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February 2015
This is a printed version of the syllabus for The Refugee Law Reader, an on-line ‘living’ casebook (www.refugeelawreader.org). The Refugee Law Reader is a collaborative project among experts in the field that offers a fully developed course curriculum and access to over 10,000 pages of legal instruments, documents and specialist commentary.

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

Introduction to International Refugee Law: Background and Context 23

I.1 History of Population Movements: Migrants, Immigrants, Internally Displaced Persons and Refugees 24
   I.1.1 The Concepts 24
   I.1.2 The Theories 25
   I.1.3 Population Movements in the Past and Present 27

I.2 The Legal and Institutional Framework for Refugee Protection 29
   I.2.1 The Evolution of the International Refugee Regime 29
   I.2.2 The Universal Standard: The 1951 Geneva Convention Refugee Definition and the Statute of the UNHCR 30
      I.2.2.1 Prior Definitions: Group Specific: Geographically and Temporarily Limited 30
      I.2.2.2 1951 Geneva Convention: Universal Applicability: Optional Geographical and Temporal Limits 31
      I.2.2.3 Expansion by the 1967 Protocol 31
   I.2.3 Contemporary Alternative Refugee Definitions 32
      I.2.3.1 Africa 32
      I.2.3.2 Latin America 33
      I.2.3.3 Europe 33

I.3 UNHCR and Other Actors Relevant to International Asylum Law 34
   I.3.1 UNHCR 34
   I.3.2 Other Agencies and Their Interaction 37
I.4 The Context of International Refugee Protection: Internal Displacement, Statelessness, Environmentally Induced Migration 40
I.4.1 Internally Displaced Persons (IDPs) 40
I.4.2 Statelessness 42
I.4.3 Environmentally induced migration 44

Section II

International Framework for Refugee Protection 47
II.1 Universal Principles and Concepts of Refugee Protection 48
II.1.1 Non-refoulement 48
II.1.2 Asylum 51
II.1.3 Non-discrimination 52
II.1.4 Family Unity 53
II.1.5 Durable Solutions 55
II.1.6 Burden- and Responsibility-sharing and International Cooperation 56
II.1.7 Right to Leave a Country 58
II.1.8 Non-penalization of Refugees for Unlawful Entry and Presence 59

II.2 The 1951 Geneva Convention 61
II.2.1 Criteria for Granting Refugee Protection 61
II.2.1.1 Alienage 62
II.2.1.1.1 Outside the Country of Nationality 63
II.2.1.1.2 Owing to Fear Is Unable or Unwilling to Avail Self of Protection of Country of Nationality 63
II.2.1.1.3 Dual or Multiple Nationality 64
II.2.1.1.4 Stateless Refugees 64
II.2.1.2 Well-founded Fear 65
II.2.1.3 Persecution 67
II.2.1.3.1 Acts of Persecution 68
II.2.1.3.2 Agents of Persecution 69
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>II.2.1.4</td>
<td>Five Grounds: Race, Religion, Nationality, Social Group, Political Opinion</td>
<td>70</td>
</tr>
<tr>
<td>II.2.1.4.1</td>
<td>Multiple Grounds and General Issues</td>
<td>70</td>
</tr>
<tr>
<td>II.2.1.4.2</td>
<td>Race</td>
<td>72</td>
</tr>
<tr>
<td>II.2.1.4.3</td>
<td>Religion</td>
<td>73</td>
</tr>
<tr>
<td>II.2.1.4.4</td>
<td>Nationality</td>
<td>74</td>
</tr>
<tr>
<td>II.2.1.4.5</td>
<td>Particular Social Group</td>
<td>75</td>
</tr>
<tr>
<td>II.2.1.4.6</td>
<td>Political Opinion</td>
<td>79</td>
</tr>
<tr>
<td>II.2.1.5</td>
<td>Internal Flight/Relocation Alternative</td>
<td>81</td>
</tr>
<tr>
<td>II.2.1.6</td>
<td>Exclusion from Convention Refugee Status</td>
<td>84</td>
</tr>
<tr>
<td>II.2.1.7</td>
<td>Cessation of Refugee Status</td>
<td>88</td>
</tr>
<tr>
<td>II.2.1.7.1</td>
<td>Cessation Grounds</td>
<td>88</td>
</tr>
<tr>
<td>II.2.1.7.2</td>
<td>Procedures</td>
<td>91</td>
</tr>
<tr>
<td>II.2.2</td>
<td>Access to Territory and Protection at Sea</td>
<td>92</td>
</tr>
<tr>
<td>II.2.2.1</td>
<td>Visa Requirements</td>
<td>94</td>
</tr>
<tr>
<td>II.2.2.2</td>
<td>Carrier Sanctions</td>
<td>94</td>
</tr>
<tr>
<td>II.2.2.3</td>
<td>Extraterritorial Immigration Control</td>
<td>95</td>
</tr>
<tr>
<td>II.2.2.4</td>
<td>Interceptions and Rescue at Sea</td>
<td>96</td>
</tr>
<tr>
<td>II.2.3</td>
<td>Access to Procedures</td>
<td>98</td>
</tr>
<tr>
<td>II.2.3.1</td>
<td>Protection Elsewhere (First Country of Asylum and Safe Third Country)</td>
<td>98</td>
</tr>
<tr>
<td>II.2.4</td>
<td>Reception Conditions</td>
<td>101</td>
</tr>
<tr>
<td>II.2.5</td>
<td>Procedures for Determining Refugee Status</td>
<td>102</td>
</tr>
<tr>
<td>II.2.5.1</td>
<td>Basic Procedural Requirements</td>
<td>102</td>
</tr>
<tr>
<td>II.2.5.2</td>
<td>Evidentiary Issues</td>
<td>104</td>
</tr>
<tr>
<td>II.2.5.2.1</td>
<td>Standards of Proof</td>
<td>104</td>
</tr>
<tr>
<td>II.2.5.2.2</td>
<td>Credibility</td>
<td>106</td>
</tr>
<tr>
<td>II.2.5.2.3</td>
<td>Factors Affecting Evidentiary Assessment</td>
<td>107</td>
</tr>
<tr>
<td>II.2.5.2.3.1</td>
<td>Post Traumatic Stress</td>
<td>107</td>
</tr>
<tr>
<td>II.2.5.2.3.2</td>
<td>Interviewing</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vulnerable Populations</td>
<td>108</td>
</tr>
<tr>
<td>II.2.5.2.3.2.1</td>
<td>Children</td>
<td>108</td>
</tr>
<tr>
<td>II.2.5.2.3.2.2</td>
<td>Women</td>
<td>110</td>
</tr>
</tbody>
</table>
II.2.6  Content of Refugee Status 112
II.2.7  Detention 113
II.3  Other Forms of International Protection 117
   II.3.1  Temporary Protection 117
   II.3.2  Complementary (Subsidiary) Protection 118
   II.3.3  Universal Human Rights Instruments Relevant to Protection 121
      II.3.3.1  Universal Declaration of Human Rights 121
      II.3.3.2  The UN International Covenant on Civil and Political Rights 122
      II.3.3.3  The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 125
   II.3.3.4  The UN Convention on the Rights of the Child 128
   II.3.3.5  The Geneva Conventions and Protocols: Minimum Standards in Times of War 130
II.4  Internally Displaced Persons 133

Section III

African Framework for Refugee Protection 137
   III.1  An Overview of the (1969) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 138
   III.2  An Analysis of the (1969) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 141
      III.2.1  Analysis of the OAU Convention Refugee Definition 141
         III.2.1.1  Compelled to Flee – A Subjective Element 141
         III.2.1.2  Place of Habitual Residence 142
         III.2.1.3  The Enumerated Events 143
            III.2.1.3.1  External Aggression, Occupation, Foreign Domination 143
            III.2.1.3.2  Events Seriously Disturbing Public Order 144
         III.2.1.4  In Whole or in Part – Existence of an Internal Flight Alternative? 145
### III.2.1.5 Group/Prima Facie Refugee Recognition under the OAU Convention

- **IV.2.2 Expanded Protection against Refoulement**
- **IV.2.3 Prohibition on Subversive Activities**
- **IV.2.4 Burden-sharing**
- **IV.2.5 Voluntary Repatriation**

### III.3 An Overview of Sub-Regional Frameworks and Domestic Legislations

<table>
<thead>
<tr>
<th>Sub-Regional</th>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Southern</td>
<td>South Africa</td>
<td>151</td>
</tr>
<tr>
<td></td>
<td>Malawi</td>
<td>152</td>
</tr>
<tr>
<td></td>
<td>Namibia</td>
<td>153</td>
</tr>
<tr>
<td>North Africa</td>
<td>Libya</td>
<td>154</td>
</tr>
<tr>
<td></td>
<td>Egypt</td>
<td>154</td>
</tr>
<tr>
<td>West Africa</td>
<td>Regional</td>
<td>155</td>
</tr>
<tr>
<td>East Africa</td>
<td>Regional</td>
<td>157</td>
</tr>
<tr>
<td></td>
<td>Kenya</td>
<td>158</td>
</tr>
<tr>
<td></td>
<td>Uganda</td>
<td>160</td>
</tr>
<tr>
<td></td>
<td>Tanzania</td>
<td>161</td>
</tr>
</tbody>
</table>

### III.4 Protection Challenges in Africa

<table>
<thead>
<tr>
<th>Challenge</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusion Clause</td>
<td>162</td>
</tr>
<tr>
<td>The Interface between Refugee Law and Immigration Law</td>
<td>163</td>
</tr>
<tr>
<td>Urban Refugees v. Camp Refugees</td>
<td>164</td>
</tr>
<tr>
<td>Resettlement</td>
<td>166</td>
</tr>
<tr>
<td>The Plight of Internally Displaced Persons (IDPs)</td>
<td>167</td>
</tr>
<tr>
<td>Unaccompanied Children</td>
<td>169</td>
</tr>
<tr>
<td>Governance and Globalization</td>
<td>171</td>
</tr>
<tr>
<td>The Search for Solutions to the Refugee Problem in Africa</td>
<td>173</td>
</tr>
<tr>
<td>Protection During Mass Repatriation</td>
<td>174</td>
</tr>
</tbody>
</table>
Section IV
Framework for Refugee and IDP Protection in the Americas

IV.1 The Evolution of the Right of Asylum in the Americas: From Refugio (Refuge)/Territorial Asylum Political/Diplomatic Asylum to Refugee Status

IV.2 Refugee Protection in the Framework of the Inter-American Human Rights System

IV.2.1 Human Rights Instruments

IV.2.1.1 The Right to Seek and Receive/Be Granted Asylum and the Rights of Refugees

IV.2.1.2 The Non-refoulement Principle and Its Expansion in the Americas

IV.2.1.3 Protection against Extradition

IV.2.1.4 Other Norms

IV.2.2 The Use of Soft Law to Advance International Refugee Protection: Specific Regional Instruments

IV.2.2.1 Regional Definition and Proposals to Improve Protection

IV.2.2.2 Durable Solutions in the Regional Framework

IV.3 Application of the 1951 Geneva Convention through the Regional Mechanisms and National Legislations

IV.4 Protection of Internally Displaced Persons with Special Attention to the Case of Colombia

IV.5 The North American Regional Materials

Section V
Asian Framework for Refugee Protection

V.1 Protection Challenges in Asia

V.2 States Party to the 1951 Refugee Convention
Section VI
European Framework for Refugee Protection

VI.1 The Council of Europe
   VI.1.1 Legal and Policy Framework for Refugee Protection
   VI.1.2 The European Convention on Human Rights and Fundamental Freedoms

