convention: Universal Applicability: Optional Geographical and Temporal Limits	31
I.2.2.3 Expansion by the 1967 Protocol	32
I.2.3 Contemporary Alternative Refugee Definitions	32
I.2.3.1 Africa	33
I.2.3.2 Latin America	33
I.2.3.3 Europe	33
I.3 UNHCR and Other Actors Relevant to International Asylum Law	34
I.3.1 UNHCR	35
I.3.2 Other Agencies and Their Interaction	36

II.2.2	Access to Territory	73
II.2.2.1	Visa Requirements	74
II.2.2.2	Carrier Sanctions	74
II.2.2.3	Extraterritorial Immigration Control	74
II.2.2.4	Interceptions and Rescue at Sea	74
II.2.3	Access to Procedures	76
II.2.3.1	Protection Elsewhere (First Country of Asylum and Safe Third Country)	76
II.2.4	Reception Conditions	78
II.2.5	Procedures for Determining Refugee Status	79
II.2.5.1	Basic Procedural Requirements	79
II.2.5.2	Evidentiary Issues	80
II.2.5.2.1	Standards of Proof	80
II.2.5.2.2	Credibility	81
II.2.5.2.3	Factors Affecting Evidentiary Assessment	82
II.2.5.2.3.1	Post Traumatic Stress	82
II.2.5.2.3.2	Interviewing Vulnerable Populations	83
II.2.5.2.3.2.1	Children	83
II.2.5.2.3.2.2	Women	84
II.2.6	Content of Refugee Status	86
II.2.7	Detention	87
II.3	Other Forms of International Protection	89
II.3.1	Temporary Protection	89
II.3.2	Complementary (Subsidiary) Protection	91
II.3.3	Universal Human Rights Instruments Relevant to Protection	92
II.3.3.1	Universal Declaration of Human Rights	93
II.3.3.2	The UN International Covenant on Civil and Political Rights	93
II.3.3.3	The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	96
II.3.3.4	The UN Convention on the Rights of the Child	99
II.3.3.5	The Geneva Conventions and Protocols: Minimum Standards in Times of War	100
II.4	Internally Displaced Persons	102

Section III

African Framework for Refugee Protection	105
III.1 Overview of African Regional Legal Instruments for Refugee Protection	106
III.2 The OAU Refugee Convention	108
III.2.1 Extended Grounds of Persecution: ‘External Aggression, Occupation, Foreign Domination or Events Seriously Disturbing Public Order’	108
III.2.2 Family Unity	109
III.3 Sub-regional Legal Framework for the Protection of Refugees	110
III.3.1 East Africa	110
III.3.1.1 Kenya	111
III.3.1.2 Uganda	112
III.3.1.3 Tanzania	113
III.4 Protection Challenges in Africa	114
III.4.1 Exclusion Clause	115
III.4.2 The Interface between Refugee Law and Immigration Law	117
III.4.3 Urban Refugees versus Camp Refugees	117
III.4.4 Resettlement	118
III.4.5 The Plight of IDPs	119
III.4.6 Unaccompanied Minors	121
III.4.7 Governance and Globalization	122
III.4.8 The Search for Solutions to the Refugee Problem in Africa	123
III.4.9 Protection During Mass Repatriation Programmes	124

Section IV

Asian Framework for Refugee Protection	125
IV.1 Protection Challenges in Asia	126
IV.2 States Party to the 1951 Refugee Convention	128
IV.2.1 Cambodia	128
IV.2.2 China	128
IV.2.3 Japan	129
IV.2.4 Philippines	130
IV.2.5 South Korea	130

IV.3 States Not Party to the 1951 Refugee Convention	131
IV.3.1 Bangladesh	131
IV.3.2 India	132
IV.3.3 Nepal	133
IV.3.4 Pakistan	134
IV.3.5 Thailand	134

Section V

European Framework for Refugee Protection	137
V.1 The Council of Europe	139
V.1.1 Legal and Policy Framework for Refugee Protection	139
V.1.2 The European Convention on Human Rights and Fundamental Freedoms	144
V.2 The European Union	158
V.2.1 Towards a Common European Asylum System (CEAS)	159
V.2.1.1 Evolution of the CEAS	160
V.2.1.2 Ongoing Development of the CEAS	162
V.2.2 Criteria for Granting Protection	163
V.2.2.1 Harmonization of the 1951 Geneva Convention Refugee Definition	163
V.2.2.2 Subsidiary Protection	166
V.2.2.3 Temporary Protection	168
V.2.3 Access to Territory and Access to Procedures	169
V.2.3.1 The EU's External and Internal Borders	170
V.2.3.2 Interception and Rescue at Sea	172
V.2.3.3 Visas	173
V.2.3.4 Carrier Sanctions	175
V.2.3.5 Extraterritorial Immigration Control and Extraterritorial Processing	176
V.2.3.6 Biometrics and Databases	179
V.2.4 Procedures for Granting Protection	179
V.2.4.1 Responsibility: The Dublin System	180
V.2.4.2 Minimum Standards for Reception Conditions	183
V.2.4.3 Minimum Standards for Normal Procedures	184
V.2.4.4 Minimum Standards for Specific Procedures	186

V.2.4.4.1	Accelerated and Manifestly Unfounded Procedures	186
V.2.4.4.2	Safe Country of Origin	187
V.2.4.4.3	Safe Third Country	189
V.2.4.5	Other Aspects of Decision-making	191
V.2.4.5.1	Evidentiary Issues	191
V.2.4.5.2	Persons with Special Needs	191
V.2.4.6	Appeals	192
V.2.5	Removal and Detention	194
V.2.5.1	Detention	194
V.2.5.2	Return Policies	195
V.2.5.3	Readmission Agreements	197

Section VI

Framework for Refugee Protection in the Americas	201
VI.1 Political Asylum, Diplomatic Asylum and Refugee Status	202
VI.2 Refugee Protection in the Framework of the Inter-American Human Rights System	203
VI.2.1 Human Rights Instruments	203
VI.2.1.1 The <i>Non-refoulement</i> Principle and the Rights of Refugees	203
VI.2.1.2 Protection against Extradition	208
VI.2.1.3 Other Norms	208
VI.2.2 Specific Instruments of Refugee Protection	209
VI.2.2.1 Regional Definition and Proposals to Improve Protection	209
VI.2.2.2 Durable Solutions in the Regional Framework	210
VI.3 Application of the 1951 Geneva Convention through the Regional Mechanisms and National Legislations	212
VI.4 Protection of Internally Displaced Persons, with Special Attention to the Case of Colombia	213
VI.5 The North American Regional Materials	216

Notes on the Editors	217
-----------------------------	------------

ABOUT THE READER AND ITS USE

About The Reader

November 2011

The Refugee Law Reader: Cases, Documents and Materials (6th edn.) is a comprehensive on-line model curriculum for the study of the complex and rapidly evolving field of international refugee law. We are proud to continue with the expanded and universal edition of The Reader, which provides sections on international and regional frameworks of refugee law, covering Africa, Asia, Europe and the Americas. Adapted language versions with specific regional focus are available in French, Russian and Spanish.

The Reader is aimed for the use of professors, lawyers, advocates, and students across a wide range of national jurisdictions. It provides a flexible course structure that can be easily adapted to meet a range of training and resource needs. The Reader also offers access to the complete texts of up-to-date core legal materials, instruments, and academic commentary. In its entirety, The Refugee Law Reader is designed to provide a full curriculum for a 48-hour course in International Refugee Law and contains over 700 documents and materials.

The Refugee Law Reader was initiated and is supported by the Hungarian Helsinki Committee and funded by the European Refugee Fund and the United Nations High Commissioner for Refugees (UNHCR). We also wish to thank the European Cooperation in Science and Technology (COST) for its support.

Structure and Content

The Reader is divided into six sections: Introduction to International Refugee Law, The International Framework for Refugee Protection, The African Framework for Refugee Protection, The Asian Framework for Refugee Protection, The European Framework for Refugee Protection and The Framework for Refugee Protection in the Americas. Each section contains the relevant hard and soft law, the most important cases decided by national or international courts and tribunals, and a carefully selected set of academic commentaries.

To facilitate teaching and stimulate critical discussion, the Editors highlight the main legal and policy debates that address each topic, as well as the main points that may be drawn from the assigned reading. In many sections of the syllabus, readers may also access Editor's Notes, which contain more detailed commentary and suggestions for teaching in a given subject area.

Because of the depth, scope, and flexibility of the Reader, it is now being accessed in multiple continents by over 28,000 users. The Reader's availability in four languages and its expanded geographical coverage have made it an effective resource for a regional approach to refugee legal education. By overcoming language and territorial barriers, the Reader can also effectively serve a larger community of asylum experts worldwide.

The Reader first deals with the international refugee law regime and its foundations: the history of population movements and theories of migration, the evolution of the international refugee regime, the 1951 Geneva Convention Relating to the Status of Refugees, the expanding mandate of UNHCR and regional developments which have a bearing on the universal perception of the rights and duties of forced migrants. The concepts and the processes are analysed in light of the formative hard and soft law documents and discussed in an up-to-date, high standard

and detailed academic commentary. Issues underlying the global dilemmas of refugee law are tackled, taking into account developments in related areas of human rights and humanitarian law, as well as research advances in the field of migration.

In addition to the examination of the classic problematique of international refugee law, The Reader also presents the major regional frameworks for refugee protection. The African section includes the core legal instruments for refugee protection in Africa and focuses on the central legal and policy challenges in their implementation. East Africa is presented as a sub-regional case study. In the future, additional case studies on other regions within Africa will be added. The Asian section presents the framework of protection on a continent where most States are not signatories to the 1951 Convention. It offers an overview of selected national refugee laws and policies on the continent and explores some of the broader protection challenges in the region. The European section presents the detailed pan-European asylum system constructed by the Council of Europe and the European Union. It highlights the Common European Asylum System that is creating regional norms and standards and is also looked to by policy makers around the world. This section's excellent collection of the central instruments and key materials is current up until mid-2011. The final section considers the distinctive framework of refugee protection that has emerged in the Americas. It presents the regional instruments and jurisprudence alongside a thematic examination of internal displacement in Latin America that is explored in the context of a case study of Colombia.

While we have attempted to design The Reader so that users across jurisdictions, and with varying objectives, can select their own focus for the material, it is important that central themes of The Reader should not be discarded in this *à la carte* approach to refugee law. Thus, we emphasize that users should understand the regional sections as adaptations and

variations on the themes set forth in the universal materials found in Sections I and II.

Accessing Source Material

Most of the core documents and materials contained in The Reader are accessible in their full text format to all users. Core readings can be downloaded from The Reader website. As there are a large number of core readings that are accessible in The Reader, we recommend that the readings should only be selectively printed. Professors may wish to assign their students segments of the assigned readings, and many of the documents, and particularly lengthy legal instruments, can be effectively reviewed on-line. In addition, the Editors have included citations to extended readings, which are not downloadable, for those who wish to study certain topics in more depth. In general, the extended readings are less central to an understanding of the topic, but on occasion copyright restrictions have required the Editors to categorize an important (new) reading as “extended”.

One of the significant advantages of an on-line Reader is that it is able to provide access to instruments, documents and cases in their entirety, offering a rich source of material for academic writing. It should be noted that for purposes of citation, however, the process of downloading articles in PDF format does not always translate the page numbers of the original publication. Hence, please consult the full citation that appears in the syllabus to ensure accuracy.

The Reader uses James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) and G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007) as core texts. The Reader is able to provide open and full access to the

assigned pages of *The Law of Refugee Status*. While it is likely that many university professors and students will have access to the Goodwin-Gill and McAdams 2007 third revised edition of *The Refugee in International Law* in their libraries or university bookshops, the Editors are aware that many of our users may not. These users, however, will still benefit from full access to the text of the assigned reading from the second edition of Goodwin-Gill's *The Refugee in International Law* (Oxford: Oxford University Press, 1996). Hence, the Editors have included parallel citations for the 3rd and 2nd editions of *The Refugee in International Law* throughout The Reader to ensure that all can follow the core readings in the syllabus regardless of resources.

The Editorial Board and the Hungarian Helsinki Committee would like to thank Oxford University Press and its authors for their invaluable support for making refugee legal education accessible across the globe. We would also like to thank Cambridge University Press and other publishers of the secondary literature included in The Reader, as well as all of the authors whose works we have selected. Because of their generous support we are able to provide password-protected access to these documents to professors teaching refugee law and legal clinics in regions of the world with a yet developing asylum system. More information can be obtained by contacting the Hungarian Helsinki Committee at the email listed at the bottom of the page.

Adapting The Reader to Specific Course Needs

Editorial recommendations for how class time should be allocated to cover each of the respective subject areas, and their sub-topics, are provided below for a 48-hour course, as well as 24- and 12-hour

modules. A copy of the complete syllabus can be downloaded and adapted for teaching purposes. Each of the sections of the complete syllabus, and their respective sub-topics can be directly accessed on the site. In the chart below, each of the major topics included in the syllabus are presented. The full text of the syllabus and the relevant source material for the assigned readings can be accessed in The Reader. For more detailed directions, see the section Technical Advice below.

Recommended hours for module teaching

Topic	48-hour course	24-hour course	12-hour course
Section I Introduction to International Refugee Law: Background and Context	8	4	2
Section II International Framework for Refugee Protection			
Universal Principles and Concepts of Refugee Protection	5	2	1
The 1951 Convention	14	8	4
Other Forms of International Protection	4	2	1
Section III–VI* Regional Frameworks for Refugee Protection	17	8	4
Section III African Framework for Refugee Protection			
Section IV Asian Framework for Refugee Protection			
Section V European Framework for Refugee Protection			
Section VI Framework for Refugee Protection in the Americas			

* *The allocation of hours across the respective regions will vary according to the focus of the course.*

Technical Advice

To begin, you are advised to download the complete Syllabus of The Refugee Law Reader or acquire the printed booklet containing the full Syllabus. The Syllabus provides you with both a general and a detailed overview of The Reader's structure and the documents included therein. The PDF format enables you to easily print out the Syllabus and use it as a general reference document. You can create your own syllabus or list of readings by simply copy-pasting the relevant citations into your own word processing system – the PDF format will ensure that the original form of the Syllabus remains unmodified.

To access a specific section of The Refugee Law Reader on-line, click on the relevant section titles and subtitles in the left hand menu. The accompanying section of the Syllabus will then appear on the screen followed by the list of downloadable documents. Most of the documents are easily available in PDF format by simply clicking on the small PDF icon under the title of the chosen document.

The vast majority of The Reader's documents are freely downloadable; however, some documents require authorization (a password) and are limited to professors teaching refugee law and legal clinics in regions of the world with a yet developing asylum system, where up-to-date academic literature is not available due to the lack of resources. Requests for a password are examined on an individual basis.

If you wish to identify documents by publisher, author, or title, you can do so easily by using the search engine of The Refugee Law Reader. For further guidelines on how to search The Reader, please consult the relevant text available on the search website.

Acknowledgments

Each edition of The Reader expands upon the contributions of prior editors. This is particularly the case with members of the editorial board who were involved in the creation and development of the previous editions. We would like to thank above all Dr. Rosemary Byrne, Associate Professor of International Law and the Director of the Centre for Post-Conflict Justice, Trinity College, Dublin, who provided wide-ranging expertise and has been a source of great inspiration to all of us as the Editor-in-Chief of The Reader's first five editions. Her leadership was instrumental in creating the universalised on-line refugee law resource that exists today in four languages. We would also like to thank the following prior editors:

Dr. Ekuru Aukot, the Director of the Committee of Experts on the Review of the Constitution in Kenya; Jean-Claude Forget, retired UNHCR official; Darina Mackova, International Human Rights Lawyer at ACUNS; Eugen Osmochescu, International Finance Corporation, Belgrade; and Steve Peers, Professor of Law at the University of Essex.

The Refugee Law Reader has developed through the dynamic participation of many experts in the field of asylum, both internationally and within the regional network of refugee law clinic. We would like to thank the following persons for their valued contributions to the creation of The Reader:

Ágnes Ambrus, Oldrich Andrysek, Deborah Anker, Frank Emmert, Lucia Fulmekova, Juris Gromovs, Anamaria Gutiu, Barbara Harrell-Bond, Romanita Iordache, Dajena Kumbaro, Sean Loughna, Gregor Noll, Imre Papp, Judit Tóth, Blagoy Vidin.

The Hungarian Helsinki Committee would like to thank the following persons for their kind cooperation in obtaining the publication permissions:

Frankie Edozien (The African), Diane Jones (Amnesty International), John Gordon (Boston College International & Comparative Law Review), Gaby van Rietschoten (Brill Academic Publishers/Martinus Nijhoff), Ken Battle (Caledon Institute of Social Policy), Mélanie McKinnon (Canadian Immigration and Refugee Board), Linda Nicol (Cambridge University Press), Roger Errera (Honorary Judge of the Council of State, France), Margarita Minkova (Centre for European Policy Studies), Information Office of the House of Lords, J. Oloka-Onyango (East African Journal of Peace and Human Rights), Ana Lopez Fontal (ECRE), Maral Bedrossian (European Policy Centre), Beata Kulpaczyńska (Publications Office of the European Union), Kelly Pitt (Forced Migration Review), Matthew Putorti (Fordham International Law Journal), Linda Davidson and Dr. Rolph K. Jenny (Global Commission on International Migration), Hans Zell (Hans Zell Publishers), Richard Hart and Rachel Turner (Hart Publishing), William Mead (Home Office, UK), Christina Bell (Human Rights Watch), Vincent Bernard (ICRC), Judith Russell (Institute for Jewish Policy Research), Edmund Jennings (Internal Displacement Monitoring Centre), Liesbeth van de Meeberg (International Association of Refugee Law Judges), Sharon Waters (Irish Refugee Council), Shaun Johnson, (LexisNexis Canada Inc.), Ranabir Samaddar (Mahanirban Calcutta Research Group), George Nasinyama (Makerere University), Mathura Yadav (Manak Publications), P.E. de Morree (Meijers Committee), Rachel Wilson (The Middle East Journal), Michelle Mittelstadt (Migration Policy Institute), Edwin Abuya (Moi University), Tom Scheirs (Netherlands Quarterly of Human Rights), Maureen Fulton (The Ohio State Journal on Dispute Resolution), Gilbert Loescher (Oxford University), Ben

Kennedy (Oxford University Press), Chris Payne (Oxford University Press), Emma Thomas (Oxford University Press), Julie Sitney (Population and Development Review), Megan Prock (Physicians for Human Rights), Rüdiger Köppe (Recht in Africa), Negin Dahya (Refuge), Moses A. Nsubuga (Refugee Law Project), Dana Adams (Russell Sage Foundation), Tony Bunyan (Statewatch), Russel King (Sussex Centre for Migration Research), Jacky Challenor and Peter Chare (Sweet & Maxwell), Philip van Tongeren (T.M.C. Asser Press), Denise Blackett (Victoria University of Wellington Law Review), Gert De Nutte (VUBPRESS Brussels University Press), Arzu Celalifer Ekinici (Uluslararası Hukuk ve Politika), Andrej Mahecic (UNHCR Bureau for Europe), Barbara Miltner (University of Cambridge), Perry Cartwright (University of Chicago Press), James C. Hathaway (University of Michigan Law School), Alison Seiler (U.S. Committee for Refugees and Immigrants), Simone Fennell (Wolf Legal Publishers), Bonnie Doyle (The Yale Journal of International Law).

The following Hungarian Helsinki Committee staff members, affiliates and friends contributed to the completion of The Reader:

Nuria Arenas, Judit Bagdany, Reyes Castillo, Gábor Gyulai, Awet Haile, Andrew James Horton, Raluca Iagher, Nino Kemoklidze, Boyan Konstantinov, Tamás Kovács, Ferenc Kőszeg, Petr Kutílek, Marina Lourenco, Alba Marcellán, Mike Matheson, Priyanca Mathur Velath, Fiona McKinnon, Márta Pardavi, Syed Qadri, Julie Ranger, Erik Reho, Julie Reynolds, Daniel L. Robbins, Barbara Salmon, Susannah Scott, Courtney Schusheim, Moira Smith, Rakhmadjon Sobirov, Ewoud Swart, Elvira Szabó, Tímea Szabó, Szabolcs Tóth, Ivy Wong.

Reader Feedback

One of the advantages of producing an on-line resource is the editorial capacity to update and review materials at more frequent intervals than published texts would allow. For this purpose, we encourage you to send the Editors any suggestions that you may have for improving The Reader.

We would also like to include current case law as it develops. If you are aware of important jurisprudence that is available in English, French, Russian or Spanish, we would be very appreciative if this could be brought to our attention.

Please send any correspondence to the editorial board at:

HUNGARIAN HELSINKI COMMITTEE

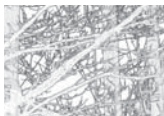
H-1054 Budapest, P.O. Box 317, Hungary

Tel./Fax: (+36 1) 321 4327, 321 4323

E-mail: reader@helsinki.hu



SECTION I



Introduction to International Refugee Law: Background and Context

Contemporary refugee law cannot be understood without knowledge of the broader global context from which it has emerged, and within which it is developed and implemented. The aim of Section I is to provide this essential context as a basis for the study of refugee law. This section introduces the major concepts of regular and irregular migration, provides a historical look at the phenomenon of migration, and surveys the magnitude of migration at the beginning of the twenty-first century. It then identifies the universal and regional standards that apply in refugee status determinations around the world, thereby illuminating the overall framework for refugee protection. It concludes by noting the major actors involved in refugee protection, particularly the UNHCR and other international and national entities.

Section I is truly introductory. It lays the foundation for what will come in other sections of *The Refugee Law Reader*. Accordingly, Section I refers only to fundamental principles, leaving the in-depth examination of case law to subsequent sections.

I.1 History of Population Movements: Migrants, Immigrants, Internally Displaced Persons and Refugees

Main Debates

Is there a human right of freedom to move to another country?

Is migration an asset to, or a burden for, sending and receiving states?

What is the relationship between past movements and present migration policies?

Main Points

Unlimited exit v. limited entry rights

Trade-offs between regular and irregular routes

Migration as a pervasive feature of the human experience

I.1.1 The Concepts

Main Debate

Should different types of migration – regular, unauthorized, and forced – be subject to different forms of control?

Main Points

Sociological, demographic, historical and legal perspectives on migration

Understanding fundamental terms of reference:

- international migrant
- asylum seeker
- refugee
- undocumented (illegal) migrant
- ‘of concern’ to UNHCR

Readings

Core

A. Demuth, ‘Some Conceptual Thoughts on Migration Research’, in B. Agozino (ed.), *Theoretical and Methodological Issues in Migration Research* (Aldershot: Ashgate Publishing, 2000), pp. 21–58.

Extended

V. Bader, 'The Ethics of Immigration', *Constellations*, vol. 12, no. 3 (2005), pp. 331–361.

IOM, *International Migration Law Glossary on Migration* IOM, Geneva, 2004.

I.1.2 The Theories

Main Debates

What are the causes of migration?

Is the model of push-pull factors adequate?

Can migratory processes be managed?

Does migration management simply redirect or reclassify migrants?

Main Points

Absence of a single theory explaining migration

The start and the continuation of a migratory process may have different causes

Migration management:

- varied tools
- short v. long term perspectives
- often unexpected results

Readings

Core

D. Massey, J. Arango, G. Hugo, A. Kouaci, A. Pellegrino, and E. Taylor, 'Theories of International Migration: A Review and Appraisal', *Population and Development Review*, vol. 19, no. 3 (September 1993), pp. 431–466.

R. Skeldon, 'International Migration as a Tool in Development Policy: A Passing Phase?', *Population and Development Review*, vol. 34, no. 3 (March 2008), pp. 1–18.

Extended

A. Betts, *Forced Migration and Global Politics*, (Chichester: Wiley-Blackwell, 2009), pp. 60–79.

C. B. Brettel and J. F. Hollifield, 'Migration Theory Talking across Disciplines', in C. B. Brettel and J. F. Hollifield (eds), *Migration Theory Talking across Disciplines* (New York: Routledge, 2008), pp. 1–29.

- J. P. Casey, 'Open Borders: Absurd Chimera or Inevitable Future Policy?', *International Migration*, vol. 48, no. 5 (2010), pp. 14–62.
- D. Fisher, S. Martin and A. Schoenhotz, 'Migration and Security in International Law', in T. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms* (The Hague: Asser Press, 2003), pp. 87–122.
- A. Pécoud and P. de Guchteneire, 'Introduction: The Migration without Borders Scenario', in A. Pécoud and P. de Guchteneire (eds), *Migration without Borders Essays on the Free Movement of People* (Paris: UNESCO Publishing, New York: Berghahn Books, 2007), pp. 3–30.
- A. Portes and J. DeWind, 'A Cross-Atlantic Dialogue: The Progress of Research and Theory in the Study of Migration', *International Migration Review*, vol. 38, no. 3 (Fall 2004), pp. 828–851.
- A. Zolberg, 'Matters of State: Theorizing Immigration Policy', in C. Hirschman, P. Kasinitz and J. DeWind (eds), *The Handbook of International Migration: The American Experience* (New York: Russell Sage Foundation, 1999), pp. 71–93.

Editor's Note

As the reading demonstrates, there is no single theory of migration. Theories of international migration attempt to explain migration at different levels (i.e., ranging from the individual, family, or community, to the national and global) and focus on various aspects of migration (i.e., forces that 'trigger' migration or factors that sustain it). Even the most widely held convictions – about the sovereign right and the economic incentives to exclude the foreigners – may be challenged.

I.1.3 The Actual Movements

Main Debates

Is the boat really full? Where?

Should former countries of origin 'repay' their historic debts by receiving migrants?

Does the European Union need an immigration policy?

Main Points

The proportion of migrants among the population is only slightly increasing in recent decades and is close to 3%

Transformation of many European states from sending to receiving states
Lessons from historical data:

- closing one entry door leads to opening of another
- migration cannot be halted

Readings

Core

A. Segal, *An Atlas of International Migration* (London: Hans Zell Publishers, 1993), pp. 3–22.

Migration in an Interconnected World: New Directions for Action (Report of The Global Commission on International Migration, October 2005), pp. 5–10.

Extended

S. Castles and M. J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Houndmills: Palgrave, 2009), pp. 96–124, 148–180, 299–312.

R. King, 'European International Migration 1945–1990: A Statistical and Geographical Overview', in R. King (ed.), *Mass Migration in Europe the Legacy and the Future* (New York: John Wiley and Sons, 1995), pp. 19–39.

S. Schmeidl, 'Comparative Trends in Forced Displacement', in J. Hampton (ed.), *Internally Displaced People: A Global Survey* (London: Earthscan, 1998), pp. 24–33.

Eurostat, 'Europe in Figures', *Eurostat Yearbook* (2010), pp. 198–203.

OECD, *International Migration Outlook* (Paris: OECD, 2010).

UN, *International Migration and Development Report of the Secretary General A/65/203*, 2 August 2010.

UNHCR, '2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons', 15 June 2010.

Editor's Note

An historical overview of migration should place a particular emphasis on post-Second World War patterns, highlighting the changes in migration policies that encouraged inward migration until the late 1970s.

Explication of trends and patterns in refugee migration should identify the changing numbers of refugees, their countries of origin, and the uneven distribution of asylum seekers among host countries.

I.2 The Legal and Institutional Framework for Refugee Protection

Main Debates

What impact do international obligations have on national sovereignty and migration control?

What are the legal and moral duties of host states?

Are the expanding refugee definitions and the rise of new actors an improvement or not?

Main Points

Three major phases of the evolution of the international refugee legal regime

Policy responses to different types of migration

Universal and regional definitions

I.2.1 The Evolution of the International Refugee Regime

Readings

Core

- J. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, vol. 31, no. 1 (Spring 1990), pp. 129–147.
- G. Loescher, 'The Origins of the International Refugee Regime', in *Beyond Charity: International Co-operation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993), pp. 32–55.
- A. Suhrke, 'Refugees and Asylum in the Muslim World', in R. Cohen (ed.), *The Cambridge Survey of World Migration* (Cambridge: Cambridge University Press, 1999), pp. 457–460.

Extended

- L. Holborn, 'The Legal Status of Political Refugees, 1920–1938', *American Journal of International Law*, vol. 32, no. 4 (October 1938), pp. 680–703.
- M. Marrus, *The Unwanted. European Refugees in the Twentieth Century* (Oxford: Oxford University Press, 1985).

Editor's Note

Note the three phases of the modern international refugee regime:

- 1) The first phase of collective recognition of refugees, which goes up until the Second World War,
- 2) The second phase of transition, which occurs during and shortly after the Second World War,
- 3) The third phase of individual recognition and other forms of protection, which begins with the establishment of UNHCR and entry into force of the 1951 Convention, continuing to the present.

1.2.2 The Universal Standard: The 1951 Geneva Convention Refugee Definition and the Statute of the UNHCR

1.2.2.1 Prior Definitions: Group Specific: Geographically and Temporarily Limited

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 1–4.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 15–20. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 4–6].

1.2.2.2. 1951 Geneva Convention: Universal Applicability: Optional Geographical and Temporal Limits

Treaties

International

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Geneva Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 5, 108–109.

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 20–24, 35–37. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–8, 18–19].
- N. Robinson, *Convention Relating to the Status of of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953).

I.2.2.3 Expansion by the 1967 Protocol

Treaties

International

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

- Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution, A/RES/428 (V), 14 December 1950.
- UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 6–11.

Editor's Note

For detailed analysis see Section II.2.1.

I.2.3 Contemporary Alternative Refugee Definitions

Editor's Note

This section traces the recent broadening of the refugee definition and the expansion of major actors (governmental and non-governmental) that has occurred from early

1970s onwards. While the 1951 Geneva Convention provides the core legal definition of ‘refugee’ and UNHCR remains the dominant actor in international refugee protection, readers should consider whether the appearance of new definitions undermines the consistency of the regime or leads to a more responsive international environment.

I.2.3.1 Africa

Treaties

Regional

Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

Editor’s Note

See also Section III.

I.2.3.2 Latin America

Soft Law

Cartagena Declaration on Refugees, 22 November 1984, OAS/Ser.L./V/II.66, doc. 10, rev. 1.

Editor’s Note

See also Section VI.

I.2.3.3 Europe

Soft Law

Council of Europe Parliamentary Assembly, ‘Recommendation 773 (1976) on the Situation of de Facto Refugees’, 26 January 1976.

EU Documents

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving

such persons and bearing the consequences thereof. OJ L 212/12, 7 August 2001.

Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.

Editor's Note

See also Section V.

I.3 UNHCR and Other Actors Relevant to International Asylum Law

Readings

Core

W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.

Editor's Note

UNHCR has changed its perceived mission several times, first extending protection to victims in situations not falling under its original mandate and second by becoming an agency involved in complex humanitarian missions in acute conflict zones.

This extended responsibility could not be discharged without an ever growing cooperation with other member organizations and programs of the UN family and without the expanding engagement of national and international non-governmental organizations as implementing partners.

The outreach of the UN-centred refugee regime depends on its precarious relationship with the major donor governments.

Since December 2005 UNHCR has become actively involved in the protection of internally displaced persons.

1.3.1 UNHCR

Main Debates

Should the role of UNHCR extend beyond protection to include humanitarian aid and/or return and reconstruction?

What procedural standards does UNHCR apply in its expansive role in status determination?

Has, and can, UNHCR put up effective resistance against restrictive tendencies in Europe and elsewhere?

Main Points

UNHCR conducts status determination in over 70 countries with significant variations in practice and standards

Necessity of networks for co-operation and engagement

Dependency on major donor governments

Treaties

International

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution, A/RES/428 (V), 14 December 1950.

UNHCR Documents

REFWORLD, The UNHCR's CD-ROM Database, www.refworld.org.

UNHCR, 'Agenda for Protection', October 2003.

UNHCR, 'Declaration Reaffirming the Principles of the 1951 Refugee Convention', December 2001.

UNHCR, 'Procedural Standards for Refugee Status Determination Procedure under UNHCR's Mandate', September 2005.

Readings

Core

- B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, vol. 11, no. 4 (December 1998), pp. 350–357, 365–368.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 20–32. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–17].

Extended

- M. Barutciski, 'A Critical View on UNHCR's Mandate Dilemmas', *International Journal of Refugee Law*, vol. 14, nos. 2–3 (April 2002), pp. 365–381.
- G. Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order', *International Journal of Refugee Law*, vol. 10, no. 3 (July 1998), pp. 350–388.
- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.
- G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).
- M. Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination', in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Heidelberg: Springer, 2009), pp. 399–405.

1.3.2 Other Agencies and Their Interaction

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 441–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 222–230].

