

**REFUGEE LAW READER SYLLABUS:  
THIRD EDITION**

BUDAPEST - DUBLIN  
2005

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## **ABOUT THE READER AND ITS USE**

### **About the Reader**

*The Refugee Law Reader: Cases, Documents and Materials* (3rd edn.) is a comprehensive on-line model curriculum for the study of the complex and rapidly evolving field of international refugee law. It was initiated and is supported by Legal Assistance through Refugee Clinics (LARC) - a project of the Hungarian Helsinki Committee and is funded by the United Nations High Commissioner for Refugees (UNHCR) and the European Refugee Fund.

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 350 documents and materials.

### **Structure and Content**

The Reader is divided into four sections: Introduction to International Refugee Law, The International Framework for Refugee Protection, The European Framework for Refugee Protection, and UNHCR and Other Actors Relevant to International Asylum Law. 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 thereto.

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 should 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.

The content of the Reader is reflective of its main objective, which is to provide teaching and resource materials for over twenty refugee clinics that are part of LARC's network - which extends across Central Europe and the Baltics, the Western CIS, and parts of the Balkans. Because of the depth, scope, and flexibility of the Reader, it is now being used in several continents for the teaching and training of refugee law.

The Reader first deals with the international refugee law regime and its foundations: 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, 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 focuses on the European Framework for Refugee Protection. The Editors share the view that the developments within the Council of Europe and the European Union are critical for lawyers in both Member and Non-Member States. For many of the Refugee Clinics within LARC, national legislation will be shaped by prevailing expectations from the West that central planks of the EU asylum *acquis communautaire* should be translated into national legislation. For many states bordering the current and future Member States, their asylum policies in turn will, for better or for worse, be responding to, and often replicating elements of Western European asylum policy. The evolution of the asylum regime in Europe, however, has broader ramifications well beyond the regional context described above, making it relevant to a much wider community of international legal scholars and advocates. For with the institutional and political fora of the European Union, the detailed pan-European asylum system that is under construction is creating regional norms and standards in the area of asylum that have been, and will continue to be, looked to by policy makers from other continents. For those reasons, the Reader offers a serious consideration of the European context for refugee protection. It also provides an excellent collection of the central instruments that are shaping regional law and policy. They are current up until September 1, 2005.

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. The Main Debates surrounding many of the topics covered in the Reader address the implications of refugee law and practice on refugee populations.

### **Accessing Source Material**

Over 85 per cent of the documents and materials contained in the Reader are accessible in their full text format to all users. For practical purposes, we have limited all assigned reading to English language materials. Permission has been granted generously by Oxford University Press for the Reader to make the core text, G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2<sup>nd</sup> edn., 1996) accessible on-line.

The structure and substantive content of the Reader requires that all of the users should also have at their disposal another core reference text in the field, J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) .

With the very generous support of the publishers of the secondary literature that is included in the Reader, we are able to provide the professors teaching refugee law and clinics within the LARC network with password-protected access to these documents. Other users who are engaged in teaching and training refugee law in a university or clinical context may also be eligible for a password to access protected materials. More

information can be obtained by contacting the LARC office at the email listed at the end of this section.

As there are a large number of core and extended readings that are accessible in the Reader, we recommend that the reading should only be selectively printed out. 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.

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, 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.

### **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 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 Refugee Law	5	2	1
Section II: Principles/Concepts of Refugee Law	5	2	1
The 1951 Convention	14	8	4
Other Forms of Protection	4	2	3
Section III			
European Framework for Refugee Protection – Council of Europe	5	2	3
European Framework for Refugee Protection – European Union	12	6	2
Section IV: UNHCR and Other Actors	3	2	1



## **Technical Advice**

To begin, you are advised to download the complete *Syllabus of the Refugee Law Reader*. The complete 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 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, 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 can be accessed in PDF format by 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 LARC's registered clinic partners. Users should note that some documents and articles in the retrieval section, primarily those assigned as Extended Readings, are not yet accessible, as the publication permissions are pending. When publication permission is received for select articles, the respective links will be activated.

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 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 first and second editions. We would like to thank*

Eugen Osmochescu, Deputy Chair of Public International Law and Law of Foreign Economic Relations, State University of Moldova, 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 LARC regional network. We would like to thank to the following persons for their valued contributions to the creation of the Reader:*

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

*LARC would like to thank to the following persons for their kind cooperation by obtaining the publication permissions:*

Jacqueline Cox (Ashgate), Marion Berghahn (Berghahn Books), Gaby van Rietschoten (Brill Academic Publishers), Jean Vandeveld (Bruylant), Gabriel M. Gilman (Buffalo Human Rights Law Review), Linda Nicol (Cambridge University Press), Linda Davidson and Pete Pazmino (Georgetown University Law Center), Hans Zell (Hans Zell Publishers), Richard Hart (Hart Publishing), Lillian Gagliardi (Harvard Human Rights Journal), Lydio F. Tomasi (International Migration Review), Duncan James (John Wiley & Sons), Eva Rodríguez (Kluwer Law International), Nienke van Schaverbeke (Martinus Nijhoff Publishers), Liz Cooper and Chris Payne (Oxford University Press), William Smith (Oxford University Press USA), Tracey Cummins (Pearson Education), Barbara Ayotte (Physicians for Human Rights), Julie Sitney (Population and Development Review), Annemieke Dolfing (Taylor & Francis Books), Lisa Toyne and Amy Woods (Thomson), Bo Schack (UNHCR Bureau for Europe), Jean-Francois Durieux (UNHCR Convention Plus), Oldrich Andrysek (UNHCR Protection Information Section).

*Our special thanks to the authors who kindly sent electronic versions of their work and in many other ways facilitated the completion of the Reader:*

Ingrid Boccardi, Juliet Cohen, Krista Daley, Andreas Demuth, Guy S. Goodwin-Gill, Brian Gorlick, Agnès Hurwitz, Michael Kagan, Ninette Kelley, Hélène Lambert, Audrey Macklin, Henry Martenson, Jennifer Moore, Catherine Phuong, Katharina Schnöring, Andrew Shacknove, Walter Suntinger, Johannes van der Klaauw.

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

Judit Bagdany, Gábor Gyulai, Andrew James Horton, Boyan Konstantinov, Tamás Kovács, Ferenc Kőszeg, Petr Kutílek, Mike Matheson, Fiona McKinnon, Márta Pardavi, Julie Reynolds, Barbara Salmon, Susannah Scott, Courtney Schusheim, Moira Smith, Rakhmadjon Sobirov, Tímea Szabó, Szabolcs Tóth, Ivy Wong.

*Appreciation is also extended to the Irish Research Council for the Humanities and Social Sciences, whose funding for Rosemary Byrne as a Government of Ireland Research Scholar facilitated the development of the Reader.*

## **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. The Reader has been strengthened by the feedback from those who are using it in a wide range of jurisdictions.

We would also like to include current case law as it develops within, and beyond, the current Member States. If you are aware of important jurisprudence that is available in an English translation, we would be very appreciative if this could be brought to our attention.

*Please send any correspondence to the editorial board at:*

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Tel./Fax: (+36 1) 321 4327, 321 4323 • E-mail: [reader@larc.info](mailto:reader@larc.info)

**SECTION I - INTRODUCTION TO INTERNATIONAL REFUGEE LAW:  
BACKGROUND AND CONTEXT**

**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

Impacts of Regular and Forced Migration:

Migration as a Pervasive Feature of the Human Experience

**a. The Concepts**

Main Debates

Regular, Illegal, and Forced Migration:

Should Different Types of Migration 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

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* (Ashgate Publishing, 2000), 21-58.

**b. 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' (1993) 19 *Population and Development Review* 431-466.

A. Pécoud, P. de Guchteneire, 'Migration without Borders: An Investigation into the Free Movement of People', *Global Migration Perspectives N27*, (Geneva: Global Commission on International Migration, 2005).

#### Extended

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), 87-122.

#### 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.*

## **c. The Actual Movements**

### Main Debates

Is the Boat Really Full? Where?

Should Former Countries of Origin 'Repay' their Historic Debts by Receiving Migrants?

Does Europe Need an Immigration Policy?

### Main Points

Transformation of European States from Sending to Receiving States

Absolute Number and Relative Proportion of Immigrants in Europe is Statistically Small

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), 3-22.

J. Salt, 'Current Trends in International Migration in Europe' (Strasbourg: Council of Europe CDMG, 2005), 2.

Extended

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

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

UNHCR, 'Refugees, Asylum-seekers, and others of Concern – Trends in Dis-placement, Protection and Solutions' in *UNHCR Statistical Yearbook* (2001).

OECD, SOPEMI: Trends in International Migration. *Annual Report 2004. Continuous Reporting System on Migration*. (Paris: OECD, 2005).

EUROSTAT, *EUROSTAT Yearbook* (2004).

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.*

## **2. The Legal and Institutional Framework for Refugee Protection**

Main Debates

National Sovereignty, Migration Control, and International Obligations

Legal v. Moral Duties of Host States

For Better or for Worse: Expanding Refugee Definitions and the Rise of New Actors

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

### **a. The Evolution of the International Refugee Regime**

Readings

Core

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), 32–55.

J. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129–147.

Extended

L. Holborn, 'The Legal Status of Political Refugees, 1920–1938' (1938) 32 *American Journal of International Law* 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.*

### ***b. The Universal Standard: The Geneva Convention Refugee Definition and the Statute of the UNHCR***

#### 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, UNGA, A/RES/428, 14 Dec. 1950.

#### Readings

##### Core

N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, New York: Institute of Jewish Affairs, 1953.

#### Editor's note

*For detailed analysis see also Section II.2*

*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 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.*

### ***c. Contemporary Alternative Refugee Definitions***

#### ***i. Africa***

#### Treaties

##### Regional

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

## ***ii. Latin America***

### Soft Law

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

## ***iii. Europe***

### Soft Law

Council of Europe Parliamentary Assembly, 'Recommendation 773 (1976) on the Situation of de facto Refugees'.

### EU Documents

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.

## ***d. Institutions and Actors in International Law Relevant to Refugee Protection***

### UNHCR Documents

UNHCR, 'Refugee Protection: A Guide to International Refugee Protection', 2001, Ch. 2.

### Editor's note

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

See also Section IV.

## ***3. Overview of National Legal Framework, Institutions, and Actors***

### ***a. The Interface between International Law and National Law***

#### Readings

##### Core

P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge 7th edn., 1997), 63–71.

### ***b. Comparing National Systems***

#### Readings

##### Core

F. Liebaut (ed.), *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries* (Copenhagen: Danish Refugee Council, 2000).

UNHCR, 'Reception Standards for Asylum Seekers In the European Union', 2000.

##### Extended

J.Y. Carlier, D. Vanheule, K. Hullmann, and C. Pena Galiano (eds.), *Who is a refugee? A Comparative Case Law Study* (The Hague: Kluwer, 1997).