VI.2 The European Union
   VI.2.1 Towards a Common European Asylum System (CEAS)
      VI.2.1.1 Evolution of the CEAS to Date
      VI.2.1.2 Ongoing Development of the CEAS
   VI.2.2 Criteria for Granting Protection
      VI.2.2.1 Harmonization of the 1951 Geneva Convention Refugee Definition
      VI.2.2.2 Subsidiary Protection
      VI.2.2.3 Temporary Protection
   VI.2.3 Access to Territory and Access to Procedures
      VI.2.3.1 The EU’s External and Internal Borders
      VI.2.3.2 Interception and Rescue at Sea
      VI.2.3.3 Visas
      VI.2.3.4 Carrier Sanctions
      VI.2.3.5 Extraterritorial Immigration Control and Extraterritorial Processing
      VI.2.3.6 Biometrics and Databases
VI.2.4 Procedures for Granting Protection  297
  VI.2.4.1 Responsibility, Including the Dublin System  298
  VI.2.4.2 Minimum Standards for Reception Conditions  302
  VI.2.4.3 Minimum Standards for Normal Procedures  304
  VI.2.4.4 Minimum Standards for Specific Procedures  306
    VI.2.4.4.1 Accelerated and Manifestly Unfounded Procedures  306
    VI.2.4.4.2 Safe Country of Origin  308
    VI.2.4.4.3 Safe Third Country  309
  VI.2.4.5 Other Aspects of Decision-making  312
    VI.2.4.5.1 Evidentiary Issues  312
    VI.2.4.5.2 Persons with Special Needs  313
  VI.2.4.6 Appeals  314
VI.2.5 Removal and Detention  316
  VI.2.5.1 Detention  316
  VI.2.5.2 Return Policies  318
  VI.2.5.3 Readmission Agreements  321

Notes on the Editors  324
ABOUT THE READER AND ITS USE

About The Reader

February 2015

_The Refugee Law Reader: Cases, Documents and Materials_ (7th edition) is a comprehensive on-line model curriculum for the study of the complex and rapidly evolving field of international refugee law. We are proud to continue with the expanded and universal edition of The Reader, which provides sections on international and regional frameworks of refugee law, covering Africa, the Americas, Asia and Europe. Adapted language versions with specific regional focus in French, Russian and Spanish are also available.

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 1500 documents and materials.

The Refugee Law Reader was initiated and is supported by the Hungarian Helsinki Committee and funded by the United Nations High Commissioner for Refugees (UNHCR).
Structure and Content

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

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

Because of the depth, scope, and flexibility of the Reader, it is now being accessed in multiple continents by over 100,000 users. The Reader’s availability in four languages and its expanded geographical coverage have made it an effective resource for regional approaches to refugee legal education. By overcoming language and territorial barriers, the Reader can also effectively serve a larger community of asylum experts worldwide.

The Reader first deals with the international refugee law regime and its foundations: the history of population movements and theories of migration, the evolution of the international refugee regime, the 1951 Geneva Convention Relating to the Status of Refugees, and 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 7th Edition also includes subsections dealing with internal displacement as well as statelessness; both topics that are closely connected
to, yet legally distinct from, the international refugee law regime. The concepts and the processes are analysed in light of the formative hard and soft law documents and discussed in an up-to-date, high standard and detailed academic commentary. Issues underlying the global dilemmas of refugee law are tackled, taking into account developments in related areas of human rights and humanitarian law, as well as research advances in the field of migration.

In addition to the examination of the classic problematique of international refugee law, The Reader also presents the major regional frameworks for refugee protection. The African section of the 7th Edition provides an extended scope of legal instruments and other material pertaining to refugee protection in Africa and focuses on the central legal and policy challenges in their implementation, as well as on sub-regional legal frameworks and selected national laws relating to refugee protection. The American section considers the distinctive framework of refugee protection that has emerged in the Americas, presenting the regional instruments and jurisprudence alongside a thematic examination of internal displacement in Latin America that is explored in the context of a case study of Colombia. The Asian section presents the framework of protection on a continent where most States are not signatories to the 1951 Convention. It offers an overview of selected national refugee laws and policies on the continent and explores some of the broader protection challenges in the region. The European section presents the detailed pan-European asylum system constructed by the Council of Europe and the European Union, highlighting the Common European Asylum System that is increasingly creating regional norms and standards and is also looked to by policy makers around the world. The content of the 7th edition has been updated with materials that appeared up to October 2014.

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

Accessing Source Material

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

One of the significant advantages of an on-line Reader is that it is able to provide access to instruments, documents and cases in their entirety, offering a rich source of material for academic writing. It should be noted that for purposes of citation, however, the process of downloading articles in PDF format does not always translate the page numbers of the original publication. Hence, please consult the full citation that appears in the syllabus to ensure accuracy.
The Reader uses James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd Edition (Cambridge: Cambridge University Press, 2014) and Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd Edition (Oxford: Oxford University Press, 2007) as core texts. While it is likely that many university professors and students will have access to these revised editions of the two books in their libraries or university bookshops, the Editors are aware that many of our users may not. These users, however, will still benefit from open and full access to the text of the assigned readings from the 1st edition of Hathaway’s *The Law of Refugee Status* (Toronto: Butterworths, 1991) and from the 2nd edition of Goodwin-Gill’s *The Refugee in International Law* (Oxford: Oxford University Press, 1996). In addition, it is possible to access the assigned readings from the 2nd edition of *The Law of Refugee Status* for those having been granted a password (see below for technical advice). Hence, the Editors have included parallel citations for the 3rd and 2nd editions of *The Refugee in International Law*, as well as for the 1st and 2nd editions of *The Law of Refugee Status*, to ensure that all can follow the core readings in the syllabus regardless of resources.

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

Editorial recommendations for how class time should be allocated to cover each of the respective subject areas, and their sub-topics, are provided below for a 48-hour course, as well as 24- and 12-hour modules. A copy of the complete syllabus can be downloaded and adapted for teaching purposes. Each of the sections of the complete syllabus, and their respective sub-topics can be directly accessed on the site. In the chart below, each of the major topics included in the syllabus are presented. The full text of the syllabus and the relevant source material for the assigned readings can be accessed in The Reader. For more detailed directions, see the section Technical Advice below.

Recommended hours for module teaching

<table>
<thead>
<tr>
<th>Topic</th>
<th>48-hour course</th>
<th>24-hour course</th>
<th>12-hour course</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section I</strong> Introduction to International Refugee Law: Background and Context</td>
<td>8</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td><strong>Section II</strong> International Framework for Refugee Protection</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Universal Principles and Concepts of Refugee Protection</td>
<td>5</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>The 1951 Convention</td>
<td>14</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Other Forms of International Protection</td>
<td>4</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td><strong>Section III–VI</strong> Regional Frameworks for Refugees Protection</td>
<td>17</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td><strong>Section III</strong>: African Framework for Refugee Protection</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Section IV</strong>: American Framework for Refugee Protection</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Section V</strong>: Asian Framework for Refugee Protection</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Section VI</strong>: European Framework for Refugee Protection</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

The complete Syllabus of The Refugee Law Reader, available online and in printed booklets, provides useful general and detailed overviews of The Reader’s structure and contents. To access a specific section of The Reader, click on the relevant section titles and subtitles in the left hand menu.

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

Acknowledgments

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

Dr. Ekuru Aukot, the Director of the Committee of Experts on the Review of the Constitution in Kenya; B.S. Chimni, Professor at Jawaharlal Nehru University, New Delhi; Francois Crépeau, Hans & Tamar Oppenheimer Professor in Public International Law at McGill University, Montreal, and United Nations Special Rapporteur on the Human Rights of Migrants; Jean-Claude Forget, retired UNHCR official; Lyra Jakuleviciene, Professor at Mykolas Romeris University in Lithuania; Darina Mackova, International Human Rights Lawyer at ACUNS; Eugen Osmochescu, International Finance Corporation, Belgrade; Steve Peers, Professor of Law at the University of Essex; and Luis Peral, Senior Analyst at the Club of Madrid.

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

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Reader Feedback

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

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

Please send any correspondence to the editorial board at:

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SECTION I

Introduction to International Refugee Law: Background and Context

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

Apart from setting the context, Section I is truly introductory. It lays the foundation for what will come in other sections of The Refugee Law Reader. Accordingly, Section I refers only to fundamental concepts and principles, leaving the in-depth examination of case law to subsequent sections.
I.1 **History of Population Movements: Migrants, Immigrants, Internally Displaced Persons and Refugees**

*Main Debates*
Is there a human right of freedom to move to another country?
Is migration an asset to, or a burden for, sending and receiving states?
What is the relationship between past movements and present migration policies?

*Main Points*
Unlimited exit v. limited entry rights
The growing competition for labour force
Trade-offs between regular and irregular routes
Migration as a pervasive feature of the human experience

### I.1.1 The Concepts

*Main Debates*
Should different types of migration – regular, unauthorized, and forced – be subject to different forms of control?
Could freedom of movement be the rule again?

*Main Points*
Sociological, demographic, historical and legal perspectives on migration
Understanding fundamental terms of reference:
- international migrant
- asylum seeker
- refugee
- undocumented (illegal) migrant
- ‘of concern’ to UNHCR
International law guarantees exit but remains silent on entry (except for refugees)
Readings

Core

Extended

1.1.2 The Theories

Main Debates
What are the causes of migration?
Is the model of push-pull factors adequate?
Can migratory processes be managed?
Does migration management simply redirect or reclassify migrants?

Main Points
Absence of a single theory explaining migration
The start and the continuation of a migratory process may have different causes

Migration management:

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

Readings

Core


Extended


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

I.1.3 Population Movements in the Past and Present

Main Debates
Is the boat really full? Where?
Should former countries of origin ‘repay’ their historic debts by receiving migrants?
Does the European Union need an immigration policy. If yes, what sort of?

Main Points
The proportion of migrants among the population is only slightly increasing in recent decades and is close to 3%
Transformation of many European states from sending to receiving states
Lessons from historical data:
  • closing one entry door leads to opening of another
  • migration cannot be halted
The migration to the global South competes in importance with the migration to the global North

Readings
Core

Extended

Editor’s Note
An historical overview of migration should place a particular emphasis on post-Second World War patterns, highlighting the changes in migration policies that encouraged inward migration until the late 1970s. Explication of trends and patterns in refugee
migration should identify the changing numbers of refugees, their countries of origin, and the uneven distribution of asylum seekers among host countries.

I.2 The Legal and Institutional Framework for Refugee Protection

Main Debates
What impact do international obligations have on national sovereignty and migration control?
What are the legal and moral duties of host states?
Are the expanding refugee definitions and the rise of new actors an improvement or not?

Main Points
Three major phases of the evolution of the international refugee legal regime
Policy responses to different types of migration
Universal and regional definitions

Readings
Core

I.2.1 The Evolution of the International Refugee Regime

Readings
Core

Extended

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.

I.2.2 The Universal Standard: The 1951 Geneva Convention Refugee Definition and the Statute of the UNHCR

I.2.2.1 Prior Definitions: Group Specific: Geographically and Temporarily Limited

Soft Law
Readings
Core

I.2.2.2. 1951 Geneva Convention: Universal Applicability: Optional Geographical and Temporal Limits

*Treaties*
*International*

*Soft Law*

Readings
Core


I.2.2.3 Expansion by the 1967 Protocol

*Treaties*
*International*
Soft Law

Editor’s Note
For detailed analysis see Section II.2.1.