- N. Kelly, 'International Refugee Protection Challenges and Opportunities', *International Journal of Refugee Law*, vol. 19, no. 3 (October 2007), pp. 432–439.
- C. Phuong, 'Improving United Nations Response to Crises of Internal Displacement', *International Journal of Refugee Law*, vol. 13, no. 4 (October 2001), pp. 491–517.

Extended

- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.
- A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002), pp. 118–138.
- UN, *International Migration and Development, Report of the Secretary-General A/63/265*, 11 August 2008.

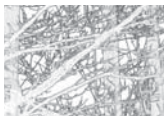
Editor's Note

Note also the activities of agencies not fully covered in the readings, among them the UN Security Council's resolutions referring to situations producing flight of persons, and the involvement of IOM and the ICRC.

See UNCHR's website on donors and partners of UNHCR.



SECTION II



International Framework for Refugee Protection

Section II of *The Refugee Law Reader* presents the international framework for refugee protection. This section focuses exclusively on universal norms. Although both universal and regional laws and practices may be important in any single case, the legal norms developed at the regional level differ significantly from one area of the globe to another. Therefore, *The Refugee Law Reader* has elected to address worldwide legal obligations in Section II and to examine regional norms in the separate sections concerning Africa, Asia, Europe, and the Americas.

The international legal norms concerning refugee protection derive from the well-known sources of international law: international conventions, international custom, and generalized principles found in major legal systems around the world. In addition to identifying these bases of international legal protection of refugees, Section II highlights soft law as well as subsidiary sources such as judicial decisions and the writings of scholars and other experts.

The organization of Section II proceeds according to the following logic. The first portion of Section II surveys the overarching principles and concepts of refugee protection. The focus is on customary international legal norms, which apply to all states whether or not they are Contracting Parties to any pertinent treaties, on soft law, and on certain provisions from international human rights conventions. The second, and by far the most extensive, portion of Section II focuses on the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol. Today there are more than 140 State Parties, making these treaty obligations applicable in many parts of the world and a wellspring of jurisprudential development.

The third portion of Section II turns to other universal protection that pertains to refugees and asylum seekers. In particular, it examines the concepts of temporary protection and complementary or humanitarian protection, which many states employ in their responses to the displacement of people. It also examines universal instruments of human rights and humanitarian protection, which are relevant to everyone, including the displaced. Lastly, Section II turns to the topic of internally displaced persons. Although they generally do not fall within the legal framework of refugee protection, many individuals displaced within their own country fear the same persecution as those who have crossed borders. The similarities between their situation and that of many refugees make it imperative to address their plight.

II.1 Universal Principles and Concepts of Refugee Protection

Main Debates

How broadly should the legal definition of 'refugee' be drawn?

How long is a state legally obliged to protect refugees?

To what extent is a state obliged to develop durable solutions as opposed to temporary protection?

When must human rights protection trump migration control?

What are the implications of extraterritorial policies that threaten refugee protection?

Main Points

International refugee protection as a surrogate to national protection, resulting from the failure of the state to protect human rights

Standards of protection and refugee rights

Increasing importance of core international human rights instruments for refugee protection

II.1.1 Non-refoulement

Main Debates

Is the principle of *non-refoulement* applicable in cases of mass influx?

Is it applicable in international zones?

Has it become *jus cogens*?

Do certain persons fall outside the protection afforded by the *non-refoulement* obligation?

Main Points

Non-refoulement and different forms of asylum

Non-refoulement under the Geneva Convention v. human rights instruments

The absolute nature of *non-refoulement*

Access to protection

Treaties

International

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Art. 3.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Art. 33.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

UNHCR EXCOM, 'Non-refoulement', Conclusion No. 6 (XXVIII), 1977.

UNHCR Documents

UNHCR, 'Note on International Protection', 7 September 1994, paras. 14–15, 30–41.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 201–267. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 117–155].

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 24–27.

E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 78–177.

Extended

P.C.W. Chan, 'The Protection of Refugees and Internally Displaced Persons: Non-refoulement under Customary International Law?', *The International Journal of Human Rights*, vol. 10, no. 3 (2006), pp. 231–239.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 268–277. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 155–171, 195–204].

- W. Kälin, 'Article 33, Paragraph 1', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 1327–1396.
- A. Zimmermann, P Wennholz, Article 33, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 1307–1423.

II.1.2 Asylum

Main Debates

Are states obliged to provide asylum?

How do extradition and other criminal law measures interact with the principle of asylum?

Main Points

Asylum v. other forms of protection

Asylum and the right to entry

Soft Law

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948, Art. 14.

Declaration on Territorial Asylum, UN General Assembly Resolution, A/RES/2312 (XXII), 14 December 1967.

UNHCR Documents

UNHCR, 'Agenda for Protection', October 2003.

Readings

Core

A. Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum', *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.

Extended

G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *International Journal of Refugee Law*, vol. 17, no. 3 (2005), pp. 542–573.

II.1.3 Non-discrimination

Main Debate

Does the principle of non-discrimination forbid all differential or preferential treatment?

Main Points

Non-discrimination and the enjoyment of refugee rights

Non-discrimination as a norm of customary international law

Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Art. 3.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 513.

Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 26.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.
International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 446–450. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 230–234].

Extended

T. Einarsen, 'Discrimination and Consequences for the Position of Aliens', *Nordic Journal of International Law*, vol. 64, no. 3 (1995), pp. 429–452.

J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 123–147.

M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*. (Kehl, Strasbourg, Arlington: NP Engel, 1993), pp. 43–53, 465–479.

II.1.4 Family Unity

Main Debate

What is the definition of a family?

Main Points

Family unity as a principle

Right of family reunification is not included in the Geneva Convention

Right to respect for family life under human rights treaties

Treaties

International

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts 17, 23.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

Soft Law

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 U.N.T.S. 37, 1951, Section IV. B on the Principle of the Unity of the Family.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 181–188.

UNHCR EXCOM, 'Family Reunion', Conclusion No. 9 (XXVIII), 1977.

UNHCR EXCOM, 'Family Reunification', Conclusion No. 24 (XXXII), 1981.

UN Human Rights Committee, 'General Comment No. 19: The Family' (1990), UN Doc.

HRI/GEN/1/Rev.7, 12 May 2004, at 149, paras. 2, 5.

UNHCR Documents

UNHCR, 'Agenda for Protection', October 2003.

UNHCR, 'UNHCR Guidelines on Reunification of Refugee Families', July 1983.

UNHCR, 'Global Consultations on International Protection, Geneva Expert Round Table', 8–9 November 2001.

Readings

Core

- E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 555–603.
- K. Jastram and K. Newland, 'Family Unity and Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

Editor's Note

See Section II.3.3.4 (*Convention on the Rights of the Child*).

II.1.5 Durable Solutions

Main Debates

How can the warehousing of refugees be changed into self-sustainability?
What is the role of UNHCR in situations of premature repatriation?

Main Points

Range of actors and obstacles to durable solutions
Peace building and return
Decline of resettlement
The role of individual preference in durable solutions

UNHCR Documents

UNHCR, *Refugee Protection and Durable Solutions in the Context of International Migration: Report on the High Commissioner's Dialogue on Protection Challenges*, December 2007 (April 2008).

UNHCR, 'Resettlement Handbook', November 2004, Chapter 2.

UNHCR, 'Agenda for Protection', October 2003, pp. 68–75.

Readings

Core

- D. Anker, J. Fitzpatrick, and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (Spring 1998), pp. 295–309.
- B.S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', *Refugee Survey Quarterly*, vol. 23, no. 3 (2004), pp. 55–73.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 489–501. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 268–282.]
- J. Hathaway and R.A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10 (Spring 1997), pp. 155–169, 173–187.

Editor's Note

See Section II.2.1.7.1 (cessation of refugee status being one of the durable solutions as foreseen by the 1951 Geneva Convention).

II.1.6 Burden Sharing and International Cooperation

Main Debates

How can the notion of burden sharing be developed into the principle of responsibility sharing?

Burden sharing v. burden shifting

Are the financial donations of states a legitimate mechanism for burden shifting?

Main Points

Capacity of receiving states

Transit states as buffer zones

Broader implication on host societies

Implicit burden sharing

Readings

Core

- D. Anker, J. Fitzpatrick, and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (Spring 1998), pp. 295–310.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 502–505. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 291–295].
- J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10 (Spring 1997), pp. 115–151, 187–209.
- P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, vol. 23 (1997), pp. 243–297.

Extended

- C. Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea', *Human Rights Quarterly*, vol. 25, no. 3 (2003), pp. 741–774.
- E.R. Thielemann and T. Dewan, 'The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing', *West European Politics*, vol. 29, no. 2 (2006), pp. 351–369.
- A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhof Publishers, 2002), pp. 40–54, 72–87.

II.2 The 1951 Geneva Convention

Main Debate

To what extent should the Convention be interpreted according to the original intent v. evolving understandings?

II.2.1 Criteria for Granting Refugee Protection

Main Debate

Should the refugee definition expand to meet protection needs not foreseen in 1951?

UNHCR Documents

UNHCR, 'The International Protection of Refugees: Interpreting Art. 1 of the 1951 Convention Relating to the Status of Refugees', April 2001.

Editor's Note

Since 1951 there have been expansions of the refugee definition in order to take into account the political and social contexts in different regions of the world. More detailed expositions of the evolution of the refugee definition can be found in the regional sections of The Reader (Section III, Africa; Section IV, Asia; Section V, Europe; and Section VI, the Americas).

II.2.1.1 Alienage

Main Debate

What justifies the difference in protection offered to those persons who cross an international border and those who do not?

Main Points

1951 Geneva Convention applies to a subset of forced migrants

Underlying legal and practical motivations of state parties for requirement that refugees cross international borders

UNHCR's increased involvement in assistance to IDPs

Readings

Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 29–33.

A. Shacknove, 'Who Is a Refugee?', *Ethics*, vol. 95, no. 2 (January 1985), pp. 274–284.

Extended

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 441–443.

Editor's Note

In 1951, the conceptual scope of international law was much more limited than it is today. Many then viewed international law as limited to duties between states that

lacked the competence to impose duties on states regarding their own nationals. There is also a sort of common sense notion that those who are outside of their own borders and fear persecution by authorities within their own state are quite clearly and visibly in need of international protection. The requirement that individuals must be outside their own state in order to qualify as a refugee accomplished multiple goals:

- 1) It reduced the number of forced migrants that the international community needed to address.*
- 2) It prevented states from shifting responsibility for large parts of their own populations to the international community.*
- 3) It prevented states from violating the territorial sovereignty of other states on the pretext of responding to a refugee problem.*
- 4) It furnished a prominent example of the limited reach of international legal obligations and duties.*

See Section II.4 concerning IDPs.

II.2.1.1.1 Outside the Country of Nationality

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 87–91.

II.2.1.1.2 Owing to Fear Is Unable or Unwilling to Avail Self of Protection of Country of Nationality

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 97–100.

Editor's Note

See Section II.2.1.4 concerning the nexus between the unavailability of state protection and the existence of a Convention ground.

II.2.1.1.3 Dual or Multiple Nationality

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 106–107.

II.2.1.1.4 Statelessness

Treaties

Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 28 September 1954.

Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 30 August 1961.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 101–105.

UNHCR Inter-parliamentary Union, 'Nationality and Statelessness: A Handbook for Parliamentarians' (Switzerland: 2005).

Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution, A/RES/61/137, 25 January 2007.

UNHCR EXCOM, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons', Conclusion No. 106 (LVII), 2006.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 67–70. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 41–43.]

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 59–63.

II.2.1.2 Well-founded Fear

Main Debate

To what extent must there be a demonstration of objective v. subjective fears in order to satisfy the well-founded fear requirement?

Main Point

Shifting standards concerning the likelihood of risk

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 37–47.

Cases

R. v. Secretary of State for the Home Department ex parte Sivakumaran, (1988) 1 All ER 193 (HL) (UK judicial decision analysing objective element).

INS v. Cardoza – Fonseca, 480 US 421 (1987) (US judicial decision stating that one in ten probability of harm can constitute well-founded fear).

Readings

Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 69–97.
'The Michigan Guidelines on Well-Founded Fear', March 2004.

Extended

- H. Cameron, 'Risk Theory and "Subjective Fear": The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations', *International Journal of Refugee Law*, vol. 20, no. 4 (2008), pp. 3567–585.
- J. Hathaway and W. Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of Well-founded Fear?', *Michigan Journal of International Law*, vol. 26, no. 2 (Winter 2005), pp. 505–560.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 335–345.

Editor's Note

See also Section II.2.5.2 concerning evidentiary issues.

Many State Parties interpret this term to require showings of both subjective and objective fear. Debates surrounding the interpretation of the well-founded fear requirement centre upon whether there is a need to demonstrate two elements: 1) the asylum seeker's subjective emotion of fear and 2) the objective factors which indicate that the asylum seeker's fear is reasonable; or whether the inquiry should be solely the objective assessment of the situation, limiting protection only to those who objectively risk persecution.

Whether viewed as two elements or one, the major focus is on showing a risk in the future. One must consider all the circumstances, the context and the conditions that have occurred in the past in order to evaluate the degree of likelihood of the actions and threats that might take place in the future. Many commentators and tribunals confuse the discussions of subjective and objective elements of fear with concerns about credibility and consistency of the asylum seekers' narratives.

See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1), Section 4) in Section II.3.3.3.

II.2.1.3 Persecution

Main Debates

Must the persecution be carried out by groups for which the state is accountable or does a showing of the inability to protect suffice?

Does the lack of state protection constitute persecution?

To what extent must the threat be individualized (singled out)?

- flight from general civil war
- widespread repressive practices

Main Points

Persecution by non-state actors

- domestic violence
- pressure from the community
- organized groups

The threshold for persecution

- discrimination
- prosecution under laws of general application

Editor's Note

The debate between the accountability theory v. the protection theory centers upon whether refugee status is limited to those who fear persecution by groups for whom the state is accountable or whether it is available to those who need protection from all sources of persecution on account of the five enumerated grounds.

II.2.1.3.1 Acts of Persecution

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 51–60, 65.

UNHCR Documents

UNHCR, 'Position on Claims for Refugee Status Based on Fear of Persecution Due to Individual's Membership of a Family or Clan Engaged in a Blood Feud', 17 March 2006.

Cases

S. v. Chief Executive, Department of Labour, [2007] NZCA 182, Decision of 8 May 2007, New Zealand Court of Appeal (persecution includes loss of life, liberty and disregard of human dignity, such as denial of access to employment, to the professions, and to education, or the imposition of restrictions on traditional freedoms).

New Zealand Refugee Status Appeals Authority, (1999) [2000] NZLR 545, (Refugee Appeal No. 71427/99), paras. 43–53. (NZ administrative decision using international law principles to interpret the term 'persecution').

Independent Federal Asylum Senate, (IFAS/UBAS) [Austria], Decision of 21 March 2002, IFAS 220.268/0-X1/33/00 (Austrian administrative appellate decision concluding that female genital mutilation constitutes persecution).

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 90–94. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 66–70.]
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 169–179.

Extended

- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 345–358.

II.2.1.3.2 Agents of Persecution

Soft Law

- UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/IP/4/Rev.1, 1979, para. 65.

UNHCR Documents

- UNHCR, ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’, 31 March 2010.
- UNHCR, ‘Guidance Note on Refugee Claims relating to Female Genital Mutilation’, May 2009.
- UNHCR, ‘Refugee Protection and Human Trafficking: Selected legal Reference Materials’, December 2008.
- UNHCR, ‘Position Paper on Agents of Persecution’, 14 March 1995.

Cases

- Adan and Aitseguer*, 23 July 1999 [1999] 3 WLR 1274 *UK House of Lords Regina v. Secretary of State for the Home Department ex parte Adan; Regina v. Secretary of State for The Home Department ex parte Aitseguer*, Judgements of 19 December 2000), [2001] 2 WLR 143. (UK judicial decision upholding asylum for applicants fearing persecution by non-state actors).

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 98–100. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 70–74.]
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 124–131.
- J. Moore, ‘Whither the Accountability Theory: Second-Class Status for Third-party Refugees as a Threat to International Refugee Protection’, *International Journal of Refugee Law*, vol. 13, nos. 1–2 (January 2001), pp. 32–50.
- V. Türk, ‘Non-State Agents of Persecution’ in V. Chetail and V. Gowlland-Debbas (eds), *Switzerland and the International Protection of Refugees* (The Hague: Kluwer Law International, 2002), pp. 95–109.

Extended

- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 358–372.

Editor’s Note

Issues regarding the agents of persecution often arise in claims involving particular social group, see Section II.2.1.4.5, and have also been addressed in the Common European Asylum System, see Section V.2.1.

II.2.1.4 Five Grounds: Race, Religion, Nationality, Social Group, Political Opinion

II.2.1.4.1 Multiple Grounds and General Issues

Main Debate

Which grounds are applicable for conscientious objection and desertion from military service?

Main Point

Broad interpretation and overlap of concepts of race, religion and nationality

Treaties

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts 2, 12, 18, 19, 26, 27.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 66–86, 167–174.

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948, Arts 2, 18, 19.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 70–90, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 43–49, 54–59.]

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 141–185.

'The Michigan Guidelines on Nexus to a Convention Ground', March 2001.

Extended

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 372–375.

Editor's Note

It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Gender-related persecution and persecution based on sexual orientation tend to be viewed as an issue of social group, but may also implicate religious grounds as well as political opinion. See Section II 2.5.2.3.2.2 for further resources concerning gender-related persecution. Persecution related to military conscription tends to be viewed as issues of political opinion, but may also implicate religious grounds.

II.2.1.4.2 Race

Treaties

Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, 660 U.N.T.S. 195.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 68–70.

UNESCO, 'Four Statements on the Race Question', COM.69/II.27/A, 1969.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 70–71. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), p. 43.]

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 141–143.

Extended

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 375–379.

II.2.1.4.3 Religion

Main Point

Public religious activity v. private worship

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 71–73, 167–174.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, UN General Assembly Resolution, A/RES/36/55, 25 November 1981.

UNHCR Documents

UNHCR, 'Guidelines on International Protection: "Religion-Based Refugee Claims under Art. 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees"', April 2004.

Cases

- Ahmad and Others v. Secretary of State for the Home Department*, (CA) (1990) Imm AR 61. (UK judicial decision on persecution of Ahmadiyas in Pakistan).
Refugee Review Tribunal, 7 July 1994 RRT Reference N93/01843. (Australian decision on persecution of Christians in China).
Dobrican v. INS 77, F 3d 164 (7th Cir 1996). (US judicial decision on religious objections to military service by Jehovah's Witness in Romania).

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 71–72, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 44–45, 54–59.]
J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 145–148.
K. Musalo, 'Claims for Protection Based on Religion or Belief', *International Journal of Refugee Law*, vol. 16, no. 2 (2004), pp. 165–226.

Extended

- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 379–387.

Editor's Note

It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Although persecution related to military conscription tends to

be viewed as issues of political opinion, it may also implicate religious grounds. It may also be useful to think about the scope of protected activities under the 1951 Geneva Convention. With regard to religion, does, or should, it include non-traditional religious beliefs? Anti-religious beliefs? Satanism?

II.2.1.4.4 Nationality

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 74–76.

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 72–73. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 45–46.]
J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 144–145.

Extended

- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 387–390.

II.2.1.4.5 Particular Social Group

Main Debates

- Must the group be defined by its protected characteristics and/or by society's perception of it?
Must there be a linkage between protected characteristics and core human rights?

Main Points

- Gender-related issues
- domestic violence

- female genital mutilation
- social mores

Sexual orientation

Transsexuality

Family members

Caste or clan

Treaties

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S. 513.

Soft Law

UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/IP/4/Rev.1, 1979, paras. 77–79.

Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution, A/RES/48/104, 20 December 1993.

UNHCR Documents

UNHCR, ‘Guidelines on International Protection: Gender-related Persecution within the Context of Art. 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’, May 2002.

UNHCR, “‘Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons’ – Guidelines for Prevention and Response’, May 2003.

UNHCR, ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’, March 2010.

UNHCR, ‘Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, November 2008.

UNHCR, ‘Handbook for the Protection of Women and Girls’, January 2008, pp. 137–144.

Cases

Core

Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department, (2006) UKHL 46 (House of Lords). (UK judicial

- decision holding that women in Sierra Leone facing female genital mutilation experienced persecution based on their social group).
- Moldova v. Secretary of State for the Home Department*, (2008) UK AIT 00002, 26 November 2007 (UK Asylum and Immigration Tribunal). (UK administrative decision that ‘former victims of trafficking’ can constitute a social group).
- R. v. Immigration Appeal Tribunal ex parte Shah; Islam v. Secretary of State for the Home Department*, (1999) 2 AC 629. (UK judicial decision holding Pakistani women accused of adultery feared persecution based on their social group).
- Matter of Acosta*, 20 Immigration & Nationality Decisions 211 (BIA 1985). (US administrative decision concerning group sharing common immutable characteristic).
- Matter of Kasinga*, 21 Immigration & Nationality Decisions 357 (BIA 1996). (US administrative decision recognizing as social group women who fear female genital mutilation).
- Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Cir 2001). (US judicial decision granting asylum to a Mexican woman based on physical abuse by father).
- Chen Shi Hai (an infant) v. The Minister for Immigration and Multicultural Affairs*, (2002) 162 ALR 577. (Australian High Court holds child born in violation of the one-child policy faces persecution based on social group).

Extended

- Federal Administrative Court* (German), 15 March 1988, 9 C 378.86, vol. 79, Collection of Decisions 143 (German judicial opinion recognising Iranian homosexual faces persecution based on social group).
- Attorney General v. Ward*, [1993] 2 SCR 689 (Supreme Court). (Canadian judicial decision on the notion of social group).
- Bah v. Mukasey, Attorney General*, 529 F. 3d 99 (2nd Cir. 2008). (US judicial decision recognizing that women who experienced female genital mutilation as children may still fear future persecution).
- Gao v. Gonzales*, 440 F. 3d 62 (2nd Cir. 2006). (US judicial decisions holding that forced marriages can constitute persecution based on social group).
- STCB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2006] HCA 61, 14 December 2006 (High Court of Australia). (Australian judicial decision holding that blood feud in Albania did not constitute persecution based on social group).

Ramos v. Holder, 589 F. 3d 426 (7th Cir. 2009). (US judicial decision ruling that former gang members can constitute a particular social group that is socially visible).

Readings

Core

- T. Aleinikof, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group" Determination', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 263–311.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 73–86. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 46–48.]
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 157–169.

Extended

- K. Daley and N. Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence', *International Journal of Refugee Law*, vol. 12, no. 2 (April 2000), pp. 148–174.
- R. Haines, 'Gender-related Persecution', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 319–350.
- N. LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary', *International Journal of Refugee Law*, vol. 22, no. 2 (July 2010), pp. 173–208.
- N. Laviolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines', *International Journal of Refugee Law*, vol. 19, no. 2 (July 2007), pp. 169–214.
- US DHS, 'Written Clarification Regarding the Definition of "Particular Social Group"', 13 July 2010.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 390–398.

II.2.1.4.6 *Political Opinion*

Main Debate

Whose political opinion is relevant: the persecutor, the persecuted or both? (imputed views)

Main Point

'Political' depends on the context

- neutrality in civil war
- withholding support from the government

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 80–86, 167–174.

Cases

Core

Bolanos-Hernandez v. INS, 767 F 2d 1277 (9th Cir 1984). (US judicial decision holding that neutrality in El Salvador can be a political opinion).

Ciric and Ciric v. Canada, 2FC 65 (1994). (Federal Court of Canada holding that refusal to serve in Serbian army in 1991 constituted protected political opinion).

Klinko v. Canada, 184 (2000) DLR 4th 14. (Federal Court of Appeal of Canada holds that public complaints about widespread corruption can constitute political opinion).

Extended

Metropolitan Court (Hungary), 28 February 2000. (judicial decision ordering new refugee procedure in order to analyse in depth the Serbian draft evader).

Metropolitan Court (Hungary), 9 February 1999. (judicial decision providing protection but not refugee status to ethnic Hungarian who disobeyed Yugoslav conscription order).

Barraza-Rivera v. INS, 913 F2d 1443 (9th Cir 1990). (US judicial decision holding that desertion from Salvadoran military in 1984 to avoid assassination duty constituted protected political opinion).

Readings

Core

- Canadian Immigration and Refugee Board, 'Guidelines on Civilian Non-combatants Fearing Persecution in Civil War Situations' (1996).
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 86–90, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 48–49, 54–59].
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 149–157.

Extended

- C. Bailliet, 'Assessing *Jus ad Bellum* and *Jus in Bello* within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum', *Georgetown Immigration Law Journal*, vol. 20, no. 3 (2006), pp. 337–384.
- M. Jones, 'The Refusal to Bear Arms as Grounds for Refugee Protection in Canadian Jurisprudence', *International Journal of Refugee Law*, vol. 20, no. 1 (2008), pp. 123–165.
- K. Schnöring, 'Deserters in the Federal Republic of Yugoslavia', *International Journal of Refugee Law*, vol. 13, nos. 1–2 (January 2001), pp. 153–173.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 398–404.

Editor's Note

It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Although persecution related to military conscription tends to be viewed as issues of political opinion, it may also implicate religious grounds.

It may also be useful to think about the scope of protected activities under the 1951 Geneva Convention. With regard to political opinion, does, or should, it include racist or anti-Semitic political statements?

II.2.1.5 Internal Protection Alternative

Main Debates

Is it sufficient that there is an absence of persecution or must there be access to genuine protection?

Does the existence of an internal protection alternative pre-empt the need for international protection?

Main Point

Multiple factors affect practical access to protection elsewhere within country of origin

- logistical
- linguistic
- familial
- financial

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, para. 91.

UNHCR Documents

UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Art. 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', July 2003.

Cases

Secretary of State for the Home Department v. AH, [2007] UKHL 49, 14 November 2007 (House of Lords) (UK judicial decision ruling that the unduly harsh standard should not be equated with inhuman or degrading treatment or punishment).

Januzi v. Secretary of State for the Home Department, Hamid, Gaafar, and Mohammed v. Secretary of State for the Home Department, [2006] UKHL 5, 15 February 2006 (House of Lords). (UK judicial decision determining that it was unduly harsh to expect applicants from Darfur to relocate elsewhere in Sudan, but not unduly harsh for Kosovar Albanian to be relocated elsewhere in Kosovo).

New Zealand Refugee Appeal, No. 71684/99 of 29 October 1999 (decision of the Refugee Appeals Authority adopting the IPA principles of Michigan Guidelines).

Rasaratnam v. Canada, F.C.J. No. 1256 of 1990 (Canadian Court of Appeal decision holding that IPA requires no possibility of persecution in area of potential relocation rather than it is not unreasonable to seek refuge there).

Duzdkiker v. Minister for Immigration and Multicultural Affairs, FAC 390 of 2000 (Australian Federal Court decision applying IPA test of real protection and reasonableness of relocation).

Readings

Core

J. Hathaway and M. Foster, 'International Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 357–417.

'The Michigan Guidelines on the Internal Protection Alternative', April 1999.

Extended

E. Ferris, 'Internal Displacement and the Right to Seek Asylum', *Refugee Survey Quarterly*, vol. 27, no. 3 (2008), pp. 83–92.

N. Kelley, 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?', *International Journal of Refugee Law*, vol. 14, no. 1 (2002), pp. 4–44.

H. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', *International Journal of Refugee Law*, vol. 10, no. 3 (1998), pp. 499–532.

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 445–460.

Editor's Note

Consider the impossibility in many national contexts for people to move from one area to establish a life in another region without family or other ties, financial resources, or skills and analysis of internal protection alternatives does not end when there is an absence of persecution in a certain region, but must proceed to assess the realistic likelihood of access to protection.

See also Section V.1.2 concerning the European Practice concerning internal protection alternatives.

II.2.1.6 Exclusion from Convention Refugee Status

Main Debates

Must there be a decision on inclusion before exclusion?

How should terrorism be defined?

Does terrorism fall under the notion of a non-political crime, Art. 1F(b), or a crime contrary to the purposes of the United Nations, Art. 1F(c)?

What degree of involvement and/or commitment to the goals of the group warrants exclusion?

Should there be a balancing of the gravity of the crime and the gravity of the feared persecution?

Main Points

Expanding content of war crimes and crimes against humanity

Diminished culpability

- superior orders
- child soldiers

Expanding application of the serious non-political crime clause

Treaties

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 280, Art. 6.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150. Arts 1.D, 1.E, 1.F, and Annex VI.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', CR/IP/4/Rev.1, 1979, paras. 140–163.

UNHCR Documents

- UNHCR, 'Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', December 2009.
- UNHCR, 'Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees', March 2009.
- UNHCR, 'Guidelines on International Protection. Application of the Exclusion Clauses (Art. 1 F of the 1951 Convention)', September 2003.
- UNHCR, 'Note on the Applicability of Art. 1D of the 1951 Convention relating to the Status of Refugees ro Palestinian Refugees', October 2002.

Cases

- R. v. Secretary of State for the Home Department*, [2010] UKSC 15, 17 March 2010 (UK Supreme Court ruling that Sri Lankan asylum seeker would be excluded if there are serious reasons for concluding that he knowingly and voluntarily contributed in a significant way to LTTE's purpose of committing war crimes).
- Tamil X v. Refugee Status Appeals Authority*, [2009] NZCA 488, 20 October 2009 (New Zealand Court of Appeal overturned ruling that Sri Lankan crew member on LTTE ship was complicit in crimes against humanity; interprets Article 1F(a) in consonance with Rome Statute of the International Criminal Court).
- Mugesera v. Canada*, [2005] 2 S.C.R. 100, 28 June 2005 (Supreme Court). (Canadian judicial decision ruling that 'reasonable grounds to believe' standard requires an objective basis with compelling and credible information for the belief).
- K. v. Secretary of State for the Home Department*, [2004] 7 May 2004 (UK Immigration and Asylum Tribunal). (characterising acts as 'terrorist' is not sufficient for exclusion based on acts contrary to the purposes of the UN).
- Refugee Review Tribunal, RRT Reference N96/12101*, 25 November 1996 (Australian administrative decision ruling that asylum seeker from Liberian rebel group that committed many atrocities should not be excluded because he acted under duress).
- Moreno v. Canada*, 107 D.L.R. 4th 424 (1993) (Canadian judicial decision holding that forcibly conscripted teenage Salvadoran present at torture of prisoners cannot be excluded).

Zacarias Osorio Cruz, Immigration Appeal Board Decision, M88-20043X CLIC Notes 118.6 25, March 1988 (Canada) (Mexican army deserter who reported political executions was not excluded, despite his participation in killings).

Readings

Core

- G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 425–478.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 421–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 205–229].
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 91–114.

Extended

- European Council on Refugees and Exiles, 'Position on Exclusion from Refugee Status', March 2004, *International Journal of Refugee Law*, vol. 16, no. 2 (2004), pp. 257–285.
- M. Gallagher, 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum', *International Journal of Refugee Law*, vol. 13, no. 3 (2001), pp. 310–353.
- M. Gottwald, 'Asylum Claims and Drug Offences: The Seriousness Threshold of Art. 1F(b) and the UN Drug Conventions', *International Journal of Refugee Law*, vol. 18, no. 1 (2006), pp. 81–117.
- J. Hathaway, 'Framing Refugee Protection in the New World Disorder', *Cornell International Law Journal*, vol. 34, no. 2 (2001), pp. 257–320.
- S. Kapferer, 'Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection', *Refugee Survey Quarterly*, vol. 27, no. 3 (2008), pp. 53–75.
- J. Rikhof, 'War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context', *International Journal of Refugee Law*, vol. 21, no. 3 (2009), pp. 193–217.
- J. Simeon, 'Exclusion Under Article 1F(a) of the 1951 Convention in Canada', *International Journal of Refugee Law*, vol. 21, no. 2 (2009), pp. 193–217.

A. Zimmermann, P Wennholz, 'Article 1 F', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 579–610.

Editor's Note

Some claimants are excluded because they are already receiving protection from other UN agencies, such as UNRWA. Those claimants residing in another state with the rights and obligations of a national of that state are also excluded. Others are excluded because they are deemed unworthy of protection, having committed:

- 1) *serious non-political crimes*
- 2) *crimes against peace, war crimes, or crimes against humanity*
- 3) *acts contrary to the purposes of the UN.*

II.2.1.7 Cessation of Refugee Status

II.2.1.7.1 Cessation Grounds

Main Debates

When are changes sufficiently fundamental, durable and stable to warrant cessation? Should there be exceptions to cessation?

Main Point

Criteria for determining ceased circumstances

Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

Art. 1.C.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 118–139.

UNHCR EXCOM, 'Cessation of Status', Conclusion No. 69 (XLIII), 1992.