## SECTION II - INTERNATIONAL FRAMEWORK FOR REFUGEE PROTECTION

### Editor's note

See also Sections II.2, II.3 and III.1

### **1. Principles and Concepts of Refugee Law**

#### Main Debates

The Scope of Beneficiaries – Adequacy of the Convention Refugee Definition  
Duration of Protection – For How Long is a State Legally Obligated to Protect Refugees?  
Temporary Protection v. Durable Solutions  
Human Rights Protection v. Migration Control  
Asylum v. Extradition and other Criminal Law Measures  
Implications of Extraterritorial Policies as an Alternative or a Threat to Asylum

#### Main Points

International Refugee Protection as a Surrogate to National Protection, Resulting from  
the Failure of the State to Protect Human Rights  
Non-refoulement and Different Forms of Asylum  
Standards of Protection and Refugee Rights

#### **a. Asylum**

##### Soft Law

Universal Declaration of Human Rights, UNGA res. 217 (LXIII), 10 Dec. 1948, Art. 14.  
Declaration on Territorial Asylum, UNGA res. 2313 (XXII), 14 Dec. 1967.  
Committee of Ministers of the Council of Europe, 'Declaration on Territorial Asylum', 18  
Nov. 1977.

##### UNHCR Documents

UNHCR, 'Agenda for Protection': UN doc. A/AC.96/965/Add.1, 26 June 2002.

##### Readings

###### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd  
edn., 1996), 173–195.

###### Extended

J. Hathaway, *Toward the Reformulation of International Refugee Law* (Research Report York  
University, 1997).

G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?'  
(2005) 17 *International Journal of Refugee Law* 542-573.

Editor's note

See also Sections II.1.b. and II.1.c.  
Cf. 1951 Convention Arts. 32, 33.

***b. Protection***

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, UNGA, A/RES/428, 14 Dec. 1950.  
UNHCR EXCOM, 'Protection of Asylum Seekers in Situations of Large-scale Influx', Conclusion No. 22 (XXXII), 1981.  
UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 39 (XXXVI), 1985.  
UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 64 (XLI), 1990.  
UNHCR EXCOM, 'Refugee Protection and Sexual Violence', Conclusion No. 73 (XLIV), 1993.  
UNHCR EXCOM, 'The Prevention and Reduction of Statelessness and the Protection of Stateless Persons', Conclusion No. 78 (XLVI), 1995.  
UNHCR EXCOM, 'Conclusion on Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 2003.

UNHCR Documents

UNHCR, 'Agenda for Protection', UN doc. A/AC.96/965/Add.1, 26 June 2002.  
UNHCR 'Protecting Refugees: A Field Guide for NGOs', August 2003, 18-22.

Readings

Extended

G. Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303-341.  
A. Edwards, 'Human Rights, Refugees, and the Right 'To Enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293-330.

Editor's note

See also 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, Art. 2(a), (d)-(g) (for definition).

See also Section II.3.

The EXCOM conclusions referenced should not be the central focus of the reading, but should serve as a representative sample of the scope of EXCOM conclusions addressing the wide range of refugee protection concerns.

### **c. Non-refoulement**

#### Treaties

##### International

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', UN doc. A/AC.96/830, 7 Sept. 1994, paras. 14-15, 30-41.

##### Readings

###### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn. 1996), 117-155.

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 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), 78-177.

###### Extended

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 155-171, 195-204.

J.-F. Durieux and J. McAdam, 'Non-Refoulement through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 *International Journal of Refugee Law* 4-24.

##### Editor's note

See also Section II.3 + III.1

### **d. Non-discrimination**

#### Treaties

##### International

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

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

## Readings

### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 230–234.

### Extended

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

T. Einarsen, 'Discrimination and Consequences for the Position of Aliens' (1995) 64 *Nordic Journal of International Law* 429–452.

### Editor's note

See Sections II.3. + III.1

Cf. *Convention on the Elimination of All Forms of Discrimination against Women*.

Cf. *Convention on the Elimination of All Forms of Racial Discrimination*.

## ***e. Family Unity***

### Treaties

#### International

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

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

#### Regional

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, Art. 8.

### 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.

Council of Europe Committee of Ministers, Recommendation No R (99)23 on Family Reunion for Refugees and Other Persons in Need of International Protection, 15 Dec. 1999.

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

UNHCR EXCOM, 'Family Reunification' Conclusion No. 23 (XXXII), 1981.

### UNHCR Documents

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

UNHCR, 'Summary Conclusions on Family Unity', 8–9 November 2001.

## Readings

### Core

H. Lambert, 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion' (1999) 11 *International Journal of Refugee Law* 427-450.

#### Extended

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), 555-603.

A. Edwards, 'Human Rights, Refugees, and the Right 'To Enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293-330.

#### Editor's note

See Section II.3.a.iii

See also Section III.1.b (case-law under ECHR Art. 8).

See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

See 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.

### **f. Durable Solutions**

#### UNHCR Documents

UNHCR, 'Handbook Voluntary Repatriation: International Protection', 1996, 7-40.

#### Readings

##### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 268-282.

J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 155-169, 173-187.

#### Editor's note:

See Section I.2

See Section II.2.j (cessation of refugee status being one of the durable solutions as foreseen by the 1951 Refugee Convention)

### **g. International Cooperation**

#### Readings

##### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 291-295.

J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115-151, 187-209.

#### Extended

A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002), 40-54, 72-87.

#### Editor's note

See Section IV.

## **2. The 1951 Refugee Convention**

### **a. Historical Context**

#### Main Debates

Relationship Between the Strategic Political Objectives of Western States in 1951 and the Scope of the 1951 Convention Definition

Does the Focus on Civil and Political Rights in the 1951 Convention Definition Offer an Adequate Understanding of the Need for International Protection?

#### Main Points

The Evolution of the Refugee Definition From:

- A Historical Context
- Juridical to Social to Individualist Perspectives
- The Specific to the Universal

1951 Refugee Definition v. Other Contemporary Definitions

#### Readings

##### Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths 1991), 1-11.

##### Editor's note

*It is instructive to identify and analyse the refugee definitions in international instruments between 1922 and 1946 in comparison to that of the 1951 Convention.*

*It is useful to identify the values (civil and political rights) highlighted in the 1951 definition and those that are not (social and economic rights) as a means of generating a broader discussion about the wisdom, practicality, and political implications of the choices made in adopting the 1951 Convention definition.*

### **i. Prior Definitions: Group Specific; Geographically and Temporally 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, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 4–6.

### ***ii. 1951 Convention: Universal Applicability; Optional Geographical and Temporal Limits***

#### 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. 5, 108–109.

#### Readings

##### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 7–8, 18–19.

### ***iii. Expansion via the 1967 Protocol***

#### Treaties

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

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.

### ***b. Definition***

#### Main Debates

Interpretive Method: Original Intent v. Evolving Interpretation – Should There Be a “Fixed” or “Expanding” Meaning?

Re-Defining Refugee: Controversies over Expanding the Definition to Meet Protection Needs Not Foreseen in 1951.

#### UNHCR Documents

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

#### Editor's note

*A discussion of whether the definition of refugee should be modernized should consider whether gender, sexual orientation, or other characteristics should be added to the enumerated grounds of persecution.*

*See Section III.2.b.ii (b) Joint Position 4 March 1996 of the Council of the European Union on the harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 Relating to the status of refugees (96/1961/JHA)*

*See Section III.2.b.ii (b) 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.*

## ***i. Alienage***

### Main Debates

*Requirement that Refugees Be Outside of their State of Nationality v. Need for Protection  
Should the Internally Displaced Receive Refugee Protection?*

### Main Points

*1951 Convention Applies to a Subset of Forced Migrants*

*Underlying Legal and Practical Motivations of State Parties for Requirement that Refugees  
Cross International Borders*

*UNHCR v. State Party Views on International Protection Needs: UNHCR Assists to IDPs*

### Readings

#### Core

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

*A. Shacknove, 'Who Is a Refugee?' (1985) 95 *Ethics* 274.*

### 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.*

## ***(a) 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.

***(b) 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.

***(c) 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.

***(d) Stateless***

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.

Readings

Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 41-43.

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

***ii. Well-founded Fear***

Main Debates

The Well-founded Fear Requirement:

Demonstration of Objective v. Subjective Fears

Main Points

Subjective v. Objective Fear

Interpretation by State Parties

Major Focus in Refugee Determinations is on the Risk of Future Persecution

Assessing the Risk of Persecution in the Future Cannot be Done in the Abstract

### 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), 69-97.

'The Michigan Guidelines on Well-Founded Fear', March 2004.

#### Extended

J. Hathaway and W. Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear?' (2005) 26 *Michigan Journal of International Law* 505.

#### Editor's note

*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 on showing a risk in the future must consider all the circumstances, the context and the conditions that have occurred in the past, and must evaluate the degree of likelihood of the actions and threats that might take place in the future.*

*N.B. 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 General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1), Section 4).*

### **iii. Persecution**

#### Main Debates

Accountability Theory v. Protection Theory

Must Persecution Include Punitive Intent?

### Main Points

#### Persecution by Non-State Actors

##### The Threshold for Persecution:

- Discrimination
- Prosecution under Laws of General Application
- Threats to Life, Liberty or Bodily Integrity without Punitive Intent (i.e.,FGM)

### Editor's note

*The debate between the accountability theory v. the protection theory centres 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.*

*For EU definition, see Section III.2.b.ii (b) Joint Position 4 March 1996 of the Council of the European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA) and see 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, Art. 2-10, 13.*

#### **(a) 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.

##### Cases

*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)

*Pitcherskaia v INS 118 F 3d 641 (9th Cir 1997) (US judicial decision holding that forced treatment in psychiatric institution without intent to punish can constitute persecution)*

*Korablina v INS 158 F 3d 1038 (9th Cir 1998) (US judicial decision finding cumulative discrimination against Jewish woman in Ukraine constitutes persecution)*

UK Court of Appeal *Adan and Aitseguer* (1998) INLR 472; 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* (Judgments of 19 December 2000) (UK judicial decision upholding asylum for applicants fearing persecution by non-state actors)

## Readings

### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 66–70.

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 169–179.

## **(b) 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, 'Position Paper on Agents of Persecution', 14 March 1995.

## Readings

### Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 124–131.

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 70–74.

J. Moore, 'Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection' (2001) 13 *International Journal of Refugee Law* 32.

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), 95–109.

### Extended

ELENA, 'Research Paper on Non-State Agents of Persecution and the Inability of the State to Protect: The German Interpretation' Sept. 2000.

R. Marx, 'Notions of Persecution by Non-State Agents in German Jurisprudence' (2001) 15 *Georgetown Immigration Law Journal* 447.

S. Edminster, 'Recklessly Risking Lives: Restrictive Interpretations of "Agents of Persecution" in Germany and France', US Committee for Refugees Worldwide Refugee Survey (Washington: US Committee for Refugees, 1999).