I.2.3 Contemporary Alternative Refugee Definitions

Editor’s Note
This section traces the broadening of the refugee definition and the expansion of major actors (governmental and non-governmental) that has occurred from the early 1970s onwards. While the 1951 Geneva Convention provides the core legal definition of ‘refugee’ and UNHCR remains the dominant actor in international refugee protection, readers should consider whether the appearance of new definitions undermines the consistency of the regime or leads to a more responsive international environment.

I.2.3.1 Africa

Treaties
Regional

Editor’s Note
See also Section III.
I.2.3.2 Latin America

*Soft Law*

*Editor’s Note*
See also Section IV.

I.2.3.3 Europe

*Soft Law*

*EU Documents*

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 339/9, 20 December 2011.

*Editor’s Note*
See also Section VI.
I.3 UNHCR and Other Actors Relevant to International Asylum Law

I.3.1 UNHCR

Main Debates
How can and should UNHCR best fulfil its supervisory responsibility for the 1951 Convention today?
To what extent should the role of UNHCR extend beyond protection to include humanitarian aid and/or return and reconstruction?
What procedural standards does UNHCR apply in its expansive role in status determination?
Has, and can, UNHCR put up effectively maintained standards in the face of restrictive tendencies in Europe and elsewhere?
Does the extension of the mandate to internally displaced persons enhance or diminish UNHCR’s protection and support potential?

Main Points
Upholding protection principles in a context of complex asylum-seeker and migratory movements across the world today
UNHCR conducts status determination in over 70 countries with significant variations in practice and standards
Necessity of networks for co-operation and engagement
Dependency on major donor governments

Treaties
International
Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; see in particular Article 35.

Soft Law
UN General Assembly Resolution, 58/153, 22 December 2003, implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to carry out its mandate, 22 December 2003, para. 9.

**UNHCR Documents**


Ministerial Communiqué, Ministerial Intergovernmental Event on Refugees and Stateless Persons, 7–8 December 2011.


UNHCR, ‘Note on the Mandate of the High Commissioner and his Office’, October 2013.


**Readings**

**Core**


Extended


Cases
I. A. v The Secretary of State for the Home Department, [2014] UKSC 6, United Kingdom: Supreme Court, 29 January 2014, (on the weight and authority to give to UNHCR’s decisions on refugee status).


Editor’s Note
UNHCR’s role has evolved over time. In 1950, UNHCR was acknowledged as the global refugee agency with a mandate for providing international protection to refugees and, together with Governments, to find solutions to their plight. Unique to UNHCR compared with other UN agencies, UNHCR has a mandate to supervise
the implementation of international instruments on refugees, and States are obliged to cooperate with the High Commissioner in the exercise of his/her functions. Originally given a three year mandate, which was extended every three years until 2003, the General Assembly granted UNHCR a permanent mandate “until the refugee problem is solved”. UNHCR also has mandates formally granted through the UN General Assembly and Economic and Social Council, as well as through other instruments, to encompass stateless people, persons fleeing armed conflict and generalised violence and internally displaced persons in certain circumstances, among others. In operational terms, the organisation’s work has also developed and expanded, particularly in and following the conflicts in the former Yugoslavia in the 1990s, with the result that UNHCR takes a leading role in providing assistance and protection in conflict zones and complex humanitarian emergencies today. 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 and impact of the UN-led international protection regime depends on the ongoing support of the major donor governments. In recent years, the Syria conflict has created one of the largest and most challenging single displacement crises that has confronted UNHCR and the international community. At the same time, millions of refugees and internally displaced persons remain in need of protection and assistance in many other regions of the world, including some which have persisted for years, including the displacement of Afghans, refugees in the Great Lakes region, the Horn of Africa and others.

I.3.2 Other Agencies and Their Interaction

Main Points
The specific reasons for establishing a parallel system for the protection of Palestinian refugees
Complementarity v. risk of duplication between different actors in the international protection sphere
Legitimacy, independence and impartiality
Scarcity of donor resources; and their most effective use
**Main Debates**

What is the interplay between the mandate of UNRWA and that of UNHCR with respect to Palestinian refugees worldwide?

How have the challenges facing UNRWA evolved over time?

What if a protected person voluntarily leaves or is forced to leave the UNRWA territory?

How can civil society and particularly non-governmental organisations complement and strengthen the actions of states and international organisations in refugee protection activities?

What is the role of NGOs as (1) contributors to promoting high legal standards, (2) service providers and/or (3) monitors in the international protection system?

**UN Documents**

United Nations General Assembly, Resolution 302(IV) on Assistance to Palestinian Refugees, 8 December 1949.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; see in particular Article 1(D).


NGO Statement to General Debate, 64th session of the Executive Committee (EXCOM) of the High Commissioner’s Programme, 30 September–4 October 2013.

**Cases**


*Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, Case C-31/09, Court of Justice of the European Union, 17 June 2010.

**Readings**

**Core**


*Extended*


J. Lindsey, ‘Fixing UNRWA: Repairing the UN’s Troubled System of Aid to Palestinian Refugees’, Policy Focus no. 91 (Washington: Washington Institute, 2009).


Editor’s Note
Multiple actors, in addition to States and UNHCR, are today involved in crucial ways in providing assistance to and facilitating the protection of refugees in many situations. This section limits its focus to two specific areas: firstly, to the UN Relief and Works Agency (UNRWA), mandated to assist Palestinian refugees in the organisation’s areas of operation; and secondly, non-governmental organisations (NGOs) as a category. It is nevertheless acknowledged that other UN and international organisations, including the International Committee of the Red Cross (ICRC) and International Organisation for Migration (IOM) as well as other actors at national level in many countries worldwide, play a significant role in support of the assistance and protection of displaced persons.

I.4 The Context of International Refugee Protection: Internal Displacement, Statelessness, Environmentally Induced Migration

Editor’s Note
The number of internally displaced, who frequently flee persecution but do not cross an international border, is greater than the number of refugees. Stateless persons, like refugees, often face deprivation of fundamental rights and require assistance from states of which they are not nationals. Environmentally induced migration is involuntary and in case of sudden events like tsunamis, volcanic eruptions it may lead to precipitous large scale movements. Although traditional refugee law does not generally address these phenomena, all three of them have links to refugee movements and need to be addressed by those studying and assisting refugees.

I.4.1. Internally Displaced Persons (IDPs)

Main Debates
Is the extension of UNHCR’s mandate sufficient or is there a need for a specialized agency?
Should there be a separate global treaty for the protection of internally displaced persons?
Does the emergence of “responsibility to protect” improve the situation of the internally displaced?
Should conflict induced displacement be treated differently from other types of involuntary domestic migration?

Main Points
Emergence of IDPs as a category of individuals in need of protection in the 1990s
International border as a defining criterion
Challenge of implementing human rights treaties to offer sufficient protection for the internally displaced

Treaty

Soft Law

Readings
Core
Extended


Editor’s Note

*See the discussions of internally displaced persons in Africa and in the Americas in Section III.4.5 and Section IV.4 respectively.*

### 1.4.2. Statelessness

**Main Debates**

What is the link between statelessness and forced displacement?

Is statelessness determination a pre-condition of providing international protection to stateless persons?

What are the common elements of and differences between refugee status determination and statelessness determination? What are the pros and cons of a joint determination of these conditions?
Can/should a distinction be drawn between ‘in situ’ and ‘migrant’ stateless persons and what does this mean in terms of states’ obligations? How has the concept of de facto statelessness been (mis-) used and why is this contested? Are there any specific arguments for its continued use?

**Main Points**

Human rights law addresses rights of stateless persons and right to nationality, but UN statelessness conventions form the only legal regimes specifically tailored towards statelessness.

Statelessness determination as cornerstone of protection for stateless persons in migration context; challenge of proving the absence of nationality.

The meaning of statelessness-specific protection as an emerging paradigm of international protection.

Stateless persons may be in ‘own country’: addressing nationality problem vs. providing (international) protection.

Forced displacement as cause and consequence of statelessness; heightened vulnerability of stateless persons to human rights abuses.

State sovereignty in regulation of nationality constrained by principal of avoidance of statelessness.

Powerful imagery of the notion of de facto statelessness vs. lack of an international legal regime.

**Treaties**

**International**


**Regional**


**Soft Law**

Readings
Core

Extended

I.4.3. Environmentally Induced Migration

Main Debates
Is environmentally induced migration “forced migration”? Does it matter if the environmental change is slow or abrupt, human-induced or the result of dominantly natural processes?
Should environmentally induced migrants qualify as refugees? Under what regime (the existing or a new one, specifically tailored to “environmentally induced refugees”)?

Main Points
Environmentally and climate change induced migration as forced migration
Access to complementary or alternative forms of international protection

UNHCR Documents
Readings
Core

Extended

Editor’s Note
Although environment induced migrants, including climate change induced migrants cannot be regarded as refugees under the 1951 Convention, refugee law developments may apply to this category of migrants. For instance, complementary protection might be available or the IDP Principles may be applied to environment induced migrants in the context of internal displacement.
SECTION II

International Framework for Refugee Protection

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

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

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

The third portion of Section II turns to other universal protection that pertains to refugees and asylum seekers. In particular, it examines the concepts of temporary protection and complementary or humanitarian protection, which many states employ in their responses to the displacement of people. It also examines universal instruments of human rights and humanitarian protection, which are relevant to everyone, including the displaced. Lastly, Section II turns to the topic of internally displaced persons. Although they generally do not fall within the legal framework of refugee protection, and should enjoy rights as nationals in their own countries, many individuals displaced within their own country fear the same persecution as those who have crossed borders. The similarities between their situation and that of many refugees make it imperative to address their plight.
II.1 Universal Principles and Concepts of Refugee Protection

Main Debates
Is there a right to asylum under international law? If so, what are its limits?
How broadly should the legal definition of ‘refugee’ be drawn?
How long is a state legally obliged to protect refugees?
To what extent is a state obliged to develop durable solutions as opposed to temporary protection?
When does human rights protection trump migration control?
What are the implications of extraterritorial policies that threaten refugee protection?

Main Points
International refugee protection as a surrogate to national protection, resulting from the failure of the state to protect the refugee from persecution
Standards of protection and refugee rights
Increasing importance of core international human rights instruments for refugee protection

II.1.1 Non-refoulement

Main Debates
Is the principle of non-refoulement applicable in cases of mass influx?
Is it applicable in international zones?
Has it become jus cogens?
Do certain persons fall outside the protection afforded by the non-refoulement obligation?

Main Points
Non-refoulement and different forms of asylum
Non-refoulement under the Geneva Convention v. human rights instruments
The absolute nature of non-refoulement
Access to protection
**Treaties**

**International**

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


**Soft Law**


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

UNHCR EXCOM, Conclusion No. 19 (XXXI) 1980.

UNHCR EXCOM, Conclusion No. 25 (XXXIII) 1983.

UNHCR EXCOM, Conclusion No. 44 (XXXVI) 1986.

UNHCR EXCOM, Conclusion No. 50 (XXXIX) 1988.

UNHCR EXCOM, Conclusion No. 79 (XLVII) 1996.

UNHCR EXCOM, Conclusion No. 81 (XLVII) 1997.

UNHCR EXCOM, Conclusion No. 82 (XLVIII) 1997.

UNHCR EXCOM, Conclusion No. 85 (XLIX) 1998.

UNHCR EXCOM, Conclusion No. 103 (LVI) 2005.