UNHCR Documents

- UNHCR, 'Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive', 2008, pp. 5–8.
- UNHCR, 'The Cessation Clauses: Guidelines on their Application', 1999.
- UNHCR, 'Note on Cessation Clauses', 30 May 1997.
- UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Art. 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees', February 2003.
- UNHCR, 'Summary Conclusions: Cessation of Refugee Status, Expert Roundtable, Lisbon', May 2001.

Cases

- Salahadin v. Federal Republic of Germany*, 2 March 2010 (ECJ interpretation of EC Qualification Directive in light of Art. 1C(5) of the Geneva Convention; cessation can only occur when there has been a significant, non-temporary change such that the reasons for persecution no longer exist and the legal system is effective in detecting and punishing acts of persecution).
- Minister for Immigration and Multicultural and Indigenous Affairs v. Qaah of 2004*, [2006] HCA 53, 15 November 2006 (Australia). (Australian judicial decision holding that government can expel Afghan granted temporary protection visa only if government establishes that the safe conditions in the country of origin are settled and durable).
- Case Regarding Cessation of Refugee Status*, VwGH No. 2001/01/0499, 15 May 2003 (Administrative Appeals Court). (Austrian administrative decision ruling that refugee's intent to normalise relations with country of origin is decisive in evaluating application for passport).

Readings

Core

- J. Fitzpatrick and R. Bonoan, 'Cessation of Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 491–544.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 139–142. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 84–87.]

- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 191–205, 209–211.
- D. Milner, ‘Exemption from Cessation of Refugee Status in the Second Sentence of Art. 1C(5)/(6) of the 1951 Refugee Convention’, *International Journal of Refugee Law*, vol. 16, no. 1 (2004), pp. 91–107.

Extended

- S. Kneebone, M O’Sullivan, ‘Article 1C’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 483–535.
- M. O’Sullivan, ‘Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons from Australia’, *International Journal of Refugee Law*, vol. 20, no. 4 (2008), pp. 586–610.

Editor’s Note

Refugee status may cease for among the following reasons:

- 1) *acts voluntarily taken by refugees, such as the voluntary return to live at the site where persecution was earlier feared*
- 2) *changed circumstances in the home country that eliminate the fear of persecution*
- 3) *short-term trips to homelands that may be triggered by family illness or other compelling circumstances, yet may indicate that persecution is no longer feared.*

See Section V. for further developments concerning cessation in EU law.

II.2.1.7.2 Procedures

Main Debate

Who carries the burden of showing changed circumstances?

Main Points

Necessity of fair process for cessation determinations

Application of cessation clause is not automatic trigger for repatriation

UNHCR Documents

UNHCR, ‘Note on the Cancellation of Refugee Status’, November 2004.

Readings

Core

- J. Fitzpatrick and R. Bonoan, 'Cessation of Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 514–517, 538–542.
- J. Hathaway, 'The Right of States to Repatriate Former Refugees', *Ohio State Journal on Dispute Resolution*, vol. 20 (2005), pp. 175–216.

II.2.2 Access to Territory

Main Debates

Where should state jurisdiction and responsibility start?

Who has responsibility for asylum seekers rescued at sea?

Main Points

Relocating the borders into international zones and third countries

Offshore action of state authorities and outsourcing of state functions

Interaction between international law of the sea and refugee and human rights law

Readings

Core

- A. Fischer-Lescano, T. Löhr, and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, vol. 21 (2009), pp. 256–296.

Extended

- S. Hamood, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', *Journal of Refugee Studies*, vol. 21 (2008), pp. 19–42.
- G. Noll, 'Article 31', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 1243–1276.
- K. Wouters and M. Den Heijer, 'The *Marine I* Case: a Comment', *International Journal of Refugee Law*, vol. 22 (2010), pp. 1–19.

II.2.2.1 Visa Requirements

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 374–375. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 191–193.]

II.2.2.2 Carrier Sanctions

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 377–380. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 191–194.]

II.2.2.3 Extraterritorial Immigration Control

Readings

Core

A. Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', *International Journal of Refugee Law*, vol. 20, no. 2 (July 2008), pp. 273–313.

G. Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law?', *International Journal of Refugee Law*, vol. 17, no. 3 (2005), pp. 542–573.

II.2.2.4 Interceptions and Rescue at Sea

Treaties

International Convention on Maritime Search and Rescue, 27 April 1979, 1403 U.N.T.S.

Soft Law

UNHCR EXCOM 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 2003.

UNHCR Documents

- UNHCR and IMO, 'Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees', 2006.
- UNHCR, Selected Reference Materials: 'Rescue at Sea, Maritime Interception and Stowaways', November 2006.
- UNHCR, 'Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees', September 2006.

Readings

Core

- R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, vol. 53, no. 1 (January 2004), pp. 47–77.
- A. Fischer-Lescano, T. Löhrr, and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, vol. 21 (2009), pp. 256–296.
- B. Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception', *Fordham International Law Journal*, vol. 30 (2006–2007), pp. 75–125.
- M. Pugh, 'Drowning not Waving, Boat People and Humanitarianism at Sea', *Journal of Refugee Studies*, vol. 17, no. 1 (2004), pp. 52–69.
- J. van Selm and B. Cooper, 'The New "Boat People": Ensuring Safety and Determining Status', *Migration Policy Institute Report*, (January 2006).

Extended

- C. Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea', *Human Rights Quarterly*, vol. 25, no. 3 (August 2003), pp. 741–774.
- S. Hamood, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', *Journal of Refugee Studies*, vol. 21 (2008), pp. 19–42.
- K. Wouters and M. Den Heijer, 'The *Marine I* Case: a Comment', *International Journal of Refugee Law*, vol. 22 (2010), pp. 1–19.

Editor's Note

It is important to analyze whether the non-refoulement obligation is applicable on the high seas.

See Section II.1.1 on non-refoulement and Section V.2.3 for an overview of Access to Territory within the European context.

II.2.3 Access to Procedures

Main Debates

Should asylum seekers have a choice?

Are states free to delegate the task of refugee protection to other states?

Under what conditions, if at all, should a state be entitled to return/send an asylum seeker to another state?

Main Points

Content of effective protection

The need to specify the grounds for removal

- to the asylum seeker
- to the authorities of the destination state

Readings

Core

S. Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum-Seekers: The "Safe Third Country" Concept', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Portland Oregon: Hart Publishing, 2008).

II.2.3.1 Protection Elsewhere (First Country of Asylum and Safe Third Country)

Soft Law

UNHCR EXCOM, 'Refugees Without An Asylum Country', Conclusion No. 15 (XXX), 1979.

UNHCR EXCOM, 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection', Conclusion No. 58 (XL), 1989.

UNHCR Documents

UNHCR, 'Global Consultations on International Protection, Background paper no. 1: Legal and practical aspects of the return of persons not in need of protection', May 2001.

UNHCR, 'Global Consultations on International Protection, Background paper no. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees', May 2001.

UNHCR, 'Global Consultations on International Protection, Background paper no. 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim', May 2001.

Cases

Canadian Council for Refugees v. Her Majesty, 2007 F C 1262 (Federal Court), 29 October 2007 (Canadian judicial opinion striking down Canada's designation of the United States as a safe third country).

Regina v. Secretary of State for the Home Department ex parte Adan; Regina v. Secretary of State for the Home Department ex parte Aitseguer, UK House of Lords (Judgments of 19 December 2000) (2001) 2 WLR 143–169. (holding that Somali and Algerian asylum applicants could not be returned to France and Germany on safe third country grounds as both states do not grant protection to those in fear of non-state agent persecution).

Al-Rahal v. Minister for Immigration and Multicultural Affairs (2001) 184 ALR 698 (20 August 2001). (deportation of Iraqi to Syria as safe third country without actual permission or formal right of entry held not to be a violation of Art. 33).

Readings

Core

S. Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum-Seekers: The "Safe Third Country" Concept', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Portland Oregon: Hart Publishing, 2008).

S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, vol. 15 (2003), pp. 567–677.

'The Michigan Guidelines on Protection Elsewhere', January 2007.

Extended

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 460–461, 1382–1389.

Editor's Note

See Section V.2.4.4.2 and V.2.4.4.3 for the development of safe country of origin and safe third country practices in Europe.

II.2.4. Reception Conditions

Main Debates

Who should maintain law and order in refugee camps?

How should armed asylum seekers be demobilized?

Soft Law

The Right to Education of Migrants, Refugees and Asylum Seekers, UN Human Rights Council, 16 April 2010.

UNHCR Documents

UNHCR, 'Reception of Asylum Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems', September 2001.

The right to education of migrants, refugees and asylum seekers, UN Human Rights Council, 16 April 2010.

Cases

The Minister of Home Affairs v. Wathenuka, 10 November 2003. (South African Supreme Court of Appeals judicial decision regarding rights of asylum seekers prior to determination of refugee status.)

Readings

Core

L. K. Newman, M. Dudley, and Z. Steel, 'Asylum, Detention, and Mental Health in Australia', *Refugee Survey Quarterly*, vol. 27 (2008), pp. 110–127.

Extended

- C. Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing', *International Journal of Refugee Law*, vol. 20 (2008), pp. 611–636.
- P. Kissoon, 'From Persecution to Destitution: A Snapshot of Asylum Seekers' Housing and Settlement Experiences in Canada and the United Kingdom', *Journal of Immigrant & Refugee Studies*, vol. 8, no. 1 (2010), pp. 4–31.
- K. Vitus and H. Lidén, 'The Status of the Asylum-seeking Child in Norway and Denmark: Comparing Discourses, Politics and Practices', *Journal of Refugee Studies*, vol. 23 (2010), pp. 62–81.

Editor's Note

Detention is dealt with in Section II 2.7.

II.2.5. Procedures for Determining Refugee Status

II.2.5.1. Basic Procedural Requirements

Main Debate

Do accelerated procedures comply with the 1951 Geneva Convention and international standards?

Main Points

Minimum standards for refugee status determination

Prima facie recognition

Impact of absence of legal representation

Impact of barriers of communication for

- asylum seekers and advocates
- asylum seekers and decision makers

Editor's Note

The 1951 Convention does not specify procedural standards. Therefore, it is important that an analysis of the minimum standards for refugee status determination identify and interpret the sources of law that establish these standards.

Soft Law

UNHCR EXCOM, Conclusion No. 8 ‘Official Records of the General Assembly, Thirty-Second Session’, Supplement No. 12, A/32/12/Add.1, para. 53(6)(e).
UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/IP/4/Rev.1, 1979, para. 189–194.

UNHCR Documents

UNHCR ‘Asylum Process (Fair and Efficient Asylum Procedures)’, in *Global Consultations on International Protection*, 31 May 2001.

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 528–535. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 324–332.]
- S. Legomsky, ‘An Asylum Seeker’s Bill of Rights in a Non-utopian World’, *Georgetown Immigration Law Journal*, vol. 14 (2000), pp. 619–640.
- J. Simeon, ‘A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration’, *International Journal of Refugee Law*, vol. 22, no. 1 (March 2010), pp. 72–103.

II.2.5.2 Evidentiary Issues

Main Point

Burden of persuasion and benefit of doubt

II.2.5.2.1 Standards of Proof

UNHCR Documents

UNHCR, ‘Note on Burden and Standard of Proof in Refugee Claims’, 16 December 1998.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, para. 195–205.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 53–60. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 34–40.]

Cases

INS v. Cardoza-Fonseca 480 US 421 (1987). (US judicial decision stating that one in ten probability of harm can constitute well-founded fear).

II.2.5.2.2 Credibility

Main Debate

Can an assessment of credibility that is adapted to the symptoms of persecution distinguish between fraudulent and genuine asylum claims?

Main Points

Linguistic, psychological, and cultural barriers to credibility assessment
Frequent absence of documentary or corroborative evidence

Readings

Core

- R. Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals', *International Journal of Refugee Law*, vol. 19, no. 4 (December 2007), pp. 609–638.
- H. Cameron, 'Refugee Status Determinations and the Limits of Memory', *International Journal of Refugee Law*, vol. 22, no. 4, (December 2010) pp. 469–511.
- J. Herlihy, K. Gleeson, and S. Taylor, 'What Assumptions About Human Behaviour Underlie Asylum Judgments?', *International Journal of Refugee Law*, vol. 22, no. 3 (October 2010), pp. 351–366.

J. Sweeney, 'Credibility, Proof and Refugee Law', *International Journal of Refugee Law*, vol. 21, no. 4 (December 2009), pp. 700–726.

Extended

J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers', *International Journal of Refugee Law*, vol. 13, no. 3 (July 2001), pp. 293–309.

Immigration and Refugee Board (Canada), 'Refugee Protection Division: Assessment of Credibility in Claims for Refugee Protection', 31 January 2004.

M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations', *Georgetown Immigration Law Journal*, vol. 17, no. 3 (2003), pp. 367–394.

W. Kälin, 'Troubled Communication: Cross-cultural Misunderstandings in the Asylum Hearing', *International Migration Review*, vol. 20, no. 2 (1986), pp. 230–241.

A. Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context', in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, IARLJ Conference* (Ottawa: International Association of Refugee Law Judges, 14–16 October 1998).

S. Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective', *International Journal of Refugee Law*, vol. 19, no. 2 (2007), pp. 273–292.

Refugee Review Tribunal (Australia), 'Guidance on the Assessment of Credibility', October 2006.

II.2.5.2.3 Factors Affecting Evidentiary Assessment

II.2.5.2.3.1 Post Traumatic Stress

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 206–219.

Readings

Core

- J. Herlihy, 'Evidentiary Assessment and Psychological Difficulties', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden: Martinus Nijhof Publishers, 2005), pp. 123–140.
- Physicians for Human Rights, *Medical Testimony on Victims of Torture: A Physician's Guide to Political Asylum Cases* (Boston: Physicians for Human Rights, 1991).

Extended

- C. Rousseau, F. Crépeau, P. Foxen, and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board', *Journal of Refugee Studies*, vol. 15, no. 1 (March 2002), pp. 43–70.

II.2.5.2.3.2 Interviewing Vulnerable Populations

II.2.5.2.3.2.1 Children

Main Debate

How should asylum systems adapt to respect the 'best interests of the child'?

Main Points

Large number of unaccompanied children seeking asylum

State guidelines

Need to take account of youth, immaturity and special needs

Treaties

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

UNHCR Documents

UNHCR, 'Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 22 December 2009.

UNHCR, 'Guidelines on Determining the Best Interests of the Child', May 2008.

UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', February 1997.

- UNHCR, 'Refugee Children: Guidelines on Protection and Care', 1994.
- UNHCR EXCOM, 'Children at Risk', Conclusion No. 107 (LVIII), 2007.
- UNHCR EXCOM, 'Refugee Children and Adolescents', Conclusion No. 84 (LXVIII), 1997.
- UNHCR EXCOM, 'Refugee Children', Conclusion No. 59 (XL), 1989.
- UNHCR EXCOM, 'Refugee Children', Conclusion No. 47 (XXXVIII), 1987.

Readings

Core

- O. Keselman, A. Cederborg, M. Lamb, and Ö. Dahlström, 'Mediated Communication with Minors in Asylum-seeking Hearings', *Journal of Refugee Studies*, vol. 21 (2008), pp. 103–116.

Extended

- Department of Justice (U.S.), 'Guidelines for Children's Asylum Claims', 10 December 1998.
- Immigration and Refugee Board of Canada, 'Child Refugee Claimants: Procedural and Evidentiary Issues', 30 September 1996.
- S. Maloney, 'Transatlantic Workshop on Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe', *Journal of Refugee Studies*, vol. 15, no. 1 (March 2002), pp. 102–119.
- Refugee Review Tribunal (Australia), 'Guidelines on Children Giving Evidence', 2002.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 404–408.

Editor's Note

The rights and vulnerabilities of children are also addressed in Section II.3.3.4, Convention on the Rights of the Child.

II.2.5.2.3.2.2 Women

Treaties

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S. 513.

UNHCR Documents

- UNHCR, 'The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees', Discussion Paper, 22 September 2010.
- UNHCR, 'Guidelines on Prevention and Response to Sexual and Gender Based Violence', May 2003.
- UNHCR 'Guidelines on the Protection of Refugee Women', July 1991, paras. 57–62.
- UNHCR, 'Gender Sensitive Techniques', 1991.
- UNHCR EXCOM, 'Women and Girls at Risk', Conclusion No. 105 (LVI), 2006.
- UNHCR EXCOM, 'Refugee Protection and Sexual Violence', Conclusion No. 73 (XLIV), 1993.
- UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 64 (XLI), 1990.
- UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 39 (XXXVI), 1985.

Readings

Core

- D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm', *Harvard Human Rights Journal*, vol. 15 (Spring 2002), pp. 133–154.
- R. Haines, 'Gender-Related Persecution', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 319–350.

Extended

- 'Asylum and Withholding Definitions', *Federal Register*, 65 (7 December 2000): 76588–76598.
- Department of Immigration and Multicultural Affairs (Australia), 'Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers', July 1996.
- Immigration and Refugee Board (Canada), 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution', March 1993.
- UK Immigration Appellate Authority, 'Asylum Gender Guidelines', November 2000.

A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 409–419.

Editor's Note

See Section II.2.1.4 and Section II.2.1.4.5 for additional resources concerning gender-related persecution.

II.2.6 Content of Refugee Status

Main Debates

Should refugees enjoy the rights of citizens?

Do international human rights instruments provide sufficient protection for refugees in host countries?

Main Points

The correlation between the refugee's attachment to the country and the extent of rights

Significance and definition of lawful stay in host country

Refugee specific standards v. universal human rights standards

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 524–527. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 307–315].

J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 156–160, 730–739, 786–828, 905–912.

Extended

J. Field, 'Bridging the Gap Between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context', *International Journal of Refugee Law*, vol. 22, no. 4 (2010), pp. 512–557.

Overseas Development Institute (ODI), 'Realising Protection. The Uncertain Benefits of Civilian, Refugee and IDP Status', Humanitarian Policy Group Report 28, September 2009.

Editor's Note

Those with refugee status generally have legal rights as great or greater than many other non-citizens who are lawfully present in the host state.

II.2.7 Detention

Main Debates

Is detention contrary to Art. 31 of the 1951 Geneva Convention?

Under what circumstances and for how long may asylum seekers be detained?

Is it lawful to use detention for the purpose of deterrence?

Main Points

Refugees often subject to penalties for illegal entry contrary to the 1951 Geneva Convention

Detention of children and other vulnerable populations

Standards for conditions of detention

Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.
Arts 26, 31, 36.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 9.

Soft Law

U.N. Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/10/21, 16 February 2009.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 189–194.

UNHCR EXCOM, 'Detention of Refugees and Asylum-Seekers', Conclusion No. 44 (XXXVII) – 1986.

UNHCR EXCOM, 'Conclusion on International Protection', Conclusion No. 85 (XLIX) – 1998.

Human Rights Committee, 'General Comment No. 27, Freedom of Movement (Art.12)', U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), 2 November 1999.

'Rules for the Protection of Juveniles Deprived of Their Liberty', UN General Assembly Resolution, A/RES/45/113, 14 December 1990.

Commission on Human Rights United Nations Working Group on Arbitrary Detention Deliberation No. 5, 'Situation Regarding Immigrants and Asylum Seekers', E/CN.4/2000/4, Annex II, 28 December 1999.

'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', UN General Assembly Resolution, A/RES/43/173, 9 December 1988.

UNHCR Documents

UNHCR, 'Selected Documents Relating to Detention', February 2009.

UNHCR, 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers', February 1999.

UNHCR, 'Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice', June 1999.

Cases

Zimbabwe Exiles Forum v. Minister of Home Affairs, 27294/2008, [2011] ZAGPPHC 29, 17 February 2011, (High Court of South Africa (North Gauteng, Pretoria)) (unlawful to arrest and detain asylum seekers without verifying their status or granting access to the refugee system).

Refugee Council New Zealand Inc., The Human Rights Foundation of Aotearoa New Zealand Inc., and 'D' v. Attorney General, M1881-AS01, 31 May 2002 (High Court of New Zealand). (NZ judicial decision limiting detention to rare cases where necessary to prevent flight or commission of crime).

C. v. Australia, HRC, Views of 28 October 2002, no. 900/1999, (lengthy detention causing mental illness is violation of Art. 9).

Torres v. Finland, HRC, Views of 2 April 1990, no. 291/1988 (failure of state to provide alien in detention for more than five days a right of access to the court proceedings for judicial review of the lawfulness of his detention constitutes a violation of Art. 9).

A. v. Australia, HRC, Views of 30 April 1997, no. 560/1993. (absence of individual consideration of reasons for detention of asylum seekers constitutes a violation of Art. 9).

Readings

Core

E. Acer and J. Goodman, 'Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention', *International Journal of Refugee Law*, vol. 24, no. 4 (2010).

Extended

Amnesty International, 'Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-seekers and Refugees', November 2007.

J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 413–439.

A. Naumik, 'International Law and Detention of U.S. Asylum Seekers: Contrasting *Matter of D-J* – with the United Nations Refugee Convention', *International Journal of Refugee Law*, vol. 19, no. 4 (2007), pp. 661–702.

S. Vohra, 'Detention of Irregular Migrants and Asylum Seekers', in R. Cholewinski and R. Perruchoud (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: T.M.C. Asser Press, 2007), pp. 49–69.

II.3 Other Forms of International Protection

II.3.1 Temporary Protection

Main Debates

Is temporary protection on the basis of group assessment of protection need an adequate alternative to individualized examination of refugee status?

Are there legally binding norms for temporary protection or is it a matter of discretionary state practice?

What should be the duration of temporary protection?

What level of rights must be accorded to those granted temporary protection?

Main Points

Temporary protection as an administrative measure until individual examination is carried out or group recognition occurs

Temporary protection is a precursor, not an alternative, to 1951 Geneva Convention protection

Temporary protection does not suspend states' duties under the 1951 Geneva Convention and other human rights treaties

Soft Law

UNHCR EXCOM, 'Protection of Asylum-Seekers in Situations of Large-Scale Influx', Conclusion No. 22 (XXXII), 1981.

UNHCR EXCOM, 'General Conclusion on International Protection', Conclusion No. 74 (XLV), 1994, sections (r)-(u).

UNHCR EXCOM, 'Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection', Conclusion No. 103 ((LVI), 2005, section (l).

UNHCR Documents

UNCHR, 'Note on International Protection', UN doc. A/AC.96/830, 7 September 1994, paras. 45–51.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 340–342. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 196–202.]

Extended

M. Albert, 'Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx', *Refugee Survey Quarterly*, vol. 29, no. 1 (2010), pp. 61–91.

J. Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime', *American Journal of International Law*, vol. 94, no. 2 (April 2000), pp. 279–306.

II.3.2 Complementary (Subsidiary) Protection

Main Debates

Is the 1951 Geneva Convention adequate in the context of forced displacement? How can the protection needs of victims of generalised violence and armed conflict be met?

Should there be a 'sliding scale' or other connection between the various kinds of protection needs and the ensuing entitlements?

Is complementary protection a humanitarian issue under state discretion or a matter of state duty?

Main Points

Limitations of 1951 Geneva Convention give rise to the need for complementary forms of protection

Role of international human rights treaties in establishing protection standards to be accorded to persons who fall outside of the 1951 Geneva Convention

Distinction between complementary protection and stay for compassionate or practical reasons.

Soft Law

UNHCR EXCOM, 'Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection', Conclusion No. 103 ((LVI), 2005).

UNHCR Documents

UNHCR, 'Providing International Protection Including Through Complementary Forms of Protection', 2 June 2005.

UNHCR, 'The International Protection of Refugees: Complementary Forms of Protection', April 2001.

Readings

Core

R. Mandal, *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, UNHCR Legal and Protection Policy Research Series, (Geneva: UNHCR, 2005).

R. Plender and N. Mole, 'Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.

Extended

J. McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008), pp. 263–282.

J. McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

J. Vedsted-Hansen, 'Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law', in D. Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels: Bruylant, 2002), pp. 57–78.

II.3.3 Universal Human Rights Instruments Relevant to Protection

Main Debates

To what extent can international human rights law fill existing gaps in refugee protection?

Are refugees rights bearers under human rights treaties?

How can international human rights treaties provide protection without enforcement powers?

Main Points

Complementarity between 1951 Geneva Convention and other human rights instruments

International monitoring bodies and their protection-related practices

II.3.3.1 Universal Declaration of Human Rights

Main Debate

Is the right to seek and enjoy asylum under the Universal Declaration a binding norm under customary international law?

Main Point

The legal and political significance of the Universal Declaration

Soft Law

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948), Arts 13, 14.

Readings

Core

- A. Edwards, ‘Human Rights, Refugees, and the Right to “Enjoy Asylum”’, *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.
- M. Kjaerum, ‘Art. 14’, in G. Alfredson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (The Hague: Nijhoff, 1999), pp. 279–296.

Extended

- U. Brandl, ‘Soft Law as a Source of International and European Refugee Law’, in J.Y. Carlier and D. Vanheule (eds), *Europe and Refugees – A Challenge?* (The Hague: Kluwer Law International, 1997), pp. 203–226.

II.3.3.2 The UN International Covenant on Civil and Political Rights

Main Debate

Does the scope of the rights under the International Covenant on Civil and Political Rights meet the specific protection needs of refugees?

Main Points

Standard setting v. quasi adjudicatory role of the Human Rights Committee
The extraterritorial application of Art. 7

Non-refoulement under Art. 7 v. *non-refoulement* under Art. 33 of the Geneva Convention

The emerging standards of the Human Rights Committee on detention of asylum seekers under Art. 9

Treaties

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts 7, 9, 12, 13.

Soft Law

Human Rights Committee, General Comment No. 20: Art. 7. (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)', 3 October 1992.

Human Rights Committee, 'General Comment No. 21: Art. 10. (Humane treatment of persons deprived of their liberty)', 10 April 1992.

Vienna Declaration, UN World Conference on Human Rights, June 1993, para. 23. Human Rights Committee.

Cases

Yin Fong v. Australia, HRC, Views of 23 October 2009 (no. 1442/2005) (detention for more than 4 years, with no consideration of less invasive means and no showing of individual circumstances necessitating continued detention, constitutes a violation of article 9).

C. v. Australia, HRC, Views of 28 October 2002, no. 900/1999, (lengthy detention causing mental illness of applicant and deportation to Iran constitutes a violation of Arts 7 and 9).

Torres v. Finland, HRC, Views of 2 April 1990, no. 291/1988 (failure of state to provide alien in detention for more than five days a right of access to the court proceedings for judicial review of the lawfulness of his detention constitutes a violation of Art. 9).

A. v. Australia, HRC, Views of 30 April 1997, no. 560/1993. (absence of individual consideration of reasons for detention of asylum seekers constitutes a violation of Art. 9).

Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3. (Canadian judicial decision ruling that deportation to torture is prohibited

by CAT and ICCPR and Canada lacked sufficient procedural safeguards for deportations when there is a risk of torture).

Readings

Core

- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 105–112.
- S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2004), pp. 230–248.
- M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2. Edition (Kehl-Strasbourg-Arlington: N.P. Engel, 2005), pp. 185–188.
- S. Persaud, ‘Protecting Refugees and Asylum Seekers under the International Covenant for Civil and Political Rights’, *New Issues in Refugee Research Series*, Research Paper No. 132, UNHCR (November 2006), pp. 1–33.
- R. Plender and N. Mole, ‘Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments’, in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.

Extended

- J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 119–147.
- C.W. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), pp. 359–423.

Editor’s Note

Although there are only a small number of Human Rights Committee (HRC) opinions concerning asylum seekers, the HRC, in its Concluding Observations on State Party reports frequently addresses the circumstances of asylum seekers and refugees in their assessment of State Party compliance with specific articles under the ICCPR. This offers another channel for asylum rights advocacy.

II.3.3.3 The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Main Debate

What level of scrutiny should the UN Committee Against Torture exercise in asylum-related cases?

Main Points

Absolute nature of Art. 3

The role of the UN Committee Against Torture in the protection against expulsion

The Committee's interim measures

Assessment of credibility of torture victims

Extraterritorial applications of Art. 3

Suspected terrorists and inadequacy of diplomatic assurances

Treaties

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Arts 1, 3, 10, 16.

Soft Law

UN Committee Against Torture (CAT), General Comment No. 1: Implementation of Art. 3 of the Convention in the Context of Art. 22 (Refoulement and Communications)', 21 November 1997. A/53/44, paras. 6, 7.

Cases

Core

M.A. & L.G. v. Sweden, CAT 373/2009, 19 November 2010. (return of long-time PKK member to Turkey where he is wanted under anti-terrorism laws would constitute a breach of art. 3).

S.A. v. Denmark, CAT 339/2008, 15 November 2010. (return to Iran in the deteriorating situation since the elections of June 2009 would constitute a breach of art. 3 with regard to an individual who had suffered torture 7 years earlier for monarchist political activities).

M.G. v. Sweden, CAT 349/2008, 11 Nov. 2010. (return of low level, but long-time PKK member to Turkey where she is likely to be imprisoned under anti-terrorism laws would constitute a breach of art. 3).

- E.N. v. Sweden*, CAT 322/2007, 14 May 2010. (return of woman and her minor daughter to Democratic Republic of the Congo where widespread violence against women exists would constitute a breach of art. 3).
- A.T. v. France*, CAT 300/2006, 11 May 2007. (violation of the Convention when France charged dual French/Tunisian national of terrorism, revoked his French citizenship, and expelled him to Tunisia while his asylum and CAT claims were still pending).
- C.A.R.M. v. Canada*, CAT 298/2006, 24 May 2007. (discrepancies in testimony about threats from Mexican government officials and drug cartel were due to misunderstandings, but insufficient evidence of real, foreseeable, personal risk).
- E.P. v. Azerbaijan*, CAT 281/2005, 1 May 2007. (violation of the Convention when Azerbaijan disregarded Committee's request for interim measures and expelled applicant who had received refugee status in Germany back to Turkey where she had previously been detained and tortured).
- E.R.K. & Y.K. v. Sweden*, CAT 270 & 271/2005, 30 April 2007. (no violation of the Convention when claimants were expelled to Azerbaijan based on evidence that many supporting documents were false).
- C.T. & K.M. v. Sweden*, CAT 279/2005, 22 January 2007. (Rwandan women repeatedly raped in detention in Rwanda by state officials have substantial grounds to fear torture if returned while ethnic tensions remain high; complete accuracy seldom to be expected of victims of torture, and inconsistencies in testimony do not undermine credibility if they are not material).
- V.L. v. Switzerland*, CAT 262/2005, 20 November 2006. (late disclosure in asylum proceedings of rape does not impair claimant's credibility).
- Agiza v. Sweden*, CAT 233/2003, 20 May 2005. (*non-refoulement* under CAT is absolute even in context of national security concerns; insufficient diplomatic assurances were obtained by sending country).
- Mutombo v. Switzerland*, CAT 13/1993, 27 April 1994. (no violation of the Convention where applicant has established existence of gross violations of human rights in country of return, absent sufficient evidence of the applicant's 'personal risk').
- Tala v. Sweden*, CAT 43/1996, 15 November 1996. (contradictions and inconsistencies in testimony of asylum seeker attributed to post-traumatic stress disorder resulting from torture).

Aemei v. Switzerland, CAT 34/1995, 9 May 1997. (activities carried out by receiving state may also give rise to risk of being subjected to torture).

Paez v. Sweden, CAT 39/1996, 28 April 1997. (membership of applicant in the Peruvian Shining Path organisation is not material to enjoyment of absolute Art. 3. right, contrasting with Art. 1F of 1951 Geneva Convention).

Extended

For a comparative analysis of national case law, see *Matter of J-E*, 23 Immigration & Naturalization Decisions 291, (BIA 2002). (detention in Haitian prison is not torture when legally sanctioned).

Matter of G-A, 23 Immigration & Naturalization Decisions 366 (BIA 2002). (Iranian Christian convicted of drug offense in US cannot be returned to Iran).

Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3. (Canadian judicial decision ruling that deportation to torture is prohibited by CAT and ICCPR and Canada lacked sufficient procedural safeguards for deportations when there is a risk of torture).

Readings

Core

J. Doerfel, 'The Convention Against Torture and the Protection of Refugees', *Refugee Survey Quarterly*, vol. 24, no. 2 (2005), pp. 83–97.

M. Jones, 'Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings', *European Journal of Migration and Law*, vol. 8, no. 1 (2006), pp. 9–39.

E. Odhiambo-Abuya, 'Reinforcing Refugee Protection in the Wake of the War on Terror', *Boston College International & Comparative Law Review*, vol. 30 (2007), pp. 277–329.

Extended

B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees', *International Journal of Refugee Law*, vol. 11, no. 3 (July 1999), pp. 479–495.