## **iv. Five Grounds: Race, Religion, Nationality, Social Group, Political Opinion**

### Main Debates

*Flight from General Civil War: Can Violent Insecurity Give Rise to the Possibility of Persecution based upon the Specified Grounds?*

*Widespread Repressive Practices: What is the Relationship between the Individual and the Group?*

*Conscription: In What Circumstances Can Coerced Military Service Constitute Persecution?*

*Whose Political Opinion is Relevant: The Persecutor, the Persecuted or Both?*

## Main Points

*Broad Interpretation of Concepts of Race, Religion and Nationality*

*Public Religious Activity v. Private Worship*

*Religious Objections to Military Service*

*Multiple Factors in Social Group Definition: Immutable Characteristics, Involuntary*

*Associations, Shared Values, Voluntary Associations, Pariah Status*

*Social Groups and Gender-Related Persecution*

*Types of Expression of Political Opinion - Including Neutrality*

## Treaties

### International

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

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

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

### Regional

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, Art.14.

### Soft Law

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) paras. 66-86, 167-174.

Universal Declaration of Human Rights, 10 Dec.1948, UNGA res. 217 (LXIII), Arts. 2, 18, 19.

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

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, UNGA res. 36/55, 1981.

Declaration on the Elimination of Violence Against Women, UNGA res. 48/04 48, 1993.

### UNHCR Documents

UNHCR, 'Guidelines on International Protection: "Membership of a particular social group" within the context of Art.1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', 2002.

UNHCR, "'Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons" - Guidelines for Prevention and Response', 2003.

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"', 2004.

## Cases

### Core

*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 recognising as a 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)

*Thomas v. Gonzales* 409 F. 3d 1177 (9th Cir. 2005). (US judicial decision holding family of a racist South African foreman constituted a social group)

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

*Ciric and Ciric v. Canada* 2FC 65 (1994). (Federal Court of Canada holding 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 corrupt conduct can constitute political opinion)

*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 Volume 79 Collection of Decisions 143 (German judicial opinion recognising Iranian homosexual faces persecution based on social group)

*Ahmad and Others v. Secretary of State for the Home Department* (CA) (1990) Imm AR 61. (UK judicial decision on persecution of Ahmadiyahs 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)

*Attorney General v. Ward* [1993] 2 SCR 689 (Supreme Court). (Canadian judicial decision on social group)

*Metropolitan Court* (Hungary) (28 February 2000). (Judicial decision ordering new refugee procedure in order to analyse in depth 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)

*Guo Chun Di v. Carroll* 824F Supp 858 (ED Va 1994). (US judicial opinion finding opposition to China's population control policy is political opinion)

## Readings

### Core

- G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 43–49, 54–59.
- T. Aleinikoff, '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), 263-311.
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 141-185.
- K. Schnöring, 'Deserters in the Federal Republic of Yugoslavia' (2001) 13 *International Journal of Refugee Law* 153.
- Canadian Immigration and Refugee Board, 'Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations' (1996) (neutrality and imputed political opinion)

### Extended

- K. Daley and N. Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' (2000) 12 *International Journal of Refugee Law* 148.
- M. Fullerton, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group' (1993) 26 *Cornell International Law Journal* 514–522, 531–552, 561–563.
- M. Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' (1990) 4 *Georgetown Immigration Law Journal* 396–442.

### Editor's note

*It should be noted that many forms of persecution may be on account of overlapping grounds under Article 1.*

*It may be useful to think about the scope of protected activities under the 1951 Convention:*

- *Religion: Does, or should, it include non-traditional religious beliefs? Anti-religious beliefs? Satanism?*
- *Political opinion: Does, or should, it include racist or anti-semitic political statements?*
- *Gender-related persecution and persecution based on sexual orientation: Tends to be viewed as issues of social group – may also implicate religious grounds as well as political opinion. See Section 2.c.i. 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.*

## **c. Groups with Special Needs**

### Treaties

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 Dec. 1979, 1249 U.N.T.S. 513. Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3.

### Editor's note

*It is desirable to stress the impact that the elements of the Convention definition have on women, children, and the elderly throughout the examination of most of the topics covered in the Reader. Special needs of individuals can have a great impact both on access to the asylum procedure and on standards of treatment.*

## **i. Women**

### Main Debates

Are Women, as a Majority of the Population, a Social Group Under the 1951 Convention?

Do Laws or Harsh Customs Imposed Upon Women Warrant International Protection?

### Treaties

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

### UNHCR Documents

UNHCR 'Guidelines on the Protection of Refugee Women', 1991, paras. 57-62.

UNHCR, 'Guidelines on Prevention and Response to Sexual and Gender Based Violence', 2003.

UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 39 (XXXVI), 1985.

UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 64 (XLI), 1990.

UNHCR EXCOM, 'Refugee Protection and Sexual Violence', Conclusion No. 73 (XLIV), 1993.

### Cases

#### Core

*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 Kasinga* 21 Immigration & Nationality Decisions 357 (BIA 1996). (US administrative decision recognising as a 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)

#### Extended

*Matter of S-A-Interim* Decision 3433 (BIA 2000) (US administrative decision granting asylum to Moroccan woman based on physical and emotional abuse by father)

*In re JJ* (Immigration Court York PA 10 April 2001 Judge Van Wyke). (US administrative decision granting asylum to Spanish Roma fearing forced return to abusive marriage)



## Readings

### Core

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), 319-350.

D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm', (2002) 15 *Harvard Human Rights Journal* 133-154.

### Extended

Canadian Immigration and Refugee Board, 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution' (Ottawa, 9 March 1993); Update to the Women Refugee Guidelines issued 25 Nov. 1996.

Australian Dept. of Immigration and Multicultural Affairs, 'Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers', July 1996.

UK Immigration Appellate Authority, 'Asylum Gender Guidelines', November 2000.

'Asylum and Withholding Definitions' (7 December 2000) 65 *Federal Register* 236, 76588-76598 (US proposed rule on gender and domestic violence asylum claims)

A. Macklin, 'Cross Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-related Asylum Cases' (Fall 1998) 13 *Georgetown Immigration Law Journal* 25.

UK Immigration Appellate Authority, 'Asylum Gender Guidelines', November 2000.

T. Spijkerboer, *Gender and Refugee Status* (Dartmouth and Aldershot: Ashgate, 2000), 107-132, 172-182, 189-206.

H. Crawley and T. Lester, *Comparative Analysis of Gender-related Persecution in National Asylum Legislation and Practice in Europe*, May 2004 (UNHCR Evaluation and Policy Analysis Unit, EPAU/2005/05).

### Editor's note

See Section II.2.b.iv for resources concerning gender-related persecution and its intersection with persecution based on membership in a particular social group.

## **ii. Children**

### Main Debates

How Should Asylum Systems Adapt to Respect the 'Best Interests of the Children'  
Child Soldiers: Should They Be Excluded or Protected?

### 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 Nov. 1989, 1577 U.N.T.S. 3.

### UNHCR Documents

UNHCR, 'Refugee Children: Guidelines on Protection and Care', 1994.  
UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', 1997.  
UNHCR EXCOM, 'Refugee Children', Conclusion No. 47 (XXXVIII), 1987.  
UNHCR EXCOM, 'Refugee Children', Conclusion No. 59 (XL), 1989.  
UNHCR EXCOM, 'Refugee Children and Adolescents', Conclusion No. 84 (LXVIII), 1997.

### Readings

#### Core

Save the Children and UNHCR, 'Separated Children in Europe Programme "Statement of Good Practice"', 3rd edn., October 2004.  
Save the Children and UNHCR, 'Separated Children in Europe Programme "Returns and Separated Children"', September 2004.

#### Extended

S. Maloney, Transatlantic Workshop on 'Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe' (2002) 15 *Journal of Refugee Studies* 102.  
Immigration and Refugee Board (Canada), 'Child Refugee Claimants: Procedural and Evidentiary Issues', 30 Sept. 1996.

#### Editor's note

NB: *There is controversy around claims submitted by child soldiers, who may be denied protection based upon acts they performed under orders.*

*See also Section II.3.a.iii for resources concerning child refugees and Section III.2.b.i. (a) 'Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries': OJ C 221 (19 July 1997). See also Section III.2.b.iii, Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, Art. 18-19.*

### **iii. Elderly**

#### UNHCR Documents

UNHCR, 'The Situation of Older Refugees', UN Doc. EC/48/SC/CRP 39, 14 August 1998.  
UNHCR, 'Older Refugees: Looking Beyond the International Year of Older Persons', UN Doc. EC/50/SC/CRP 8, 7 February 2000.

### **d. Exclusion from Convention Refugee Status**

#### Main Debates

## Exclusion v. Protection for Conscripts Acting under Superior Orders Should Different Exclusion Criteria Apply to Child Soldiers?

### Main Points

Already Receiving Protection  
Undeserving of International Protection  
War Crimes and Coercion: Child Soldiers

### Treaties

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

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

### EU Instruments

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, Art. 12, 17.

### 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. 140-163.

### UNHCR Documents

UNHCR, 'Guidelines on International Protection. Application of the Exclusion Clauses (Article 1 F of the 1951 Convention)', 2003.

### Cases

*Australia 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) (forcibly conscripted teenage Salvadoran present at torture of prisoners not 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

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 91-114.

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 205-229.

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), 425–478.

### Extended

B. Saul 'Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law', Institute for International Integration Studies, Discussion Paper N 26, 2004.

M. Gallagher, S.J. 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum' (2001) 13 *International Journal of Refugee Law* 310.

J. Hathaway, 'Framing Refugee Protection in the New World Disorder' (2001) 34 *Cornell International Law Journal* 257–320.

### 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*

## ***e. Internal Protection Alternative***

### Main Debates

Internal Flight Alternative v. Internal Protection Alternative

Should Barriers to Access to Protection and to Secure an Existence Matter?

Who has the Burden of Proof?

### Main Points

Absence of Persecution in One Region v. Access to Genuine Protection

Factors that Affect Practical Access to Protection Elsewhere Within Country of Origin:

Logistical, Linguistic, Familial, Financial, etc.

### 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 Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 2003.

### Cases

*New Zealand Refugee Appeal* No. 71684/99 of 29 Oct. 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 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), 357-417.

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

#### Extended

N. Kelley, 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?' (2002) 14 *International Journal of Refugee Law* 4.

ELENA, 'Research Paper on the Application of the Concept of Internal Protection Alternative' (1998 updated 2000).

H. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 *International Journal of Refugee Law* 506.

#### 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.*

*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.*

## **f. Reception**

### UNHCR Documents

UNHCR, 'Reception Standards for Asylum Seekers in the European Union', July 2000, Part I.

UNHCR, 'Reception of Asylum Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems', 4 September 2001.

### EU Instruments

Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers

### Cases

*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, Judgments of 21 May 2004 (UK judicial decision holding failure to provide shelter and assistance to destitute asylum seekers violates Article 3, European Convention on Human Rights)

Editor's note

For further resources, see Section III.2.b (iii).

**g. Detention**

UNHCR Documents

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

UNHCR, 'Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice', 4 June 1999.

Readings

Extended

M. Pistone, 'Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers' (1999) 12 *Harvard Human Rights Journal* 197.

C. Stone, 'Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project' (2000) 14 *Georgetown Immigration Law Journal* 673.