**Readings**

**Core**


**Extended**


**Soft Law**


**UNHCR Documents**

UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between *C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011.

II.1.2 Asylum

Main Debates
Are states obliged to provide asylum?
Does the ‘right to asylum’ cover more than protection against refoulement?
How do extradition and other criminal law measures interact with the principle of asylum?

Main Points
Asylum v. other forms of protection
Asylum and the right to entry

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

Readings
Core

Extended

**II.1.3 Non-discrimination**

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

*Main Points*
Non-discrimination and the enjoyment of refugee rights
Non-discrimination as a norm of customary international law

*Treaties*

*Readings*
*Core*
II.1.4 Family Unity

Main Debate
What is the definition of a family?

Main Points
Family unity as a principle
Right of family reunification is not included in the Geneva Convention
Right to respect for family life under human rights treaties

Treaties
International

Soft Law
UNHCR EXCOM, ‘Family Reunion’, Conclusion No. 9 (XXVIII), 1977.
UNHCR EXCOM, ‘Family Reunification’, Conclusion No. 24 (XXXII), 1981.
UN Human Rights Committee, ‘General Comment No. 19: The Family’ (1990), UN Doc.
HRI/GEN/1/Rev.7, 12 May 2004, at 149, paras. 2, 5.

UNHCR Documents

Readings
Core

Extended

Editor’s Note
See Section II.3.3.4 (Convention on the Rights of the Child).
II.1.5 Durable Solutions

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

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

UNHCR Documents
UNHCR, ‘Agenda for Protection’, October 2003, pp. 68–75.

Readings
Core
THE REFUGEE LAW READER


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

II.1.6 Burden- and Responsibility-sharing and International Cooperation

Main Debates
Is there a legal obligation among States to cooperate and share responsibility for refugee protection?
If so, what is its basis? What does it require?
Burden sharing v. burden shifting
Are the financial donations of states a legitimate mechanism for burden shifting?

Main Points
Capacity of receiving states
Transit states as buffer zones
Broader implication on host societies
Implicit burden sharing

UNHCR Documents
UNHCR, ‘Regional Cooperative Approach to Address Refugees, Asylum Seekers and Irregular Movement’, November 2011.

Readings

Core


Extended


**UNHCR Documents**


### II.1.7 Right to Leave a Country

**Main Debates**

What, if any, restrictions may States place on the right to leave one’s country?

Right to leave vs. right to be admitted to another country

**Main Points**

Legal basis for the right to leave

Discriminatory restrictions on the right to leave

Interaction with the right to seek and enjoy asylum

**Treaties**


**Regional**

**Soft Law**
UN Human Rights Committee, General Comment no. 27, CCPR/C/21/Rev.1/Add.9, November 1999.

**Cases**

**Readings**
**Core**

**Editors’ note**
See also section I.4.1 on Internally Displaced Persons.

**II.1.8 Non-penalization of Refugees for Unlawful Entry and Presence**

**Main Debates**
Are States justified in using penalties to deter and punish asylum-seekers and refugees for irregular entry and presence?
From which criminal or administrative offences does Article 31 of the 1951 Convention provide immunity from prosecution?
Is detention of asylum-seekers or refugees permissible in this context? (See II.2.7 on detention)

**Main Points**
Preconditions for the application of Article 31: ‘coming directly’ from territory where life or freedom is threatened; ‘present themselves without delay’, ‘show good cause’
Restrictions on free movement of asylum-seekers and refugees
Treaties

UNHCR Documents

Cases

Readings
Core
II.2 The 1951 Geneva Convention

Main Debate
To what extent should the Convention be interpreted according to the original intent v. evolving understandings?
Was the Convention a political tool when adopted?

Readings
Core

II.2.1 Criteria for Granting Refugee Protection

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

UNHCR Documents

Editor’s Note
Since 1951 there have been expansions of the refugee definition in order to take into account the political and social contexts in different regions of the world. More detailed expositions of the evolution of the refugee definition can be found in the regional sections of The Reader (Section III, Africa; Section IV, the Americas; Section V, Asia; and Section VI; Europe).
II.2.1.1 Alienage

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

Main Points
1951 Geneva Convention applies to a subset of the displaced
Underlying legal and practical motivations of state parties for requirement that refugees cross international borders
UNHCR’s increased involvement in assistance to IDPs

Readings
Core

Extended

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 displaced persons that the international community needed to address.
2) It prevented states from shifting responsibility for large parts of their own populations to the international community.
3) It prevented states from violating the territorial sovereignty of other states on the pretext of responding to a refugee problem.
4) It furnished a prominent example of the limited reach of international legal obligations and duties.
See Section I.4.1 concerning IDPs.

II.2.1.1.1 Outside the Country of Nationality

Case Law
R v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55, 9 December 2004 (U.K. House of Lords judicial decision that U.K. immigration officer stationed in the Prague Airport unlawfully discriminated against Czech citizens of Roma origin seeking to travel to the U.K.).

Soft Law
UNHCR, The European Roma Rights Center and Others (Appellants) v. (1) The Immigration Officer at Prague Airport, (2) The Secretary of State for the Home Department (Respondents), and the Office of the United Nations High Commissioner for Refugees (Intervener). Skeleton Argument on Behalf of the Intervener (UNHCR), 30 January 2003.

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

Soft Law
Editor’s Note
See Section II.2.1.4 concerning the nexus between the unavailability of state protection and the existence of a Convention ground.

II.2.1.1.3 Dual or Multiple Nationality

Soft Law

II.2.1.1.4 Stateless Refugees

Treaties
International

Soft Law

Cases
UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of Kuric and Others v. Slovenia, 8 June 2011, No. 26828/06.
II.2.1.2 Well-founded Fear

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

Main Point
Shifting standards concerning the likelihood of risk

Soft Law

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).

Readings

Core


Extended


Editor’s Note
See also Section II.2.5.2 concerning evidentiary issues.

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

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

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

II.2.1.3 Persecution

Main Debates
Must the persecution be carried out by groups for which the state is accountable or does a showing of the inability to protect suffice?
Does the lack of state protection constitute persecution?
To what extent must the threat be individualized (singled out)?
• flight from general civil war or generalised violence
• widespread repressive practices

Main Points
Persecution by non-state actors
• domestic violence
• pressure from the community
• organized groups
The threshold for persecution
• discrimination
• prosecution under laws of general application

Editor’s Note
The debate between the accountability theory v. the protection theory centers upon whether refugee status is limited to those who fear persecution by groups for whom the state is accountable or whether it is available to those who need protection from all sources of persecution on account of the five enumerated grounds. Under the 1951 Convention, however, a showing that the state is either unable or unwilling to provide protection against the persecutory harm would suffice.
II.2.1.3.1 Acts of Persecution

**Soft Law**


**UNHCR Document**

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

**Cases**

*Mirisawo v. Holder*, 599 F. 3d 391 (4th Cir. 2010) (economic measures that deliberately deprive individuals of basic necessities or deliberately impose severe economic disadvantage constitute persecution).

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

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

**Readings**

**Core**


Extended

Editor’s Note
See Section VI.2.2.1 for related cases concerning threats that constitute persecution.

II.2.1.3.2 Agents of Persecution

Soft Law

UNHCR Documents
UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’, 23 October 2012, HCR/GIP/12/01.

Cases
Readings

Core


Extended


Editor’s Note

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

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

II.2.1.4.1 Multiple Grounds and General Issues

Main Debate

Which grounds are applicable for conscientious objection and desertion from military service?
Main Point
Broad interpretation and overlap of concepts of race, religion and nationality

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

Soft Law

Readings
Core

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

II.2.1.4.2 Race

Treaties

Soft Law

Readings
Core

Extended
II.2.1.4.3 Religion

Main Point
Public religious activity v. private worship

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

UNHCR Documents

Cases
Toufighi v. Mukasey, 538 F. 3d 988 (9th Cir. 2008) (US judicial decision ruling that conversion from Islam to Christianity was not genuine and would not result in apostasy charges if returned to Iran).
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).
Ahmad and Others v. Secretary of State for the Home Department, (CA) (1990) Imm AR 61. (UK judicial decision on persecution of Ahmadiyas in Pakistan).

Readings
Core

**Extended**

**Editor’s Note**
It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Although persecution related to military conscription tends to be viewed as triggered by religious objection, it may also implicate political opinion. It may also be useful to think about the scope of protected activities under the 1951 Geneva Convention. With regard to religion, does, or should, it include non-traditional religious beliefs? Anti-religious beliefs? Satanism? Witchcraft?

**II.2.1.4.4 Nationality**

**Soft Law**

**Readings**

**Core**
II.2.1.4.5 Particular Social Group

Main Debates
Must the group be defined by its protected characteristics and/or by society’s perception of it? Are these two approaches cumulative, or alternative? Must there be a linkage between protected characteristics and core human rights?

Main Points
Gender-related issues
• domestic violence
• female genital mutilation
• social mores
Sexual orientation
Transsexuality
Family members
Caste or clan

Treaties

Soft Law

UNHCR Documents

Cases
Core
X, Y, Z v. Minister of Immigration and Asylum, CJEU Judgment of 8 November 2013 (criminal laws that target homosexuals, who share an innate and fundamental characteristic, support the conclusion that homosexuals constitute a particular social group).

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

Al-Ghorbani v. Holder, 585 F. 3d. 980 (6th Cir. 2009. (US judicial decision ruling that recognized young westernized Yemenites who married in defiance of family and clan as particular social group).
Attorney General v. Ward, [1993] 2 SCR 689 (Supreme Court). (Canadian judicial decision on the notion of social group).

Bah v. Mukasey, Attorney General, 529 F. 3d 99 (2nd Cir. 2008). (US judicial decision recognizing that women who experienced female genital mutilation as children may still fear future persecution).

Moldova v. Secretary of State for the Home Department, (2008) UK AIT 00002, 26 November 2007, (UK Asylum and Immigration Tribunal). (UK administrative decision that ‘former victims of trafficking’ can constitute a social group).

Gao v. Gonzales, 440 F. 3d 62 (2nd Cir. 2006). (US judicial decisions holding that forced marriages can constitute persecution based on social group).

Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department, (2006) UKHL 46 (House of Lords). (UK judicial decision holding that women in Sierra Leone facing female genital mutilation experienced persecution based on their social group).


Readings

Core


*Extended*


II.2.1.4.6 Political Opinion

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

Main Point
‘Political’ depends on the context
- neutrality in civil war
- withholding support from the government

Soft Law

Cases
Core
RT (Zimbabwe) and others v. Secretary of State for the Home Department, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012 (UK judicial decision dealing with political neutrality and political indifference).
Bolanos-Hernandez v. INS, 767 F 2d 1277 (9th Cir 1984). (US judicial decision holding that neutrality in El Salvador can be a political opinion).

Extended
Metropolitan Court (Hungary), 28 February 2000. (judicial decision ordering new refugee procedure in order to analyse in depth the Serbian draft evader).
Metropolitan Court (Hungary), 9 February 1999. (judicial decision providing protection but not refugee status to ethnic Hungarian who disobeyed Yugoslav conscription order).
Readings

Core


Extended


UNHCR Documents

Editor’s Note
It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Although persecution related to military conscription tends to be viewed as issues of religion, it may also implicate political opinion. It may also be useful to think about the scope of protected activities under the 1951 Geneva Convention. With regard to political opinion, does, or should, it include racist or anti-Semitic political statements? What about political neutrality or indifference?

II.2.1.5 Internal Flight/Relocation Alternative

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

Does the existence of an internal flight/relocation/protection alternative disqualify an individual for international protection?