O. Okafor and P. Okoronkwo, 'Reconfiguring *Non-refoulement*? The *Suresh* Decision, 'Security Relativism', and the International Human Rights Imperative', *International Journal of Refugee Law*, vol. 15, no. 1 (2003), pp. 30–67.

- R. Plender and N. Mole, 'Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.
- D. Weissbrodt and I. Hortreiter, 'The Principle of Non-refoulement: Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties', *Buffalo Human Rights Law Review*, vol. 5, no. 1 (1999), pp. 1–30.
- C.W. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), pp. 425–524.

II.3.3.4 The UN Convention on the Rights of the Child

Main Debate

What are the implications of the best interest principle in the implementation of asylum law?

Main Points

Definition of a child
Vulnerability of children
Unaccompanied minors

Treaties

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 213–219.

UNHCR EXCOM, 'Refugee Children', Conclusion No. 47 (XXXVIII), 1987.

UNHCR EXCOM, 'Refugee Children', No. 59 (XL), 1989.

UNHCR EXCOM, 'Refugee Children and Adolescents', No. 84 (XLVIII), 1997.

UNHCR Documents

UNHCR, 'Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 22 December 2009.

UNHCR, 'Guidelines on Determining the Best Interests of the Child', May 2008.

UNHCR, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked', 7 April 2006.

Readings

Core

F. Martin and J. Curran, 'Separated Children: A Comparison of the Treatment of Separated Child Refugees Entering Australia and Canada', *International Journal of Refugee Law*, vol. 19, no. 3 (October 2007), pp. 440–470.

Extended

K. Touzenis, *Unaccompanied Minors: Rights and Protections* (Rome: Xledizioni, 2006).

II.3.3.5 The Geneva Conventions and Protocols: Minimum Standards in Times of War

Main Debates

Does suffering the violation of humanitarian law entitle one to refugee status?
What are the obligations of the international community to ensure protection of refugees in camps from military attacks?

Main Points

Actors for protection

Nexus between international refugee law and international humanitarian law

Treaties

Fourth Geneva Convention Relative to the Protection to Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, Arts 27, 35, 44, 45, 46, 70 (special protection for women)

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Art. 9. Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Additional Protocol I to the Geneva Conventions, 8 June 1977, 1125 U.N.T.S. 3.

Additional Protocol II to the Geneva Conventions, 8 June 1977, 1125 U.N.T.S. 609.

Convention on Cluster Munitions, 30 May 2008

Soft Law

UN Security Council, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict', 11 November 2010.

UNHCR EXCOM, 'Conclusion on the civilian and humanitarian character of asylum', Conclusion No. 94 (LIII), 2002.

UNHCR Documents

UNHCR, 'Note on the Protection of Refugees in Armed Conflict Situations', 4 October 1982.

UNHCR, 'Note on Military and Armed Attacks on Refugee Camps and Settlements', 10 August 1987.

Readings

Core

H. Lambert and T. Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence', *International Journal of Refugee Law*, vol. 22, no. 2 (2010), pp. 237–273.

S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', *International Review of the Red Cross*, vol. 843 (September 2001), pp. 651–674.

A.C. Trindade, 'Approximations and Convergencies Revisited: Ten Years of Interaction Between International Human Rights Law, International Refugee Law, and International Humanitarian Law', in G. Cohen-Jonathan and J.-F. Flauss (eds), *Le Rayonnement International de la Jurisprudence de la Cour Européenne des Droits de l'Homme* (Bruxelles: Bruyant, 2005), pp. 101–138.

Extended

Human Rights Watch, 'Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions', 22 November 2010.

- J.P. Lavoyer, 'Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC', *International Review of the Red Cross*, vol. 305 (April 1995), pp. 162–180.
- S. Ojeda, 'Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 58–66.

II.4 Internally Displaced Persons

Main Debates

Is the extension of UNHCR's mandate sufficient or is there a need for a specialized agency?

Should there be a separate treaty for the protection of internally displaced persons?

Main Points

Emergence of IDPs as a category of individuals in need of protection in the 1990s
International border as a defining criterion

Challenge of implementing human rights treaties to offer sufficient protection for the internally displaced

Treaty

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 23 May 2009 (not yet entered into force).

Soft Law

The Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2 (11 February 1998).

London Declaration of International Law Principles on Internally Displaced Persons, 2000, *International Journal of Refugee Law*, vol. 12, no. 4 (2000), p. 672.

Readings

Core

A. Adebé, 'The African Union Convention on Internally Displaced Persons: its Codification Background, Scope, and Enforcement Challenges', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 28–57.

- R. Cohen, 'Strengthening Protection of IDPs: The UN's Role', *Georgetown Journal of International Affairs* (Winter/Spring 2006), pp. 101–109.
- W. Kälin, 'The Role of the Guiding Principles on Internal Displacement', *Forced Migration Review*, (October 2005), pp. 8–9.

Extended

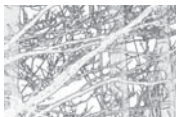
- H. Entwisle, 'Tracing Cascades: The Normative Development of the U.N. Guiding Principles on Internal Displacement', *Georgetown Immigration Law Journal*, vol. 19 (2004–2005), pp. 369–390.
- N. Geissler, 'The International Protection of Internally Displaced Persons', *International Journal of Refugee Law*, vol. 11, no. 3 (1999), pp. 451–478.
- K. Luopajarvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?', *International Journal of Refugee Law*, vol. 15, no. 3 (2003), pp. 678–714.
- S. Ojeda, 'Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 58–66.
- P. Orchard, 'Perils of Humanitarianism: Refugee and IDP Protection in Situations of Regime-induced Displacement', *Refugee Survey Quarterly*, vol. 29, no. 1 (2010), pp. 38–60.

Editor's Note

Discussions of internally displaced persons in Africa and in the Americas appear in Section III.4.5 and Section VI.4. respectively.



SECTION III



African Framework for Refugee Protection

This section of The Refugee Law Reader examines the legal norms of refugee protection that have developed in Africa, a continent that has produced millions of refugees and forced migrants that move within and beyond the African continent. The section contains two main subdivisions: the first focuses on the legal framework for refugee protection in Africa, and the second focuses on serious contemporary challenges to the protection of refugees in Africa.

This section begins with the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the principal regional instrument relating to refugees. One of the fundamental innovations of the OAU Convention is its expansion of the refugee definition, and the materials highlight several elements that have had far-reaching effect. The section next turns to the sub-regional legal frameworks and concentrates on the Eastern Africa region. The references are both international (within the region) and national and in particular, the materials address the relevant legislation in Kenya, Uganda, and Tanzania. Future editions of The Refugee Law Reader will expand this sub-regional focus to include other parts of Africa. It is important to note that the growth and elaboration of regional and sub-regional legal frameworks co-exist with underdeveloped national legal structures in many countries that host sizeable refugee populations. Indeed, the absence of domestic legislation concerning refugees, which leads governments to characterize their refugee programs as a matter of state discretion rather than state obligation, remains a grave problem.

The second major subdivision of this section highlights the multiple challenges to refugee protection in Africa. It explores the interaction between the exclusion clause and the international criminal justice regime, a high profile issue at present. It also examines many facets of the relationship between refugees and the territories to which they flee. For example, it addresses the interface between refugee law and immigration law, the different situations of urban refugees and those who live in camps, the relations between refugees and their host populations, and the impact of resettlement and the problems that arise when it is not an available durable solution. This portion of the section also devotes attention to two especially vulnerable populations, unaccompanied minors and those who are internally displaced. In its concluding entries, this section highlights the connection between governance and globalization and the continuing search for solutions to the refugee problems in Africa.

III.1. Overview of African Regional Legal Instruments for Refugee Protection

Main Debates

What are the regional legal bases for refugee protection in Africa?

How enforceable are these rules and standards proclaimed in the regional refugee law and human rights instruments at national courts?

Is refugee protection legal or political?

Main Points

Refugee rights and duties in the light of the African refugee law and human rights frameworks

States' ratification of the relevant instruments v. their compliance

National legislation of refugee law v. policy-based administration of refugees

Complementarity between the regional and international refugee protection frameworks

Treaties

OAU, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45.

OAU, African Charter on Human and Peoples' Rights, 21 I.L.M. 58, 27 June 1981.

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), 11 July 1990.

Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

Soft Law

Constitutive Act of the African Union, 11 July 2000

The African Charter on Democracy, Elections and Governance, 30 January 2007.

Protocol on Amendments to the Constitutive Act of the African Union, 11 July 2003.

Addis Ababa Document on Refugees and Forced Population Displacements in Africa, Adopted by the OAU/UNHCR on 10 September 1994.

Khartoum Declaration on Africa's Refugee Crisis, Adopted by the OAU Seventeenth Extraordinary Session of the Commission of Fifteen on Refugees,

meeting in Khartoum, Sudan, 22–24 September 1990, OAU Doc BR/COM/ XV/55.90. The Assembly of Heads of State and Government of the Organization of African Unity, 12 June 1983.

Resolution on the Second International Conference on Assistance to Refugees in Africa (ICARA II) AHG/Res. 114 (XIX) The Assembly of Heads of State and Government of the Organization of African Unity, 12 June 1983.

UNHCR EXCOM of the UNHCR Executive Committee on Protection of Asylum Seekers in Situations of Large-Scale Influx, Conclusion No. 22 (XXXII), 1981.

The Scope of International Protection in Mass Influx. Executive Committee of the High Commissioner's Programme, Sub-committee of the Whole on International Protection, 26th mtg. U.N. Doc. EX/1995/SCP/CRP.3 (2 June 1995).

Note on International Protection, International Protection in Mass Influx, Executive Committee of the High Commissioner's Programme, 46th Sess., UN Doc. A/AC.96/850 (1 September 1995).

Protection of Refugees in Mass Influx Situations: Overall Protection Framework, Global.

Consultations on International protection, 1st mtg. U.N. Doc. EC/GC/01/4 (19 February 2001).

The Personal Security of Refugees, Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 22nd mtg. U.N. Doc. EX/1993/SCP/CRP.3 (5 May 1993).

Readings

Core

E. Odhiambo-Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', *International Journal of Refugee Law*, vol. 19, no. 1 (2007), pp. 51–95.

E. Odhiambo-Abuya and G. Mukundi, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?', *Netherlands International Law Review*, vol. 53, no. 2 (2006) pp. 171–204.

E. Odhiambo-Abuya, 'Revisiting Liberalism and Post-Colonial Theory in the Context of Refugee Applications', *Netherlands Quarterly of Human Rights*, vol. 24, no. 2 (2006), pp. 193–227.

J. Oloka-Onyango, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva', *International Journal of Refugee Law*, vol. 3 (1991), pp. 453–460.

Extended

J. Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situation in Africa', in I. Ohta and Y.D. Gebre (eds), *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto and Melbourne: Kyoto University Press and Trans Pacific Press, 2005), pp. 17–52.

III.2. The OAU Refugee Convention

Main Debate

Does the OAU refugee convention fill the gaps in the international refugee law?

Main Points

Similarities and differences between the OAU Refugee Convention and the 1951 Geneva Convention

Substantive elements v. procedural elements

III.2.1 Extended Grounds of Persecution: 'External Aggression, Occupation, Foreign Domination or Events Seriously Disturbing Public Order'

Main Debates

Are these grounds extensive enough to address every ground of persecution in the regional context?

Who decides the occurrence of these events in a certain country?

Would it be desirable for these grounds of persecution to be universal standards?

Main Points

From whom should the country of origin information be obtained?

Group/Prima facie recognition

Procedural issues related to group/prima facie recognition

Other grounds of persecution, including 'gender', 'sex', 'sexual orientation' etc.

Treaties

OUA Convention Governing the Specific Aspects of Refugees Problems in Africa,
10 September 1969, 1001 U.N.T.S. 45.

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 15–20 [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 4–6].

Lawyers Committee of Human Rights, *African Exodus – Refugee Crisis, Human Rights and the 1969 OAU Convention* (New York: LCHR, 1995), pp. 29–30.

Editor's Note

See Section I.2.3.1 on Africa.

III.2.2 Family Unity

Main Debate

Who is a family member for the purpose of granting derivative status and family reunion of refugees?

Main Points

Nuclear family v. extended family

Issues of polygamy v. monogamy

Traditional Africa practices v. Islamic practices

Relatives v. dependants

Readings

Extended

J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), pp. 533–560.

Editor's Note

See Section II.1.4 on Family Unity.

III.3 Sub-regional Legal Framework for the Protection of Refugees

III.3.1 East Africa

Main Debates

Are Eastern African states meeting their obligations under these human rights and refugee law instruments they have ratified at the continental and sub-regional levels?

What are the roles of eastern African states in the protection of refugees?

Main Points

Distinctive and similar features of the Eastern Africa states

Emergence of national refugee-specific legislation for the protection of refugees

Development of IDPs policy frameworks

Treaties

The Treaty Establishing the East African Community, 1999.

Soft Law

Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19–20 November 2004.

International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006.

International Conference on the Great Lakes Region, Protocol on the Property Rights of Returning Persons, 30 November 2006.

International Conference on the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 30 November 2006.

Regional Parliamentarian Meeting, Kinshasa Declaration, 26–28 February 2007.

Readings

Extended

J.M. Fitzpatrick, *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Transnational Publishers Inc., 2002), pp. 297–301.

III.3.1.1 Kenya

Legislation

The Constitution of Kenya (Revised Edition), 1998, Chapter V on Fundamental Rights and Freedoms of the Individual, Sections 70–84.

The Refugees Act, 2006.

The Immigration Act, cap 172, S. 5 and Schedule on Work Permits (class M); S.6 (3).

The Aliens Restriction Act, cap 173, S.3 (2); rule 6(1).

Readings

Core

E. Odhiambo-Abuya, 'Legislating to Protect Refugees and Asylum Seekers in Kenya: A Note to the Legislator', *Research Paper Series*, vol. 1, no. (2004).

G. Verdirame, 'Human Rights and Refugees: The Case of Kenya', *Journal of Refugee Studies*, vol. 12, no. 1 (1999), pp. 54–77.

Extended

J. Crisp, 'A State of Insecurity: The Political Economy of Violence in Refugee-populated Areas of Kenya', *African Affairs*, vol. 99 (2000), pp. 601–632.

J. Crisp, 'New Issues in Refugee Research: A State of Insecurity: The Political Economy of Violence in Refugee-Populated Areas of Kenya', *Working Paper No. 6*, Geneva, UNHCR.

J. Hyndman and B.V. Nylund, 'UNHCR and the Status of Prima Facie Refugees in Kenya', *International Journal of Refugee Law*, vol. 10, no. 1–2 (1998), pp. 21–48.

M. Katzarova and A. Korkeakivi, *African Exodus – Refugee Crisis, Human Rights and the 1969 OAU Convention: a Report of the Lawyers Committee of Human Rights* (New York: LCHR, 1995), pp. 64–71.

- E. Odhiambo-Abuya, 'Refugee Status Imtaxaan in Kenya: An Empirical Survey', *Journal of African Law*, vol. 48, no. 2 (2004), pp. 187–206.
- E. Odhiambo-Abuya, 'Refugees and Their Interpreters: Lessons from the Kenyan Experience', *Australasian Review of African Studies*, vol. 25 (2004), pp. 66–76.
- P.G. Opatata and S.M. Singo, 'The Economics of Displacement: A Study of the Changing Gender Roles, Relations and its Impact on the Livelihood and Empowerments of Women Refugees in Kenya Camps', *Occasional Paper Series*, no. 5 (2005), Centre for Refugee Studies, Moi University.

III.3.1.2 Uganda

Legislation

Ugandan Constitution, 1995, National Objectives and Directive principles of State Policy, Sec. V., Chapter Four: Protection and Promotion of fundamental and other human rights and Freedoms.

The Refugees Act, 2006.

The Uganda Citizenship and Immigration Control Act, 1999.

Policy

The National Policy on Internally Displaced Persons, 2004.

Readings

Core

S.T. Beraki, *The Human Rights Dimension of Refugee Status Determination in Uganda: a Critical Analysis of the Right of Asylum Seekers to a Fair Hearing*, An LL.M dissertation submitted to the School of Graduate Studies (Uganda: Makerere University, 2008).

A. Kiapi, 'The Legal Status of Refugees in Uganda', *East African Journal of Peace and Human Rights*, vol. 3, no.1 (1997), pp. 115–129.

Z.A. Lomo, A. Naggaga, and L. Hovil, 'The Phenomenon of Forced Migration in Uganda: An Overview of Policy and Practice in Historical Context', *Refugee Law Project Working Paper*, no. 1 (2001), Kampala.

Extended

K. Huff, K. and R. Kalyango, 'Refugees in the City: Status Determination, Resettlement and the Changing Nature of Forced Migration in Uganda', *Refugee Law Project Working Paper*, no. 6 (2002).

- K. Huff and R. Kalyango, 'A Drop in the Ocean: Assistance and Protection for Forced Migrants in Kampala', *Refugee Law Project Working Paper*, no. 16 (2006).
- Z.A. Lomo, 'The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work', *Berkeley Journal of International Law*, vol. 18, no. 2 (2000), pp. 268–284.
- Refugee Law Project, *Critique of the Refugees Act* (2006).
- R. Sengendo, 'Do Refugees Have Rights? The Case of Tesfaye Shiferwa Awala v. Attorney General', *East African Journal of Peace and Human Rights*, vol. 11, no. 2 (2005), pp. 301–322.
- S. Tindifa, 'Refugees and Human Rights in Uganda: A Critical Assessment of the Law, Policy and Practice', *East African Journal of Peace and Human Rights*, vol. 5, no. 1 (1998), pp. 53–63.

III.3.1.3 Tanzania

Legislation

The Refugees Act, 1998.

Policy

National Refugee Policy 2003.

Readings

Core

- L. Landau, 'Challenge without Transformation: Changing Material Practices in Refugee-Affected Tanzania', *Journal of Modern African Studies*, vol. 42, no. 1 (2003), pp. 31–60.
- B. Rutinwa, 'Assertions Regarding the Impact of Refugees in Tanzania', *The African*, 8 July (2004), p. 10.

Extended

- A. Armstrong, 'Aspects of Refugee Wellbeing in Settlement Schemes: An Examination of the Tanzanian Case', *Journal of Refugee Studies*, vol. 1, no. 1 (1988) pp. 57–73.
- J. Crisp, *Lessons Learned from the Implementation of the Tanzania Security Package*, Evaluation and Policy Analysis Unit UNHCR, May 2001.

- J.F. Durieux, 'Preserving the Civilian Character of Refugee Camps – Lessons from the Kigoma Refugee Programme in Tanzania', *Track Two*, vol. 9, no. 3 (2000), pp. 25–35.
- K. Kamanga, 'International Refugees Law in East Africa: An Evolving Regime', *Georgetown Journal of International Affairs*, vol. 3 (Winter/Spring 2002), pp. 25–35.
- K. Kamanga, 'Refugee Presence: Impact on the Environment and Economic Development', *The African*, 10 July (2004), p. 10.
- K. Kamanga, 'Impact of Refugee Presence on Internal and Regional Security', *The African*, 12 July (2004), p. 10.
- G. Verdirame and B. Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York and Oxford: Berghahn Books, 2005).

III.4 Protection Challenges in Africa

Main Debates

- Are African states willing and ready to deal with refugees who flee war, break down of public order, foreign invasion and persecution in their home country? To what extent is the interface between Immigration law and Refugee law hurting protection of refugees in the region?
- What is the relevance of regional cooperation or integration such as the East African community, SADC, COMESA, IGAD to the protection of refugees or forced migration?
- To what extent will the plight of host populations be ignored in protection of refugees?

Main Points

- Political willingness to accord refugee protection
- Institutional preparedness
- Professionalism of authorities responsible for refugee affairs
- Resources demands on host countries, particularly in context of mass influx of refugees

III.4.1 Exclusion Clause

Main Debates

Is refugee protection in Africa protected from being exploited by fugitives from justice?

Role of the international community during conflicts that disturb public order and generate mass displacement

Main Points

Exclusion during mass influx situation

Sources of excludable crimes/acts

Procedural safeguards

Treaties

Hague Convention Respecting the Laws and Customs of War on Land, 1907.

Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 1950.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, 1950.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, 1950.

Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, 1950.

Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1951, U.N.T.S. 1021, vol. 78.

No. 17512 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.

Statute of the International Tribunal for the Former Yugoslavia, 25 May 1993 as amended in 1998 and 2000.

Statute of the International Tribunal for Rwanda, UNSC Res. 935 and 955, 1994.

Rome Statute of the International Criminal Court, 1998.

United Nations Convention against Transnational Organized Crimes, United Nations, 2000.

Soft Law

Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly Resolution 47/133 of 1992.

Draft Code of Crimes against the Peace and Security of Mankind, 1996.

Readings

Core

G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 425–478.

A.H. Okba, *The Application of Exclusion Clause to Refugees under International and Municipal Law in Uganda*, LLM dissertation submitted to the School of Graduate Studies (Kampala, Uganda: Makerere University, 2008).

Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice*, Washington, D.C., 2002.

Extended

Lawyers Committee for Human Rights, Exclusion from Protection, *International Journal of Refugee Law*, Special Supplementary Issues on Exclusion (2000), pp. i–ii.

L. Yu, 'Separating Ex-combatants and Refugees in Zongo, DRC: Peacekeepers and UNHCR's "Ladder of Options"', *New Issues in Refugee Research*, Working Paper No. 60 (August 2002).

Editor's Note

See Section II.2.1.6 on Exclusion from Convention Refugee Status.

III.4.2 The Interface between Refugee Law and Immigration Law

Main Debate

Border patrol and control v. entry of genuine refugees

Main Points

Non-refoulement

Refugee law v. immigration law

Illegal immigrants v. genuine refugees

Rejection at the frontier, expulsion of genuine refugees

Cases

Zimbabwe Exiles Forum v. Minister of Home Affairs, 27294/2008, [2011] ZAGPPHC 29, 17 February 2011, (High Court of South Africa (North Gauteng, Pretoria)) (unlawful to arrest and detain asylum seekers without verifying their status or granting access to the refugee system).

Readings

Core

J. Hathaway, 'Refugee Law Is Not Immigration Law', *World Refugee Survey* (2002), pp. 38–45.

Extended

Human Rights Watch, 'No Healing Here – Violence, discrimination and Barriers to Health for Migrants in South Africa', 7 December 2009.

III.4.3 Urban Refugees versus Camp Refugees

Main Debate

Legality of the encampment of refugees

Main Points

Urban refugee management and protection

Self-reliant v. vulnerable refugees settled in urban areas

Limitation of assistance to camp based refugees
Camp location v. right to free movement

Soft Law

The Security and Civilian and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the 'Ladder of Options', Executive Committee of the High Commissioner's Programme, Standing Committee, 18th mtg., U.N. Doc. EX/50/SC/Inf.4 (27 June 2000).

Note on Military and Armed Attacks on Refugee Camps and Settlements, Executive Committee of the High Commissioner's Programme, Sub Committee of the Whole on International Protection, 38th Sess., U.N.Doc. EX/SCP/47 (10 August 1987).

Readings

Core

Human Rights Watch, 'Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala', 2003.

Extended

O. Bakewell, 'Refugee Aid and Protection in Rural Africa: Working in Parallel or Cross-purposes?', *New Issues in Refugee Research*, Working Paper, no. 35 (March 2001).

E. Odhiambo-Abuya, 'From Here to Nowhere: Protracted Refugee Situations in Africa', in A. Edwards and C. Ferstman (eds), *Human Security and Non-Citizens in the New Global Order* (Cambridge: Cambridge University Press, 2008).

UNHCR, *Report of the Mid-Term Review: Self-Reliance Strategy for Refugee Hosting Areas in Moyo, Arua and Adjumani Districts, Uganda*, RLSS Mission Report March 2004, (Geneva: UNHCR, 2004).

III.4.4 Resettlement

Main Debates

Is resettlement a right or privilege?

Who determines whether to resettle or not?

Are African states suitable to resettlement?

Main Points

Resettlement v. protection concerns

Absence of legal provisions for durable solutions

Readings

Core

J. Milner, 'Recent Developments in International Resettlement Policy: Implications for the UK Programme', in V. Gelthorpe and L. Herlitz (eds), *Listening to the Evidence: the Future of UK Resettlements*, (London: Home Office, 2003), pp. 53–66.

J. v. Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?', *Refugee*, vol. 22, no. 1 (2004), pp. 39–48.

Extended

G. Kibreab, 'Local Settlements in Africa: A Misconceived Option?', *Journal of Refugees Studies*, vol. 2, no. 4 (1989), pp. 125–146.

United Nations Development Group, *UNDG Guidance Note on Durable Solutions for Displaced Persons* (New York: UNDG, 2004).

Editor's Note

See II.2.1.5 on Internal Protection Alternative.

III.4.5 The Plight of IDPs

Main Debates

Do we need to expand the UNHCR mandate to accommodate IDPs?

Who should be responsible for the plight of IDPs? Is it a local or international problem?

Main Points

The main legal framework for the protection of IDPs

Rural IDPs v. urban IDPs

IDPs v. refugees

Treaty

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 23 May 2009 (not yet entered into force).

Soft Law

Guiding Principles on Internal Displacement, UN Document E/CN.4/1998/53/Add.2.

Readings

Core

- A. Adebé, 'The African Union Convention on Internally Displaced Persons: its Codification Background, Scope, and Enforcement Challenges', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 28–57.
- Internal Displacement Monitoring Centre and International Refugee Rights Initiative, *The Great Lakes Pact and the Rights of Displaced People: A Guide for Civil Society*, September 2008.
- D. Korn, 'Exodus Within Borders: An Introduction to the Crisis of Internal Displacement' (Washington: Brookings Institution, 1999).
- S. Ojeda, 'Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 58–66.
- J. Oloka-Onyango, 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa', in C. Mulei, L. Dirasse, and M. Garling (eds), *Legal Status of Refugee and Internally Displaced Women in Africa* (Nairobi: Space Sellers Ltd, 1996), p. 41.

Extended

- R. Cohen, 'Strengthening Protection of IDPs: the UN's Role', *Georgetown Journal of International Affairs*, vol. 7 (Winter /Spring 2006), pp. 101–110.
- N. Geissler, 'The International Protection of Internally Displaced Persons', *International Journal of Refugee Law*, vol. 11, no. 3 (1999), pp. 451–478.
- W. Kälin, 'The Role of the Guiding Principles on Internal Displacement', *Forced Migration Review*, (October 2005), pp. 8–9.

- J. Oloka-Onyango, 'Forced Displacement and the Situation of Refugee and Internally Displaced Women In Africa', *East African Journal of Peace and Human Rights*, vol. 5, no. 1 (1998), pp. 1–31.
- P. Orchard, 'Perils of Humanitarianism: Refugee and IDP Protection in Situations of Regime-induced Displacement', *Refugee Survey Quarterly*, vol. 29, no. 1 (2010), pp. 38–60.
- M. Stavropoulou, 'Key Areas of Challenge in the Legal Status of Internally Displaced Women', in C. Mulei, L. Dirasse, and M. Garling (eds), *Legal Status of Refugee and Internally Displaced Women in Africa* (Nairobi: Space Sellers Ltd, 1996), p. 99.

Editor's Note

See Section II.4 for further discussions concerning IDPs.

III.4.6 Unaccompanied Minors

Main Debates

Who is responsible for safeguarding the special protection needs of unaccompanied minors?

What kind of assistance can ensure the protection of unaccompanied minor refugees?

Main Points

Best interest of the child

Duties of host states v. role of UNHCR and implementing NGOs

Prospects of durable solution

Soft Law

Accra Declaration on War-Affected Children in West Africa, ECOWAS member states, Accra, April 2000.

Readings

Core

M.S. Gallagher, 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum', *International Journal of Refugee Law*, vol. 13, no. 3 (2001), pp. 310–353.

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 356–358.

UNHCR, *Refugee Children in Africa: Trends and Patterns in the Refugee Population in Africa Below the Age of 18 Years, 2000, 2001*.

UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994.

Extended

B. Harrell-Bond, 'Are refugee camps good for children?', *New Issues in Refugee Research*, Working Paper no. 29 (August 200), UNHCR.

III.4.7 Governance and Globalization

Main Debates

Are resources in the protection of refugees shared equally?

Should each region shoulder its burden in the protection of refugees?

Main Points

Disparities between the south and the north

The south-north debate

Readings

Core

E. Aukot, 'The Plight of Refugees as a Quest for Good Governance: Critically Imagining Refugees' Influence on the Democratic Process of a Host Community in Kenya', *Recht in Afrika*, no. 2 (2003), pp. 109–138.

B.S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, vol. 11, no. 4 (1998), pp. 350–374.

B. Rutinwa, 'Presence of Refugees: Impact on Local Governance and Administration', *The African*, (16 July 2004), p. 10.

A. Suhrke, 'Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action', *Journal of Refugee Studies*, vol. 11, no. 4 (1998), pp. 396–415.

Extended

A. Betts, 'International Cooperation and Targeting Development Assistance for Refugees Solution: Lessons from the 1980', *New Issues in Refugees Research*, Working Paper No. 107 (2004), Geneva, UNHCR.

- J. Hyndman, 'Refugee Self-Management and the Question of Governance', *Refugee*, vol. 16, no. 2 (1997), pp. 16–22.
- J. Milner, 'Sharing the Security Burden: Towards the Convergence of Refugee Protection and State Security', *Working Paper*, no. 4 (Oxford: Refugee Studies Centre, 2000).
- O. Sadako, 'Solidarity and Nation Building: The Case of Refugees', *East African Journal of Peace and Human Rights*, vol. 5, no. 1 (1998).

III.4.8 The Search for Solutions to the Refugee Problem in Africa

Main Debates

- Given the African states political, social, cultural and economic reality, can refugees get durable solutions within Africa?
- Should countries that produce refugees be held accountable and asked to contribute to their protection in the country of asylum?
- Refugees' assistance v. local host communities

Main Points

- Legal frameworks to accommodate refugees
- Divergent interests and perceptions
- Political stability
- Human, social and economic resources

Readings

Core

- E. Aukot, 'It is Better to Be a Refugee than a Turkana in Kakuma: Revisiting the Relationship Between Hosts and Refugees in Kenya', *Refugee*, vol. 21, no. 3 (2001), pp. 73–83.
- UNHCR, 'Refugees in Africa: the challenges of protection and Solutions', Regional Parliamentary Conference on Refugees in Africa, Cotonou, Benin, 1–3 June 2004.

Extended

- A. Betts, 'International Cooperation between North and South to Enhance Refugee Protection in Regions of Origin', *Working Paper*, no. 25 (Oxford: Refugee Studies Centre, 2005), pp. 40–63.

- A. Betts, 'Public Goods Theory and the Provision of Refugees Protection: The role of the joint- Product Model in Burden Sharing Theory', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 274–296.
- N. Binaifer, 'In the Name of Security: Erosion of Refugee Rights in East Africa', *World Refugee Survey*, USCR.
- J. Crisp, 'Africa's Refugees: Patterns, Problems and Policy Challenges', *UNHCR Working Paper*, no. 28 (August 2000).
- B. Rutinwa, 'Presence of Refugees: Impact on Health Services', *The African*, (13 July 2004), p. 10.
- B. Rutinwa, 'Presence of Refugees: Impact on Education Services', *The African*, (14 July 2004), p. 10.
- B. Rutinwa, 'Presence of Refugees: Impact on Water Services', *The African*, (15 July 2004), p. 10.
- UNHCR, 'Putting Refugees on Development Agenda: How Refugees and Returnees can Contribute to Achieving the Millennium Development Goals', FORUM/2005/4, 2005.

III.4.9 Protection During Mass Repatriation Programmes

Main Debates

Forced return v. voluntary return during mass repatriation

Should refugees be involved in the decision making process of repatriation?

Main Points

Monitoring the repatriation exercise to ensure voluntary and safe return

The various stakeholders in the repatriation exercise

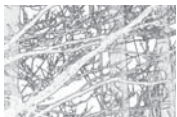
Reading

Core

Lawyers Committee of Human Rights, *African Exodus – Refugee Crisis, Human Rights and the 1969 OAU Convention* (New York: LCHR, 1995), pp. 111–138.



SECTION IV



Asian Framework for Refugee Protection

This section of the Refugee Law Reader examines the legal norms developed in Asia regarding refugee protection. The challenges in framing this section arose from several overlapping reasons. Only a few countries are State Parties to the 1951 Convention relating to the Status of Refugees. Furthermore, there is no regional convention on human rights and the non-binding AALCO (Asian African Legal Consultative Organization) principles have not had any serious influence on the law and practice in the region. Moreover, most countries in Asia have not passed national legislation on the status of refugees, with the result that there is little case law and the status of refugees frequently is not distinguished from that of noncitizens in general. While there is literature on the origin and condition of refugees, this rarely includes legal analyses of the relevant issues. Even the legal texts that exist, for example the Memorandum of Understanding between UNHCR and Pakistan, are not readily accessible.