Editor's note

*Consider the impact on state practice that is likely to result from the limitation on detention contained in Art. 17, Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 14203/04 Limite Asile 64, 9 Nov. 2004 and the limitation contained in Art. 7, Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers.*

**h. Recognition as a Refugee**

Main Debates

Accelerated Procedures v. 1951 Convention and International Standards

Main Points

Minimum Standards for Refugee Status Determination

Burden of Persuasion

Linguistic, Psychological, and Cultural Barriers to Credibility Assessment

Frequent Absence of Documentary or Corroborative Evidence

Impact of Absence of Legal Representation

Impact of Barriers of Communication for:

- Asylum Seekers v. Advocates
- Asylum Seekers and Decision Makers

Editor's note

*An analysis of the minimum standards for refugee status determination should identify and interpret the sources of law that establish these standards.*

## ***i. Procedures***

### 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, paras. 189–194.

### UNHCR Documents

UNHCR 'Asylum Processes (Fair and Efficient Asylum Procedures)' in *Global Consultations on International Protection* (31 May 2001), UN Doc. EC/GC/01/12.

### EU Instruments

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 14203/04 Limite Asile 64, 9 Nov. 2004.

### Cases

*The Minister of Home Affairs v. Watchenuka* 10/2003 (2003). (South African Supreme Court of Appeal judicial decision regarding rights of asylum seekers prior to determination of refugee status)

### Readings

#### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 324–332.

S. Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) 14 *Georgetown Immigration Law Journal* 619.

#### Editor's note

*Consider the impact of the new EU approach, which outlines minimum procedural standards. See Section III.2.b (ii) for further references.*

## ***ii. Establishing the Facts***

### 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, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 34–40.

### ***(a) Standards of Proof***

### UNHCR Documents

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

### 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)

## **(b) Credibility**

### Readings

#### Core

M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations', (2003) 17 *Georgetown Law Journal* 367.

J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *International Journal of Refugee Law* 293.

A. Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context' (International Association of Refugee Law Judges: Ottawa, Canada, 14-16 October 1998).

#### Extended

W. Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing' (1986) 20 *International Migration Review* 230.

## **(c) Special Issues**

### 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.

### UNHCR Documents

UNHCR, 'Guidelines on Protection of Refugee Women', 1991, paras. 57-62.

UNHCR, 'Gender Sensitive Techniques', 1991.

### Readings

#### Core

Physicians for Human Rights, *Medical Testimony on Victims of Torture: A Physician's Guide to Political Asylum Cases* (Boston, 1991).

#### Extended

C. Rousseau, F. Crepeau, 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' (2002) 15 *Journal of Refugee Studies* 43.

J. Herlihy, 'Evidentiary Assessment and Psychology Difficulties', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden: Martinus Nijhoff Publishers, 2005), 123-140.



## ***i. Rights and Obligations of Refugees***

### Main Debates

Should Refugees Enjoy the Rights of Citizens?

### Main Points

Comparison with Rights of Other Non-Nationals

### Readings

#### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 307-315.

R. Cholewinski, 'Economic and Social Rights of Refugees and Asylum Seekers in Europe' (2000) 14 *Georgetown Immigration Law Journal* 709.

#### 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.*

## ***j. Cessation of Refugee Status***

### Main Debates

What Should be the Standard of Proof to Show a Change of Circumstances?  
Who Carries the Burden?

### Main Points

Gaining or Re-gaining National Protection  
Changed Circumstances  
Risk of Short-Term Trips to Homeland

### 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, 'The Cessation Clauses: Guidelines on their application', 1999.

UNHCR, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clauses in the 1951 Convention', UN Doc. EC/SCP/1992/CRP.1, 20 Dec. 1991.

UNHCR, 'Note on Cessation Clauses', UN Doc. EC/47/SC/CRP.30, 30 May 1997.

UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 2003.

## Readings

### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 84–87.

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 191–205, 209–211.

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), 491–544.

'Summary Conclusions: Cessation of Refugee Status, Expert Roundtable, Lisbon, May 2001' 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), 491–544.

J. Hathaway, 'The Right of States to Repatriate Former Refugees', (2005) 20 *Ohio State Journal on Dispute Resolution* 175.

### 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*

## **3. Other Forms and Instruments of Protection**

### **a. Universal Human Rights Instruments**

#### Main Debates

To What Extent Can International Human Rights Law Fill Existing Gaps in Refugee Protection?

Legally Binding Protection Norms v. Discretionary State Practices

How Can International Human Rights Treaties Provide Protection without Enforcement Powers?

#### Main Points

Universal Instruments for Human Rights Protection

Complementarity between 1951 Convention and Other Human Rights Instruments

International Monitoring Bodies and their Protection-Related Practices

#### Editor's note

See also Section III.1

***i. Universal Declaration of Human Rights; The UN International Covenant for Civil and Political Rights***

Treaties

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

Soft Law

Universal Declaration of Human Rights, 10 Dec.1948, UNGA res. 217 (LXIII), Arts. 13, 14.

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

'General Comments of the Human Rights Committee', Nos. 20, 21.

Human Rights Committee Cases

*C. v. Australia* (900/1999) ICCPR, (28 October 2002). (lengthy detention causing mental illness of applicant and deportation to Iran constitutes a violation of Articles 7 and 9)

*Torres v. Finland* (291/1988) ICCPR (2 April 1990). (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 Article 9)

*A. v. Australia* (560/1993) ICCPR (3 April 1997). (absence of individual consideration of reasons for detention of asylum seekers constitutes a violation of Article 9)

Readings

Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 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, 2000), 162–170, Section 9.58.

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), 81–105.

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).

M. Kjaerum, 'Article 14' in G. Alfredson and A. Eide (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (The Hague: Nijhoff, 1999).

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 address 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. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

### Treaties

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

### Soft Law

'General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture', UN Doc. CAT/CIXX/Misc.1, 1997, paras. 6, 7.

Office of the High Commissioner for Human Rights Fact Sheet No. 7/Rev.1 Complaint Procedures.

### Cases

#### Core

*Mutombo v. Switzerland* (CAT 13/1993) (27 April 1994). (no violation 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 Convention)

#### Extended

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

*Matter of G-A- 23 Immigration & Naturalization Decisions 366* (BIA 2002).

### Readings

#### Core

S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000), 162–170.

B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 *International Journal of Refugee Law* 3.

D. Weissbrodt and I. Hortreiter, 'The Principle of Non-refoulement: Article 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' (1999) 5 *Buffalo Human Rights Law Review* 1.

Extended

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), 81-105.

Editor's note

See Section III.1.a. and Section IV.1

**iii. The UN Convention on the Rights of the Child**

Treaties

Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3. Arts. 1, 2, 3, 6, 22, 37, 40.

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status', 1992, paras. 213-219.

UNHCR EXCOM, 'Refugee Children', Conclusion No. 47 (XXXVIII), 12 Oct. 1987.

UNHCR EXCOM, 'Refugee Children', No. 59 (XL), 13 Oct. 1989.

UNHCR EXCOM, 'Refugee Children and Adolescents', No. 84 (XLVIII), 17 Oct. 1997.

UNHCR Documents

UNHCR, 'Refugee Children: Guidelines on Protection and Care', 1994, Ch. 2, 8, 10.

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

UNHCR, 'Note on Refugee Children', 9 July 1987.

Readings

Core

Immigration and Refugee Board (Canada), 'Child Refugee Claimants: Procedural and Evidentiary Issues', 30 Sept. 1996.

Separated Children in Europe Programme, 'Statement of Good Practice', 2nd edn., October 2000.

Editor's note

See Section III.2.b.i (a). Council of the European Union Resolution on Unaccompanied Minors Who are Nationals of Third Countries

**iv. The Geneva Conventions and Protocols: Minimum Standards in Times of War**

Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Article 9.

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

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

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.

#### Soft Law

UNHCR EXCOM, 'Conclusion on the civilian and humanitarian character of asylum', Conclusion No. 94 (LIII), 8 Oct. 2002.

UNHCR EXCOM, 'Military Attacks on Refugee Camps and Settlement in Southern Africa and Elsewhere', Conclusion No. 27 (XXXIII), 20 Oct. 1982.

UNHCR EXCOM, 'Military Attacks on Refugee Camps and Settlement in Southern Africa and Elsewhere', Conclusion No. 32 (XXXIV), 20 Oct. 1983.

UNHCR EXCOM, 'Military and Armed Attacks on Refugee Camps and Settlements', Conclusion No. 45 (XXXVII), 13 Oct. 1986.

UNHCR EXCOM, 'Military or Armed Attacks on Refugee Camps and Settlements', Conclusion No. 48 (XXXVIII), 12 Oct. 1987.

#### UNHCR Documents

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

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

#### Readings

##### Core

J.P. Lavoyer, 'Refugees and internally displaced persons: International humanitarian law and the role of the ICRC' (1995) 305 *International Review of the Red Cross* 162-180.

S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law' (2001) 83 *International Review of the Red Cross* 843.

##### Extended

J.-M. Henckaerts and Louise Doswald-Beck (eds.), *ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005)

K. Hulme, 'Armed Conflict and the Displaced' 2005) 17 *International Journal of Refugee Law* 91-116.

##### Editor's note

*Within the context of an overall refugee curriculum for clinical teaching, this topic may be given less emphasis than the universal instruments discussed above.*

## ***b. Special Forms of Protection: Subsidiary Protection and Humanitarian Status***

### **Main Debates**

Adequacy of the 1951 Refugee Convention in the Context of the Various Forms of Forced Displacement: Are Additional (International or Regional) Instruments Needed to Secure Protection for Victims of Generalised Violence, Armed Conflict etc.?

Should there be a 'Sliding Scale' of Protection and Entitlements?

### Main Points

The Need for a Wider Scope of Beneficiaries, and for Establishing the Protection Standards to be Accorded for Persons in Need of Subsidiary Protection

### UNHCR Documents

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

### EU Documents

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.

### Readings

#### Core

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), 81-105.

G. Noll, 'Fixed definitions or framework legislation? The delimitation of subsidiary protection *ratione personae*', Working Paper No. 55 New Issues in Refugee Research (UNHCR, 2002).

T. Spijkerboer, 'Subsidiarity in Asylum Law. The Personal Scope of International Protection' in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?* (Brussels: Bruylant, 2002), 19-42.

#### Extended

B. Nagy, 'Is there a need for subsidiary protection in Europe? A view from a candidate country' in D. Bouteillet-Paquet (ed.), *Subsidiary protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels: Bruylant, 2002), 95-116.

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), 57-78.

J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461-516.

#### Editor's note

*While human rights instruments may provide protection against refoulement, the standards of treatment for persons outside the scope of the 1951 Refugee Convention are only vaguely defined in general human rights law.*

See also Section II.3.a. and Section III.1. and 2.

### ***c. Temporary Protection***

#### Main Debates

Adequacy of the 1951 Refugee Convention in Mass Flight Situations: Legally Binding Protection Norms v. Discretionary State Practices

#### Main Points

Temporary Protection Is Not an Alternative to Convention Protection, but a Precursor to it (or to Subsidiary Protection) – until Individual Procedures Are Carried Out or Group Recognition Occurs

#### 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 (2001) OJ L212/12.

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#### Readings

##### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd ed., 1996), 196-202.

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J. Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *American Journal of International Law* 279-306.