Is internal flight/relocation/protection alternative applicable only to cases of persecution at the hands of non-state actors?

Main Point
Is an internal flight/relocation/protection alternative relevant to the case at hand? Drawing on human rights, is the proposed site of internal flight/relocation/protection reasonable?

Soft Law


Cases
New Zealand Refugee Appeal, No.76044 of 11 September 2008 (discussing the problems of subjectivity associated with the reasonableness approach).
Secretary of State for the Home Department v. AH, [2007] UKHL 49, 14 November 2007 (House of Lords) (UK judicial decision ruling that the unduly harsh standard should not be equated with inhuman or degrading treatment or punishment, and that conditions must be compared against ‘normal’ life standards within the country of origin).

Secretary of State for the Home Department (Appellant) v. AH (Sudan), IG (Sudan) and NM (Sudan) (Respondents) and the Office of the United Nations High Commissioner for Refugees (Intervener). Case for the Intervener, 4 October 2007.

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

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).


Thirunavukkarasu v. Canada (Minister of Employment and Immigration) (1994) 1 FC 589 of 10 November 1993, (Federal Court of Canada, Court of Appeal) (the question is whether, given the persecution in the claimant’s part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere).

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 and that it is not unreasonable to seek refuge there).

Readings
Core

**Extended**


**Editor’s Note**

*There is no requirement for an asylum-seeker to have sought protection elsewhere in his/her country before seeking asylum abroad. However, courts have held that there are at times options for internal relocation such that the fear of persecution cannot be said to be well-founded. In making such an assessment, consider the impossibility in many national contexts for people to move from one area to establish a life in another region without family or other ties, financial resources, or skills and analysis of internal protection alternatives does not end when there is an absence of persecution in a certain region, but must proceed to assess the realistic likelihood of access to protection.*

*See also Section VI.1.2 concerning the European practice concerning internal relocation alternatives.*
II.2.1.6 Exclusion from Convention Refugee Status

Main Debates
Must there be a decision on inclusion before exclusion?
How should terrorism be defined?
Does terrorism fall under the notion of a non-political crime, Art. 1F(b), or a crime contrary to the purposes of the United Nations, Art. 1F(c)?
What degree of involvement and/or commitment to the goals of the group warrants exclusion?
Should there be a balancing of the gravity of the crime and the gravity of the feared persecution?
What role should international criminal law play in interpreting Article 1F?

Main Points
Expanding content of war crimes and crimes against humanity
Diminished culpability
• superior orders
• child soldiers
Expanding application of the serious non-political crime clause

Treaties

Soft Law
**UNHCR Documents**


**Cases**

*Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40, 19 July 2013 (Supreme Court). (Canadian judicial decision on Article 1F(a) ruling that to exclude a claimant from the definition of refugee by virtue of Art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization’s crime or criminal purpose).

*Al-Sirri v. Secretary of State for the Home Department* and *DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54, 21 November 2012 (UK Supreme Court ruling that ‘acts contrary to the purposes and principles of the United Nations’ refers to attacks on ‘the very basis of the international community’s co-existence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights would fall under this category’ – as per para. 17 UNHCR Guidelines; and ‘serious reasons’ requires a higher standard of proof than ‘reasonable grounds’).

*R (JS) (Sri Lanka) v. Secretary of State for the Home Department* [2011] 1 AC 184 (UK Court of Appeal ruling that in determining membership of an organisation engaged in terrorism, in the context of Article 1F(a), one should...
focus on determining factors, such as the nature and size of the organisation, and the asylum seeker’s personal and individual responsibility as evidenced by his or her position, rank, standing and influence in the organisation etc, as well as the necessary mental element).

**R. v. Secretary of State for the Home Department**, [2010] UKSC 15, 17 March 2010 (UK Supreme Court ruling that Sri Lankan asylum seeker would be excluded if there are serious reasons for concluding that he knowingly and voluntarily contributed in a significant way to LTTE’s purpose of committing war crimes).

**Tamil X v. Refugee Status Appeals Authority**, [2009] NZCA 488, 20 October 2009 (New Zealand Court of Appeal overturned ruling that Sri Lankan crew member on LTTE ship was complicit in crimes against humanity; interprets Article 1F(a) in consonance with Rome Statute of the International Criminal Court; applies **R(JS)(Sri Lanka)**).

**Jayaeskara v. Minister of Citizenship and Immigration** 2008 FCA 404, [2009] 4 FCR 164, 17 December 2008 (Court of Appeal). (Canadian court ruling that the interpretation of Article 1F(b) regarding the seriousness of a crime requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating circumstances underlying the conviction, and not just the length or completion of a sentence).

**SRYYY v. Minister for Immigration** [2005] 147 FCR 1, 5 April 2006 (Federal Court of Australia ruling that it is appropriate to refer to Articles 7 and 8 of the Rome Statute of the ICC for definitions of ‘crimes against humanity’ and ‘war crimes’).

**MIMA v. Singh** [2002] 209 CLR 533, 7 March 2002 (High Court of Australia ruling that acts of revenge, ie the revenge killing of a police officer, could constitute a political crime).

**Pushpanathan v. Canada (Minister of Citizenship and Immigration)** [1998] 1 SCR 982, 4 June 1998 (Supreme Court). (Canadian court ruling that the purpose of Article 1F(c) is to exclude these individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting. Article 1F(c) may be applicable to non-state actors. Conspiring to traffic in a narcotic is not a violation if Article 1F(c)).

**Refugee Review Tribunal, RRT Reference** N96/12101, 25 November 1996 (Australian administrative decision ruling that asylum seeker from Liberian
A rebel group that committed many atrocities should not be excluded because he acted under duress.

**Readings**

**Core**


**Extended**


Editor’s Note

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

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

II.2.1.7 Cessation of Refugee Status

II.2.1.7.1 Cessation Grounds

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

Main Point
Criteria for determining ceased circumstances
**Treaties**
   Art. 1.C.

**Soft Law**
UNHCR EXCOM, ‘Cessation of Status’, Conclusion No. 69 (XLIII), 1992.

**UNHCR Documents**

**Cases**
Salahadin v. Federal Republic of Germany, 2 March 2010 (ECJ interpretation of EC Qualification Directive in light of Art. 1C(5) of the Geneva Convention; cessation can only occur when there has been a significant, non-temporary change such that the reasons for persecution no longer exist and the legal system is effective in detecting and punishing acts of persecution).
only if government establishes that the safe conditions in the country of origin are settled and durable).

*Case Regarding Cessation of Refugee Status*, VwGH No. 2001/01/0499, 15 May 2003 (Administrative Appeals Court). (Austrian administrative decision ruling that refugee’s intent to normalise relations with country of origin is decisive in evaluating application for passport).

**Readings**

**Core**


**Extended**


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 or the acquisition of another nationality (Art. 1C(1)–(4))
2) changed circumstances in the home country that remove the fear of persecution (Art. 1C(5)–(6)).
The readings above deal only with the issue of changed circumstances. See Section VI. for further developments concerning cessation in EU law.

II.2.1.7.2 Procedures

Main Debate
Who carries the burden of showing changed circumstances?

Main Points
Necessity of fair process for cessation determinations
Application of cessation clause is not automatic trigger for repatriation

UNHCR Documents

Cases
Curtis Francis Doebbler v. Sudan, 235/00, African Commission on Human and Peoples’ Rights, 11 May 2012 (unsuccessful case concerning alleged forced repatriation of 14,000 Ehtiopian refugees from Sudan on the basis of article 1(C)(5) of the 1951 Refugee Convention without previous consideration of individual circumstances and due process of law; also notes relationship between 1951 Convention, OAU Convention and African Charter on Human and Peoples’ Rights, as well as relationship between non-refoulement and cessation)
Pretoria v. The Entry Clearance Officer, Karachi [2008] EWCA Civ 1420, 18 December 2008 (Court of Appeal ruling that cessation must involve a formal process and that written notice must be given when competent authorities consider withdrawing refugee status).

RD (Cessation – Burden of Proof – Procedure) Algeria [2007] IKAIT 00066, 26 June 2007 (determination by the UK tribunal that in appeal cases against the cessation of refugee status, the burden of proof rests on the respondent. This derives from the fundamental common law principle that a party that alleges must prove).

Readings
Core

II.2.2 Access to Territory and Protection at Sea

Main Debates
Where should state jurisdiction and responsibility start?
Who has responsibility for asylum seekers rescued at sea?

Main Points
Relocating the borders into international zones and third countries
Offshore action of state authorities and outsourcing of state functions
Interaction between international law of the sea and refugee and human rights law

UNHCR Documents
Case Law

**Hirsi Jamaa and Others v. Italy**, European Court of Human Rights, Application no 27765/09, Judgment of 23 February 2012 (European Court of Human Rights opinion ruling that interdiction on the high seas and return to country of departure without any inquiry into threats to life and liberty violated European human rights law).


**Haitian Center for Human Rights v. United States**, Case 10.675, Report No. 51/96, Inter-American Commission of Human Rights Doc. OEA/Ser.L/V/II.95 Doc.7 rev., 13 March 1997 (Judicial decision by the Inter-American Commission of Human Rights ruling that interdiction of vessels at the high seas and repatriation of Haitian asylum-seekers breached their right to seek and receive asylum, as well as the right life).


Readings

**Core**


**Extended**


II.2.2.1 Visa Requirements

**Readings**

Core


Cases


II.2.2.2 Carrier Sanctions

**Readings**

Core


Cases
Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004; and, European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department, [2003] EWCA Civ 666, United Kingdom: Court of Appeal (England and Wales), 20 May 2003 (Roma rights cases). (UK judicial decision stating that non-refoulement obligations of a State under 1951 Refugee Convention begin from the moment when an asylum-seeker is present at the territory of the state or at its borders. The case also provides an analysis of lawfulness of imposing sanctions on carriers in accordance with State’s obligations under 1951 Refugee Convention.)

II.2.2.3 Extraterritorial Immigration Control

Readings
Core

Extended
II.2.2.4 Interception and Rescue at Sea

*Treaties*

*Soft Law*
Conclusion No. 53 (XXXIX) of 1988, Stowaway Asylum-Seekers, 10 October 1988.

*UNHCR Documents*
UNHCR, UNHCR Central Mediterranean Sea Initiative (CMSI): ‘EU solidarity for rescue-at-sea and protection of refugees and migrants’, 13 May 2014.

*Cases*
Minister for Immigration and Multicultural Affairs & Others v. Vadarlis ("Tampa Case"), [2001] FCA 1329, Australia: Federal Court, 17 September 2001 (The appeal considered by the Federal Court of Australia in famous Tampa case, which held that Australian authorities had prerogative powers to prevent the entrance of non-citizens to Australia in certain cases).

Readings

Core

Extended

Editor’s Note
It is important to analyze whether the non-refoulement obligation is applicable on the high seas.
See Section II.1.1 on non-refoulement, Section VI.2.3 for an overview of Access to Territory within the European context, and Section VI.2.3.2 on European practice concerning Interception and Rescue at Sea.
II.2.3 Access to Procedures

Main Debates
Should asylum seekers have a choice?
Are states free to delegate the task of refugee protection to other states?
Under what conditions, if at all, should a state be entitled to return/send an asylum seeker to another state?

Main Points
Content of effective protection
The need to specify the grounds for removal
- to the asylum seeker
- to the authorities of the destination state

Readings
Core

Editor’s Note
See Section VI.2.3 for analyses of European jurisprudence on access to procedures.