Nonetheless, there are important materials available and the Section on Asia has organized them in three parts. The first presents general materials on the challenges to refugee protection in Asia. It includes readings that explain Asian exceptionalism, and thus provide a setting in which to appreciate the selected references. The second portion of this section focuses on the State Parties to the 1951 Convention: Cambodia, China, Japan, Philippines, and South Korea. It examines national legislation, case law, and literature exploring the protection afforded to refugees. The concluding part of the Section on Asia addresses the protection concerns that arise in states that are not party to the 1951 Convention. Bangladesh, India, Pakistan, and Thailand were selected for this examination, based on the large numbers of refugees they host or the existence of a corpus of reasonably evolved practices and laws. It should be noted that three of these states are in South Asia; this contrasts to the State Parties to the 1951 Convention, all of which are located in Southeast Asia or East Asia. As materials on countries in Central Asia and West Asia have not been included, in this context the Section on Asia refers to South Asia and Southeast Asia.

IV.1 Protection Challenges in Asia

Main Debates

Why most Asian states are not parties to the 1951 Convention?

Does the Comprehensive Plan of Action (CPA) offer a model for dealing with mass influx of refugees in Asia?

Main Points

Asian exceptionalism

Concerns of post-colonial states

UNHCR refugee status determination (RSD)

Mass influx of refugees

International burden sharing

Illegal migration

Soft Law

Final Text of the Asian African Legal Consultative Organization's (AALCO), 1966.

Bangkok Principles on Status and Treatment of Refugees, 2001.

UNHCR, 'Putting Refugees on Development Agenda: How Refugees and Returnees can Contribute to Achieving the Millennium Development Goals', FORUM/2005/4, 2005.

UNHCR Executive Committee Conclusion No. 22 (XXXII), 1981.

UN Guidelines on Internally Displaced Persons, 1998.

Comprehensive Plan of Action (CPA) Indo-Chinese Refugees, 1989.

Readings

Core

C. Abrar, 'Legal Protection of Refugees in South Asia', *Forced Migration Review*, vol. 10 (April 2001), pp. 21–23.

M. Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law*, vol. 18, no. 1 (2006), pp. 1–29.

V. Muntharborn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992), pp. 3–29.

RSDWatch.org. An independent source of information about the way the UN Refugee agency decides refugee cases. The Asian states in which UNHCR conducts RSD include Bangladesh, Cambodia, China, Hong Kong, India, Malaysia, Nepal, Pakistan, Sri Lanka, and Thailand.

UNHCR, 'Putting Refugees on Development Agenda: How Refugees and Returnees can Contribute to Achieving the Millennium Development Goals', FORUM/2005/4, 2005.

Extended

H. Adelman (ed.), *Protracted Displacement in Asia: No Place to Call Home* (Aldershot: Ashgate, 2008).

S. Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment', *International Journal of Refugee Law*, vol. 4, no. 4 (1992), pp. 487–513.

A. Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indo-Chinese CPA', *New Issues in Refugee Research*, Working Paper no. 120 (2006).

B. S. Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law', *New York University Journal of International Law and Politics*, vol. 37, no. 4 (2005), pp. 799–827.

B. S. Chimni, 'Outside the Bounds of Citizenship: The Status of Aliens, Illegal Migrants and Refugees in India', in R. Bhargava and H. Reifeld (eds), *Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions* (New Delhi: Sage Publications, 2005), pp. 277–313, pp. 277–285, 295–297.

B. S. Chimni, 'Status of Refugees in India: Strategic Ambiguity', in R. Samaddar (ed.), *Refugees and the State: Practices of Asylum and Care in India 1947–2000* (New Delhi: Sage Publications, 2003), pp. 277–313.

S. E. Davies, *Legitimizing Rejection: International Refugee Law in South East Asia* (Leiden, Boston: Martinus Nijhoff, 2008).

S. Davies, 'The Asian Rejection: International Refugee Law in Asia', *Australian Journal of Politics and History*, vol. 52, no. 4 (2006), pp. 562–575.

A. Schloenhardt, 'Immigration and Refugee Law in the Asia-Pacific Region', *Hong Kong Law Journal*, vol. 32, no. 3 (2002), pp. 519–548.

IV.2 States Party to the 1951 Refugee Convention

Main Debate

Has ratification of 1951 Convention made a difference?

Main Points

National legislation or its absence

Urban refugees

Rights of refugees

Human rights

IV.2.1 Cambodia

National Legislation

Law on Nationality, Cambodia, 9 October 1996.

Exit and Reside in the Kingdom of Cambodia, of Immigrant Aliens, Cambodia, 21 June 1996.

Law on Immigration, Cambodia, 22 September 1994.

Readings

Core

Amnesty International, 'Amnesty International Report 2008 – Cambodia', 28 May 2008.

United States Department of State, '2007 Country Reports on Human Rights Practices – Cambodia', 11 March 2008.

IV.2.2 China

Readings

Core

E. Chan and A. Schloenhardt, 'North Korean Refugees and International Refugee Law', *International Journal of Refugee Law*, vol. 19 (2007), pp. 215–245, 222–225.

J. Seymour, 'China: Background Paper on the Situation of North Koreans in China', Writenet Report, commissioned by UNHCR, 2005, pp. 4–6, 11–12.

Extended

- J. R. Charny, 'Acts of Betrayal: The Challenge of Protecting North Koreans in China', *Refugees International*, (April 2005), pp. 1–64.
- V. Muntharborn, 'Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea', *UNGA*, 62nd Session, A/62/264 (2007), pp. 9–13.

IV.2.3 Japan

National Legislation

Immigration Control and Refugee Recognition Act, Japan, 1951.

Case Law

- Afghan v. Japan* (Prosecutor) Heisei 14 (2002) U (Criminal Case) No.129. (Misapplication of Article 70-2 of the Immigration Act).
- Hanrei Jiho (Ryo Kan-ei) Case*. Japan: High Courts. 6 December 1982. (Contentions based on the assumption that the accused is a Treaty Refugee according to Article 1, Para C of the Refugee Treaties, are not supportable).
- Sougil Yung Decision*. Japan: Supreme Court. 26 January 1976. (The case hold that the principle of non-refoulement of political criminals cannot be recognised as an established customary law among nations).
- Turkish v. Japan* (Minister of Justice) Heisei 14 (2002) Gyo-U (Administrative Case) No. 49 (Lawsuit for Revocation of Decision to Reject Application for Refugee Status) Nagoya District Court, Date of Decision 15 April 2004 (The court revoked the decision not to recognize the plaintiff as a refugee and affirmed the nullity of the written deportation order issued to him).

Readings

Core

- M. Dean and M. Nagashima, 'Sharing the Burden: The Role of Government and NGOs in Protecting and Providing for Asylum Seekers and Refugees in Japan', *Journal of Refugee Studies*, vol. 20, no. 3 (2007), pp. 481–499.
- M. Kaneko 'Beyond "Seclusionist" Japan: Evaluating the Free Afghans/Refugee Law Reform Campaign after September 11', *Refugee*, vol. 21, no. 3 (2003), pp. 34–44.

Extended

O. Arakaki, *Refugee Law and Practice in Japan* (Aldershot: Ashgate, 2008).

S. Banki, 'Burmese Refugees in Tokyo: Livelihoods in the Urban Environment', *Journal of Refugee Studies*, vol. 19, no. 3 (2006), pp. 328–344.

IV.2.4 Philippines

National Legislation

The Philippines Immigration act of 1940 (Commonwealth Act of 613).

Reading

Core

'USCRI Country Report – Philippines', 2004.

Extended

V. Muntharborn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992), pp. 81–89.

IV.2.5 South Korea

National Legislation

Immigration Law no. 1289, South Korea, 5 March 1963, Last Amended on 5 February 1999.

South Korea Nationality Act 1948, Last amended 2004, Act no 7074.

Act on Immigration and Legal Status of Overseas Koreans, South Korea, 2000.

Readings

Core

J. R. Charny, 'Acts of Betrayal – The Challenge of Protecting North Koreans in China' *Refugees International*, (April 2005), pp. 16–18.

Human Rights Watch, 'Country summary – South Korea', 2007.

Extended

B. Adams, 'Korea needs to Open its Doors', *JoongAng Daily*, (21 August 2007).

IV.3 States Not Party to the 1951 Refugee Convention

Main Debate

Is there a need for a national law on refugees?

Main Points

Status of aliens and refugees

Stateless refugees

Role of judiciary

Burden sharing

IV.3.1 Bangladesh

National Legislation

Bangladesh Citizenship Order, 1972.

Bangladesh Control of Entry Act, 1952.

Reading

Core

C. R. Abrar, 'State, Refugees and the Need for a Legal Procedure', in C. R. Abrar and S. Malik (eds), *Towards National Refugee Laws in South Asia*, (Dhaka: University of Dhaka, 2003), pp. 45–49.

Extended

S. Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 1', *International Journal of Refugee Law*, vol. 11, no. 4 (1999), pp. 625–645, 629–639.

S. Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 2', *International Journal of Refugee Law*, vol. 12, no. 1 (2000), pp. 41–70.

IV.3.2 India

National Legislation

- R. Trakroo, A. Bhat and S. Nandi (eds), *Refugees and the Law* (New Delhi: Human Rights Law Network, 2006), pp. 68–76.
- The Foreigner's Act, India 1946.
- Passport Act, India, 1920.
- Passport Act, India, 1967.
- Registration of Foreigner's Act, India, 1939.
- Foreigner's Order, India, 1948.
- Illegal Migrants Act, India, 1983.
- Indian Penal Code, 1860.
- Protection of Human Rights Act, India, 1993.

Case Law

- National Human Rights Commission v. State of Arunachal Pradesh and Another*, 1996 SCC (1) 742 (Right to Life and Liberty) Article 21 of the Constitution of India.
- Dr. Malvika Karlekar v. Union of India* (Criminal Writ Petition No. 583 of 1992) (Right of asylum seekers to approach UNHCR).
- The Sarbananda Sonowal v. Union of India* (2005) 5 Supreme Court Cases 665 (Aliens; Aggression; Illegal Migrants; Powers of State).
- The State of Arunachal Pradesh v. Khudiram Chakmas*, 1994 Supp. (1) SCC 615 (Citizenship of Chakma Refugees).
- Anand Swaroop Verma v. Union of India* (2002) (VI AD (DELHI) 1025 CRLW. No. 746/2002 8.8.2002).

Reading

Core

- S. Baruah, 'Citizens and Denizens: Ethnicity, Homelands and the Crisis of Displacement in Northeast India', *Journal of Refugee Studies*, vol. 16, no. 1 (2003), pp. 44–67.
- P. Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (New Delhi: Oxford University Press, 2006), pp. 77–103.

P. Saxena, 'Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future', *International Journal of Refugee Law*, vol. 19 (2007), pp. 246–272.

Extended

- B. S. Chimni, *International Refugee Law: A Reader* (New Delhi: Sage, 2000), Chapter VIII.
- R. Dhawan, *Refugee Law and Policy in India* (New Delhi: PILSARC, 2004), pp. 32–80, 43–59.
- R. Kharat, *Tibetan Refugees in India* (New Delhi: Kaveri Books, 2003), pp. 46–71, pp. 84–94.
- Model Law, drafted by the Eminent Persons Group (EPG), South Asia and PILSARC, and others.
- E. Rolfe, 'Refugee, Minority, Citizen, Threat: Tibetans and the Indian Refugee Script', *South Asia Research*, vol. 28 no. 3 (2008), pp. 253–283.
- D. K. Singh, *Stateless in South Asia: The Chakmas between Bangladesh and India*, (New Delhi: Sage Publications, 2010), pp. 180–182, 194–95, 197–200.

IV.3.3 Nepal

National Legislation

- Interim Constitution 2063 of Nepal, 2007.
- Citizenship Act 2063, Nepal, 2006.
- Immigration Act 2049, Nepal, 1992.
- Extradition Act 2045, Nepal, 1988.

Reading

Core

USCRI World Refugee Survey 2009 – Nepal.

Extended

- S. Banki, 'Bhutanese Refugees in Nepal: Anticipating the Impact of Resettlement', *Briefing Paper* (Austcare, Griffith University, Australian National University, Institute for Ethics, Governance and Law, 2008).

IV.3.4 Pakistan

National Legislation

The Foreigner's Act of Pakistan, 1946.

Foreigner's Order of Pakistan, 1951.

Pakistan's Citizenship Act, 1951.

Foreigner's (Amendment) Ordinance, Pakistan, 2000.

Readings

Core

P. Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia*, (New Delhi: Oxford University Press, 2006), pp. 136–169.

A. R. Sheikh, 'Toward a Legal Regime for Refugee Protection in Pakistan', *Refugee Watch*, no. 19 (August 2003).

Extended

D. A. Kronenfeld, 'Afghan Refugees in Pakistan: Not All Refugees, Not Always in Pakistan, Not Necessarily Afghan?', *Journal of Refugee Studies*, vol. 21, no. 1 (2008), pp. 43–64.

M. Zieck, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises', *International Journal of Refugee Law*, vol. 20, no. 2, pp. 253–272.

IV.3.5 Thailand

National Legislation

Immigration Act, B.E. 2522, Thailand, 1979.

Readings

Core

G. Loescher and J. Milner, 'Protracted Refugee Situation in Thailand: Towards Solutions', Presentation to the Foreign Correspondents' Club of Thailand, 1 February 2006.

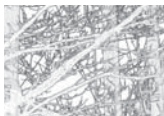
V. Muntarbhorn, *Refugee Law and Practice in the Asia and Pacific Region: Thailand as a Case Study*, Research Paper, (Thailand: UNHCR, 2004).

Extended

- A. Alexander, 'Without Refuge: Chin Refugees in India and Malaysia', *Forced Migration Review*, vol. 30 (April 2008), pp. 36–37.
- A. Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-sharing Theory', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 274–296.
- P. R. Chari, M. Joseph and S. Chandran (eds), *Missing Boundaries: Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia* (New Delhi: Manohar Publishers, 2003).
- P. Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (New Delhi: Oxford University Press, 2006), pp. 232–244.
- N. Obi and J. Crisp, 'Evaluation of UNHCR's Policy on Refugees in Urban Areas – A Case Study Review of New Delhi' UNHCR, Evaluation and Policy Analysis Unit, 2000.
- UNHCR, 'UNHCR's Policy and Practice Regarding Urban Refugees', A Discussion Paper.



SECTION V



European Framework for Refugee Protection

In this section The Refugee Law Reader turns to the legal norms developed in Europe regarding refugee protection. This is a complex area, as two quite separate actors both have significant impact on asylum and related protection issues. First, the Council of Europe, comprising 47 countries, addresses general human rights protection, and its activities have significant implications for the legal position of asylum applicants and refugees. Second, the European Union (EU), an organization that is entirely separate from the Council of Europe (though the EU's 27 Member States are simultaneously members of the Council of Europe), has embarked on an active programme to develop new legal norms affecting immigration, borders, and asylum.

The first part of Section V focuses on the soft law that the Council of Europe has developed in its inter-governmental cooperation efforts. The backbone of these materials are the Recommendations and Resolutions of the Committee of Ministers and the Parliamentary Assembly relating to international protection. Although these documents are politically binding, they do not have immediate legal consequences. Nonetheless, they are useful as aids to interpretation of the undertakings of states with regard to international protection. The second portion of this section examines the European Convention on Human Rights, a core treaty of the Council of Europe. Although the Convention itself makes no reference to international protection of refugees, the judgments issued by the European Court of Human Rights impose important obligations regarding asylum on State Parties. Furthermore, all members of the Council of Europe must adhere to the Convention and must accept the jurisdiction of the European Court of Human Rights.

The second half of Section V highlights the key EU legislation, both Regulations and Directives, concerning international protection of asylum seekers and refugees. Although the central concern of the EU is the successful functioning of the internal market (a market for the free movement of goods, persons, services, and capital across the internal frontiers), the EU expanded its scope in 1999 to include immigration and asylum. Indeed, the EU has adopted three five-year programmes (the most recent Stockholm Programme lasting until 2014) in order to create a Common European Asylum System intended to be based on a harmonized interpretation and application of the 1951 Geneva Convention. This portion of the section also includes important

decisions of the Court of Justice of the European Union, which is competent to issue binding interpretations of EU law, though it normally cannot receive complaints directly from individual asylum seekers.

Within the Council of Europe one of the main challenges to refugee protection stems from the ever increasing case load of the European Court of Human Rights. Protocol No. 14 to the Convention, intended to enhance the Court's capacity, has thus far not resolved the growing backlog. Within the EU one of the central challenges is that, despite the goal of developing a Common European Asylum System, genuinely common standards and practices are far from a reality. In addition, the EU is placing increased priority on external migration control measures; these actions inevitably limit access to asylum procedures, and thereby restrict access to protection, for unknown numbers of persons in need of international protection.

V.1 The Council of Europe

V.1.1 Legal and Policy Framework for Refugee Protection

Main Debate

Should the Council of Europe play a greater role in standard setting in the area of asylum in a wider pan-European context?

Main Points

Binding v. non-binding regional instruments

Committee of Ministers recommendations v. Parliamentary Assembly resolutions

Establishing harmonization between EU and non-EU states

Treaties

Regional

Core

European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950, E.T.S. 005.

European Agreement on the Abolition of Visas for Refugees, 20 April 1959, E.T.S. 031.

European Agreement on Transfer of Responsibility for Refugees, 16 October 1980, E.T.S. 107.

European Convention on Extradition, 13 December 1957, E.T.S. 24.

European Social Charter, 18 October 1961, E.T.S. 035.

European Social Charter (Revised), 3 May 1996, E.T.S. 163.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, E.T.S. 126.

Extended

European Convention on Consular Functions, 11 December 1967, E.T.S. 061.

Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, 11 December 1967, E.T.S. 61A.

European Convention on the Suppression of Terrorism, 27 January 1977, E.T.S. 090.

- Protocol Amending the European Convention on the Suppression of Terrorism, 15 May 2003, E.T.S. 190.
- Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, E.T.S. 196.
- Framework Convention for the Protection of National Minorities, 1 February 1995, E.T.S. 157.
- European Convention on Nationality, 6 November 1997, E.T.S. 166.
- European Convention on Repatriation of Minors, 28 May 1970, E.T.S. 071.
- Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, E.T.S. 197.

Soft Law

Council of Europe: Committee of Ministers

- Committee of Ministers of the Council of Europe, 'Resolution 14 (1967) on Asylum to Persons in Danger of Persecution', 29 June 1967.
- Committee of Ministers of the Council of Europe, 'Recommendation 70 (2) (1970) on the Acquisition by Refugees of the Nationality of Their Country of Residence', 26 January 1970.
- Committee of Ministers of the Council of Europe, 'Declaration on Territorial Asylum', 18 November 1977.
- Committee of Ministers of the Council of Europe, 'Recommendation R (81) 16 on the Harmonisation of National Procedures Relating to Asylum', 5 November 1981.
- Committee of Ministers of the Council of Europe, 'Recommendation R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees', 25 January 1984.
- Committee of Ministers of the Council of Europe, 'Recommendation R (84) 21 on the Acquisition by Refugees of the Nationality of the Host Country', 14 November 1984.
- Committee of Ministers of the Council of Europe, 'Recommendation No. R (94) 5 on Guidelines to Inspire Practices of the Member States of the Council of Europe Concerning the Arrival of Asylum-Seekers at European Airports', 21 June 1994.

- Committee of Ministers of the Council of Europe, 'Recommendation R (97) 22 Containing Guidelines on the Application of the Safe Third Country Concept', 25 November 1997.
- Committee of Ministers of the Council of Europe, 'Recommendation R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Art. 13 of the European Convention on Human Rights', 18 September 1998.
- Committee of Ministers of the Council of Europe, 'Recommendation R (99) 23 on Family Reunion for Refugees and Other Persons in Need of International Protection', 15 December 1999.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2000) 9 on Temporary Protection', 3 May 2000.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2001) 18 to Member States on Subsidiary Protection', 27 November 2001.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2003) 5 to Member States on Measures of Detention of Asylum-Seekers', 16 April 2003.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2004) 9 to Member States on the Concept of "Membership in a Particular Social Group" (MPSG) in the Context of 1951 Convention', 30 June 2004.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2004) 14 to Member States on the Movement and Encampment of Travellers in Europe', 1 December 2004.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2005) 6 to Member States on Exclusion from Refugee Status in the Context of Art. 1F of the Convention Related to the Status of Refugees', 23 March 2005.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2006) 6 of the Committee of Ministers to Member States on Internally Displaced Persons', 5 April 2006.
- Committee of Ministers of the Council of Europe, 'Guidelines on human rights protection in the context of accelerated asylum procedures', 1 July 2009.

Soft Law

Council of Europe: Parliamentary Assembly

- Parliamentary Assembly of the Council of Europe, 'Recommendation 773 (1976) on *De Facto* Refugees', 26 January 1976.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1236 (1994) on the Right of Territorial Asylum', 12 April 1994.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-seekers in Europe', 24 April 1997.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1374 (1998) on Situation of Refugee Women in Europe', 26 May 1998.
- Parliamentary Assembly of the Council of Europe 'Recommendation 1440 (2000) on Restrictions on Asylum in the Member States of the Council of Europe and the EU', 25 January 2000.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1470 (2000) on Situation of Gays and Lesbians and Their Partners in Respect of Asylum and Immigration', 30 June 2000.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1475 (2000) on Arrival of Asylum-seekers at European Airports', 26 September 2000.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1503 (2001) on Health Conditions of Migrants and Refugees in Europe', 14 March 2001.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1550 (2002) on Combating Terrorism and Respect for Human Rights', 24 January 2002.
- Parliamentary Assembly of the Council of Europe 'Recommendation 1624 (2003) on Common Policy on Migration and Asylum', 30 September 2003.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1652 (2004) on Education of Refugees and Internally Displaced Persons', 2 March 2004.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1645 (2004) on Access to Assistance and Protection of Asylum-Seekers at European Seaports and Coastal Areas', 29 January 2004.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1644 (2004) on Terrorism', 29 January 2004.
- Parliamentary Assembly of the Council of Europe 'Resolution 1437 (2005) "Migration and Integration: a Challenge and an Opportunity for Europe"', 27 April 2005.

- Parliamentary Assembly of the Council of Europe, 'Recommendation 1703 (2005) on Protection and Assistance for Separated Children Seeking Asylum', 28 April 2005.
- Parliamentary Assembly of the Council of Europe, 'Resolution 1509 (2006) Human Rights of Irregular Migrants', 27 June 2006.
- Parliamentary Assembly of the Council of Europe, 'Resolution 1569 (2007) on Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum-Seekers', 1 October 2007.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1889 (2009) on Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States', 20 November 2009.
- Parliamentary Assembly of the Council of Europe Resolution 1707 (2010) on Detention of Asylum-Seekers and Irregular Migrants in Europe', 28 January 2010.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1901 (2010): Solving Property Issues of Refugees and Displaced Persons', 28 January 2010.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1917 (2010) Migrants and Refugees: A Continuing Challenge for the Council of Europe', 30 April 2010.
- Parliamentary Assembly of the Council of Europe, 'Resolution 1765 (2010) on Gender-Related Claims for Asylum', 8 October 2010.
- Parliamentary Assembly of the Council of Europe, 'Resolution 1768 (2010) Roma Asylum-Seekers in Europe', 12 November 2010.

Soft Law

Commissioner for Human Rights

- Commissioner for Human Rights 'Recommendation CommDH (01) 1 Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders', 19 September 2001.
- Commissioner for Human Rights 'Recommendation CommDH (04) 1 on Combating Trafficking of Children in Europe', 19 January 2004. Commissioner for Human Rights 'Preliminary Report CommDH (05) 4 on the Human Rights Situation of the Roma, Sinti and Travellers in Europe', 4 May 2005.

Commissioner for Human Rights, 'Human Rights Challenges of Migration in Europe' 17–18 February 2011.

Readings

Core

G. Tessenyi, 'Recommendations of the Committee of Ministers of the Council of Europe Concerning Asylum, Refugees and Other Persons', in *Legal Status of Refugees and Asylum-Seekers and the European Convention on Human Rights* (Chisinau, 2001), pp. 210–220.

Editor's Note

The Committee of Ministers is empowered to make recommendations to Member States on matters for which the Committee has agreed a 'common policy'. Recommendations of the Parliamentary Assembly contain proposals addressed to the Committee of Ministers, the implementation of which is the competence of national governments. Resolutions of the Parliamentary Assembly embody decisions on policy issues and have no binding effect.

V.1.2 The European Convention on Human Rights and Fundamental Freedoms

Main Debates

Refugee protection under regional v. universal treaties

Subsidiary protection under human rights treaties – a potential challenge to the primacy of the 1951 Convention?

Has the European Court of Human Rights (ECtHR) exhibited too much or too little deference to national refugee decision-making bodies?

Main Points

Scope of protection against *refoulement* under Art. 3 of the ECHR v. Arts 1 and 33 of the 1951 Convention

Effective remedies for rejected asylum seekers under the ECHR

Expulsion

Detention

Treaties

Regional

Core

European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, 4 November 1950 (213 E.T.S. 222).

Cases

Core

Art. 3 – prohibition of torture, inhuman or degrading treatment or punishment

Soering v. UK, ECtHR Judgement of 7 July 1989 (holding extradition from UK to USA of a German national charged with capital crime and at risk of serving on death row would be a violation of ECHR Art. 3, recognising the extra-territorial effect of ECHR provisions).

Cruz Varas and others v. Sweden, ECtHR judgement of 20 March 1991 (recognizing the extra-territorial effect of ECHR Art. 3 similarly applicable to rejected asylum seekers; finding no Art. 3 violation in expulsion of a Chilean national denied asylum, noting that risk assessment by State Party must be based on facts known at time of expulsion).

Velvarajah and others v. UK, ECtHR judgement of 30 October 1991 (finding no breach of Art. 3 although applicants claimed to have been subjected to ill-treatment upon return to Sri Lanka; this had not been a foreseeable consequence of the removal of the applicants, in the light of the general situation in Sri Lanka and their personal circumstances; a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Art. 3, and there existed no special distinguishing features that could or ought to have enabled the UK authorities to foresee that they would be treated in this way).

H.L.R. v. France, ECtHR judgement of 29 April 1997 (finding no violation of Art. 3 in case of expulsion of the applicant to Columbia, as there was no relevant evidence of risk of ill-treatment by non-state agents; thereby recognising that ill-treatment caused by such actors would fall within the scope of Art. 3 if the authorities are not able to obviate the risk by providing adequate protection).

Jabari v. Turkey, ECtHR judgement of 11 July 2000 (holding violation of Art. 3 in case of deportation that would return a woman who has committed adultery to Iran; Art. 13 violated as well due to the lack of an effective remedy with suspensive effect to challenge the rejection of her asylum claim).

- Venkadajalasarma v. Netherlands*, ECtHR judgement of 17 February 2004 (current situation in Sri Lanka makes it unlikely that Tamil applicant would run a real risk of being subject to ill-treatment after his expulsion from the Netherlands).
- Said v. Netherlands*, ECtHR judgement of 5 July 2005 (asylum seeker held to be protected against refoulement under Art. 3; the Dutch authorities had taken his failure to submit documents establishing his identity, nationality, or travel itinerary as affecting the credibility of his statements; the Court instead found the applicant's statements consistent, corroborated by information from Amnesty International, and thus held that substantial grounds had been shown for believing that, if expelled, he would be exposed to a real risk of ill-treatment as prohibited by Art. 3).
- Bader v. Sweden*, ECtHR judgement of 8 November 2005 (asylum seeker held to be protected against refoulement due to a risk of flagrant denial of fair trial that might result in the death penalty; such treatment would amount to arbitrary deprivation of life in breach of Art. 2; deportation of both the asylum seeker and his family members would therefore give rise to violations of Arts 2 and 3).
- D. and others v. Turkey*, ECtHR judgement of 22 June 2006 (deportation of woman applicant in view of the awaiting execution of severe corporal punishment in Iran would constitute violation of Art. 3, as such punishment would inflict harm to her personal dignity and her physical and mental integrity; violation of Art. 3 would also occur to her husband and daughter, given their fear resulting from the prospective ill-treatment of D).
- Salah Sheekh v. Netherlands*, ECtHR judgement of 11 January 2007 (asylum seeker held to be protected against refoulement under Art. 3; there was a real chance that deportation to 'relatively safe' areas in Somalia would result in his removal to unsafe areas, hence there was no 'internal flight alternative' viable; the Court emphasised that even if ill-treatment be meted out arbitrarily or seen as a consequence of the general unstable situation, the asylum seeker would be protected under Art. 3, holding that it cannot be required that an applicant establishes further special distinguishing features concerning him personally in order to show that he would be personally at risk).

Sultani c. France, ECtHR judgement of 20 September 2007 (finding no violation of Art. 3, despite the applicant's complaint that the most recent asylum decision within an accelerated procedure had not been based on an effective individual examination; the Court emphasized that the first decision had been made within the normal asylum procedure, involving full examination in two instances, and held this to justify the limited duration of the second examination which had aimed to verify whether any new grounds could change the previous rejection; in addition, the latter decision had been reviewed by administrative courts at two levels; the applicant had not brought forward elements concerning his personal situation in the country of origin, nor sufficient to consider him as belonging to a minority group under particular threat).

N.A. v. UK, ECtHR judgement of 17 July 2008 (the Court considered the general principles applicable to cases of expulsion or deportation of rejected asylum applicants, restating that substantial grounds must have been shown for believing that the applicant faces a real risk of treatment contrary to Art. 3; the assessment of the existence of such real risk must necessarily be a rigorous one, basing itself on both the general situation in the country of destination and the applicant's personal circumstances; while the Court will have regard to whether there is a general situation of violence in the country of destination, such a situation will not normally in itself entail a violation of Art. 3 in the event of deportation; however, the Court has never excluded the possibility that a general situation of violence in the country of destination will be of a sufficient level of intensity as to entail that any removal thereto would necessarily breach Art. 3, yet such an approach will be adopted only in the most extreme cases of general violence where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return; in addition, protection under Art. 3 exceptionally enters into play where there are serious reasons to believe that a certain group is systematically exposed to a practice of ill-treatment and the applicant establishes membership of such a group; in such circumstances, the Court will not insist that the applicant show the existence of further special distinguishing features; against that background, considering the cumulative factors in the case, the information about systematic torture and ill-treatment of Tamils found to be of interest

to the Sri Lankan authorities upon return, and the current climate of general violence and heightened security in Sri Lanka, there were substantial grounds for finding that the applicant would be considered of interest to the authorities, and therefore deportation at the present time would be a violation of Art. 3).

N. v. Sweden, ECtHR judgement of 20 July 2010 (deportation of woman to Afghanistan would give rise to a violation of Art. 3; the Court observed that women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system; reference was here made to UNHCR observations that Afghan women having adopted a less culturally conservative lifestyle, such as those returning from exile in Iran or Europe, continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment; actual or perceived transgressions of the social behavioural code include not only social behaviour in the context of a family or a community, but also sexual orientation, pursuit of a professional career, and mere disagreements as to the way family life is conducted; as the applicant had resided in Sweden since 2004, had attempted to divorce her husband, and had expressed a clear, real and genuine intention of not resuming the marriage, the Court could not ignore the general risk to which she might be exposed should her husband decide to resume their married life together, or should he perceive her filing for divorce as an indication of an extramarital relationship; in these special circumstances, there were substantial grounds for believing that the applicant would face various cumulative risks of reprisals falling under Art. 3 from her husband, his or her family, and from the Afghan society).

See also *Abdolkhani and Karimnia v. Turkey*, ECtHR judgement of 22 September 2009 (reiterating the interpretation of Art. 3 in *Salah Sheekh v. Netherlands* as regards the non-insistence on further special distinguishing features if the applicant establishes being a member of a group systematically exposed to a practice of ill-treatment).

Particular issues of evidence and proof

N. v. Finland, ECtHR judgement of 26 July 2005 (asylum seeker held to be protected against *refoulement* under Art. 3, despite the Finnish authorities’

doubts about his identity, origin, and credibility; two delegates of the Court were sent to take oral evidence from the applicant, his wife and a Finnish senior official; while retaining doubts about his credibility on some points, the Court found that the applicant's accounts on the whole had to be considered sufficiently consistent and credible; deportation would therefore be in breach of Art. 3).