J. Hathaway and R.A. Neve 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 156-69, 173-84.

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G. Noll and J. Vedsted-Hansen, 'Temporary Protection and Burden Sharing: Conditionalising Access Suspending Refugee Rights?' in E. Guild and C. Harlow (eds.) *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001) 195-222.



Editor's note

See Sections II.2.h, II.2.i, and II.2.j

See also Section III.2.b.iv

**SECTION III - EUROPEAN FRAMEWORK FOR REFUGEE PROTECTION**

**1. The Council of Europe and Refugee Protection**

**a. Legal and Policy Framework for Refugee Protection**

Main Debates

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 Nov. 1950, 213 U.N.T.S., 222.

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 Oct. 1980, E.T. N 107.

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

European Social Charter, 18 Oct. 1961, 529 U.N.T.S. 89.

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 Nov. 1987, E.T.S. 126.

Extended

European Convention on Consular Functions, 11 Dec. 1967, E.T.S. N 61.

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

European Convention on the Suppression of Terrorism, 27 Jan. 1977, E.T.S. N 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 Febr. 1995, E.T.S. 157.

European Convention on Nationality, 6 Nov. 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

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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 Jan. 1970.

Committee of Ministers of the Council of Europe, 'Recommendation R (81) 16 on the Harmonisation of National Procedures Relating to Asylum', 5 Nov. 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 Jan. 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 Nov. 1984.

Committee of Ministers of the Council of Europe, 'Recommendation R (97) 22 Containing Guidelines on the Application of the Safe Third Country Concept', 25 Nov. 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 Article 13 of the European Convention on Human Rights', 18 Sept. 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 Dec. 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 Nov. 2001.

Committee of Ministers of the Council of Europe, 'Recommendation R (2003) 5 to Member States on Measures of Detention of Asylum Seekers', 16 Apr. 2003.

Committee of Ministers of the Council of Europe, 'Recommendation R (2004) 9E 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) 14E to Member States on the Movement and Encampment of Travellers in Europe', 1 Dec. 2004.

Committee of Ministers of the Council of Europe, 'Recommendation R (2005) 6E to Member States on Exclusion from Refugee Status in the Context of Article 1F of the Convention Related to the Status of Refugees', 23 March 2005.

Soft Law

Council of Europe: Parliamentary Assembly

Parliamentary Assembly of the Council of Europe 'Resolution 1437 (2005) "Migration and Integration: a Challenge and an Opportunity for Europe"', 27 Apr. 2005.

Parliamentary Assembly of the Council of Europe 'Recommendation 1624 (2003) on Common Policy on Migration and Asylum', 30 Sept. 2003.

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 Jan. 2000.

Consultative Assembly of the Council of Europe, 'Recommendation 564 (1969) on the Acquisition by Refugees of the Nationality of their Country of Residence', 30 Sept. 1969.

Parliamentary Assembly of the Council of Europe, 'Recommendation 773 (1976) on De Facto Refugees', 26 Jan. 1976.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1088 (1988) on the Right to Territorial Asylum', 7 Oct. 1988.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1236 (1994) on the Right of Territorial Asylum', 12 Apr. 1994.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1163 (1991) on the Arrival of Asylum-seekers at European Airports', 23 Sept. 1991.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1475 (2000) on Arrival of Asylum-seekers at European Airports', 26 Sept. 2000.

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 Jan. 2004.

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Parliamentary Assembly of the Council of Europe, 'Recommendation 1703 (2005) on Protection and Assistance for Separated Children Seeking Asylum', 28 Apr. 2005.

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 Apr. 1997.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1652 (2004) on Education of Refugees and Internally Displaced Persons', 2 Mar. 2004.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1503 (2001) on Health Conditions of Migrants and Refugees in Europe', 14 Mar. 2001.

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 1550 (2002) on Combating Terrorism and Respect for Human Rights', 24 Jan. 2002.

Parliamentary Assembly of the Council of Europe, 'Recommendation 1644 (2004) on Terrorism', 29 Jan. 2004.

## 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 Sept. 2001.

Commissioner for Human Rights 'Recommendation CommDH (04) 1 on Combating Trafficking of Children in Europe', 19 Jan. 2004.

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## Readings

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## Editor's note

*The Committee of Ministers is empowered to make recommendations to Members 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.*

*Note the relationship between the ECHR jurisprudence and the Recommendations of the Committee of Ministers.*

## Art. 3 -

(1) *Expulsion decision may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled (Hilal v. UK para.59, Ahmed v. Austria paras.38-39).*

(2) *Mere possibility of ill-treatment is not in itself sufficient (Vilvarajah v. UK para.111).*

(2) *Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of existence of risk is due to those facts that were known or ought to have been known to the Contracting State at the time of the expulsion (Vilvarajah v. UK para.107, and H.L.R. v. France, para.37).*

(3) *The Court has confirmed the absolute (ius cogens) nature of Art. 3 applicable irrespective of the reprehensible nature of the conduct of person in question and gravity of the offence that the applicant committed (Ahmed v. Austria).*

(4) *Art. 3 makes no provision for exceptions nor derogation that would be permissible under Art.15 even in the event of public emergency threatening the life of the nation (Ireland v. UK, reiterated in Chahal v. UK).*

(5) *Protection afforded by Art. 3 is wider than that provided by Art. 33 of the 1951 Convention relating to the Status of Refugees (Ahmed v. Austria para. 24, and Chahal v. UK para. 80).*

*Art. 5 -*

(1) *To satisfy the purpose of Article 5 para.1, the national system must provide safeguards for the lawfulness of detention, requiring inter alia that individuals were protected from arbitrariness (Chahal v. UK para.118).*

(2) *Para. 4 of Article 5, the Court recalls that the notion of "lawfulness" has the same meaning as under para.1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of those in the text of the ECHR,*

*Art. 8 -*

(1) *No right of an alien to enter or to reside in a particular country is as such guaranteed by the ECHR, nor does it prohibit Contracting States from regulating the entry and length of stay of aliens in order to maintain public order (Berrehab v. the Netherlands para.28).*

(2) *Expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 para. 1 of the ECHR (Moustaquim v. Belgium para.36).*

(3) *Main criteria applied by the Court are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country, with specific account on localisation of family and social ties - in the home or the host country. Years of schooling and spending the decisive years.*

## ***b. The European Convention on Human Rights and Fundamental Freedoms***

### **Main Debates**

Refugee Protection under Regional v. Universal Treaties

Has the European Court of Human Rights Exhibited Too Much or Too Little Deference to National Refugee Decision-Making Processes?

### **Main Points**

Scope of Protection under Article 3 of the ECHR v. Articles 1 and 33 of the 1951 Convention

Effective Remedies for Rejected Asylum Seekers under the ECHR

Expulsion

Family Reunification

## Detention

### Treaties

#### Regional

##### Core

European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 Nov. 1950, 213 U.N.T.S. 222.

### Cases

#### Core

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

##### Facing real and immediate risk of ill-treatment

*Soering v. UK*, European Court of Human Rights Judgment of 7 July 1989. (holding extradition from UK to USA of German national charged with capital crime and at risk of serving on death row is a violation of Article 3 recognising the extra-territorial effect of the ECHR)

*Chahal v. UK*, European Court of Human Rights, Judgment of 15 November 1996. (holding deportation order that would return a Sikh separatist to India on national security grounds where he would face ‘real risk’ of being subject to treatment contrary Article 3 is in breach of the ECHR)

*Ahmed v. Austria*, European Court of Human Rights Judgment of 17 December 1996. (holding deportation of a Somali convicted of serious criminal offence is a violation of Article 3 if the applicant is under the risk to be subject to inhuman and degrading treatment by non-state agents upon expulsion)

*Hilal v. UK*, European Court of Human Rights Judgment of 6 March 2001. (expulsion of Zanzibari opposition party member, having previously suffered serious ill-treatment in detention, would be contrary to Art.3)

*Jabari v. Turkey*, European Court of Human Rights Judgment of 11 July 2000. (holding violation of Article 3 in case of deportation that would return a woman who has committed adultery to Iraq)

##### Lack of necessary health care and destitution as violation of Art. 3

*BB v. France*, European Court of Human Rights Judgment of 7 September 1998. (finding Article 3 violation whereby a citizen of Congo suffering from AIDS would be deported to the country of origin without access to adequate medical care)

*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, Judgments of 21 May 2004 (UK judicial decision holding failure to provide shelter and assistance to destitute asylum seekers violates Article 3, European Convention on Human Rights)

##### Conditions in detention amounting to violation of Art. 3

See *Dougoz v. Greece* (under Art. 5)

##### Limitations to Art. 3

*Cruz Varas and others v. Sweden*, European Court of Human Rights Judgment of 20 March 1991. (finding no Article 3 violation in expulsion of Chilean national denied asylum, noting that risk assessment by State Party must be based on facts known at time of expulsion)

*Vilvarajah and others v. UK*, European Court of Human Rights Judgment of 30 October 1991. (holding no breach of Article 3 although applicants faced forms of ill-treatment upon return to Sri Lanka, which did not pose a risk of treatment beyond the threshold of Article 3 noting that their personal situation was not worse than 'the generality' of other young male Tamils. The right to political asylum is not contained in either the Convention or its Protocols)

*HLR v. France*, European Court of Human Rights Judgment of 27 April 1997. (finding no violation of Article 3 in case of expulsion of a citizen of Columbia as there was no 'relevant evidence' of risk of ill-treatment by non-state agents, whereby authorities 'are not able to obviate the risk by providing adequate protection')

*Bensaid v. UK*, European Court of Human Rights Judgment 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 being subject to compelling humanitarian considerations, once the necessary treatment is available in his country of origin)

Art. 5 – the right to liberty and security of person (para. 1), lawfulness of detention (para. 4)

*Amuur v. France*, European Court of Human Rights Judgment of 25 June 1996. (ruling detention of asylum seekers in a so-called extra-territorial 'international zone' of an airport is a violation of Article 5, para. 1)

Art. 3 and Art. 5

*Dougoz v. Greece*, European Court of Human Rights Judgment of 6 March 2001. (conditions and length of detention amount to degrading treatment contrary to Article 3 and the absence of remedies. a violation of Art. 5 paras. 1 and 4)

Art. 8 – the right to respect for private and family life, home and correspondence

*Beldjoudi v. France*, European Court of Human Rights Judgment of 26 March 1992. (deportation of applicant residing in France for more than four decades with no de facto links with Algeria, apart from his nationality constitutes a violation of Art. 8)

Parental access

*Berrehab v. the Netherlands*, European Court of Human Rights Judgment of 21 June 1988. (refusal to grant a new residence permit after the divorce and the resulting expulsion order infringes right to respect for family life guaranteed in Art. 8)

*Dogan and others v. Turkey*, European Court of Human Rights judgment of 29 June 2004. (internal displacement as a result of terrorist activities of the PKK. Expulsion from a home village and refusal on security grounds, to permit the return of villagers to their homes, constitutes a breach of Art. 8)

Limitations to Art.8

*Gul v. Switzerland*, European Court of Human Rights Judgment of 9 February 1996. (finding no violation of Art. 8 in case of refusal by public authorities to allow family reunification)