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

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

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

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

**Readings**

**Core**


**Extended**


**Editor’s Note**

*See Section VI.2.4.4.2 and VI.2.4.4.3 for the development of safe country of origin and safe third country practices in Europe.*
II.2.4 Reception Conditions

Main Debates
How should asylum-seekers and refugees be treated upon arrival? What rights do they enjoy during the examination of their claims?
Who should maintain law and order in refugee camps?
How should armed asylum seekers be demobilized?

UNHCR Documents

UN Documents

Cases
The Minister of Home Affairs v. Watchenuka, 10 November 2003. (South African Supreme Court of Appeals judicial decision finding that a blanket prohibition on employment to all asylum-seekers, without offering social benefits, amounted to a breach of the constitutional right to dignity, as among those excluded from the workforce would be persons who had no other means of survival and refugees are to be protected against destitution.)
Readings

Core


Extended


Editor’s Note

*Detention is dealt with in Section II 2.7.*

*See Section VI.2.4.2 for related materials on minimum standards of reception in the European context.*

II.2.5 Procedures for Determining Refugee Status

II.2.5.1 Basic Procedural Requirements

Main Debate

Do accelerated procedures comply with the 1951 Geneva Convention and international standards?
Main Points
Minimum standards for refugee status determination
Prima facie recognition
Impact of absence of legal representation
Impact of barriers of communication for
  • asylum seekers and advocates
  • asylum seekers and decision makers

Soft Law

UNHCR Documents

Cases
Landon v. Plasencia, [1982] 459 U.S. 21 (US judicial decision stating that the domestic law guarantee of due process requires that cases considering deportation of noncitizens provide substantial advance notice, access to legal assistance, and information concerning the applicable legal standards in order to safeguard the right to full and fair court hearings).

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

II.2.5.2 Evidentiary Issues

Main Debate
What is the standard of proof in claims to refugee status? Is there a difference between the standards applied in domestic jurisdictions?
Who bears the burden of proof – the applicant, the state, or is it a shared duty?

Main Point
Burden of persuasion and benefit of doubt

II.2.5.2.1 Standards of Proof

UNHCR Documents
**Soft Law**

**Readings**

**Core**


**Cases**

*Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, Australia: High Court, 12 September 1989 (Australian judicial decision stating that there should be a ‘real chance’ of persecution if the applicant will be returned to the country of origin, and that the ‘real chance’ standard can be a less than fifty percent probability.)

*R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UNHCR Intervening)*, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords (Judicial Committee), 16 December 1987 (UK judicial decision setting up the standard of proof in asylum cases as ‘a reasonable degree of likelyhood’.)


*Fernandez v. Government of Singapore and Others*, United Kingdom: House of Lords (Judicial Committee), 25 May 1971 (UK judicial decision stating that the application of ‘balance of probabilities’ standard in proceedings challenging the
legality of extradition is not appropriate. Instead, the Court suggested that more favorable standard should be applied in relation to claims of the fugitive, e.g. ‘a reasonable chance’, ‘serious possibility’ or ‘substantial grounds for thinking’.)

II.2.5.2.2 Credibility

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

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

Readings
Core

Extended


**Editor’s Note**

See Section VI.2.4.5.1 for European practice concerning credibility.

II.2.5.2.3 Factors Affecting Evidentiary Assessment

II.2.5.2.3.1 Post Traumatic Stress

*Soft Law*


*Cases*

*Alfred Musema v. The Prosecutor (Appeal Judgement)*, ICTR-96-13-A, Criminal Tribunal for Rwanda (ICTR), 16 November 2001, paras. 58–63. (Post traumatic stress and disorders may affect the ability of witnesses to fully or adequately recount the relevant events. In assessment of credibility of such testimonies the personal background and the nature of atrocities to which a witness may have been subjected must be taken into consideration.)
Readings

Core


Extended


Editor’s Note

*See Section VI.2.4.5.1 for European practice concerning evidentiary assessment.*

II.2.5.2.3.2 Interviewing Vulnerable Populations

II.2.5.2.3.2.1 Children

Main Debate
How should asylum systems adapt to respect the ‘best interests of the child’?

Main Points
Large number of unaccompanied children seeking asylum
State guidelines
Need to take account of youth, immaturity and special needs
Treaties

Soft Law

UNHCR Documents

Cases
UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR, 17 February 2012.
Yusuf v. Canada (Minister of Employment and Immigration),[1992] 1 F.C. 629; [1991] F.C.J. 1049, Canada: Federal Court, 24 October 1991, para. 5. (Canadian judicial decision stating that the fact that a child or person with mental disability is incapable of experiencing fear should not serve as a reason for dismissing the asylum claim when the reasons for which clearly exist in objective term. Instead, the relevant immigration authorities should assess if the reasons for a well-founded fear of persecution exist.)

Readings
Core
Extended

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

**II.2.5.2.3.2.2 Women**

*Treaties*
The Council of Europe: Convention on preventing and combating violence against women and domestic violence, 12 April 2011.

*Soft Law*
Committee on the Elimination of All Forms of Discrimination against Women, General Comment No. 32 on gender-related dimensions of refugee status,
asylum, nationality and statelessness of women, CEDAW/C/GC/32, 5 November 2014.


**UNHCR Documents**


UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/01, 23 October 2012.


**Readings**

**Core**


Extended
Department of Immigration and Multicultural Affairs (Australia), Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers, July 1996.
Immigration and Refugee Board (Canada), Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, March 1993.
UK Immigration Appellate Authority, Asylum Gender Guidelines, November 2000.

Editor’s Note
See Section II.2.1.4 and Section II.2.1.4.5 for additional resources concerning gender-related persecution.

II.2.6 Content of Refugee Status

Main Debates
Should refugees enjoy the rights of citizens?
Do international human rights instruments provide sufficient protection for refugees in host countries?

Main Points
The correlation between the refugee’s attachment to the country and the extent of rights
Significance and definition of lawful stay in host country
Refugee specific standards v. universal human rights standards
Readings

Core


Extended


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

II.2.7 Detention

Main Debates
Is detention a penalty within the meaning of Art. 31 of the 1951 Geneva Convention?

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

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

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

Detention of children and other vulnerable populations

Standards for conditions of detention
Treaties

Soft Law

UNHCR Documents
Cases


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


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


Readings

Core


Extended


_Editor’s Note_

*See Section VI.2.5.1 for overview of European detention practices.*
II.3 Other Forms of International Protection

II.3.1 Temporary Protection

Main Debates
Is temporary protection on the basis of group assessment of protection need an adequate alternative to individualized examination of refugee status?
Are there legally binding norms for temporary protection or is it a matter of discretionary state practice?
What should be the duration of temporary protection?
What level of rights must be accorded to those granted temporary protection?

Main Points
Temporary protection as an administrative measure until individual examination is carried out or group recognition occurs
Temporary protection is a precursor, not an alternative, to 1951 Geneva Convention protection
Temporary protection does not suspend states’ duties under the 1951 Geneva Convention and other human rights treaties

Soft Law
UNHCR EXCOM, ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’, Conclusion No. 22 (XXXII), 1981.
UNHCR EXCOM, ‘General Conclusion on International Protection’, Conclusion No. 74 (XLV), 1994, sections (r)–(u).

UNHCR Documents


**Readings**

**Core**


**Extended**


**II.3.2 Complementary (Subsidiary) Protection**

**Main Debates**

Is the 1951 Geneva Convention adequate in the context of forced displacement?

How can the protection needs of victims of generalised violence and armed conflict be met?

Should there be a ‘sliding scale’ or other connection between the various kinds of protection needs and the ensuing entitlements?
Is complementary protection a humanitarian issue under state discretion or a matter of state duty?

**Main Points**
Limitations of 1951 Geneva Convention give rise to the need for complementary forms of protection
Role of international human rights treaties in establishing protection standards to be accorded to persons who fall outside of the 1951 Geneva Convention
Distinction between complementary protection and stay for compassionate or practical reasons.

**Soft Law**
UNHCR EXCOM, ‘General Conclusion on International protection’, No. 87 (L), 1999.

**UNHCR Documents**
Readings

Core


Extended


II.3.3 *Universal Human Rights Instruments Relevant to Protection*

*Main Debates*
To what extent can international human rights law fill existing gaps in refugee protection? What are their differences?
Are refugees rights bearers under human rights treaties?
How can international human rights treaties provide protection without enforcement powers?

*Main Points*
Complementarity between 1951 Geneva Convention and other human rights instruments
International monitoring bodies and their protection-related practices

*Readings*
*Core*

II.3.3.1 *Universal Declaration of Human Rights*

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

*Main Point*
The legal and political significance of the Universal Declaration

*Soft Law*
Readings:

Core

Extended

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

Main Debate
Does the scope of the rights under the International Covenant on Civil and Political Rights meet the specific protection needs of refugees?
How useful are the reporting and individual communications functions of the Human Rights Committee for the protection of refugees and asylum-seekers?

Main Points
Reporting, Standard setting v. quasi adjudicatory role of the Human Rights Committee
The extraterritorial application of Art. 7
*Non-refoulement* under Art. 7 v. *non-refoulement* under Art. 33 of the Geneva Convention
The emerging standards of the Human Rights Committee on detention of asylum seekers under Art. 9
**Treaties**


**Soft Law**

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


**Cases**

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


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


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

Core

Extended

Editor’s Note
There are a number of General Comments relevant to refugees and asylum-seekers; likewise the HRC, in its Concluding Observations on State Party reports increasingly frequently addresses the circumstances of asylum seekers and refugees in their assessment of State Party compliance with specific articles under the ICCPR. This offers another channel for asylum rights advocacy. The views of the HRC on individual
communications are dominated by cases of rejected asylum-seekers and fear of return to torture and cases on arbitrary detention.

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

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

Main Points
Absolute nature of Art. 3
The role of the UN Committee Against Torture in the protection against expulsion
The Committee’s interim measures
Assessment of credibility of torture victims
Extraterritorial applications of Art. 3
Suspected terrorists and inadequacy of diplomatic assurances

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

Soft Law

Cases
Core
M.A. & L.G. v. Sweden, CAT 373/2009, 19 November 2010. (return of long-time PKK member to Turkey where he is wanted under anti-terrorism laws would constitute a breach of art. 3).
S.A. v. Denmark, CAT 339/2008, 15 November 2010. (return to Iran in the deteriorating situation since the elections of June 2009 would constitute a
breach of art. 3 with regard to an individual who had suffered torture 7 years earlier for monarchist political activities).

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

*E.N. v. Sweden*, CAT 322/2007, 14 May 2010. (return of woman and her minor daughter to Democratic Republic of the Congo where widespread violence against women exists would constitute a breach of art. 3).

*A.T. v. France*, CAT 300/2006, 11 May 2007. (violation of the Convention when France charged dual French/Tunisian national of terrorism, revoked his French citizenship, and expelled him to Tunisia while his asylum and CAT claims were still pending).


*E.P. v. Azerbaijan*, CAT 281/2005, 1 May 2007. (violation of the Convention when Azerbaijan disregarded Committee’s request for interim measures and expelled applicant who had received refugee status in Germany back to Turkey where she had previously been detained and tortured).

*E.R.K. & Y.K. v. Sweden*, CAT 270 & 271/2005, 30 April 2007. (no violation of the Convention when claimants were expelled to Azerbaijan based on evidence that many supporting documents were false).