R.C. v. Sweden, ECtHR judgement of 9 March 2010 (asylum seeker protected against deportation under Art. 3, despite the Swedish authorities' doubts about his credibility; while acknowledging the need to give asylum seekers the benefit of the doubt, the Court held that they must adduce evidence capable of proving that there are substantial grounds for believing that they would be exposed to a real risk of ill-treatment, and that they must provide a satisfactory explanation for alleged discrepancies if there are strong reasons to question the veracity of their submissions; if such evidence is adduced, it is for the State to dispel any doubts about it; and while accepting that national authorities are generally best placed to assess the facts and the credibility, the Court did not share their conclusion about the applicant's general credibility; the Court referred to a medical report concluding that the applicant's injuries were consistent with his alleged exposure to torture, thus corroborating his story about political activities in Iran, and to information on ill-treatment of demonstrators in Iran; as the applicant's account was consistent with that general information, he was held to have discharged the burden of proving that he had already been tortured, so that the onus to dispel any doubts about the risk was resting with the State; the current situation in Iran, and the specific risk facing Iranians returning from abroad without evidence of their legal departure from the country, were adding a further risk; the cumulative effect of these factors led the Court to conclude that there were substantial grounds for believing in a real risk of detention and ill-treatment of the applicant if deported to Iran).

Particular issues of national security and criminal offences

Chahal v. UK, ECtHR judgement of 15 November 1996 (holding that deportation of a Sikh separatist to India on national security grounds would be in breach of ECHR Art. 3, as he would face real risk of being subjected to treatment

contrary to Art. 3; the prohibition in Art. 3 is absolute also in expulsion cases, and the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration).

Ahmed v. Austria, ECtHR judgement of 17 December 1996 (reconfirming the absolute nature of Art. 3; deportation of a Somali convicted of serious criminal offences would therefore be a violation of Art.3, as the applicant was under the risk to be subjected to inhuman and degrading treatment by non-state agents upon expulsion).

Saadi v. Italy, ECtHR judgement of 28 February 2008 (reconfirming the absolute nature of the prohibition in Art. 3 of torture and inhuman or degrading treatment or punishment, and hence of the protection against *refoulement*, irrespective of the victim's conduct; the applicant had been prosecuted in Italy for participation in international terrorism and, as a result, his deportation to Tunisia was ordered, whereas in Tunisia he had been sentenced in absentia to 20 years' imprisonment for membership of a terrorist organization and for incitement to terrorism; noting the immense difficulties faced by States in protecting their communities from terrorist violence, the Court held that this cannot call into question the absolute nature of Art. 3, thus reaffirming the principle stated in *Chahal v. UK* that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion; the 'diplomatic assurances' sought by Italy from the Tunisian authorities were not accepted by the Court, stating that the existence of domestic law and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR; even if diplomatic assurances had been given by the receiving State, the weight to be given to such assurances would depend on the circumstances in each case, and the Court would still have to examine whether the assurances provided in their practical application sufficient guarantee against the risk of prohibited treatment).

See also *Muminov v. Russia*, ECtHR judgement of 11 December 2008; *Ben Khemais v. Italy*, ECtHR judgement of 24 February 2009; *O. v. Italy*, ECtHR judgement of 24 March 2009; *Abdolkhani and Karimnia v. Turkey*, ECtHR

judgement of 22 September 2009; *Trabelsi v. Italy*, ECtHR judgement of 13 April 2010; *A. v. Netherlands*, ECtHR judgement of 20 July 2010 (all reiterating the interpretation pronounced in *Saadi v. Italy* as regards the absolute nature of the prohibition in Art. 3).

Health issues

- D. v. UK*, ECtHR judgement of 2 May 1997 (applicant suffering from advanced stages of a terminal HIV/AIDS illness; expulsion to the country of origin, known for its lack of medical facilities and appropriate treatment in case, and where he would have no family or friends to care for him, would amount to inhuman treatment prohibited by Art. 3; the Court stressed the very exceptional circumstances of the case and the compelling humanitarian considerations at stake).
- Bensaid v. UK*, ECtHR judgement of 6 February 2001 (high threshold set by Art. 3, according to which a schizophrenic suffering from psychotic illness does not face a sufficiently real risk after his return to Algeria; not compelling humanitarian considerations as required under Art. 3, once the necessary treatment is available in the country of destination).
- Aoulmi v. France*, ECtHR judgement of 17 January 2006 (high threshold set by Art. 3, in particular if the departing State has no direct responsibility for the potential infliction of harm due to substandard health services in country of origin; not proven that the applicant could not receive adequate medical treatment upon expulsion to Algeria; the binding nature of Rule 39 indications was reconfirmed, hence deportation despite such indication was held to violate ECHR Art. 34).
- N. v. UK*, ECtHR judgement of 27 May 2008 (the ECtHR Grand Chamber maintained the high threshold set in *D v. UK* concerning cases of removal of aliens suffering from a serious mental or physical illness to a country where the facilities for treatment of that illness are inferior to those available in the CoE State; such decisions may raise an issue under Art. 3, but only in very exceptional cases where the humanitarian grounds against the removal are compelling; Art. 3 was held principally to prevent deportation where the risk of ill-treatment in the destination country would emanate from intentional acts or omissions of public authorities, or from non-State bodies when the authorities are unable to afford the applicant appropriate protection;

the fact that the alien's circumstances, including life expectancy, would be significantly reduced is not sufficient in itself to give rise to breach of Art. 3; the applicant had been diagnosed as having two AIDS defining illnesses, but was not presently considered critically ill, so her case was not found to disclose very exceptional circumstances such as in *D v. UK*, and implementation of the removal decision would therefore not give rise to a violation of Art. 3).

Internal protection alternative

Hilal v. UK, ECtHR judgement of 6 March 2001 (expulsion of Tanzanian opposition party member, having previously suffered serious ill-treatment in detention, would be contrary to Art. 3; no 'internal flight alternative' found to be viable in his case).

See also *Chahal v. UK*, ECtHR judgement of 15 November 1996; *Salah Sheekh v. Netherlands*, ECtHR judgement of 11 January 2007 (summaries above).

Family issues

Mayeka and Mitunga v. Belgium, ECtHR judgement of 12 October 2006 (the arrest, detention and subsequent deportation of a 5 year old child, transiting Belgium in order to join her mother living as a refugee in Canada, held to be in violation of Arts 3, 5, and 8; breaches of Art. 3 were found both due to the conditions of the child's detention, the conduct of the deportation of the child to DR Congo, and the resulting distress and anxiety suffered by her mother).

Muskhadzhiyeva and others v. Belgium, ECtHR judgement of 19 January 2010 (detention of four children aged 7 months, 3½ years, 5 years and 7 years, awaiting transfer to Poland under the Dublin Regulation, over a month in the same closed centre as in the aforementioned case, not designed to house children, held to be in violation of Arts. 3 and 5; as the mother had not been separated from the children, her treatment had not reached the level of severity required to constitute inhuman treatment, and her detention had been lawful in accordance with Art. 5).

See also *D. and others v. Turkey*, ECtHR judgement of 22 June 2006 (summary above).

Procedural issues

Mamatkulov and Askarov v. Turkey, ECtHR judgement of 4 February 2005 (evidence insufficient to find a violation of Art. 3 by the applicants' extradition from Turkey to Uzbekistan; the extradition constituted Turkey's non-adherence to the Court's indication of interim measures under Rule 39 of the Rules of Court, thereby violating ECHR Art. 34).

Ben Khemais v. Italy, ECtHR judgement of 24 February 2009 (violation of Art. 3 due to deportation of the applicant to Tunisia; 'diplomatic assurances' alleged by the respondent Government could not be relied upon; violation of Art. 34 as the deportation had been carried out in spite of an ECtHR decision issued under Rule 39 of the Rules of Court).

Trabelsi v. Italy, ECtHR judgement of 13 April 2010 (violation of Art. 3 due to deportation of the applicant to Tunisia; 'diplomatic assurances' alleged by the respondent Government could not be relied upon; violation of Art. 34 as the deportation had been carried out in spite of an ECtHR decision issued under Rule 39 of the Rules of Court).

M.S.S. v. Belgium and Greece, ECtHR judgement of 21 January 2011 (upholding the principle previously adopted in *T.I. v. UK*, admissibility decision of 7 March 2000, according to which the deporting State is responsible under ECHR Art. 3 for the foreseeable consequences of the deportation of an asylum seeker to another EU Member State, even if the deportation is being decided in accordance with the Dublin Regulation; the responsibility of the deporting State comprises not only the risk of indirect *refoulement* by way of further deportation to risk of ill-treatment in the country of origin, but also the conditions in the receiving Member State if it is foreseeable that the asylum seeker may there be exposed to treatment contrary to Art. 3; thus, Greece was held to have violated Art. 3 due to the detention conditions and the absence of any measures to cover the applicant's basic needs during the asylum procedure; Belgium too was in violation of Art. 3 by having returned the applicant to Greece and thereby having knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment; the deficiencies in the Greek asylum procedure and the consequent risk that the applicant might have been returned to Afghanistan without any serious examination of the merits of his asylum application, and without

having access to an effective remedy in Greece, was held to be a violation of Art. 13 in conjunction with Art. 3; since the Belgian authorities knew or ought to have known that the applicant would have no guarantee that his asylum application would be seriously examined by the Greek authorities, the transfer from Belgium to Greece under the Dublin Regulation had given rise to a violation of Art. 3 by Belgium).

Extended

Art. 3 – prohibition of torture, inhuman or degrading treatment or punishment

Gomes v. Sweden, ECtHR admissibility decision of 7 February 2006 (application declared inadmissible; the complaints of risk of death penalty, life imprisonment and torture held to be manifestly ill-founded due to the contradictory information given by the applicant to the Swedish authorities, and the lack of documents substantiating his allegations).

Ayegh v. Sweden, ECtHR admissibility decision of 7 November 2006 (application declared inadmissible; the authenticity of documents invoked by the applicant was in dispute, and she was found not to have established a real risk to her life or physical integrity if deported to Iran; if the benefit of the doubt is to be given to asylum seekers, they must provide satisfactory explanation when the veracity of their submissions is questioned).

R (on the applications of Adam, Tesema, and Limbuela) v. Secretary of State for the Home Department (2004), 2004 EWCA 540, All ER (D) 323, Judgements of 21 May 2004 (UK judicial decision holding failure to provide shelter and assistance to destitute asylum seekers violates ECHR Art. 3).

S.D. v. Greece, ECtHR judgement of 11 June 2009 (violation of Art. 3 due to the conditions of detention in holding centres for foreigners).

A.A. v. Greece, ECtHR judgement of 22 July 2010 (violation of Art. 3 both due to the conditions in detention centre and to the Greek authorities' lack of diligence in providing the applicant with appropriate medical assistance).

Art. 1 – territorial scope of applicability

Xhavara et al. c. Italie et Albanie, ECtHR admissibility decision of 11 January 2001 (Italian jurisdiction as regards the incident of a collision between an Italian military vessel and an Albanian boat that was intercepted by the Italian vessel, resulting in the death of irregular immigrants on-board the boat, was

undisputed; the application to the ECtHR was declared inadmissible due to non-exhaustion of domestic remedies).

Al-Adsani v. UK, ECtHR judgement of 21 November 2001 (state not responsible for torture that had taken place outside the Council of Europe Member State jurisdiction and was committed by agents of another State, even in case of an applicant of dual British/Kuwaiti citizenship; any positive obligation deriving from ECHR Arts 1 and 3 could extend only to the prevention of torture).

Medvedyev and Others v. France, ECtHR judgement of 10 July 2008, upheld by Grand Chamber judgement of 29 March 2010 (case not regarding asylum issues; however, the Court interpreted Art. 1 so as to imply State responsibility in an area outside national territory when, as a consequence of military action, it exercises control of that area, or in cases involving activities of its diplomatic or consular agents abroad and on-board aircraft and ships registered in the State concerned; as France had exercised full and exclusive control over a cargo vessel and its crew, at least de facto, from the time of its interception, and the crew had remained under the control of the French military, the applicants were held to have been effectively within the jurisdiction of France).

Art. 5 – deprivation of liberty

Saadi v. UK, ECtHR judgement of 11 July 2006, upheld by Grand Chamber judgement of 29 January 2008 (detention of an asylum seeker for 7 days to facilitate the examination of the case found to be justified under Art. 5 (1) (f); it was considered a necessary adjunct to the right of States to control aliens' entry and residence that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not; until the State has authorised entry, any entry is 'unauthorised' and detention is permissible under Art. 5 (1) (f), provided that such detention is not arbitrary; this requires that detention must be carried out in good faith, be closely connected to the purpose of preventing unauthorised entry, the place and conditions of detention should be appropriate, and the duration should not exceed that reasonably required for the purpose pursued; however, informing the applicant's lawyer of the reason for the detention of his client after 76 hours of detention was incompatible with the requirement under Art. 5 (2) to provide such information promptly).

S.D. v. Greece, ECtHR judgement of 11 June 2009 (violation of Art. 5, since detention with a view to expulsion of the applicant had no legal basis in Greek law, and the applicant had been unable to have the lawfulness of his detention reviewed by the courts).

A.A. v. Greece, ECtHR judgement of 22 July 2010 (violation of Art. 5 as the period of detention subsequent to the registration of the applicant's asylum request had been unnecessary for the aim pursued; the applicant had further been unable to have the necessary judicial review of the lawfulness of his detention).

Louled Massoud v. Malta, ECtHR judgement of 27 July 2010 (reiterating the interpretation of Art. 5 pronounced in *Saadi v. UK* as regards the protection from arbitrariness; Art. 5 held to be violated due to the failure of the national system to protect the applicant from arbitrary detention, and his prolonged detention could not be considered to have been lawful; it had not been shown that the applicant had at his disposal under domestic law an effective and speedy remedy for challenging the lawfulness of his detention).

Art. 9 – right to freedom of religion

Z. and T. v. UK, ECtHR admissibility decision of 28 February 2006 (application declared inadmissible; the Court not ruling out the possibility that, in exceptional circumstances, there might be protection against *refoulement* on the basis of Art. 9 where the person would run a real risk of flagrant violation of that provision in the receiving state).

Art. 13 – right to effective remedy

Conka v. Belgium, ECtHR judgement of 5 February 2002 (the detention of rejected Roma asylum seekers before deportation to Slovakia constituted a violation of Art. 5; due to the specific circumstances of the deportation the prohibition against collective expulsion under Protocol 4 Art. 4 was violated; the procedure followed by the Belgian authorities did not provide an effective remedy in accordance with Art. 13, requiring guarantees of suspensive effect).

Gebremedhin v. France, ECtHR judgement of 26 April 2007 (holding that the particular border procedure declaring 'manifestly unfounded' asylum applications inadmissible, and refusing the asylum seeker entry into the territory, was incompatible with Art. 13 taken together with Art. 3; emphasising that in order to be effective, the domestic remedy must have suspensive effect as of right).

Abdolkhani and Karimnia v. Turkey, ECtHR judgement of 22 September 2009 (holding a violation of Art. 13 in relation to complaints under Art. 3; the notion of an effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim to risk of *refoulement* under Art. 3, and a remedy with automatic suspensive effect; the Court was not persuaded by the respondent State's argument that the applicants had failed to request asylum when entering Turkish territory, as this argument was not supported by any documents; in the absence of a legal procedure governing deportation and providing procedural safeguards, there were reasons to believe that their requests would not have been officially recorded; the administrative and judicial authorities had remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran, amounting to a lack of the rigorous scrutiny required by Art. 13).

See also *Jabari v. Turkey*, ECtHR judgement of 11 July 2000 (summary above); *Keshmiri v. Turkey*, ECtHR judgement of 13 April 2010 (violation of Art. 13, case almost identical to *Abdolkhani and Karimnia v. Turkey*).

Readings

Core

H. Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', *Refugee Survey Quarterly*, vol. 24, no. 2 (2005), pp. 39–55, 40–49.

UNHCR, *UNHCR Manual on Refugee Protection and the European Convention on Human Rights* (April 2003, updated February 2007).

Extended

P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, (Antwerp – Oxford: Intersentia, 2006), pp. 19–23, 427–40.

J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Ardsley Transnational Publishers Inc., 2002), pp. 359–427.

N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2010).

- G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *International Journal of Refugee Law*, vol. 17, no. 3 (2005), pp. 542–573.
- R. C. A. White and C. Ovey, *Jacobs, White and Ovey, The European Convention on Human Rights*, (Oxford: Oxford University Press, 2010), pp. 179–182.

Editor's Note

The use of case law and case studies is an effective method for teaching the scope of protection offered by the ECHR. Complex issues of State jurisdiction under ECHR Art. 1 arise in connection with the exercise of extra-territorial immigration controls, whether in foreign territories or in international maritime areas.

Note the practical importance of interim measures under rule 39 of the Rules of Court, according to which the ECtHR may request the CoE Member State not to enforce a removal decision while the application submitted to the Court is still pending.

In addition to the scope of protection against refoulement, ECtHR judgements may also illustrate the occurrence of human rights violations in certain CoE Member States from which asylum seekers in other European States originate, as well as EU Member States to which other Member States consider transferring asylum seekers under the Dublin Regulation.

To compare the absolute protection under Art. 3 of the ECHR with Arts 1 F and 33 of the 1951 Convention, see Section II.1.1 and Section II.2.1.6.

V.2. The European Union

The EU comprises 27 Member States. It was established through three treaties signed by six European states in the 1950s, the most important being the EEC Treaty of 1957. Its original objectives were to achieve economic integration in the region. Three main transformations have subsequently taken place, which have significantly impacted upon the asylum field. These have resulted, firstly, from the continued enlargement of the group of states participating to 27 at present; secondly, through the consolidation of EU law in this area, which now takes priority over the national law of the Member States; and thirdly, the widening of the Union's responsibilities with the addition of justice and home affairs, including asylum and migration, as a Union or Community competence, in

1999. From that date the EU has been a central actor in determining the law of international protection in the Member States. The EU's structure incorporates several key institutions including the European Parliament, the European Council and the Court of Justice of the European Union (CJEU).

In addition, EU asylum law and practice has great potential to influence significantly the development of the international protection system more broadly. This is in part because many countries look to the EU as a leading standard-setter in legal and normative terms. In addition, however, given that State practice is a source of international law, harmonized practice (if and when it is achieved) in 27 EU Member States will be extremely important in contributing to the evolution of international refugee law worldwide.

Editor's Note

This section is structured to provide an overview of EU developments of refugee law. The section starts with the criteria and contents of protection and then follows the road of the asylum seeker attempting to access the procedure in order to be recognised as in need of protection.

V.2.1 Towards a Common European Asylum System (CEAS)

Main Debates

What are the objectives of EU involvement in asylum law?

Does it aim at human rights protection, application of asylum in the context of the EU internal market, or establishment of fortress Europe?

Is the EU involvement in asylum law raising or lowering standards in practice?

What is the relationship of the 1951 Geneva Convention with EU asylum law?

What is the relationship between the 1951 Geneva Convention and Member States' national law enacted pursuant to the European community instruments?

What are the possible implications of the EU's decision to work towards full establishment of a common European asylum system by 2010?

Main Points

Historical development of EU law on asylum

Evolving EU competences over asylum matters

Human rights and the EU

Institutional actors and their powers and roles

Evolving roles of the different EU institutions in EU asylum law- and policy-making

Readings

Core

- E. Guild, 'The Europeanisation of Europe's Asylum policy', *International Journal of Refugee Law*, vol. 18 (2006), pp. 630–651.
- S. S. Juss, 'The Decline and Decay of European Refugee Policy', *Oxford Journal of Legal Studies*, vol. 25 (2005), pp. 749–792.

V.2.1.1 Evolution of the CEAS

EU Documents

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU, COM (2008) 360, 17 June 2008.
- Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, COM (2004) 401, 2 June 2004.
- Commission Staff Working Paper, Annex to Communication from the Commission: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, SEC (2004) 693, 2 June 2004.
- Commission Staff Working Paper, The Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations – List of the most Important Instruments Adopted, SEC (2004) 680, 2 June 2004.

UNHCR Documents

- UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, vol. 1, no. 3, European Series (Geneva: UNHCR, 1995).

UNHCR, 'Towards a Common European Asylum Policy', in C. Dias Urbano de Sousa and P. De Bruycker, *The Emergence of a European Asylum Policy* (Brussels: Bruylant, 2004), pp. 227–295.

Readings

Core

- O. Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (The Hague: T.M.C. Asser Press, 2007), Chapter 1.
- J. McAdam, 'Regionalising International Refugee Law in the European Union', *Victoria University of Wellington Law review* 255A, vol. 38, no. 2 (2007), pp. 255–280.
- F. Nicholson, 'Challenges to Forging a Common European Asylum System in line with the International Obligations' in S. Peers and N. Rogers, *EU Immigration and Asylum Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), pp. 505–537.

Extended

- I. Boccardi, 'After Amsterdam: Towards an EU Asylum Policy?', *Europe and Refugees: Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), Chapter 6.
- S. Craig, 'The European Commission's Proposals for Directives to Establish a Common European Asylum System: The Challenges of Accession and the Dangers of Negative Integration', *European Law Review*, vol. 27, no. 4 (2002), pp. 497–502.
- ECRE (ECRE, ENAR, MPG), 'Guarding Standards – Shaping the Agenda: Analysis of the Treaty of Amsterdam and Present EU Policy on Migration Asylum and Anti-Discrimination', April 1999.
- S. Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', *European Journal of Migration and Law*, vol. 10, no. 2 (2008), pp. 219–247.
- E. Thieleman and N. El-Enany, 'The Myth of 'Fortress Europe': The (True) Impact of European Integration on Refugee Protection', paper presented at Fourth ECPR Pan-European Conference on EU Politics, 25 to 27 September 2008, University of Latvia, Riga, Latvia.

V.2.1.2 Ongoing Development of the CEAS

EU Documents

- Treaty on the Functioning of the European Union, Title V, Chapter 2, Consolidated version, OJ C 83/47, 30 March 2010, p. 75.
- Treaty of the European Union, Consolidated version, OJ C 83/13, 30 March 2010.
- Protocol No 24 on Asylum for Nationals and Member States of the EU, OJ C 83/305, 30 March 2010.
- The Charter of Fundamental Rights of the EU (including notably Arts. 18 and 19), OJ C 83/389, 30 March 2010.
- European Commission: Green Paper on the Future Common European Asylum System, COM (2007) 301 final, 6 June 2007.
- European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ C 53, 3 March 2005.
- European Council, 'The Stockholm Program – An Open and Secure Europe Serving and Protecting Citizens', OJ C 115/1, 4 May 2010.
- European Commission, 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan Implementing the Stockholm Programme', COM (2010) 171, 20 April 2010.
- Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 19 May 2010.

Readings

Core

- H. Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), Chapter 2.
- E. Collet, 'The European Union's Stockholm Program: Less Ambition on Immigration and Asylum, But More Detailed Plans', Migration Information Source, January 2010.
- A. Missiroli, J. Emmanouilidis, Implementing Lisbon: the EU's Presidency's other (rotating) half, Paper European Policy Centre, December 2009.

Extended

J. Pirjola, 'European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language', *European Journal of Migration and Law*, vol. 11, no. 4 (2009), pp. 347–366.

ECRE, Comments on the Proposal for a Regulation establishing a European Asylum Support Office, 29 April 2009.

Editor's Note

The Court of Justice of the European Union (CJEU) has begun its work providing common definitions of the core legal measures adopted as part of the CEAS. We can expect over the next years that important and unresolved issues of the CEAS will come before the Court. The rules on access to the CJEU changed in 2009 when the Lisbon Treaty created two new treaties and the restrictions precluding lower courts from referring questions to the CJEU were lifted. Among the outstanding question is how the CJEU will interpret the CEAS in the light of the 1951 Geneva Convention.

The Treaty of Lisbon amended the Treaty on European Union (TEU), which retains its name, and the Treaty Establishing the European Community (TEC), which is renamed as the Treaty on the Functioning of the European Union (TFEU).

The legislative procedure for measures in the CEAS now follows the normal EU procedures of co-decision with the European Parliament. The Commission, as guardian of the Treaties, is responsible for ensuring that there is a common application of the CEAS in the Member States. This is challenging and the Commission has begun a number of enforcement procedures against Member States for failure to comply with the CEAS.

V.2.2 Criteria for Granting Protection

V.2.2.1 Harmonization of the 1951 Geneva Convention Refugee Definition

Main Debates

Is the EU legislation on qualification for protection consistent with the 1951 Geneva Convention?

How should the 1951 Geneva Convention exclusion clauses be applied in the context of the 'fight against terrorism'?

Main Points

Different interpretations of the refugee definition among Member States

Persecution by non-state agents

Protection by non-state agents

Gender and sexual orientation

Refugee sur place

Internal flight alternative

Compatibility of rules on exclusion, revocation, cessation with 1951 Geneva Convention

Differentiation in rights accorded to 1951 Geneva Convention refugees and subsidiary protection beneficiaries
Cessation and exclusion

EU Documents

European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM (2009) 551, 21 October 2009.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30 September 2004.

UNHCR Documents

UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM (2009) 551, 21 October 2009, 29 July 2010.

UNHCR comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 28 January 2005.

UNHCR, 'Asylum in the European Union', A Study of the Implementation of the Qualification Directive, November 2007.

UNHCR, ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, No. 103 (LVI), 7 October 2005, paragraph (k).

UNHCR Statement on the "Ceased Circumstances" clause of the EC Qualification Directive, 1 August 2008.

UNHCR Statement on Article 1F of the 1951 Convention, July 2009.

Cases

Federal Republic of Germany v. B (C-57/09), *D*(C-101/09), Court of Justice of the EU, 9 November 2010.

Aydin Salahadin Abdulla and others v. Federal Republic of Germany, C-175/08, Court of Justice of the EU, 2 March 2010.

Opinion in the case of *Abdulla*, joined cases C-175/08, C-176/08, C-178/08, C-179/08 by Advocate General Mazák, Court of Justice of the EU, 15 September 2009.

Opinion in the case of *Germany v. B and D*, joined cases C-57/09 and C-101/09, by Advocate-General Mengozzi, Court of Justice of the EU, 1 June 2010.

Bolbol Nawras v. Bevándorlási és Állampolgársági Hivatal, Case C-31/09, Preliminary reference from the Fővárosi Bíróság (Hungary) lodged on 26 January 2009.

Opinion in the case of *Bolbol Nawras* by Advocate General Sharpston, C-31/09, Court of Justice of the EU, 4 March 2010.

Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department, 2006 UKHL 46.

See also the cases *Chahal v. UK* (V.1.2) and *Adan and Aitseguer* (V.2.4.1).

Readings

Core

N. Blake, 'The Impact of the Minimum Standards Directive 2004/83/EC on National Case Law', in *The Asylum Process and the Rule of Law, IARLJ World Conference publication, April 2005 Stockholm* (New Delhi: Manak Publications, 2006).

M. Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly*, vol. 27, no. 3 (2008), pp. 33–52.

- E. Guild and M. Garlick, 'Refugee Protection, Counter-Terrorism and Exclusion in the European Union', in *Refugee Survey Quarterly*, vol. 29, no. 4 (2010), p. 63–82.
- J. McAdam, 'The Qualification Directive: An Overview', in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers 2007).

Extended

- H. Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International Comparative Law Quarterly*, vol. 55 (2006), pp. 161–192.
- H. Storey, 'EU Refugee Qualification Directive: a Brave New World?', *International Journal of Refugee Law*, vol. 20 (2008), pp. 1–49.

V.2.2.2 Subsidiary Protection

Main Debates

- Does subsidiary protection threaten the 1951 Geneva Convention?
- Are the needs of subsidiary protection beneficiaries less pressing or durable than those of refugees?
- Is there a justification for giving different levels of entitlements to refugees and subsidiary protection beneficiaries?

Main Points

- Relationship between directive and refugee determination process
- Diminished rights under the EC temporary protection regime compared with 1951 Geneva Convention rights

EU Documents

- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.
- Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554/4.

UNHCR Documents

UNHCR, Statement on subsidiary protection under the EC Qualification Directive for people threatened by indiscriminate violence (Art 15(c)), January 2008.

See also the UNHCR documents in Section V.2.2.1.

Cases

M. and N. Elgafaji v. Staatssecretaris van Justitie, C-465/07, 17 February 2009.

Opinion in the case of *Elgafaji*, by Advocate-General Poiares Maduro, Court of Justice of the EU, 9 September 2008.

KH (Article 15(c) Qualification Directive) Iraq v. Secretary of State for the Home Department. CG [2008] UKAIT 00023. United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 25 March 2008.

Readings

Core

H. Battjes, 'Subsidiary Protection and Reduced rights', in K. Zwaan (ed.) *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007), pp. 49–55.

ECRE, *Complementary Protection in Europe*, 29 July 2009.

R. Errera, 'The ECJ and Subsidiary Protection: Reflections on Elgafaji – and After', European Asylum Law Judges Association, European Academy Workshop, 19–20 October 2009.

Extended

M. Gil-Bazo, 'Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EC law', Research paper No. 136, UNHCR, November 2006.

G. Noll, 'International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive', in C. Dias Urbano de Sousa and P. De Bruycker (eds), *The Emergence of a European Asylum Policy* (Brussels: Bruylant, 2004), pp. 183–194.

Editor's Note

See Section II.3.2 about other forms and instruments of protection after the 1951 Convention.

V.2.2.3 Temporary Protection

Main Debate

Does temporary protection threaten the 1951 Geneva Convention?

Main Point

Diminished rights under the EC temporary protection regime compared with 1951 Geneva Convention rights

EU Document

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L212 12, 7 August 2001.

Readings

Core

- N. Arenas, 'The Concept of 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System', *European Journal of Migration and Law*, vol. 7 (2005), pp. 435–450.
- K. Kerber, 'The Temporary Protection Directive', *European Journal of Migration and Law*, vol. 4 (2002), pp. 193–214.
- G. Tessenyi, 'Massive Refugee Flows and Europe's Temporary Protection', in S. Peers and N. Rogers (eds), *EU Immigration and Asylum law: text and commentary* (Leiden: Martinus Nijhoff Publishers, 2006), pp. 487–504.

Readings

Extended

- D. Joly, 'Temporary Protection and the Bosnian Crises: a Cornerstone of the New European Regime', in D. Joly (ed.), *Global Changes in Asylum Regimes* (Basingstoke: Palgrave/Macmillan, 2002), pp. 49–78.

Editor's Note

Temporary Protection is not in itself a status. Rather it is an administrative measure to deal with mass influx situations for a limited period of time. It can be combined with a suspension of the examination of individual claims. Temporary Protection can only apply on a group basis following a political decision by the Council.

Compare the substantive rights for a person in an EC Temporary Protection regime with those for asylum seekers provided for in the Directive on Reception Conditions, on the one hand, and those for refugees provided for in the Geneva Convention and the Qualification Directive on the other.

V.2.3 Access to Territory and Access to Procedures

Main Debates

Displacement activities v. duty to provide protection

Non-entrée policies v. duty to provide protection

Main Point

Tension between objectives of migration control, particularly control of irregular migration, and protection obligations

EU Document

Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), OJ L 105, 13 April 2006.

UNHCR Document

UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 26 January 2007.

Cases

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section V.1.2).

Readings

Core

ECRE, *Defending Refugees' Access to Protection in Europe*, December 2007.

J. van der Klaauw 'Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?', in B. Bogusz, R. Cholewinski, A. Cygan, and E.

Szyszczyk (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), Chapter II.6.

Extended

Oxfam, 'Foreign Territory: The Internationalisation of EU Asylum Policy' (Oxford: Oxfam, 2005), pp. 7–69.

T. Spijkerboer, 'Briefing Paper: Trends in the Different Legislations of the Member States Concerning Asylum in the EU: The Human Costs of Border Control', IPOL/C/LIBE/FWC/2005-23-SC1 PE 378.258, 2006.

Editor's Note

Examine how attempts to reconcile migration control and protection have been made when EC legislation was proposed and applied in practice and when the legislation was adopted.

V.2.3.1 The EU's External and Internal Borders

Main Debates

Are states entitled to prevent arrival at their borders of persons seeking protection?
Do the 1951 Geneva Convention and article 3 of the ECHR create a right of access to territory?

Main Points

The claim to state sovereignty as regards the control of borders
Absence of a right to cross a border as such under international law
Borders in asylum regions

EU Documents

Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM (2010) 61 final, 24 February 2010.

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199, 31 July 2007.

Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of third Countries, OJ C 221, 19 July 1997.

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1, 25 November 2004.

Report on the Evaluation and Future Development of the FRONTEX Agency, COM (2008) 67.

UNHCR Document

UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), COM (2010) 61 final.

Readings

Core

S. Carrera, 'Towards a Common European Border Service?', CEPS Working Document no. 331, June 2010.

House of Lords–European Union Committee, 'Frontex, the EU External Borders Agency', 9th Report of Session 2007–08.

Meijers Committee, Views on the Commission Report on the Evaluation and Future Development of the FRONTEX Agency COM (2008) 67 final, 4 April 2008.