Art. 4 of the Protocol No. 4 – prohibition of collective expulsion of aliens

*Conka v. Belgium*, European Court of Human Rights Judgment of 5 February 2002. (the detention and return of rejected Roma asylum seekers to Slovakia constituted a violation of Art. 5, as well as the prohibition against ‘collective expulsion’ under Protocol 4)

Extended

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

*D. v. UK*, European Court of Human Rights Judgment of 2 May 1997. (expulsion to the country of origin - known for the lack of medical facilities and appropriate treatment in case of the applicant suffering from advanced stages of a terminal and incurable illness - HIV/AIDS, would amount to inhumane treatment prohibited by Art. 3)

*S.C.C. v. Sweden*, European Court of Human Rights decision of 15 February 2000. (expulsion to the country of origin - known for availability of HIV/AIDS treatment, in case of relatively well-off applicant in early stage of illness, with close relatives residing in her homeland, does not give grounds to compelling humanitarian consideration)

Limitations to Art. 3

Territorial and material limitations

*Al-Adsani v. UK*, European Court of Human Rights Judgment of 21 November 2001. (state not responsible for torture that has taken place outside the Council of Europe member state jurisdiction, even in case of an applicant of dual British/Kuwaiti citizenship. Any positive obligation deriving from Arts. 1 and 3 of the European Convention could extend only to the prevention of torture)

Absence of real risk

*Venkadajalasarma v. the Netherlands*, European Court of Human Rights judgment 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)

*Thampibillai v. the Netherlands*, European Court of Human Rights decision of 17 February 2004, (present conditions are decisive in determining whether expulsion of the applicant would be contrary to Art. 3)

Art. 8 – the right to respect for private and family life

*Mehemi v. France*, European Court of Human Rights Judgment of 26 Sept. 1997 (enforcement of order for permanent exclusion from French territory of Algerian



national convicted for drug-trafficking and has family and minor children in France is an Art. 8 violation)

### Readings

#### Core

UNHCR, 'UNHCR Manual on Refugee Protection and the European Convention on Human Rights' 2005.

H. Lambert, 'Article 3 of the European Convention on Human Rights and the Protection of Refugees and Rejected Asylum-Seekers against *Refoulement* from Europe' in *European Convention on Human Rights and Protection of Persons in need of International Protection* (Chisinau, 2000), 77-87.

#### Extended

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), 359-427.

F. Jacobs and R. White, *The European Convention on Human Rights* (Oxford: Clarendon Press 2nd edn., 1996), 41-297.

D. J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 37-274, 462-489.

#### Editor's note

*The use of case studies is an effective method for teaching the scope of protection offered by the ECHR. See Part III of the 'UNHCR Manual on Refugee Protection and the European Convention on Human Rights' (2003).*

*Compare the beneficiaries under the ECHR in contrast to the 1951 Convention.*

*The ECHR can be invoked by a much wider range of individuals, including refused asylum-seekers, beneficiaries of Temporary Protected Status and non-Convention refugees.*

*To compare the absolute protection offered under Article 3 of the ECHR with Articles 1 (f) and 33 of the 1951 Convention. See Section II.2.b.iii.*

*The practice of the European Court of Human Rights has led to an extended protection expanding the ambit of the non-refoulement principle – see also Section II 1.c.*

## **2. The European Union**

### **a. The Evolving EU Acquis on Asylum**

#### **i. European Integration and Asylum**

##### Main Debates

Is the EU Involvement in Asylum Law Raising or Lowering Standards in Practice?

Which of These Approaches Should the EU Take?

What Is the Relationship of the Geneva Convention with EU Asylum Law?

What Is the Relationship between the 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

Objectives of Giving EU Competence over Asylum Matters

### EU Instruments

'Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy and the Agenda for Protection', COM (2003)152, 26 March 2003.

Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ C 53, 3 February 2005.

'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 the Communication from the Commission: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations, SEC (2004) 693, 2 June 2004.

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Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union OJ C198/01 (12 August 2005).

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'The European Union, Asylum and the International Refugee Protection Regime: the New Multiannual Programme in the Area of Freedom, Security and Justice', Summary of UNHCR's Recommendations to the Multiannual Programme, September 2004.

### Readings

#### Core

G. Noll, 'European Integration and Extraterritorial Protection' in *Negotiating Asylum* (The Hague: Kluwer Law International, 2000), 117-161.

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Immigration Law Practitioners Association, The Standing Committee of Experts on International Immigration, Refugee and Criminal Law, 'An Area of Freedom, Security and Justice Five Years On Immigration and Asylum for the Next Five Years', Joint Submissions to the European Commission, Utrecht and London, 3 June 2005.

#### Extended

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.

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).

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' (2002) 27 *European Law Review*, 497-502.

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), 227-295.

## ***ii. The Institutional and Legal Framework for European Refugee Protection***

### 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 EU Internal Market, or Establishment of Fortress Europe?

### Main Points

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

### EU Instruments

Treaty Establishing the European Community (1957), OJ C 325/33 24 December 2002, Title IV, Arts. 61-68.

Protocol on Asylum for Nationals and Member States of the EU, OJ C 340/103 10 November 1997.

Acquis of the European Union under Title IV of the TEC and title VI of the TEU. Consolidated version 2003.

Charter of Fundamental Rights of the EU, OJ C 364/1 18 December 2000, Arts. 18, 19.

Draft Treaty Establishing a Constitution for Europe, (2004), OJ 2004 C 310, 25 June 2004, Title I, Arts. 1-9.

Draft Treaty Establishing a Constitution for Europe, (2004), OJ 2004 C 310, 25 June 2004, Title III, Arts. III-266 - III-268.

### Readings

#### Core

I. Boccardi, 'After Amsterdam: Towards an EU Asylum Policy?' in *Europe and Refugees - Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), Chapter 6.

#### Editor's note

*Note the limits on the Court's jurisdiction, voting rules in Council and EP, and the shared Commission initiative. The Commission has full right of initiative from 1 May 2004, the date of the most recent EU enlargement to include 10 new Member States.*

*Consider the provision on changed rules for decision-making on asylum, Article 67(5), in force under the Treaty of Nice as of 1 February 2003:*

- What do 'common rules and basic principles' mean, especially since EC power is mostly limited to minimum standards?*
- The Council has now resolved to move to co-decision in all areas covered by Chapter IV of the Amsterdam Treaty, with the exception of legal migration. This means that while the Parliament will have the power to bind the Council to follow its recommendations in many areas, Member States will retain sole decision-making rights in respect of the sensitive question of criteria, rules and programmes for legal (notably economic) migration to their territory, which is currently under discussion at a policy level among EU states.*
- The Commission is responsible, in its role as 'guardian of the Treaties', for monitoring transposition and implementation at national level of the asylum Directives adopted in the first phase of harmonisation. What powers and tools has it at its disposal to compel states to adopt and implement national laws in line with the Community standards?*
- A major outstanding question will be the possible consequences of state laws and practices which could be in line with the minimum standards of the Directives, but are potentially contrary to the 1951 Geneva Convention and other international laws. The question of what bodies would have power and standing to challenge such national measures remains sensitive and widely debated.*

## ***b. European Refugee Protection: Practices and Policies***

### ***i. Access to Territory***

#### *Main Debates*

Displacement Activities v. Duty to Provide Protection

Non-Entrée Policies vs. Duty to Provide Protection

#### *Main Points*

Tension between Objectives of Migration Control, Particularly Control of Irregular Migration, and Protection Obligations

#### *EU Instruments*

Regulation of the Parliament and Council Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders, adopted by the European Parliament, 25 June 2005.

#### *Readings*

##### *Core*

J. van der Klaauw 'Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?' in B. Bogusz, R. Cholewinski, A. Cygan, and E. Szyszczak *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), II.6.

#### Extended

G. Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303-341.

Oxfam 'Foreign Territory: The Internationalisation of EU Asylum Policy' (Oxford: Oxfam, 2005), 7 - 69.

#### Editor's note

*Examine how attempts to reconcile these two objectives have been made when EC legislation was proposed and applied in practice when the legislation was adopted.*

### **(a) International and Regional Legal Framework**

#### Main Debates

Do the 1951 Convention and Article 3 of the ECHR Create a Right of Access to Territory?

#### Main Points

Absence of a Right to Cross a Border as Such under International Law

#### EU Instruments

Schengen Agreement (1985), OJ L 239/13 22 September 2000, Arts.1-16.

Schengen Implementing Agreement (1990) Arts. 2-8; 28-38 [2000], OJ L239 Arts. 62-63 ECT.

Schengen Protocol to the Amsterdam Treaty (1999), OJ C 340/96 10 November 1997.

Council Decision of 13 June 2002 adopting an Action Programme for Administrative Cooperation in the Fields of External Borders, Visas, Asylum and Immigration (ARGO programme) OJ L161 11 (19 June 2002).

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 (12 November 2004).

#### Readings

##### Core

E. Guild, 'Reaching into the European State: Border Pressures and International Asylum Obligations' in *Moving the Borders of Europe* (University of Nijmegen, 2001), 52-61.

E. Guild, 'Jurisprudence of the ECHR: Lessons for the EU Asylum Policy' in C. Dias Urbano de Sousa and P. de Bruycker *The Emergence of a European Asylum Policy*, (Brussels: Bruylant, 2004), 329-342.

### Extended

H. Staples, 'Adjudicating Schengen' in K. Groenendijk, E. Guild, and P. Minderhoud (eds.), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).

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).

A. Edwards, 'Human Rights, Refugees, and the Right 'To Enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293-330.

### Editor's note

Please note that Arts. 28-38 of the Schengen Agreement relate to responsibility and have not been in force since 1997.

## **(b) Visas**

### Main Debates

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 Instruments

Council Regulation (EC) 453/2003 of 6 March 2003 amending Regulation (EC) 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, amended by Regulation (EC) 453/2003 of 6 March 2003 - consolidated version.

Council Regulation (EC) 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa OJ L150 of 6 June 2001, 4.

Council Regulation (EC) 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, 7.

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) N 2414/2001 amending Regulation (EC) N 539/2001 listing the third countries, whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement OJ L 327/1 (12 December 2001).

Council Regulation (EC) N 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 99/8 (17 April 2003).

Council Decision (EC) N 512/2004 establishing the Visa Information System (VIS) OJ L 213/5 (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 L141/3 (4 June 2005).

### Readings

#### Core

E. Guild, 'The Border Abroad: Visas and Border Controls' in K. Groenendijk, E. Guild and P. Minderhoud *In Search of Europe's Borders* (The Hague: Kluwer, 2003).

#### 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 Convention.*

## **(c) Carrier Sanctions**

### Main Debates

Are Carrier Sanctions Permitted Under the Letter of the 1951 Convention?

Should Non-State Parties be Responsible for Pre-Screening Asylum Seekers?

### Main Points

Carrier Sanctions as a Deflection Mechanism

### EU Instruments

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 321/26 (6 December 2003).