*C.T. & K.M. v. Sweden*, CAT 279/2005, 22 January 2007. (Rwandan women repeatedly raped in detention in Rwanda by state officials have substantial grounds to fear torture if returned while ethnic tensions remain high; complete accuracy seldom to be expected of victims of torture, and inconsistencies in testimony do not undermine credibility if they are not material).


*Agiza v. Sweden*, CAT 233/2003, 20 May 2005. (*non-refoulement* under CAT is absolute even in context of national security concerns; insufficient diplomatic assurances were obtained by sending country).

*Mutombo v. Switzerland*, CAT 13/1993, 27 April 1994. (no violation of the Convention where applicant has established existence of gross violations of
human rights in country of return, absent sufficient evidence of the applicant’s ‘personal risk’).


*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).


**Extended**


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

**Readings**

**Core**


**Extended**

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

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

Main Points
Definition of a child
Vulnerability of children
Unaccompanied minors

Treaties
**Soft Law**
Committee on the Rights of the Child (CRC), ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’, 29 May 2013, CRC /C/GC/14.
UNHCR EXCOM, ‘Refugee Children and Adolescents’, No. 84 (XLVIII), 1997.

**UNHCR Documents**

**Readings**

Core
Extended

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

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

Main Points
Actors for protection
Nexus between international refugee law and international humanitarian law

Treaties

Soft Law
31st International Conference of the Red Cross and Red Crescent, ‘Resolution on Strengthening Legal Protection for Victims of Armed Conflicts’, 1 December 2011.
UNHCR EXCOM, ‘Conclusion on the civilian and humanitarian character of asylum’, Conclusion No. 94 (LIII), 2002.
UNHCR and ICRC Documents


Cases

ICTY, Milosevic, Slobodan, Trial Chamber Decision, IT-02-54-T, decision of 16 June 2004 (on deportation and forcible transfer as grave breaches of the Geneva Conventions and crimes against humanity).
Readings

Core


Extended


II.4 Internally Displaced Persons

Main Debates
Is the extension of UNHCR’s mandate sufficient or is there a need for a specialized agency?
Should there be a separate treaty for the protection of internally displaced persons?

Main Points
Emergence of IDPs as a category of individuals in need of protection in the 1990s
International border as a defining criterion
Challenge of implementing human rights treaties to offer sufficient protection for the internally displaced

Treaty

Soft Law

**UNHCR Documents**


**Readings**

**Core**


**Extended**


Editor’s Note

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

African Framework for Refugee Protection

This section of the Refugee Law Reader focuses on the legal framework for the protection of refugees which has developed in Africa. The legal regime governing refugee law in Africa is comprised of three main legal instruments: the 1951 UN Convention Relating to the Status of Refugees (46 signatory States in Africa) and its 1967 Protocol (46 signatory States in Africa), the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa (46 signatory States in Africa), and the African Charter on Human and People’s Rights (49 signatory States). It is noteworthy that most of the 53 African States have ratified these international agreements.

The OAU Convention was prepared, in part, to take into account the unique aspects of the refugee situation on the African continent, in light of the fact that the 1951 Convention definition of a refugee, as a “person fleeing a well-founded fear of persecution”, had not considered several problems encountered by African refugees and was therefore seen as too narrow within the African context. One of the fundamental innovations of the OAU Convention is its expansion of the refugee definition, and the materials contained in this section highlight several elements of the definition that have had far-reaching effect. Further, this part highlights other significant contributions of the OAU Convention, for example that it expanded the principle of non-refoulement and that it is the only legal instrument that has codified a principle on the safe and humane voluntary repatriation of refugees.

In addition to the in-depth analysis of the OAU Convention, this part of the Refugee Law Reader considers the sub-regional legal frameworks relating to refugee protection and the migration of persons across borders, as well as national refugee laws which have developed since the introduction of the OAU Convention. The material contained in this section demonstrates how many of these domestic instruments have both implemented the states’ international obligations and expanded upon the Convention definitions.

The focus of the section will then turn to address various obstacles pertaining to refugee protection in Africa. It explores the interaction between the exclusion clause and the international criminal justice regime, a high profile issue at present. It also examines many facets of the relationship between refugees and the territories to which they flee. For example, it addresses the interface between refugee law and immigration law, the different situations of urban refugees and those who live in camps, the relations between refugees and their host populations, and the impact of resettlement and the problems that arise when it is not an available durable solution. This portion of the section also devotes attention to two especially vulnerable populations, foreign unaccompanied children and those who are internally displaced.
III.1 An Overview of the (1969) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Main Debates
What are the regional legal bases for refugee protection in Africa?
How enforceable are these rules and standards proclaimed in the regional refugee law and human rights instruments at national courts?
Is refugee protection legal or political?
Does the OAU Convention fill the gaps in international refugee law?
Does the OAU Convention adequately address the unique issues facing African refugees?

Main Points
Individual v. group-based status determination
Similarities and differences between the OAU Refugee Convention and the 1951 UN Convention
Substantive v. procedural elements
Refugee rights and duties in the light of the African refugee law and human rights frameworks
States’ ratification of the relevant instruments v. their compliance
National legislation of refugee law v. policy-based administration of refugees
Complementarity between the regional and international refugee protection frameworks

Treaties
African (BANJUL) Charter on Human and Peoples’ Rights 21 I.L.M. 58 (1982), entered into force 21 October 1986 (ACPHR) – The African Commission on Human and Peoples Rights is the supervisory organ of the ACPHR. It has been tasked to monitor States’ compliance with the OAU Refugee Convention and to encourage States to implement the OAU Refugee Convention in its domestic law.


**Cases**


**Soft Law**


Khartoum Declaration on Africa’s Refugee Crisis, adopted by the OAU Seventeenth Extraordinary Session of the Commission of Fifteen on Refugees, meeting in Khartoum, Sudan, 22–24 September 1990.


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

Readings

Core


Extended

III.2 An Analysis of the (1969) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

III.2.1. Analysis of the OAU Convention Refugee Definition

III.2.1.1 Compelled to Flee – A Subjective Element

Main Debates
Does the OAU Convention refugee definition contain a subjective element or is the definition predicated on the mainly objective events compelling someone to flee their place of habitual residence?
Does the OAU Convention refugee definition exclude *sur-place* refugees?

Main Points
The meaning of ‘compelled to flee’
Assessment of whether the term ‘compelled’ indicates that the OAU Convention definition has a subjective element
Test for establishment of the causal connection between the individual’s flight and the enumerated events
Strict interpretation of compelled to flee may exclude *sur-place* OAU Convention refugees
**Treaties**


**Readings**

**Core**


**Extended**


### III.2.1.2 Place of Habitual Residence

**Main Debate**

What is the meaning of the phrase ‘place of habitual residence’?

**Main Points**

Existence of a geographic nexus between the enumerated event and the person’s place of habitual residence

Determining what is a claimant’s particular place of habitual residence includes undertaking a factual enquiry considering all the factors connecting the person to the place where he or she resided

**Treaties**

**Readings**

**Core**


**Extended**


**III.2.1.3 The Enumerated Events**

**III.2.1.3.1 External Aggression, Occupation, Foreign Domination**

**Main Debates**

What is the precise meaning of the terms ‘external aggression,’ ‘occupation,’ and ‘foreign domination’?

Are these enumerated events still relevant in today’s context?

**Main Point**

None of these enumerated events are defined in the OAU Convention – thus it is necessary to look to other areas of international law for their meanings.

**Treaties**


**Readings**

**Core**

Extended

III.2.1.3.2 Events Seriously Disturbing Public Order

Main Debate
Given that this enumerated appears to be the most flexible, can it be considered a potential catch-all?

Main Point
‘Events seriously disturbing public order’ should be interpreted broadly in order to align it to the OAU Convention’s emphasis on the need for an essentially humanitarian approach towards refugees.

Treaties
1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

UNHCR Document

Readings
Core
III.2.1.4 In Whole or in Part – Existence of an Internal Flight Alternative?

Main Debate
Does the Internal Flight Alternative/Internal Protection Alternative apply to the OAU Convention refugee definition?

Main Point
The OAU Convention’s definition clearly states that the events need only occur ‘in part’ of the country; hence the IFA is not applicable.

Treaties
1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Readings
Core

Extended

III.2.1.5 Group/Prima Facie Refugee Recognition under the OAU Convention

Main Debate
Is the OAU Refugee Convention definition a ‘group-based’ definition?

Main Point
While the definition appears to imply a link to prima facie refugee determination, the definition is framed in individual terms and nowhere in the definition or the OAU Convention’s provisions for asylum is the concept of prima facie refugee determination considered.

Readings
Core

Extended
III.2.2 Expanded Protection against Refoulement

Main Debates
Has the OAU Refugee Convention significantly expanded the protection against refoulement?
Does rejection at the frontier constitute refoulement?

Main Points
Safe third country rule
First country of asylum rule

Cases
Abdi and another v. Minister of Home Affairs and others, 2011(3) SA 37(SCA).

Readings
Core

Extended

III.2.3 Prohibition on Subversive Activities

Main Debate
Does Article 3 of the OAU Convention adequately address issues of national security and social stability?
Main Points
National security v. protection for refugees
Freedom of expression v. international relations

Readings
Core

Extended

III.2.4 Burden-sharing

Main Debate
With no mechanisms in place to support burden-sharing, it remains an ideal.

Main Points
While Article 2of the OAU Refugee Convention was drafted in the spirit of burden-sharing, the reality reflects otherwise.
Neighbouring States and States with better human rights records are attracting larger numbers of refugees.

UNHCR Documents

Readings
Core

III.2.5 Voluntary Repatriation

Main Debate
Various academics are challenging UNHCR’s view that voluntary repatriation is the preferred solution. Is this a valid criticism?

Main Points
Local integration v. voluntary repatriation

UNHCR Documents

Readings

Core

Extended

III.3 An Overview of Sub-Regional Frameworks and Domestic Legislations

III.3.1 Southern Africa

Main Debate
Will a free movement protocol ease or increase the burden on States?

Main Point
Urban v. camp based refugees

UNHCR Documents
**Readings**

**Core**

**Extended**

**III.3.1.1 South Africa**

**Legislation**
Immigration Act 13 of 2002.

**Cases**
A comprehensive case law reader to be found at: http://www.refugeerights.uct.ac.za/legal/case_law_reader

**Selected Supreme Court of Appeal (SCA) case law**
Bula and others v. Minister of Home Affairs and others, 2012 (4) SA 560 (SCA).
Arse v. Minister of Home Affairs and others, 2012(4) SA 544 (SCA).
Abdi and another v. Minister of Home Affairs and others, 2011(3) SA 37(SCA).
**Readings**

**Core**


**Extended**


T. Schreier, ‘Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit’, *Refuge*, vol. 28, no. 2, pp. 61–75.


Various working papers to be found at: http://www.refugeerights.uct.ac.za/research/working_papers/

**III.3.1.2 Malawi**

**Legislation**


**Readings**

**Core**


### III.3.1.3 Namibia

**Legislation**


**Readings**

**Core**


### III.3.2 North Africa

**Main Debate**

What are the effects of transit migration from Sub-Saharan Africa to Mediterranean, European and the Maghreb states?

**Main Point**

Barriers to accessing countries of asylum of choice

**Readings**

**Core**


Extended

III.3.2.1 Libya

Legislation
No domestic refugee legislation
UNHCR conducts refugee status determinations under its mandate and issues letters of attestation to those it grants protection

Readings
Core

Extended

III.3.2.2 Egypt

Legislation
No domestic refugee legislation
The Egyptian Constitution guarantees the right of asylum
1954 Memorandum of Understanding with UNHCR
III.3.3 West Africa

III.3.3.1 Regional

Main Debate
How do mixed migration movements affect the protection needs of refugees who migrate with other forms of migrants within the region?