Extended

R. Cholewinski, 'No Right of Entry: The Legal Regime on Crossing the EU Border', in K. Groenendijk, E. Guild, and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).

- E. Guild, 'Jurisprudence of the ECHR: Lessons for the EU Asylum Policy', in C. Dias Urbano de Sousa and P. de Bruycker (eds), *The Emergence of a European Asylum Policy* (Brussels: Bruylant, 2004), pp. 329–342.
- E. Haddad, 'The External Dimension of EU Refugee Policy: a New Approach to Asylum?', *Government and Opposition*, vol. 43, no. 2 (2008), pp. 190–205.
- S. Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea', *European Journal of Migration and Law*, vol. 12 (2010), pp. 1–21.
- V. Mitsilegas, J. Monar & W. Rees, *The EU and Internal Security* (Basingstoke: Palgrave/ Macmillan 2003), pp. 109–111.
- E. Papastavridis, 'Fortress Europe' and Frontex: Within or Without International Law?', *Nordic Journal of International Law*, vol. 79 (2009), pp. 75–111.
- S. Peers, 'Key Legislative Developments on Migration in the European Union: SIS II', *European Journal of Migration and Law*, vol. 10 (2008), pp. 77–104.

Editor's note

See also the *Gebremedhin v. France* case in Section V.1.2 and the *Prague Airport* case in Section V.2.3.2.

V.2.3.2 Interception and Rescue at Sea

Main Debates

Who has responsibility for asylum-seekers intercepted or rescued at sea?
 How does the position change if they are intercepted or rescued by Member States' registered vessels in
 Member States' territorial waters?
 international waters?
 the waters of third states?

Main Point

Interaction between international law of the sea and rules of refugee and human rights law

EU Documents

Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007.

Draft Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, Council Doc. 5323/1/10, 21 January 2010.

UNHCR Documents

UNHCR ExCom, 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 10 October 2003.

UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea', 1 March 2002.

UNHCR, Selected Reference Materials: Rescue at Sea, Maritime Interception and Stowaways, November 2006.

UNHCR, Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees, September 2006.

Readings

Core

R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, vol. 53, no. 1 (January 2004), pp. 47–77.

A. Fischer-Lescano, L. Tillmann & T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, vol. 21, no. 2 (April 2009), pp. 256–296.

M. Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies*, vol. 17, no. 1 (March 2004), pp. 50–69.

R. Weinzierl & U. Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea* (German Institute for Human Rights, 2008).

Cases

R (on the application of European Roma Rights Centre et al) v Immigration Officer at Prague Airport & Anor (UNHCR intervening), 2004 UKHL 55; 2005, 2 AC 1.

V.2.3.3 Visas

Main Debates

Are visas a mechanism to move border control beyond the physical border?

Do protection seekers have a right to a visa even if they are in their country of origin?

Immigration control v. human rights protection

Main Points

Content of EU visa rules, particularly visa list and visa format

Connections between visa rules and asylum issues

EU Documents

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ L 243/1, 15 September 2009.

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

Council Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405, 30 December 2006.

Council Regulation (EC) No 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa OJ L150 of 6 June 2001.

Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas OJ L53 of 23 February 2002.

Council Regulation (EC) No 1683/95 laying down a uniform format for visas, amended by Regulation (EC) 334/2002 of 18 February 2002 – consolidated version.

Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, OJ L 99, 17 April 2003.

Council Decision (EC) No 512/2004 establishing the Visa Information System (VIS), OJ L 213, 15 June 2004.

Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism OJ L 141, 4 June 2005.

Readings

Extended

- E. Guild, 'The Border Abroad: Visas and Border Controls' in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2003).
- A. Meloni, *Visa Policy within the European Union Structure* (Berlin/New York: Springer, 2006), pp. 24–41.
- S. Peers, 'Legislative Update, EC Immigration and Asylum Law: The New Visa Code', *European Journal of Migration and Law*, vol. 12 (2010), pp. 105–131.
- S. Peers, 'EC Immigration and Asylum Law 2008: Visa Information System', *European Journal for Migration and Law*, vol. 11 (2009), pp. 69–94.

Editor's Note

Note the imposition of visas on every country producing large numbers of refugees/asylum-seekers and the inevitable impact on the likelihood that they will enter illegally and/or use facilitators for smuggling them in. Readers should recall Article 31 of the 1951 Geneva Convention.

V.2.3.4 Carrier Sanctions

Main Debates

Are carrier sanctions permitted under the letter of the 1951 Geneva Convention? Should non-state parties be responsible for pre-screening asylum seekers?

Main Point

Carrier sanctions as a deflection mechanism

EU Documents

Council Directive (EC) 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement OJ L187, 10 July 2001.

Council Directive (EC) 2004/82 on the obligation of carriers to communicate passenger data OJ L261, 6 August 2004.

Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air OJ L 321, 6 December 2003.

Readings

Core

- E. Basaran, 'Evaluation of the Carriers Liability Regime as a Part of the EU Asylum Policy under Public International law', *Uluslararası Hukuk ve Politika*, vol. 4, no. 15 (2008), pp. 149–163.
- V. Guiraudon, 'Before the EU Border: Remote Control of the "Huddled Masses"', in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2003), pp. 191–214.
- F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', *International Comparative Law Quarterly*, vol. 46 (1997), pp. 586–634.

Extended

- A. Cruz, *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (Stoke-on-Trent: Trentham Books Limited, 1995).
- P. Minderhoud & S. Scholten, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', *European Journal on Migration and Law*, vol. 2 (2008), pp. 123–147.

V.2.3.5. Extraterritorial Immigration Control and Extraterritorial Processing

Extraterritorial immigration control refers inter alia to the system of immigration liaison officers used for some time by EU Member States which post officials from their border services in other countries, to reinforce checks and controls on entry to their territory from the point of departure. In addition, recent years have seen several debates about the possibility of obliging asylum seekers to request asylum of the EU from countries outside the Union, with the implication that this would be accompanied by restrictions on entry and/or rights to seek asylum within the EU.

Main Debates

What are the potential arguments for and against the legality of processing requests for asylum in the EU while claimants remain outside EU territory?

What practical problems could result from such a policy?

What are the potential implications of making financial assistance to non-EU States conditional upon more restrictive border control?

Main Points

External relations policy as tool to persuade non-EU States to carry out EU policies

Future prospect of external processing of asylum applications

EU Documents

Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin 'Improving access to durable solutions', COM (2004) 410, 4 June 2004.

Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM (2005) 388, 1 September 2005.

Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions. 'Migration and Development: Some Concrete Orientations' COM (2005) 390.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Common Immigration Policy for Europe: Principles, Actions and Tools, COM (2008) 359, 17 June 2008.

UNHCR Document

UNHCR, 'Observations on the Communication on Regional Protection Programmes', 10 October 2005.

Readings

Core

M. Garlick & J. Kumin, 'Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control', in B. Martenczuk and S. van Thiel

(eds), *Justice, Liberty and Security: New challenges for EU External Relations*, (Brussels: VUB Press, 2008).

- S. Peers, 'EU Migration Law and Association Agreements', in B. Martenczuk and S. van Thiel, *Justice, Liberty and Security: New Challenges for EU External Relations* (Brussels: VUB Press, 2008).
- B. Vandvik, 'Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE', 26 September 2008.
- K. De Vries, 'An Assessment of "Protection in Regions of Origin" in Relation to European Asylum Law', *European Journal of Migration and Law*, vol. 9 (2007), pp. 83–103.

Extended

- M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law*, vol. 18 (September/December 2006), pp. 601–629.
- M. Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', *International Journal of Refugee Law*, vol. 18 (September/December 2006), pp. 571–600.
- A. Klug & T. Houve, 'The Concept of State Jurisdiction and the Applicability of the *Non-Refoulement* Principle to Extraterritorial Interception Measures', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control, Legal Challenges* (Nijmegen: Martinus Nijhoff Publishers, 2010), pp. 69–102.
- S. Kneebone, C. McDowell, and G. Morrell, 'A Mediterranean Solution? Chances of Success', *International Journal of Refugee Law*, vol. 18 (2006), pp. 492–508.
- O. Lynskey, 'Complementing and Completing the Common European Asylum System: A Legal Analysis of the Emerging Extraterritorial Elements of EU Refugee Protection Policy', *European Law Review*, vol. 31, no. 2 (2006), pp. 230–250.
- G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, vol. 5 (2003), pp. 303–341.

Editor's Note:

See also Section V.2.4.4.3 on Safe Third Country.

V.2.3.6 Biometrics and Databases

Main Debate

Interoperability v. the purpose limitation principle

Readings

Core

- A. Baldaccini, 'Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases', *European Journal of Migration and Law*, vol. 1 (2008), pp. 31–49.
- E. Guild, 'Unreadable Papers?', in J. Lodge (ed.), *Are You Who You Say You Are? The EU and Biometric Borders* (Nijmegen: Wolf Legal Publishers, 2007), pp. 31–45.
- Meijers Committee, 'Proposal to Law Enforcement Authorities on Access to Eurodac', 6 November 2007.

Extended

- E. Brouwer, 'Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection', in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate, 2006), pp. 137–154.
- E. Brouwer, 'Eurodac: Its Temptations and Limitations', *European Journal of Migration and Law*, vol. 4 (2002), pp. 231–247.

V.2.4 Procedures for Granting Protection

Main Debates

Has the first phase of harmonisation of EC asylum law brought about consistency of decision-making and harmonisation in practice? If not, what further steps are required to achieve these aims?

What do the extensive exceptions and qualifications to protection criteria and procedural safeguards in EU instruments mean for access to a fair and effective refugee status determination process?

Readings

Core

- H. Battjes, *European Asylum Law and International Law*, (Leiden/Boston: Martinus Nijhoff publishers, 2006) pp. 289–384.
- K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007).

V.2.4.1 Responsibility: The Dublin System

Main Debates

Distribution mechanisms v. protection obligations.

Who controls the identity of the asylum seeker?

Does the Dublin system provide sufficient safeguards against *refoulement*?

Are there risks that asylum seekers will not receive any substantive claim examination in the EU as a result of the Dublin system?

Main Points

Allocating responsibility for determining asylum claims

Implementing Dublin without prior harmonization in asylum policies

Identity and data protection

EU Documents

Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system SEC (2007) 742, COM (2007) 0299.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 050, 25 February 2003 (Dublin II).

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 222, 5 September 2003.

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (signed in Dublin 15 June 1990, entered into force 1 September 1997) OJ C254, 19 August 1997.

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L316, 15 December 2000.

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L62, 5 March 2002.

Commission Communication Regarding the Implementation of Council Regulation (EC) No 2725/2000, 'Eurodac'.

UNHCR Documents

UNHCR, *The Dublin II Regulation. An UNHCR Discussion Paper*, April 2006.

UNHCR Observations on Greece as a Country of Asylum, December 2009.

UNHCR Comments on Dublin II and Eurodac Proposals, 18 March 2009.

Cases

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section V.I.2).

Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010: *NS v Secretary of State for the Home Department*, Case C-411/10, OJ C 274/21, 9 October 2010; joined with Reference for a preliminary ruling from the High Court of Ireland on 15 October 2010: *M.E. & others v Refugee Applications Commissioner*, Case C-493/10, OJ C 13/32, 15 January 2011.

Petrosian and Others, ECJ, C-19/08, 21 March 2009.

Asylum and Immigration Tribunal, YI (Previous claims – Fingerprint match – EURODAC) Eritrea, 2007, UKAIT 00054.

Regina v. Secretary of State for the Home department ex parte Adan; Regina v. Secretary of State for the Home Department ex parte Aitseguer (Judgements of 19 December 2000), 2001, 2 WLR, pp. 143–169.

TI v. UK, European Court of Human Rights 2000, Third Section Decision as to the Admissibility of Application 43844/98 (2000) 12 IJRL, pp. 244–267.

Readings

Core

ECRE, Comments on the European Commission Proposal to Recast the Dublin Regulation, 29 April 2009.

ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', April 2008.

ECRE Summary Report on the Application of the Dublin II Regulation in Europe, March 2006, AD2/3/2006/EXT/MH.

C. Filzwieser, 'The Dublin Regulation v. the European Convention of Human Rights – A Non-Issue or a Precarious Legal Balancing Act?', December 2006.

Meijers Committee, Comments on Dublin and Reception Directive (CM0902), 18 March 2009.

Extended

M. Byrne, 'Fortifying Europe: Poland and Slovakia Under The Dublin System', in M. Killingsworth (ed.), *Europe: New Voices, New Perspectives* (Melbourne: Contemporary Europe Research Centre, 2007).

R. Byrne, 'Harmonization and Burden Redistribution in the Two Europes', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 336–358.

E. R. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 253–273.

See also Section V.2.3.6 about Biometrics and Databases with regard to Eurodac.

Editor's Note

An analysis of the Dublin rules should consider the following:

- *Are they compatible with the 1951 Geneva Convention and the ECHR?*
- *What kind of disputes might arise as to how to interpret the Dublin II rules?*
- *Is Dublin II a burden-shifting mechanism? What can be done to balance its impact on the EU's external border States?*

V.2.4.2 Minimum Standards for Reception Conditions

Main Debate

Has the EU set an adequate standard for reception conditions?

Main Points

Purposes of EU power over reception conditions

Objectives of Directive 2003/9

Level of obligations in Directive

Exceptions from obligations

Application of the directive to particular groups: asylum seekers in detention; those under Dublin II

EU Documents

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM (2007) 745.

UNHCR Document

UNHCR, Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, 1 July 2003.

Cases

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section V.1.2).

Readings

Core

E. Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures', *European Law Review*, vol. 29 (2004), pp. 198–218.

N. Rogers, 'Minimum Standards for Reception', *European Journal of Migration and Law*, vol. 4 (2002), pp. 215–230.

Editor's Note

Is the Directive likely to raise standards anywhere?

What disputes might arise concerning its interpretation?

What are the consequences (legal and otherwise) of States' failure to respect their obligations to provide minimum reception conditions in practice?

V.2.4.3 Minimum Standards for Normal Procedures

Main Debates

What constitute appropriate minimum standards?

Harmonisation of standards v. deference to state law, policy and practice

Rights of vulnerable applicants to procedural protections (e.g. separated children, traumatized asylum-seekers)

Main Points

Low level of common minimum standards

Extended safeguards

Appeals

Remedies

EU Documents

European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554, 21 October 2009.

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status OJ L 326, 13 December 2005.

European Commission, Communication from the Commission to the Council and the European Parliament "A More Efficient Common European Asylum System: The Single Procedure as the Next Step", COM (2004) 503, 17 July 2004.

UNHCR Documents

UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on

procedures in Member States for granting and withdrawing international protection, COM(2009)554, 21 October 2009, August 2010.

UNHCR, *Improving Asylum Procedures: Comparative analysis and recommendations for law and practice*, March 2010.

UNHCR, *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, 9 November 2004), 10 February 2005.

Cases

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see Section V.1.2).

European Parliament v. Council, C-133/06, 6 May 2008 (Annulment of Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status), European Court of Justice.

Readings

Core

D. Ackers, 'The Negotiations on the Asylum Procedures Directive', *European Journal of Migration and Law*, (2005) vol. 7, pp. 1–33.

ECRE, 'Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', October 2006.

R. Errera, 'The Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', Seminar on Current asylum issues and human rights, organized by the Warsaw Regional Administrative Court and the UNHCR Warsaw, Jablonna, 17–18 April 2007.

G. Gyulai, 'Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU', Hungarian Helsinki Committee, 2007.

K. Zwaan (ed.), 'The Procedures Directive: Central Themes, Problem Issues and Implementation in Selected Member States' (Nijmegen: Wolf Legal Publishers, 2008).

Extended

J. van der Klaauw, 'Towards a Common Asylum Procedure', in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), pp. 165–194.

V.2.4.4 Minimum Standards for Specific Procedures

V.2.4.4.1 Accelerated and Manifestly Unfounded Procedures

Main Debate

Efficient v. fair procedures

Main Points

Contrast between UNHCR and EU definition of 'manifestly unfounded' claims
Abridged safeguards

Shifts in the standard and burden proof

Procedural and formal grounds (as opposed to grounds related to the merits) for channelling claims into accelerated procedures

EU Documents

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ 326 13, 13 December 2005, Arts. 23, 28, 34, 35, 39.

Resolution on Manifestly Unfounded Applications for Asylum, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG (London 30 Nov–1 Dec 1992).

Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures OJ 274 13, 19 September 1996.

UNHCR Documents

UNHCR, ExCom Conclusion No 30 (XXXIV), 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum', 1983.

UNHCR, ExCom Conclusion No 8 (XXVIII), 'Determination of Refugee Status', 12 October 1977.

UNHCR, 'Position on Manifestly Unfounded Applications for Asylum', *3rd International Symposium on the Protection of Refugees in Central Europe* (Geneva: UNHCR, 1997), pp. 397–399.

UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, vol. 1, no. 3, European Series (Geneva: UNHCR, 1995).

See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section V.2.4.3.

Readings

Core

- R. Byrne, 'Future Perspectives: Accession and Asylum in an Expanded European Union Manifestly Unfounded Claims', in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Netherlands: Kluwer International Law, 2002), pp. 403–408.
- S. Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determination* (September 2001), pp. 59–65.
- S. Oakley, 'Accelerated Procedures for Asylum in the European Union: Fairness Versus Efficiency', Sussex Migration Working Paper no. 43, April 2007.

Editor's Note

A discussion of accelerated and manifestly unfounded procedures should also consider their relationship to the notions of safe third country and safe country of origin. A consideration of procedural safeguards should consider issues such as, inter alia, legal representation, oral hearings, and appeals, with and without, suspensive effect.

V.2.4.4.2 Safe Country of Origin

Main Debate

Does the safe country of origin notion undermine the right to have a claim assessed individually?

Main Points

Safe country of origin notion:

As a bar to access to procedures

As a rebuttable presumption of unfoundedness of claim

'White lists' of safe countries of origin

Need for individual assessment of claims

Criteria for designating countries as 'safe'

EU Documents

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status OJ 326 13, 13 December 2005, Arts. 23 (4) (c), 29, 30, 31, Annex II.

Council Conclusion on Countries in Which There Is Generally No Serious Risk of Persecution, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG (London, 30 Nov–1 Dec 1992).

UNHCR Document

See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section V.2.4.3.

Cases

European Parliament v. Council of the European Union, European Court of Justice (Grand Chamber), C-133/06, 6 May 2006.

Readings

Core

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*, vol. 7 (2005), pp. 35–70.

ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection' (ECRE: London 2004), pp. 10–12.

H. Martenson and J. McCarthy, 'Field Report. "In General No Serious Risk of Persecution" Safe Country of Origin Practices in Nine European States', *Journal of Refugee Studies* vol. 11, no. 3 (1998), pp. 304–325.

Extended

R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, vol. 9 (1996), pp. 190–196.

V.2.4.4.3 Safe Third Country

Main Debates

Deflection and deterrence policies v. protection obligations

What minimum safeguards should there be for the implementation of safe third country returns?

Are European safe third country practices shifting the responsibility for refugees to transit states?

Main Points

Contrasts between UNHCR and EU criteria for determining safe third countries

Safe third country lists

European safe third country notion

Chain deportations

EU Documents

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326, 13 December 2005, Arts. 23(4), 26, 27, 37.

Resolution on a Harmonised Approach to Questions Concerning Host Third Countries Document WG I 1283, adopted 30 November 1992, (London Resolution).

UNHCR Documents

UNHCR, ExCom Conclusion No 15 (XXX), ‘Refugees Without An Asylum Country’, 1979.

UNHCR, ExCom Conclusion No 58 (XL), ‘Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection’, 1989.

UNHCR, ‘Global Consultations on International Protection, Background paper no 1: Legal and practical aspects of the return of persons not in need of protection’, May 2001.

UNHCR, ‘Global Consultations on International Protection, Background paper no 2: The application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees’, May 2001.

UNHCR, 'Global Consultations on International Protection, Background paper no 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim', May 2001.

See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section V.2.4.3.

Cases

European Parliament v. Council of the European Union, European Court of Justice (Grand Chamber), C133/06, 6 May 2006.

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see Section V.1.2).

Regina v. Secretary of State for the Home Department ex parte Adan; Regina v Secretary of State for the Home Department ex parte Aitseguer, UK House of Lords, 19 December 2000, 2001, 2 WLR, pp. 143–169.

TI v. UK, European Court of Human Rights 2000 European Court of Human Rights Third Section Decision as to the Admissibility of Application 43844/98 (2000) 12 IJRL, pp. 244–267.

Al-Rahal v. Minister for Immigration and Multicultural Affairs (2001) 184 ALR 698, 20 August 2001.

Judgment in the cases 2 BvR 1938/93 and 2 BvR, German Constitutional Court 2315/93, 14 May 1996, BVerfGE 94, 49.

Readings

Core

R. Byrne, G. Noll, and J. Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, (The Netherlands: Kluwer Law International, 2002), pp. 5–28.

S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, vol. 15, no. 4 (2003), pp. 567–667.

E. Neumayer, 'Asylum Destination Choice: What Makes Some West European Countries more Attractive than Others', *European Union Politics*, vol. 5, no. 2 (2004), pp. 155–180.

UNHCR, 'Global Consultations in International Protection, Regional Meeting Budapest, 6–7 June 2001, Conclusions'.

Extended

- R. Byrne and A. Shacknove, ‘The Safe Country Notion in European Asylum Law’, *Harvard Human Rights Journal*, vol. 9 (1996), pp. 190–196.
- S. Lavenex, “‘Passing the Buck’: European Union Refugee Policies towards Central and Eastern Europe’ *Journal of Refugee Studies*, vol. 11, no. 2 (1998), pp. 126–145.
- E. R. Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing’, *European Journal of Migration and Law*, vol. 6 (2004), pp. 47–65.

Editor’s Note

See Section V.2.5.2 regarding Readmission agreements.

V.2.4.5 Other Aspects of Decision-making

V.2.4.5.1 Evidentiary Issues

Readings

Core

- R. Thomas, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’, *European Journal of Migration and Law*, vol. 8 (2006), pp. 86–92.

V.2.4.5.2 Persons with Special Needs

UNHCR document

UNHCR, EXCOM Conclusion on Children at Risk No. 107 (LVIII) – 2007, 5 October 2007.

Readings

Core

- R. Bruin, M. Reneman & E. Bloemen (eds), ‘Care-full: Medico-legal reports and the Istanbul Protocol in Asylum Procedures’, 2006.
- L. Feijen, ‘The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe’, *Refugee Survey Quarterly*, vol. 27 (2008), pp. 63–73.

Extended

- Care-Full Initiative, 'Principles and Recommendation by 35 Organisations Regarding Survivors of Torture and Ill-Treatment and Asylum Procedures', 2006.
- M. E. Kalverboer, A. E. Zijlstra and E. J. Knorth, 'The Developmental Consequences for Asylum-seeking Children Living With the Prospect for Five Years or More of Enforced Return to Their Home Country', *European Journal of Migration and Law*, vol. 11, no. 1 (2009), pp. 41–67.
- Life Projects for Unaccompanied Migrant Minors – Recommendation (2007) 9 and explanatory memorandum (2008).
- Refugee Women's Resource Project and European Women's Lobby, 'Asylum is not gender neutral: a practical advocacy guide for protecting women seeking asylum', 2007.
- STEPS Study for the European Parliament, '*The Conditions in Centres for Third Country Nationals (detention camps, open centres as well as transit centres and transit zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*' IP/C/LIBE/IC/2006-181, December 2007.

V.2.4.6 Appeals

Main Debates

What is an effective remedy?

What is an independent tribunal?

Must appeal courts take into account new circumstances arising after the decision on the initial asylum claims?

Do appeals which do not have suspensive effect (ie. do not permit the appellant to remain in the country awaiting the outcome of the appeal) satisfy the requirements of an effective remedy?

Main Points

The meaning of 'effective remedy'

Right to legal assistance in preparing appeals

EU Document

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326, 13 December 2005.

UNHCR Document

See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section V.2.4.3.

Cases

M.S.S. v Belgium and Greece, Grand Chamber, (European Court of Human Rights), 21 January 2011 (see Section V.1.2).

Opinion in the case of *Samba Diouf*, *Case C-69/10* by Advocate General Cruz Villalon, Court of Justice of the EU, 1 March 2011.

M.B. and others v. Turkey, (European Court of Human Rights) judgment of 26 August 2010, appl. 36009/08.

Gebremedhin v. France (European Court of Human Rights), judgment of 26 April 2007, appl. 25389/05.

Readings

Core

E. Brouwer, *Digital borders and real rights: effective remedies for Third-Country nationals in the Schengen Information System*, (Leiden: Martinus Nijhoff: 2008), Chapters 9–10.

R. Byrne, 'Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures', *European Journal of Migration and Law*, vol. 7 (2005), pp. 71–86.

ECRE-ELENA, 'Survey on Legal Aid for Asylum Seekers in Europe', October 2010.

Extended

I. Staffans, 'Judicial Protection and the New European Asylum Regime', *European Journal of Migration and Law*, vol. 3 (2010), pp. 273–297.

V.2.5 Removal and Detention

V.2.5.1. Detention

Main Debate

Is detention of asylum seekers consistent with EU Member States' international refugee and human rights obligations?

Main Point

The use of detention as a deterrent or punishment, in addition to containment

Readings

Core

K. Hailbronner, 'Detention of Asylum Seekers', *European Journal of Migration and Law*, vol. 7, no. 9 (2007), pp. 159–172.

Statewatch, 'Analysis on the Returns Directive', 9 June 2008.

STEPS Study for the European Parliament, '*The Conditions in Centres for Third Country Nationals (detention camps, open centres as well as transit centres and transit zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*' IP/C/LIBE/IC/2006-181, December 2007.

D. Wilsher, 'Immigration Detention and Common Asylum and Immigration Policy', in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), pp. 395–426.

Extended

E. Mincheva, 'Case Report on *Kadzoev*, 30 November 2009', *European Journal of Migration and Law*, Vol. 3 (2010), pp. 361–371.

Cases

Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatrešnite raboti, Case C-357/09, 30 November 2009.

Opinion in the case of *Kadzoev* by Advocate General Mazák, Court of Justice of the European Union, C-57/09, 10 November 2009.

V.2.5.1 Return Policies

Main Debate

Is there adequate protection for rejected asylum-seekers in order to ensure that return policies do not infringe the *non-refoulement* principle?

Main Point

Use of protection mechanisms to delay expulsion or removal

EU Documents

Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/EC/115, OJ L 348/98, 24 December 2008.

Green Paper on a Community Return Policy on Illegal Residents', COM (2002) 175 10 April 2002.

Commission communication on a Community return policy on illegal residents', COM (2002) 175, 10 April 2002.

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Study on the links between legal and illegal migration', COM (2004) 412, 4 June 2004.

Communication from the Commission to the Council, the European Parliament, in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings external borders and the return of illegal residents', COM (2003) 323, 3 June 2000.

Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air, OJ L 321/26, 6 December 2003.

UNHCR Document

UNHCR ExCom Conclusion No 96 (LIV), 'The Return of Persons Found Not to Be in Need of International Protection', 2003.

Readings

Core

- C. Rodier, 'Analysis of the External Dimension of the EU's Asylum and Immigration Policies', *Summary and Recommendations for the European Parliament*, DGExPo/B/PolDep/ETUDE/2006_11, PE 374.366, 8 June 2006.
- Meijers Committee, Note on the Returns Directive, CM08010 VIII, 27 May 2008.

Extended

- D. Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, vol. 11 (2009), pp. 19–39.
- A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU law: An Analysis of the Returns Directive', *European Journal of Migration and Law*, vol. 11, no. 1 (2009), pp. 1–17.
- R. Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004).
- Consortium of 13 NGOs, including Cimade, Amnesty International, EU, Churches' Commission for Migrants in Europe, Caritas Europa, Human Rights Watch and others, 'Common Principles on Removal of Irregular Migrants and Rejected Asylum Seekers', August 2005.
- ECRE, 'Comments from the European Council on Refugees and Exiles on the Commission Green Paper on a Community Return Policy on Illegal Residents (Brussels, 10 April 2002, COM (2002) 175 final)', 2 August 2002.
- Statewatch, 'Analysis on the Returns Directive', 9 June 2008.

Editor's Note

Note the practical relevance of these policies for rejected asylum-seekers and persons whose refugee status or Subsidiary Protection/Temporary Protection status has ceased.

V.2.5.2 Readmission Agreements

Main Debate

Are the ‘safeguard’ provisions in readmission agreements sufficient

Main Points

Objectives of readmission agreements:

- EU seeking to use readmission agreements to guarantee removal of irregular migrants, including those who have merely transited through other contracting party
- rules on proof and presumptive evidence for nationality and transit route
- safe guard clauses

EU Documents

European Commission, Communication to the European Parliament and the Council: An Evaluation of EU Readmission Agreements, COM (2011) 76 final, Brussels, 23 February 2011.

Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the European Community on the Readmission of Persons Residing without Authorisation, OJ L 17/23, 1 March 2004.

Agreement between the European Community and the Macao Special Administrative Region of the People’s Republic of China on the Readmission of Persons Residing without Authorisation, OJ L 143/97, 1 June 2004.

Agreement between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorization, OJ L 124/43, 2005.

Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation, OJ L 124, 1 May 2005.

Agreement between the European Community and the Russian Federation on Readmission, OJ L 129, 1 June 2007.

Agreement between the European Community and Ukraine on the Readmission of Persons, OJ L 332, 1 January 2008.

Agreement between the European Community and Bosnia and Herzegovina on Readmission of Persons Residing without Authorisation, OJ L 332, 1 January 2008.

Agreement between the European Community and the Republic of Montenegro on Readmission of Persons Residing without Authorisation, OJ L 334, 1 January 2008.

Agreement between the European Community and the Former Yugoslav Republic of Macedonia on Readmission of Persons Residing without Authorisation, OJ L 334, 1 January 2008.

Agreement between the European Community and Serbia on Readmission of Persons Residing without Authorisation, OJ L 334, 1 January 2008.

Agreement between the European Union and Pakistan on Readmission of Persons Residing without Authorisation, OJ L 287/50, 1 December 2010.

Readings

Core

J. Cassarino, Readmission Policy in the European Union, Study for the European Parliament, PE 425.632, 2010.

J. Cassarino (ed.), 'Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area'. Washington: The Middle East Institute, 2010.

A. Roig & T. Huddelston, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse', *European Journal of Migration and Law*, vol. 3 (2007), pp. 362–387.

M. Schieffer, 'Readmission and Repatriation of Illegal Residents', in B. Martenczuk and S. van Thiel, *Justice, Liberty and Security: New Challenges for EU External Relations* (Brussels: VUB Press Brussels, 2008).

Extended

N. A. Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees', *International Journal of Refugee Law*, vol. 11, no. 1 (1999), pp. 60–83.

C. Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice', *European Journal of Migration and Law*, vol. 12 (2010), pp. 45–79.

D. Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States', *European Journal of Migration and Law*, vol. 3 (2003), pp. 359–377.

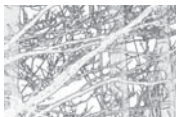
- I. Kruse, 'EU Readmission Policy and its Effects on Transit Countries – The Case of Albania', *European Journal of Migration and Law*, vol. 8 (2006), pp. 115–142.
- M. Schieffer, 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', *European Journal of Migration and Law*, vol. 3 (2003), pp. 343–357.

Editor's Note

Readmission agreements will apply to rejected asylum seekers and to people removed to supposedly safe third countries and safe countries of origin. But it must be questioned whether readmission agreements concluded by the EC to date do contain adequate safeguards to ensure that people in need of international protection are not returned to persecution.



SECTION VI



Framework for Refugee Protection in the Americas

This section of The Refugee Law Reader examines the legal norms regarding refugee protection that have developed in the Americas. In particular, it highlights concepts and instruments that are unique to Latin America, where most of the regional developments have occurred. The sparse developments involving Canada and the United States are addressed at the end of the section.

The first portion of this section addresses the regional instruments dealing with ‘diplomatic asylum’, ‘political asylum’, and asylum provided to refugees. These concepts have a specific meaning in the Latin American context, and efforts to interpret and apply them have given rise to a substantial body of law. Materials in this section attempt to clarify ‘diplomatic asylum’ and ‘political asylum’ in the light of the overarching international law framework protecting refugees; the scarcity of literature in a language other than Spanish makes this a difficult task.

The second part of this section focuses on the regional system of human rights and its impact on refugee protection in Latin America. It canvasses the instruments and the related jurisprudence, as well as the soft law developments that are an important complement to refugee protection in the region. The section then turns to an examination of the Cartagena Declaration of 1984, the principal regional instrument specific to refugee protection. The Cartagena Declaration, the written expression of regional customary law, is notable for its distinctive collective nature and its emphasis on durable solutions. Other non-binding texts that play an important role in the region are also examined.