### Readings

#### Core

V. Guiraudon, 'Before the EU Border: Remote Control of the „Huddled Masses“' in K. Groenendijk, E. Guild and P. Minderhoud, *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2003), 191-214.

#### 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).

#### ***(d) Interception and Rescue at Sea***

##### Main Debates

Who has Responsibility for Asylum-Seekers Discovered or Rescued on the Seas?

##### Main Points

Interaction between International Law of the Sea and Rules of Refugee, Human Rights, and Humanitarian Law

##### Soft Law

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

##### UNHCR Documents

UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea', 1 March 2002.

##### Readings

###### Core

R. Barnes, 'Refugee Law at Sea' 53 (1) *International and Comparative Law Quarterly*, January 2004, 47-77.

M. Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' 17 (1) *Journal of Refugee Studies*, March 2004, 50-69.

#### ***(e) Extraterritorial Immigration Control***

##### Main Debates

What are the Potential Arguments for and against the Legality of Forced Processing Outside the Territory of the EU?

What Practical Problems Could Result from Such a Policy?

##### Main Points

External Relations Policy as Tool for Non-EU States to Carry out EU Policies

Future Prospect of External Processing of Asylum Applications

##### EU Instruments

'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 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.



### UNHCR Documents

UNHCR, 'Observations on the Communication on Regional Protection Programmes', 10 October 2005.

### Readings

- V. Guiraudon, 'The EU „Garbage Can“: Accounting for Policy Developments in the Immigration Domain' in „Immigration and the Problems of Incomplete European Integration“, *Conference of the European Community Studies Association* (Madison Wisconsin, 2001).
- S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* (4), 567-667.

## ***ii. Refugee Status Determination Procedures***

### ***(a) Access to Procedures***

#### Main Debates

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

##### Extended

G. Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303-341

## ***i. Responsibility: The Dublin Convention and Dublin II Regulation***

#### Main Debates

Distribution Mechanisms v. Protection Obligations

Who Controls the Identity of the Asylum Seeker?

Does the Dublin System Provide Sufficient Safeguards Against Refoulement?

What are the implications of the Dublin II Regulation post-Enlargement?

#### Main Points

Allocating Responsibility for Determining Asylum Claims

Implementing Dublin without Prior Harmonization in Asylum Policies

ID and Data Protection

#### EU Instruments

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 Dublin 15 June 1990, entered into force 1 September 1997) OJ C254 1 (19 August 1997).

Decision No 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention OJ L281, 14 October 1997, 1-25.

Decision No 2/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, establishing the Committee's Rules of Procedure OJ L281, 14 October 1997, 26.

Decision 1/98 of the Article 18 Committee of the Dublin Convention, concerning provisions for the implementation of the Convention OJ L196, 14 July 1998.

Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention OJ L281, 7 November 2000, 1.

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, 1.

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, 1.

Commission Communication Regarding the Implementation of Council Regulation (EC) No 2725/2000, 'Eurodac'.

Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, 2001.

Commission of the European Communities, 'Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States': SEC (2002) 522.

Council Regulation (EC) 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, amended by Regulation (EC) 453/2003 of 6 March 2003 - consolidated version.

Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts SCH/Com-ex (99)13 (28 April 1999).

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.

Commission Staff Working Paper 'First annual report to the Council and the European Parliament on the activities of the EURODAC' SEC (2004) 557.

### Cases

UK Court of Appeal *Adan and Aitseguer* [1998] INLR 472; 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* (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)

*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 244-267. (noting that agreements for allocating responsibility for asylum seekers do not relieve a State Party to the ECHR of the responsibility to ensure that indirect removal of an asylum seeker will not give rise to Article 3 violation)

### Readings

#### Core

A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment' [1999] 11 4 *International Journal of Refugee Law* 646-677.

Justice, *Asylum: Changing policy and practice in the UK, EU and selected countries* (Justice, 2002), 84-92.

G. Noll, 'Formalism vs Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 (1-2) *Nordic Journal of International Law* 161-182.

R. Cholewinski, 'The Baltic states in the context of the Dublin Convention and Related Asylum Norms' (2001) *International Organization for Migration* 19-56.

#### Extended

E. Guild, 'Between Persecution and Protection: Refugees and the New European Asylum Policy' in A. Dashwood, J. Spencer, A Ward, and C. Hillion (2000, 2001) 3 *The Cambridge Yearbook of European Legal Studies* 169-199.

N. Blake, 'The Dublin Convention and the Rights of Asylum Seekers in the European Union' in E. Guild and C. Harlow, *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), 95-116.

U. Brandl, 'Judicial Consideration of the Dublin Convention' in P. de Bruycker and C. de Sousa (eds.), *Immigration and Asylum in the European Union* (Brussels: Bruylant, 2003).

H. Battjes, 'A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Convention' (2002) 4 *European Journal of Migration and Law* 159-192.

- R. Marx, 'Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications' (2001) 3 *European Journal of Migration and Law* 7-22.
- E. Brouwer, 'Eurodac: Its Temptations and Limitations' (2002) 4 *European Journal of Migration and Law* 231-247.
- M. Bell, 'Mainstreaming equality norms into European Union asylum law' (2001) 20 *European Law Review* 20-34.

#### Editor's note

*An analysis of the Dublin rules should consider the following:*

- *Are they compatible with the Geneva Convention and the ECHR?*
- *What are the disputes over how to interpret the Dublin rules?*
- *How have they changed as a result of the Dublin II regulation? What is the likely impact of the changes?*
- *What disputes might arise as to how to interpret the Dublin II rules?*
- *Is Dublin II an effective burden-sharing arrangement, or a burden-shifting mechanism?*

#### **ii. 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?

Should All EU Member States be Considered Safe Third Countries?

##### Main Points

Contrasts between UNHCR and EU Criteria for Determining Safe Third Countries

Safe Third Country Lists

Super Safe Third Country

Chain Deportations

##### 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.

##### EU Documents

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 14203/04, 9 November 2004 Arts. 23(4), 26, 27, 35A.

Resolution on a Harmonised Approach to Questions Concerning Host Third Countries Document WG I 1283, adopted 30 November 1992.

### UNHCR Documents

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

UNHCR, '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, '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

*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* (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)

*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 244-267. (noting that agreements for allocating responsibility for asylum seekers do not relieve a State Party to the ECHR of the responsibility to ensure that indirect removal of an asylum seeker will not give rise to Article 3 violation)

*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 Article 33)

*German Constitutional Court: Judgment in the cases 2 BvR 1938/93 and 2 BvR 2315/93* delivered on 14 May 1996 BVerfGE 94, 49. (upholding the constitutionality of the new clause in the Basic Law introducing the safe third country concept)

### Readings

#### Core

'Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics' 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, 2002) 5-28.

UNHCR, 'Global Consultations in International Protection, Regional Meeting Budapest, 6-7 June 2001, Conclusions'.

G. Goodwin-Gill, 'Safe Country? Says Who?' (1992) 4 *International Journal of Refugee Law* 248.

S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* (4), 567-667.

ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection' (ECRE: London 2004), 10-12.

### Extended

R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 190–196.

K. Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 *International Journal of Refugee Law* 31.

S. Lavenex, "'Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe' (1998) 11 *Journal of Refugee Studies* 134.

### Editor's note

*The safe third country principle does not preclude a host state from voluntarily assuming responsibility for an asylum claim.*

*A consideration of the safeguards that should be incorporated into safe third country practices should address, inter alia, readmission agreements, access and adequacy of procedures, national interpretations of the refugee definition, and standards of protection in the host third state.*

*The documents in this section of the Reader allow the student to see the evolution of safe third country practices in Europe. Note should be taken of the return to the concept of the first country of asylum that is embodied in Art. 26 of the Amended Proposal for the Directive on Minimum Standards. Attention should also be paid to the exceptional border procedure that formalizes the notion of Super Safe Third Countries.*

*See Section v. (b) regarding readmission agreements*

## **(b) Harmonizing the Definition and the Determination Procedures**

### **i. Harmonization of the 1951 Convention Refugee Definition**

#### Main Debates

Should the EU Ensure That All Member States Treat Persecution by Non-State Agents as Persecution under the Geneva Convention?

How Should the Geneva Convention Exclusion Clauses be Applied post-September 11th?

#### 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 Convention

Differentiation in Rights Accorded to 1951 Convention Refugees and Subsidiary Protection Beneficiaries

#### EU Documents

Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term

'refugee' in Article 1 of the Geneva Convention, 28 July 1951, relating to the status of refugees OJ L63, 13 March 1999.

Council Directive 8043/04 of 27 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.

### UNHCR Documents

UNHCR 'UNHCR Annotated 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', January 2005.

### Cases

*Adan and Aitseguer* [1998] INLR 472 (UK CA); *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 HL) (Judgments of 19 December 2000) (UK judicial decision upholding asylum for applicants fearing persecution by non-state actors)

*Chahal v. UK* (European Court of Human Rights 1996) (violation of Article 3, Article 5, para 4, and Article 13 in conjunction with Article 3 in case of a deportation order to India of a Sikh separatist on national security grounds needs. The Indian citizen has spent 6 years waiting the deportation. The necessity of judicial review has been proved)

### Readings

#### Core

Justice, 'Proposal for a Council Definition of a Refugee' in *Asylum: Changing policy and practice in the UK, EU and selected countries* (Justice, 2002), 78-84.

G. Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam' in E. Guild and C. Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001) 141-159. (version updated mainly in relation to the EU Charter of Fundamental Rights)

G. Noll, 'Access to Protection under the EU Acquis' in *Negotiating Asylum* (Kluwer Law International 2000), 233-244.

## ***ii. Minimum Standards for Normal Procedures***

### Main Debates

What Constitutes 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 Minimum Standards

Safeguards  
Appeals  
Remedies

### EU Documents

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 14203/04, 9 November 2004.

Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures OJ 274 13, 19 September 1996.

'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 'Summary of UNHCR's Provisional Observations 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, of 9 November 2004)', March 2005.

### Reading

#### Core

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), 165-194.

R. Byrne 'Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures' (2005) 7 *European Journal of Migration and Law* 71 - 86.

Immigration Law Practitioners Association 'Analysis and Critique of Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (30 April 2004)', London, July 2004.

### ***iii. Minimum Standards for Specific Procedures***

#### ***a. Accelerated and Manifestly Unfounded Procedures***

#### Main Debates

*Efficient v. Fair Procedures*

#### Main Points

*Contrast between UNHCR and EU Definition of Manifestly Unfounded*

*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*

#### Soft Law



UNHCR EXCOM, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum', Conclusion No. 30 (XXXIV), 1983.

UNHCR EXCOM, 'Determination of Refugee Status', Conclusion No. 8 (XXVIII), 12 Oct. 1977.

### EU Documents

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 14203/04, 9 November 2004, Arts. 23, 29, 34, 35, 38.

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, 'Position on Manifestly Unfounded Applications for Asylum', *3rd International Symposium on the Protection of Refugees in Central Europe* (Geneva: UNHCR, 1997), 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).

### Readings

#### Core

'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 Law International, 2002), 403-408.

S. Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determination* (September 2001), Ch. 2, 4 (59-65), 5.

#### 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.*

## **b. Safe Country of Origin**

### Main Debates

Does the Safe Country Notion Undermine the Right to have a Claim Assessed Individually?

### Main Points

As a Bar to Access to Procedures

As a Rebuttable Presumption of Unfoundedness of Claim  
White Lists  
Need for Individual Assessment of Claims  
Criteria for Designating Countries as 'Safe'

### EU Documents

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 14203/04, 9 November 2004, Arts. 23(4)(c), 30, 30A, 30B, Annex B to the Annex 1.

Council Conclusion on Countries in Which There is Generally No Serious Risk of Persecution, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG (London, 30 Nov.-1 Dec. 1992).

### Readings

#### Core

H. Martenson and J. McCarthy, 'Field Report. "In general no serious risk of persecution" safe country of origin practices in nine European states' (1998) 11 *Journal of Refugee Studies* 3.

R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 190-196.

ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection' (ECRE: London 2004), 10-12.

C. Costello 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law*, 35 - 70.

### **iii. Minimum Standards for Reception Conditions**

#### Main Debates

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

#### EU Documents

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

#### UNHCR Documents

UNHCR, 'UNHCR Comments on the European Commission Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States' COM (2001) 181 final.

#### Reading

### Core

N. Rogers, 'Minimum Standards for Reception' (2002) 4 *European Journal of Migration and Law* 215–230.

E. Guild, 'Seeking asylum: storm clouds between international commitments and EU legislative measures' (2004) 29 *European Law Review*, 198–218.

### 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?*

## **iv. Other Forms of Protection**

### Main Debates

Does Temporary Protection Threaten the 1951 Convention?

### Main Points

Relationship between Directive and Refugee Determination Process

Diminished Rights under the EC TP Regime Compared with 1951 Convention Rights

### 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 L212 12 (7 July 2001).

### UNHCR Documents

UNHCR, 'Comments on the proposal for Directive of the Council': Doc 11620/00, 26 Sept. 2000

### Readings

#### Core

K. Kerber, 'The Temporary Protection Directive' 2002 4 *European Journal of Migration and Law* 193–214.

#### Extended

R. Piotrowicz and C. Van Eck, 'Subsidiary Protection and Primary Rights' (2004) 53 *International and Comparative Law Quarterly* 107–138.

### Editor's note

*See the section on other forms and instruments of protection after the 1951 Convention (Section II.3.).*

*A process is required to invoke the TP scheme; it does not replace national TP schemes. In the absence of using the EC process, national schemes could be established.*

*Compare the substantive rights for a person in an EC TP 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 1951 Convention on refugees and the 'Council of the European Union Proposal for a Council Directive 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' (25 September 2002).*

## ***v. Leaving Territory***

### ***(a) Return Policies***

#### *Main Debates*

Is there Adequate Protection for Rejected Asylum-Seekers in order to Ensure that Return Policies do not Infringe the Non-Refoulement Principle?

#### *Main Points*

Use of Protection Mechanisms to Delay Expulsion or Removal

#### *EU Documents*

'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.

'Commission communication on a Community return policy on illegal residents', COM(2002)564, 14 October 2002.

'EU plan for return to Afghanistan', 4 December 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.

Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2005) 391, 1 September 2005.

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 Documents*

UNHCR EXCOM, 'Conclusion on the Return of Persons Found Not to Be in Need of International Protection', Conclusion No. 96 (LIV), 2003.

#### *Readings*

### Core

R. Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?' in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), part III, 9.

### Extended

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. 04. 2002, COM(2002)175 final)', 2 August 2002.

Consortium of 13 NGOs, including Cimade (France), 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.

### Editor's note

*Note the practical relevance of these policies for rejected asylum-seekers and persons whose refugee status or SP/TP status has ceased.*

## **(b) Readmission Agreements**

### Main Debates

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 contract-ing party
- Rules on Proof and Presumptive Evidence for Nationality and Transit Route

Safe Guard Clauses

### EU Documents

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, 27 November 2002.

Agreement between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorization: SEC (2003) 255, 21 March 2003.

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 2004 L 143/97, 30 April 2004.

Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation: COM(2004) 92, 12 February 2004.

## Readings

### Core

M. Schieffer, 'Community readmission agreements with third countries - objectives, substance and current state of negotiations' (2003) 3 *European Journal of Migration and Law*, 343-357.

D. Bouteillet-Paquet, 'Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States' (2003) 3 *European Journal of Migration and Law*, 359-377.

### Extended

IGC Secretariat, 'Report on Readmission Agreements', June 2000.

N. A. Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees' 11(1) *International Journal of Refugee Law* 60-83.

### Editor's note

*Readmission agreements will apply to those who are failed protection-seekers and to removals to supposedly safe third countries and safe countries of origin. But query 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.*

## **vi. Co-operation and Responsibility/Burden-Sharing**

### Main Debates

Burden Shifting v. Burden-Sharing

### Main Points

Modest Degree of Funding Provided for the Review of the European Refugee Fund Planned after Enlargement.

### EU Instruments

'Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013', COM (2005) 123, 6 April 2005.

## Readings

### Core

R. Byrne, 'Harmonization and Burden Redistribution in the Two Europes' 16(3) *Journal of Refugee Studies* 336-358.

E. Thielemann, 'Towards Refugee Burden-Sharing in the European Union State Interests and Policy Options' *Ninth Biennial International Conference of the European Union Studies Association* Austin, Texas, 31 March - 2 April 2005..

### Extended

E. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' 16(3) *Journal of Refugee Studies* 253-273.

### *(a) European Refugee Fund*

#### Main Debates

Burden Shifting v. Burden Sharing

#### Main Points

Have the Amounts Provided under the ERF Proven Too Modest for the Member States' Needs?

Is the Split between the Community Actions (7.5% of Total) and the Amount Available for Member States Equitable?

Is the Distribution Criteria Appropriate? (ie. States with Largest Asylum Seeker Numbers Receive Greatest Proportion of Funds).

#### EU Instruments

Council Decision of 28 September 2000 establishing a European Refugee Fund OJ L252/12, 6 October 2000.

Council Decision establishing the European Refugee Fund for the period 2005-2010, OJ L381/52, 28 December 2004.

'Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013. Proposal for a Decision of the European Parliament and the Council establishing the European Refugee Fund for the period 2008-2013 as part of the General programme 'Solidarity and Management of Migration Flows'', COM (2005) 123, 6 April 2005.

#### Readings

Comments by the European Council on Refugee and Exiles on the Commission Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010, CO1/03/2004/Ext/HM.

## **SECTION IV - UNHCR AND OTHER ACTORS RELEVANT TO INTERNATIONAL ASYLUM LAW**

### Main Debates

The Role of UNHCR: Should it Extend Beyond Protection to Include Humanitarian Aid, and/or Return and Reconstruction?

Has, and Can, UNHCR Put Up Effective Resistance against Restrictive Tendencies in Europe and Elsewhere?

### Main Points

UNHCR's Evolving Role

Necessity of Networks for Co-operation and Engagement

Dependency on Major Donor Governments

Global Consultations

Convention Plus

## Agenda for Protection

### Editor's note

*See also Section I.2, on Institutions and Actors in international law relevant to refugee protection for a brief introduction and basic readings.*

*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 co-operation 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-centered refugee regime depends on its precarious relationship with the major donor governments.*

*UNHCR strives to redefine itself through the global consultations, the "Convention Plus" approach and the Agenda for Protection.*

See also W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond' in Section IV.2., exploring the possibilities of supervising the Geneva Convention the second chapter of which reviews present day UNHCR practice. W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond' in Section IV.2.

## 1. UNHCR

### Main Debates

The Role of UNHCR:

Should it Extend Beyond Protection to Include

Humanitarian Aid, and/or Return and Reconstruction

Has, and Can, UNHCR Put Up Effective Resistance Against Restrictive Tendencies in Europe and Elsewhere?

### Main Points

UNHCR's Evolving Role

Necessity of Networks for Co-operation and Engagement

Dependency on Major Donor Governments

Global Consultations

Convention Plus

Agenda for Protection

### 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, UNGA, A/RES/428, 14 Dec. 1950.

### UNHCR Documents

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

REFWORLD, the UNHCR's CD-ROM Database (2005).

'Agenda for Protection', 2nd edn., March 2003.

'Procedural Standards for Refugee Status Determination Procedure under UNHCR's Mandate', 1 September 2005.

### Readings

#### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 7-17.

G. Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order' (1998) 10(3) *International Journal of Refugee Law* 350-388.

B.S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350-357; 365-368.

#### Extended

G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).

M. Barutciski, 'A Critical View on UNHCR's Mandate Dilemmas' (2002) 14 (2/3) *International Journal of Refugee Law* 365-381.

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

## **2. Other Agencies and Their Interaction**

### Readings

#### Core

G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 2nd edn., 1996), 222-230.

C. Phuong, 'Improving United Nations Response to Crises of Internal Displacement' (2001) 13(4) *International Journal of Refugee Law* 491-517.

#### Extended

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

A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002) 118-138.

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Rosemary Byrne earned her bachelor's degree from Barnard College, Columbia University and her J.D. from Harvard Law School. She has worked extensively with non-governmental organizations and is the director of the International Process and Justice Project, a founding member of the Refugee Policy Protection Group, as well as the Secretary of the Irish branch of the International Law Association. 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. Since 1994 she has been on the faculty of Trinity College Dublin, where she lectures in human rights and international law at the Law School. She also serves as member of the Executive Committee of the Institute for International Integration Studies.

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Maryellen Fullerton 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. She has been a Visiting Professor of Law at the University of Louvain in Belgium and a Fulbright Scholar researching asylum policies in Belgium, Germany, Denmark, and the Netherlands. She has also been a German Marshall Fund Fellow, researching refugee law and asylum policy in Hungary, Poland, and the Czech Republic and a Visiting Scholar at the Center for Advanced Studies in Social Sciences of the Juan March Institute in Madrid. In addition to her academic research, she has 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.

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Madeline Garlick studied at Monash University, Melbourne, Australia, where she obtained an LL.B.(Honours) in general law and B.A.(Honours) in politics and German language and literature. She later read law at Queens' College, Cambridge, UK, from which she graduated with an LL.M., after writing a thesis on the compatibility of the national asylum legislation of different countries and international refugee and human rights law. 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 work for Justice, UK, she lead research and prepared the 1997 report entitled 'Providing Protection', on the UK asylum procedure. 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. Subsequently, she worked for the United Nations Peacekeeping Force in Cyprus (UNFICYP), including as a member of the Secretary-General's negotiating team, which sought to facilitate a resolution to Cyprus' political conflict, from 1999-2004. She is currently Senior EU Affairs Officer with the United Nations High Commissioner for Refugees (UNHCR) in Brussels, in charge of liaison with the EU institutions. 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.

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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 Professor of European Immigration Law. She is also a partner in the immigration department at the London law firm, Kingsley Napley. She teaches at Sciences-Po in Paris and is a Visiting Fellow at the London School of Economics. She has published widely in the field of immigration and asylum law and policy in Europe. Her monograph, *Immigration Law in the European Community*, remains a basis text in the field. 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.

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