The section next reviews the application of the 1951 Geneva Convention in the context of regional norms and national legislation adopted in Latin America. With the sole exception of Cuba, all the states in the region have ratified the 1951 Geneva Convention. The development of national laws and jurisprudence concerning refugee status and refugee rights is in its infancy, however.

This section also examines the internal displacement of more than two million people in Colombia and the situation of internally displaced persons more generally in Latin America. It highlights the all too frequent interaction of collective persecution, refugees, and the internally displaced.

The section concludes by noting the regional developments in North America between Canada and the United States.

VI.1 Political Asylum, Diplomatic Asylum and Refugee Status

Main Debates

What are the differences between diplomatic, political and territorial asylum within the Latin American protection framework?

To what extent does each of the three forms of asylum remain a discretionary right of a sovereign state?

In Latin America, is it preferable to apply regional treaties on asylum when individuals seek asylum in states parties to these instruments?

Main Points

Diplomatic asylum as regional customary law in Latin America

Confusion caused by the distinction between political asylum and asylum granted to refugees based on the 1951 Geneva Convention

Consequences of lack of domestic norms concerning the application of the 1951 Geneva Convention

Treaties

Convention on Territorial Asylum, 28 March 1954, OAS Treaty Series No. 19.

Convention on Diplomatic Asylum, 28 March 1954, OAS Treaty Series No. 18.

Treaty on Asylum and Political Refuge, 4 August 1939.

Convention on Political Asylum, 26 December 1933.

Convention on Asylum, 20 February 1928.

Cases

Columbia v. Peru, Judgement of 20 November 1950, International Court of Justice, I.C.J. Reports 1950, p. 273. (The court declared that the granting of asylum by the Colombian Embassy to the instigator of a military uprising against the government of Peru did not fulfil the conditions envisaged in the Havana Convention in as much as the asylum country does not enjoy a right to qualify the nature of the offence upon which asylum is granted by a unilateral and definitive decision; also, the alleged regional custom on diplomatic asylum neither includes a safe-conduct to leave the country of origin – in which the Embassy of the country granting asylum is based – nor extends protection for the time necessary to solve such a request).

Editor's Note

Please note that in reality, despite its title, the 1954 Convention on Territorial Asylum codifies the concept of political asylum as it has developed in the Latin American tradition. Likewise, the expression political refuge that appears in the 1939 Convention increases confusion in terminology in the Latin American legal context.

VI.2 Refugee Protection in the Framework of the Inter-American Human Rights System

VI.2.1 Human Rights Instruments

VI.2.1.1 The *Non-refoulement* Principle and the Rights of Refugees

Main Debate

What is the concrete impact of the explicit recognition of the right to seek and receive asylum by the American Declaration of the rights and duties of man?

Main Points

Relevance of the regional framework of human rights protection in ensuring the right to asylum and the rights of refugees in Latin America

Comparison, in theoretical and practical terms, between the protection offered by the European Convention on Human Rights and the Inter-American Convention on Human Rights

Treaties

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999.

Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994.

Inter-American Convention on International Traffic in Minors, 18 March 1994, OAS Treaty Series No. 79.

Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, OAS Treaty Series No. 73.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, OAS Treaty Series No. 69.

Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series No. 67, Art. 15.

American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, UN Register 08/27/1979 No. 17955.

Soft Law

American Declaration of the Rights and Duties of Man, 1948, Art. 27.

Inter-American Court of Human Rights

Cases

Article 8

Case Baena Ricardo and others v. Panama. Judgement of 2 February 2001 (the Court states that the minimum due process guarantees set forth in Article 8.2 must be observed in the course of an administrative procedure, as well as in any other procedure leading to a decision that may affect the rights of persons).

Article 25

Case Castillo Páez. Judgement of 27 November 1998 (according to the judgement, Peru has to indemnify for the material and moral harms caused, the family members of a disappeared person, including the father, the mother and the sister, who were forced to leave their country and seek asylum in the Netherlands).

Advisory Opinions

Advisory opinion on the juridical condition and rights of the undocumented migrants, 17 September 2003 (OC-18/03, Series A N° 18) (the fundamental principles of equality and non-discrimination, as rules of *jus cogens*, entail *erga omnes* obligations of protection that bind all states and affects third countries as well, regardless of any circumstance or condition of a person concerned, including his/her regular or irregular migrant status).

Provisional Measures

Provisional measures in the case of Haitian and Haitian-origin Dominican persons in the Dominican Republic, 18 August 2000, in order that the Dominican Republic refrains from deporting or expelling from its territory two of the applicants, that it enables the immediate return to its territory of two others and that it enables the immediate family reunification on its territory of two applicants with their minor children.

Provisional measures, 12 November 2000, in order that the Dominican Republic stops the massive expulsion of foreigners and guarantees the requirements of due process in cases of deportation.

Inter-American Commission on Human Rights

Individual Petitions

Admissibility of the case Rumaldo Juan Pacheco Osco y Otros v. Bolivia, Report No. 53/04, 13 October 2004 (Petition No. 301/2002) (possible violation of the right to personal integrity, to personal liberty, to judicial guarantees, the rights of the child, the freedom of movement and residence with regard to refugees recognised in Chile wishing to reside in Bolivia).

Admissibility of the case 120 Cuban citizens and 8 Haitian citizens detained in Bahamas, Report No. 6/02, 3 April 2002 (Petition No. 12.071) (indications of the violation of Art. 27 of the American Declaration of the rights and duties of man, concerning the right to seek and receive asylum).

Admissibility of the case Rafael Ferrer-Mazorra and others v. United States, Report No. 51/01, 4 April 2001 (Case No. 9903) (possible violation of the Articles 1, 2, 17, 18 and 25 of the American Declaration of the Rights and Duties of Man, with regard to the deprivation of liberty of the applicants, based on their illegal entry to US territory).

Admissibility of the case interdiction of Haiti, Report No. 51/96, 13 March 1997 (Case No. 10.675) (the Commission considered that the USA violated the right of Haitian citizens to seek and receive asylum when returning them to their country of origin despite that their life would be in danger there, after a summary proceeding of their asylum claims).

Admissibility of the case Joseph v. Canada, Report No. 27/93, 6 October 1993 (Case No. 11.092) (following the analysis of existing domestic remedies concerning the recognition of refugee status, the application was declared inadmissible).

Admissibility of the case Honduras, Report No. 5/87, 28 March 1987 (Case No. 9.619) (the state has the obligation to guarantee the situation, the security and the integrity of refugees hosted on its territory).

Admissibility of the case Maria Eugenia Calvar Rivero and her daughter Maudie Valero Calvar, Report No. 6/82, 8 May 1982 (Case No. 7.602) (violation of the rights of the family, the right to work and the right to seek asylum as included in the American Declaration of the rights and duties of man).

Admissibility of the case Eduardo Eloy Alvarez Hernández, Report No. 11/82, 8 March 1982 (Case No. 7.898) (violation of the prohibition of arbitrary detention, the right to justice, the right to seek asylum and the rights of the family as included in the American Declaration of the Rights and Duties of Man).

Annual Reports

Annual Report (2003), 29 December 2003 (OEA/Ser.L/V/II.118) (obligation of states to ensure a reasonable possibility for asylum-seekers to substantiate their claim for refugee status and the reasons for which they fear being tortured if sent to a certain country, including the country of origin).

Annual Report (1993), 11 February 1994 (OEA/Ser.L/V/II.85) (analysis of the universal and regional legal framework applicable for refugees, internally displaced and stateless persons, specific analysis of the situation in Colombia, El Salvador, Guatemala, Haiti, Nicaragua and Peru).

Special Reports

Report on Immigration in the United States: Detention and Due Process, 30 December 2010 (OEA/Ser.L/V/II. Doc. 78/10). (The Commission severely denounces many forms of detention of foreigners in the US).

Report on Terrorism and Human Rights, 22 October 2002 (OEA/Ser.L/V/II.116) (in the framework of anti-terrorist policies, the Commission analyses the situation of migrant workers, asylum-seekers, refugees and foreigners, particularly with regard to the right to liberty and security, to humane treatment, to due process and fair trial, and to non-discrimination).

Recommendation on Asylum and International Crimes, 20 October 2000 (OEA/Ser.L/V/II.111, Doc. 20 Rev.) (recommendation for States to refrain from granting asylum to supposed perpetrators of international crimes).

Country Reports

Report on Haiti, Failed Justice or Rule of Law? Challenges Ahead for Haiti and the International Community, 26 October 2005 (OEA/Ser.L/V/II.123) (analysis of the deportation of Haitian citizens from other countries and the preventive detention of foreigners).

Precautionary Measures

Precautionary measures, 27 January 1999, in order that the Bahamas suspend the deportation of a Cuban family, the members of which asked for asylum and that this process should respect the relevant procedural guarantees.

Precautionary measures, 14 August 1998, in order that the Bahamas refrain from deporting a group of 120 Cuban nationals who applied for refugee status, while the Commission is examining in detail their allegations of human rights violations.

Precautionary measures, 16 January 1998, in order that Canada refrains from deporting a Sri Lankan national, recognised by Canada as refugee in 1991, while the Commission is investigating the human rights violations reported in the application.

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1971 (XXXIII-O/03), 2003. The protection of refugees, returnees, and stateless and internally displaced persons in the Americas.

Resolution AG/RES. 1504 (XXVII-O/97), 1997. The situation of refugees, returnees, and internally displaced persons in the hemisphere.

Resolution AG/RES. 838 (XVI-O/86), 1986. Inter-American action on behalf of refugees.

Readings

Core

F. Galindo Vélez, 'Asylum in Latin America. Use of the Regional Systems to Reinforce the United Nations System for the Protection of Refugee', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 226–237, 240–245.

VI.2.1.2 Protection against Extradition

Main Debate

To what extent does the regional practice in Latin America apply international principles concerning the extradition of asylum seekers and refugees?

Main Point

Comparison between protection against extradition and asylum granted to refugees

Treaties

Inter-American Convention against Terrorism, 3 June 2002, AG/RES. 1840 (XXXII-O/02), Art. 13.

Inter-American Convention on Extradition, 25 February 1981, OAS Treaty Series No. 60.

Convention on Extradition, 26 December 1933, Arts 3 and 17.

Treaty on International Penal Law, 23 January 1889.

Inter-American Court of Human Rights

Precautionary Measures

Precautionary measures, 27 October 1999, in order that the government of Argentina refrains from extraditing a Peruvian citizen to his country of origin, in connection with political reasons, while his asylum claim is being assessed.

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 2249 (XXXVI-O/06), 2006. Extradition of and denial of safe haven to terrorists: mechanisms for cooperation in the fight against terrorism.

VI.2.1.3 Other Norms

Treaties

Convention on rights and duties of states in the event of civil strife, 20 February 1928, Art. 3.

VI.2.2 Specific Instruments of Refugee Protection

Editor's Note

The most important instrument that specifically addresses the problems of forced migration in the region has a noticeable collective character and was elaborated ex post facto. This means that it was conceived in order to offer durable solutions for large groups of refugees, after their exodus had taken place. The other instruments maintain this collective character, which results in few references to the personal status of those concerned, other than the principle of non-refoulement. Moreover, these instruments do not have legally binding effect, except in a few concrete cases of forced displacement (such as in Guatemala). Nevertheless, the Cartagena Declaration – a soft law instrument – provides a written expression of a customary law definition in the regional framework. However, there is no recent practice concerning the application of the Cartagena Declaration, despite the occurrence of grave situations of forced displacement.

VI.2.2.1 Regional Definition and Proposals to Improve Protection

Main Debates

Is the Cartagena Declaration legally binding or is it a non-binding regional instrument?

What role does the Cartagena Declaration play within the framework of the global debate on refugee protection?

Main Points

Incorporation of the Cartagena principles into national legislation

Possibilities and likely impacts of applying the Cartagena Declaration in the framework of individualised refugee status determination

Soft Law

Mexico Declaration and Plan of Action, 2004.

San José Declaration on Refugees and Displaced Persons, 7 December 1994.

Cartagena Declaration on Refugees, 22 November 1984.

Inter-American Commission on Human Rights

Annual Reports

Annual Report (1984–1985) 1 October 1985 (OEA/Ser.L/V/II.66) (analysis of the situation of refugees in the American states, with special emphasis on *en masse* displacement and the importance of the Cartagena Declaration).

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1336 (XXV-O/95), 1995. The situation of refugees, returnees, and internally displaced persons in the hemisphere (recognition of the principles stated in the San José Declaration on Refugees and Displaced Persons, and a call for Member States to develop a process of legal harmonization in this regard).

Resolution AG/RES. 774 (XV-O/85), 1985. The juridical situation of refugees, returnees, and internally displaced persons in the hemisphere (recommendation to Member States to apply the Cartagena Declaration in case of refugees on their territory).

Readings

Core

- S. Corcuera, 'Reflections on the Application of the Broader Refugee Definition of the Cartagena Declaration in Individual Refugee Status Determination Procedures', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 197–203.
- L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 92–119.

VI.2.2.2 Durable Solutions in the Regional Framework

Main Debates

Does the Central American peace process after 1984 provide a framework for creating durable solutions for refugees or is its significance limited to the particular historical and political circumstances?

Is the Mexico Declaration and Plan of Action a rhetorical compromise or a regional action plan?

Main Points

Peace process and assisted repatriation of refugees

Historical and comparative experiences

New focuses in the Mexico Declaration and Plan of Action and their potential impact on the progressive development of international refugee law

Soft Law

Mexico Declaration and Plan of Action, 16 November 2004.

Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Guatemala, 17 June 1994.

Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, International Conference on Central American Refugees, CIREFCA, 30 May 1989, Doc. CIREFCA/89/9.

Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, International Conference on Central American Refugees, CIREFCA, 30 May 1989, Doc. CIREFCA/89/13/Rev.1.

Inter-American Commission on Human Rights

Country Reports

Report on the Situation of Human Rights in Haiti, 11 February 1994 (OEA/Ser.L/V/II.85) (analysis of the situation of Haitian refugees and the situation of Haiti as country of origin).

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1040 (XX-O/90), 1990. The situation of refugees in Central America and the regional efforts for solving their problems.

Resolution AG/RES. 1021 (XIX-O/89), 1989. Central American refugees and the International Conference on Central American refugees.

Readings

Core

L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 81–88, 102–107.

Extended

S. Aguayo, H. Christensen, L. O'Dogherty and S. Varesse, *Social and Cultural Conditions and Prospects of Guatemalan Refugees in Mexico* (Geneva: United Nations Research Institute for Social Development, 1987), pp. 59–68.

UNHCR, 'Mexico Plan of Action: The Impact of Regional Solidarity 2005–2007', (San Jose: UNHCR, 2007), pp. 16–28.

VI.3 Application of the 1951 Geneva Convention through the Regional Mechanisms and National Legislations

Main Debate

Does the regional human rights protection framework (to the extent it is interpreted as legally binding by the Inter-American Court of Human Rights) effectively protect refugees' rights?

Main Points

Reluctance to directly apply the international obligations derived from the 1951 Geneva Convention

Slow transposition of the 1951 Geneva Convention provisions into national legislation in Latin America

Paucity of national legislation and national administrative and judicial organs dedicated specifically to protecting refugees

Inter-American Commission on Human Rights

Country Reports

Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee Determination System, 20 February 2000 (OEA/Ser.L/V/II.106)

(detailed analysis about the access to refugee status determination, the right to asylum, exclusion and expulsion practices in Canada).

UNHCR Documents

UNHCR, *Refugee Protection and International Migration in the Americas: Trends, Protection Challenges and Responses*, December 2009.

Readings

Core

L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 66–75.

VI.4 Protection of Internally Displaced Persons with Special Attention to the Case of Colombia

Main Debates

In the case of Colombia, what have been the results achieved by the protection offered by national institutions, in contrast with the results of the protection offered by the international community?

What are the direct and indirect consequences of UNHCR's activities beyond its traditional mandate in Colombia: does assistance to the internally displaced come at the expense of refugees?

Main Points

National status of 'internally displaced person' versus refugee status

Situation of the internally displaced in host communities

Problems related to voluntary return (as durable solution) in the framework of a conflict

Protection of human rights (including *non-refoulement*) versus concerns of regional security

Eventual reparation measures in the Inter-American framework of human rights protection versus situation of grave and massive human rights violations

Inter-American Court of Human Rights

Cases

Article 22

Case of the Massacre of Ituango v. Colombia. Judgement of 1 July 2006 (the state must ensure the return of displaced persons to their territories of origin in conditions of security, or if this cannot be ensured, provide the necessary and sufficient resources in order that they can be resettled in similar conditions at the place they freely and voluntarily choose).

Case of the Massacre of Mapiripán v. Colombia. Judgement of 15 September 2005 (the state must take the necessary measures to guarantee that the family members of the victims of displacement can return in conditions of security to Mapiripán when they so desire).

Case Moiwana v. Suriname. Judgement of 15 June 2005 (the state did not take the necessary measures to guarantee the safe and dignified return of displaced persons, nor did it carry out the necessary investigations about the human rights violations due to the forced displacement of this community, which caused them emotional, psychological, spiritual and economic suffering).

Provisional Measures

Provisional measures in the matter of the indigenous community of Kankuamo, 5 July 2004 (the Colombian state was required to guarantee the necessary conditions of security in order to respect the right to freedom of movement of the indigenous Kankuamo people, so that those who have been forcibly displaced could return to their home if they so desire).

Provisional measures in the matter of the communities of Jiguamiando and Curbarado, 6 March 2003 (the state of Colombia was required to ensure that the applicants can continue to live in their habitual residence as well as to adopt the necessary measures in order that the displaced persons of these communities could return to their home).

Provisional measures in the matter of the Peace Community of San Jose de Apartado, 24 November 2000 (the state of Colombia was requested to ensure the necessary conditions in order that the forcibly displaced persons of the Community of Paz de San José de Apartado could return to their home).

Inter-American Commission on Human Rights

Annual Reports

Annual Report (2005), 27 February 2006 (OEA/Ser.L/II.124) (analysis of the situation of Colombian refugees and migrants in Haiti and the human rights situation in Colombia, with special emphasis on the internal armed conflict and its consequences on the civil population, particularly the forced displacement).

Annual Report (1998), 16 April 1999 (OEA/Ser.L/V/II.102) (recommendations for states to adopt, respect and apply the Guiding Principles on Internal Displacement).

Country Reports

Report on the Situation of Human Rights in Guatemala, 6 April 2001 (OEA/Ser.L/V/II.111) (analysis of the human rights situation of the population uprooted by the armed conflict, with special attention to its reintegration, the possession and ownership of land, the development and the access to basic services).

Report on the Situation of Human Rights in Haiti, 8 February 1995 (OEA/Ser.L/V.88) (analysis of the situation of internal displacement in Haiti as well as the situation of Haitian refugees, with special attention to the issues of rescue at sea and their transfer to the Guantánamo military base).

Report on the Situation of Human Rights in Guatemala, 1 June 1993 (OEA/Ser.L/V/II.83) (historical analysis of the displacement in Guatemala, the signature of Agreements between the Government of Guatemala and the Permanent Commissions in 1992, and the specific problems experienced by this vulnerable population).

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 2229 (XXXVI-O/06). Internally Displaced Persons.

Readings

Core

A. A. Cançado Trindade, 'Approximations and Convergences Revisited: Ten Years of Interaction between International Human Rights Law, International

Refugee Law, and International Humanitarian Law (from Cartagena – 1984 to San Jose – 1994 and Mexico – 2004)’, in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (Bogota: UNHCR, 2004), pp. 142–147.

M. Gottwald, *Protecting Colombian Refugees in the Andean Region: The Fight against Invisibility* (Geneva: UNHCR, 2003), pp. 7–10, 14–18.

VI.5 The North American Regional Materials

Main Debates

Is the implementation of the 2002 Canada-USA “Safe Third Country” agreement leading to the violation of protection obligations by either country?

Treaties

Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, signed on 5 December 2002, as part of the Smart Border Action Plan, and entered into force on 29 December 2004.

Readings

Core

A. Macklin, *The Values of the Canada-US Safe Third Country Agreement* (Ottawa: Caledon Institute of Social Policy, 2003).

Extended

D. Anker and Harvard Law Student Advocates for Human Rights, *Bordering on Failure: the US-Canada Safe Third Country Fifteen Months after Implementation*, The International Human Rights Clinic, Human Rights Program, March 2006.

NOTES ON THE EDITORS

Editor in Chief

Maryellen Fullerton

Brooklyn Law School, New York, USA

Maryellen Fullerton is Full Professor of Law at Brooklyn Law School, New York, USA. Her areas of expertise include asylum, immigration, and refugee law, with research focusing, in particular, on comparative refugee law. Her world view and teaching methods have been shaped by her academic commitments, first as a Fulbright Scholar in Belgium and Germany, later as a German Marshall Fund Fellow in Hungary, and as a visiting scholar at the Center for Advanced Studies in Social Sciences in Spain. Among her recent works are her co-authored casebooks, *Immigration and Citizenship Law: Process and Policy* (7th edn. 2012) and *Forced Migration: Law and Policy* (2007). In addition to her academic research and scholarly publications, she served as a rapporteur for Human Rights Watch/Helsinki on several human rights fact-finding missions to Germany. She has been active in the International Law Association on the Committee on Internally Displaced Persons and on the Committee on Refugee Law (American Branch). For her work with law students representing asylum seekers, she was awarded the Migration and Refugee Services' Volunteer Service Award for Assistance to Refugees. She earned her bachelor's degree at Duke University, pursued graduate studies in Psychology at the University of Chicago, and then studied Law at Antioch School of Law, from which she received her J.D. degree. After her law studies she worked as a judicial clerk for Judge Frank M. Johnson, Jr., Chief Judge, United States District Court for the Middle District of Alabama, and then served as a judicial clerk for Judge Francis L. Van Dusen, United States Court of Appeals for the Third Circuit. She joined the faculty of Brooklyn Law School in New York in 1980, where she has been a professor of law since 1985.

Editorial Board

Rosemary Byrne

Trinity College, Dublin, Ireland

Rosemary Byrne is Associate Professor of International Law and the Director of the Centre for Post-Conflict Justice at Trinity College Dublin. Recently she completed a five year term as a Human Rights Commissioner at the Irish Human Rights Commission, and has been a Visiting Professor at the Paris School of International Affairs, Institut d'Études Politiques (Sciences-Po) and the China-EU Law School, China University of Political Science and Law. She has been a Government of Ireland Research Fellow and a Visiting Fellow at the Harvard Law School Human Rights Programme. Her research is in the areas of comparative refugee law and policy and international criminal law. She earned her bachelor's degree from Barnard College, Columbia University and her J.D. from Harvard Law School.

Bhupinder Chimni

Jawaharlal Nehru University, New Delhi, India

B.S. Chimni is Professor at Jawaharlal Nehru University, New Delhi and is the author of *International Refugee Law: A Reader*, one of the main international textbooks in the field. His areas of expertise include international law, international trade law and international refugee law. He served for three years as Vice Chancellor of the W.B. National University of Juridical Sciences and has been a Visiting Professor at the International Center for Comparative Law and Politics, Tokyo University, a Fulbright Visiting Scholar at Harvard Law School, Visiting Fellow at the Max Planck Institute for Comparative and Public International Law, Heidelberg, and a Visiting Scholar at the Refugee Studies Center, York University, Canada. He served as a member of the Academic Advisory Committee of the Office of the United Nations High Commissioner for Refugees for the period of 1996–2000. He is on the editorial board of several national and international journals including the *Indian Journal of International Law*, *International Studies*, *International Refugee Studies*, *Georgetown Immigration Law Journal* & *Refugee Survey*

Quarterly. Professor Chimni is part of a group of scholars who self-identify as the Third World Approaches to International Law (TWAAIL) scholars.

François Crépeau

McGill University, Montreal, Canada

François Crépeau is a Full Professor and holds the Hans and Tamar Oppenheimer Chair in Public International Law and is the scientific director of the *Centre for Human Rights and Legal Pluralism* at the Faculty of Law of McGill University. He is the United Nations Special Rapporteur on the Human Rights of Migrants. He is guest professor at the *Université catholique de Louvain* (2010–2013). He has participated at many conferences, published numerous articles, and written and edited five books: *Les migrations internationales contemporaines – Une dynamique complexe au cœur de la globalisation* (2009), *Penser l'international, Perspectives et contributions des sciences sociales* (2007), *Forced Migration and Global Processes – A View from Forced Migration Studies* (2006), *Mondialisation des échanges et fonctions de l'État* (1997) and *Droit d'asile: De l'hospitalité aux contrôles migratoires* (1995). He is a fellow of the Institute for Research in Public Policies (IRPP) and heads the 'Mondialisation et droit international' collection at Éditions Bruylant-Larcier (Brussels). He is a member of several editorial boards: *Journal of Refugee Studies*, *International Journal of Refugee Law*, *Refugee, Droits fondamentaux*, *Refugee Law Reader*. He was a Fellow of the Pierre Elliott Trudeau Foundation in 2008–2011.

Madeline Garlick

UNHCR, Bureau for Europe, Brussels, Belgium

Madeline Garlick is the Head of the Policy and Legal Support Unit in the Bureau for Europe of the Office of the United Nations High Commissioner for Refugees (UNHCR). Prior to her appointment to this post in 2009, she served for five years as Head of UNHCR's Liaison Unit to the EU Institutions. She holds a Master of Laws (LL.M.) from Cambridge University, UK, as well as an LL.B. (Honours) in general law and B.A. (Honours) in politics and German language and literature from Monash University, Melbourne, Australia. She is qualified as a barrister and solicitor in Victoria,

Australia, where she has practiced in various legal fields, including advice and representation for asylum seekers and refugees in Australia. In her previous career experience, she has worked for 'Justice', the British Chapter of the International Commission of Jurists, after which she worked for three years in Bosnia and Herzegovina, for the Commission for Real Property Claims of Displaced Persons and Refugees and for the Office of the High Representative. She has also served with the United Nations Peacekeeping Force in Cyprus (UNFICYP), as a member of the Secretary-General's negotiating team, which sought to facilitate a resolution to Cyprus' political conflict, from 1999–2004. Madeline Garlick serves as an Editor in her personal capacity, and the views expressed or implied in *The Reader* do not necessarily represent the position of the United Nations or UNHCR.

Elsbeth Guild

University of Nijmegen, Nijmegen, The Netherlands

Elsbeth Guild studied classics in Canada and Greece and law in London. She defended her thesis on European Community immigration law at the University of Nijmegen, where she now is the Jean Monnet Professor ad Personam of European Immigration Law at the Radboud University Nijmegen and at the Law Faculty, Queen Mary University of London. She is associate senior research fellow at the Centre for European Policy Studies, Brussels and a partner in the immigration department at the London law firm, Kingsley Napley. She also teaches at Sciences Po in Paris. She has published widely in the field of immigration and asylum law and policy in Europe. Her most recent monograph is *Security and Migration in the 21st Century*, Polity 2009. Professor Guild is the UK member of the Odysseus Network of academic experts in European Immigration and Asylum Law. She is frequently invited to advise both the European Commission and the Council of Europe on immigration and asylum issues.

Lyra Jakuleviciene

Mykolas Romeris University, Vilnius, Lithuania

Lyra Jakuleviciene is a Professor at Mykolas Romeris University in Lithuania and has over ten years of teaching experience in international law (human

rights, refugee and treaty law in particular). She served in the capacities of Legal Adviser and later as Liaison Officer of the United Nations High Commissioner for Refugees in Lithuania (1997–2003) and lately as the Head of United Nations Development Programme in Lithuania. Her international experience includes participation in the Söderköping process where she was responsible for the establishment and management of a Cross Border Cooperation Secretariat in Kiev, Ukraine in 2003. In this capacity Ms. Jakuleviciene has been working on facilitation and promotion of co-operation among ten countries in the Western CIS and the Central European/Baltic region on migration, asylum and other cross-border related issues, as well as on bridging the implementation of the UN priorities and strategies with the changing environment due to the EU enlargement process in the countries on both sides of the future EU external borders. Since 2006 she has been serving as an expert in building the European Asylum Curriculum, which was taken over by the European Asylum Support Office in 2011, as well as engaged in a number of studies and research projects on refugees, including the study on transposition of the ten EU asylum directives (2006–2007) and the study for the European Parliament on the future Common European Asylum System (2009–2010) among them. She holds a Doctor of Social Sciences (law) degree and is an author of over a dozen of articles on refugee protection, as well as the first book in Lithuania on the rights of refugees. Ms. Jakuleviciene is a permanent member of the Odysseus Academic Network in Europe and the Observatory on Free Movement of Workers.

Boldizsár Nagy

ELTE University, Budapest, Hungary

Boldizsár Nagy read law and philosophy at the Eötvös Loránd University in Budapest and pursued international studies at the Johns Hopkins University SAIS Bologna Center. Besides the uninterrupted academic activity both at the Eötvös Loránd University (since 1977) and the Central European University (since 1992) he has been engaged both in governmental and non-governmental actions. He acted several times as expert for the Hungarian Ministry of Foreign Affairs, the Council of Europe and UNHCR and was counsel for Hungary in the Gabcikovo-Nagymaros Project case before the

International Court of Justice. He was one of the founders of the European Society of International Law and sat on the board until 2010. He is member of the editorial board of the International Journal of Refugee Law and of the European Journal of Migration and Law. In 2004 Boldizsár Nagy joined the Odysseus academic network for legal studies on asylum and immigration in Europe. In recent years he has delivered lectures in Amsterdam, Beijing, Brussels, Cambridge, Geneva, Moscow, among others. (For further details see: www.nagyboldizsar.hu)

Luis Peral

European Union Institute for Security Studies, Paris, France

Luis Peral holds a Ph.D. in Law, M.A. in Law of the European Union, M.A. in Political Sciences & International Relations (Universities Complutense and Carlos III of Madrid), and Diploma in English Law (University of Kent, Canterbury, UK). From 1992 to 2004, he taught Public International Law at University Carlos III of Madrid, where he organised a Masters Course on Cooperation to Development, Migration and Humanitarian Action. From 2004 until he joined the EUISS as Research Fellow in 2008, he worked at the Center for Constitutional Studies of the Ministry of the Presidency under the Ramón y Cajal Research Program of the Spanish Government, whilst he was Senior Research Fellow at FRIDE and Director of the Conflict Prevention and Resolution Programme of the International Center of Toledo for Peace (CITpax). He has been visiting Scholar at the University of Michigan Law School, and a lecturer at several universities and institutions, such as the International Institute of Humanitarian Law (Sanremo) and the European Inter-University Center (Venice). He founded the Cuenca Colloquium on International Refugee Law in 2006. His research and publications, particularly, "Éxodos masivos, supervivencia y mantenimiento de la paz", are focused on International Refugee Law, Humanitarian Law, European Human Rights Law, Peacekeeping and Peace building. At the EUISS, he deals with the EU contribution to multilateralism and in particular to the international security system, EU-Asia relations with a focus on India, and international responses to conflict situations such as that of Afghanistan.

Jens Vedsted-Hansen

University of Aarhus, Aarhus, Denmark

Jens Vedsted-Hansen earned his LL.M and LL.D. from the University of Aarhus, where he is a Professor of Law. Having worked as a research scholar at the University of Aalborg, Faculty of Social Sciences, and as assistant and associate professor at the University of Aarhus Law School, he became a research fellow at the Danish Centre for Human Rights in 1993. In 1997 he joined the Faculty of Law at the University of Copenhagen as an associate professor. Since 1999 he has been a professor of human rights law at the University of Aarhus Law School. He has participated in various international research projects as a contributor, commentator or panel member. He is a member of the Odysseus Academic Network of Legal Studies on Immigration and Asylum in Europe, and of the editorial board of European Journal of Migration and Law. He served as a member of the Danish Refugee Appeals Board from 1987 to 1994. His research interests include administrative law, immigration and refugee law, and human rights law.

Editorial Staff

Anikó Bakonyi

Hungarian Helsinki Committee, Budapest, Hungary

Anikó Bakonyi graduated from the Humanities Faculty at the Eötvös Lóránd University in Budapest and earned an M.A. degree in Human Rights at the Central European University. Her thesis focused on the repatriation of Bosnian refugees after the war in Yugoslavia. Before joining the Hungarian Helsinki Committee, she worked for the International Organization for Migration, coordinating an anti-trafficking program and later a compensation program for Roma forced labourers during WWII. She has also worked for the London-based International Commission on Holocaust Era Insurance Claims (ICHEIC) as a project manager. After returning to Hungary, she coordinated a project called 'Immigrant Budapest' at Menedék, the Hungarian Association for Migrants. At the Hungarian Helsinki Committee she is The Refugee Law Reader's coordinator.



European Refugee Fund