Main Point
Increased intra-regional mobility is compounded by factors such as climate change and environmental degradation.
**Treaties**

Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993.

Economic Community of West African States (ECOWAS), 1990 Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right to Establishment).

Economic Community of West African States (ECOWAS), 1989 Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment.

Economic Community of West African States (ECOWAS), 1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence).

Economic Community of West African States (ECOWAS), 1985 Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.

Economic Community of West African States (ECOWAS), Treaty of the Economic Community of West African States (ECOWAS), 28 May 1975.


**Readings**

**Core**


Extended

III.3.4 East Africa

III.3.4.1 Regional

Main Debates
Are East African states meeting their obligations under the human rights and refugee law instruments they have ratified at the continental and sub-regional levels?
What are the roles of Eastern African states in the protection of refugees?

Main Points
Distinctive and similar features of the East African states
Emergence of national refugee-specific legislation for the protection of refugees
Development of IDPs policy frameworks

Treaties
Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2008.
Regional Parliamentarian Meeting, Kinshasa Declaration, 26–28 February 2007.

**Readings**

**Core**


**Extended**


**III.3.4.2 Kenya**

**Legislation**


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


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

**UNHCR Documents**

UNHCR, *Brief of the United Nations High Commissioner for Refugees (1st Amicus Curiae), in the matter of the contravention of fundamental rights and freedoms under Articles 2, 3, 10, 20, 21, 27, 28, 29, 36, 39 and 259, of the Constitution*
of the Republic of Kenya 2010, and in the matter of Articles 22, 23 and 258 of the Constitution of the Republic of Kenya 2010 and in the matter of the Refugees Act and in the matter of the intention of the Government of Kenya to move all refugees residing in urban areas to the Dadaab and Kakuma Refugee Camps with effect from 21.01.2013, in the High Court of Kenya at Nairobi, Constitutional and Human Rights Division, 12 March 2013, Petition No. 115 of 2013,— concerning the right to seek and enjoy asylum; the principle of non-refoulement; rights of residence and freedom of movement; urban refugee policy in the context of forced relocation (to camps) of asylum-seekers and refugees.

Readings

Core

Extended
III.3.4.3 Uganda

**Legislation**

**Readings**

**Core**

**Extended**


**III.3.4.4 Tanzania**

*Legislation*


*Readings*

*Core*


*Extended*


III.4 Protection Challenges in Africa

III.4.1 Exclusion Clause

Main Debates
Is refugee protection in Africa safe from being exploited by fugitives from justice?
Role of the international community during conflicts that disturb public order and generate mass displacement

Main Points
Exclusion during mass influx situation
Sources of excludable crimes/acts
Procedural safeguards

UNHCR Documents

Readings
Core
Extended


III.4.2 The Interface between Refugee Law and Immigration Law

Main Debate
Border patrol and control v. entry of genuine refugees

Main Points
Non-refoulement
Refugee law v. immigration law
Illegal immigrants v. genuine refugees
Rejection at the frontier, expulsion of genuine refugees

Cases

*Ulde v. Minister of Home Affairs and Another*, 2009 (4) SA 522.
Readings

Core


Extended


III.4.3 Urban Refugees v. Camp Refugees

Main Debate

Legality of the encampment of refugees

Main Points

Urban refugee management and protection
Self-reliant v. vulnerable refugees in urban areas
Limitation of assistance to camp-based refugees
Camp location v. right to freedom of movement

Soft Law


Readings

Core


Extended


III.4.4 Resettlement

Main Debates
Is resettlement a right or a privilege?
Who determines whether to resettle or not?
Are African States suitable for resettlement?

Main Points
Resettlement v. protection concerns
Absence of legal provisions for resettlement as a durable solution

UNHCR Documents
UNHCR, Implementation of the Strategic Use of Resettlement, September 2011.
UNHCR, Position Paper on the Strategic Use of Resettlement, 4 June 2010.

Readings
Core

Extended


### III.4.5 The Plight of Internally Displaced Persons (IDPs)

**Main Debate**
Can UNHCR extend its mandate to accommodate IDPs?

**Main Points**
The main legal framework for the protection of IDPs
Rural IDPs v. urban IDPs
IDPs v. refugees

**Treaty**

**Soft Law**

**UNHCR Documents**


**Readings**

**Core**


**Extended**

**III.4.6 Unaccompanied Children**

**Main Debates**
Who is responsible for safeguarding the special protection needs of unaccompanied minors?
What kind of assistance can ensure the protection of unaccompanied minor refugees?

**Main Points**
Best interest of the child
Duties of host states v. role of UNHCR and implementing NGOs
Prospects of durable solutions
**Soft Law**
Accra Declaration on War-Affected Children in West Africa, ECOWAS Member States, Accra, April 2000.

**UNHCR Documents**

**Readings**

**Core**
T. Schreier, ‘Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit’, *Refuge*, vol. 28, no. 2, pp. 61–75.

**Extended**


### III.4.7 Governance and Globalization

**Main Debates**

Are resources in the protection of refugees shared equally?  
Should each region shoulder its burden in the protection of refugees?  
In the context of the changing nature of forced displacement, who should have an entitlement to cross an international border and seek asylum?

**Main Points**

Disparities between the South and the North  
The South-North debate  
Since its beginnings the modern refugee regime has been progressively implemented, becoming increasingly more operational and international in scope. Today the regime faces a period of transition, forced to adapt to increasing refugee flows and enhanced restrictions among its member states.

**Readings**

**Core**


**Extended**


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

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

Main Points
The refugee problem in Africa is characterized by a high number of protracted refugee situations and the continuing presence of large populations of internally displaced persons, as well as the presence of armed elements in some refugee camps and forced recruitment, serious violations of the universally recognized principle of non-refoulement, growing xenophobia and intolerance against refugees, and threats to the physical safety of refugees.
Legal frameworks to accommodate refugees
Divergent interests and perceptions
Political stability
Human, social and economic resources

UNHCR Document

Readings
Core
**Extended**

**III.4.9 Protection during Mass Repatriation**

**Main Debates**
Forced return v. voluntary return during mass repatriations
Should refugees be involved in the decision making process of repatriation?

**Main Points**
Monitoring the repatriation exercise to ensure voluntary and safe return
The various stakeholders in the repatriation exercise
Readings:
Core

Extended

III.4.10 Protection during Mass Influx

Main Debates
How to deal with situations of mass influx
Who decides when a situation is one of mass influx?

Main Point
Prima facie determination v. individual determination

Readings:
Core
III.4.11 Protracted Refugee Situations

Main Debates
Is it humane to restrict refugees to camps in protracted refugee situations? 
What are the roles of UNHCR and States in preventing and addressing protracted refugee situations?

Main Points
Refugees trapped in “protracted refugee situations” for 5 years or more after their initial displacement, without immediate prospects for implementation of durable solutions, suffer the detrimental effects on their physical, mental, social, cultural and economic well-being due to their long-lasting and intractable exile.

Camps v. local integration
Readings
Core

### III.4.12 Cessation of Refugee Status

**Main Debate**
When is cessation of refugee status appropriate and what procedures must be adhered to in order to ensure that the individual’s rights are not violated?

**Main Point**
Principles of international law and principles of domestic law pertaining to administrative fairness determine whether cessation in fact applies. This often involves complex issues of fact and law.

**Readings**
Core
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’, UN/HCR/GIP/03/03,10 February 2003.
Extended

III.4.13 Family Unity

Main Debate
Who is a family member for the purpose of granting derivative status and family reunification of refugees?

Main Points
Nuclear family v. extended family
Issues of polygamy v. monogamy
Traditional African practices v. Islamic practices
Relatives v. dependents
Readings:

Core

Extended
SECTION IV

Framework for Refugee and IDP Protection in the Americas

This section of The Refugee Law Reader examines the legal norms regarding refugee protection that have developed in the Americas. In particular, it highlights concepts and instruments that are unique to Latin America, where most of the regional developments have occurred. Some developments involving Canada and the United States of America are addressed at the end of the section.

The first portion of this section addresses the regional instruments dealing with ‘diplomatic/political asylum’, ‘refugio (refuge)/territorial asylum’, and asylum provided to refugees. These concepts have a specific meaning in the Latin American context, and efforts to interpret and apply them have given rise to a substantial body of law. Materials in this section attempt to clarify ‘political/diplomatic asylum’ and ‘refugio (refuge)/territorial asylum’ in the light of the overarching international law framework protecting refugees and the recent developments of the Inter-American Court of Human Rights; the scarcity of literature in a language other than Spanish makes this a difficult task.

The second part of this section focuses on the regional system of human rights and its impact on refugee protection in the Americas. It canvasses the instruments and the related jurisprudence, as well as the soft law developments that are an important complement to refugee protection in the region. The section then turns to an examination of the Cartagena Declaration of 1984, the principal regional instrument specific to refugee protection. The Cartagena Declaration, the written expression of regional customary law, is notable for its situational approach, and its emphasis on protection and durable solutions. Other non-binding instruments that play an important role in the region are also examined.

The section next reviews the application of the 1951 Geneva Convention in the context of regional norms and national legislation adopted in Latin America. With the sole exception of Cuba, all the states in the region have ratified the 1951 Geneva Convention and/or its 1967 Protocol. The development of national jurisprudence concerning refugee protection still needs to be further developed, however.

This section also examines the internal displacement in Colombia and the situation of internally displaced persons more generally in Latin America. It highlights the all too frequent interaction of collective displacement, persecution and violence, refugees, and the internally displaced.

The section concludes by noting the regional developments in North America between Canada and the United States of America concerning the adoption and implementation of the safe third country agreement.
IV.1 The Evolution of the Right of Asylum in the Americas: From Refugio (Refuge)/Territorial Asylum Political/Diplomatic Asylum to Refugee Status

Main Debates
What are the differences between diplomatic, political/territorial asylum within the Latin American protection framework?
To what extent does each of the two forms of Latin American “asylum” remain a discretionary right of a sovereign state and its implications for refugee protection?
How to overcome the dualism “asilo and refugio” (asylum and refuge) in Latin America?
In Latin America, is it preferable to apply regional treaties on asylum when individuals seek asylum in states parties to these instruments or refugee status under the international refugee instruments?

Main Points
Evolution of the right of “asylum” in the Americas and its codification
Distinctions between refugio (refuge)/territorial asylum and political/diplomatic asylum
Diplomatic asylum as regional customary law in Latin America
Confusion caused by the distinction between refugio (refuge)/territorial asylum and asylum granted to refugees based on the 1951 Geneva Convention and/or its 1967 Protocol

Treaties
Caracas Convention on Diplomatic Asylum, 28 March 1954, OAS Treaty Series No. 18.
Montevideo Treaty on Asylum and Political Refuge, 4 August 1939.
Montevideo Convention on Political Asylum, 26 December 1933.
Havana Convention on Asylum, 20 February 1928.

Cases

Columbia v. Peru, Judgement of 20 November 1950, International Court of Justice, I.C.J. Reports 1950, p. 273. (The Court declared that the granting of asylum by the Colombian Embassy to the instigator of a military uprising against the government of Peru did not fulfil the conditions envisaged in the Havana Convention in as much as the asylum country does not enjoy a right to qualify the nature of the offence upon which asylum is granted by a unilateral and definitive decision; also, the alleged regional custom on diplomatic asylum neither includes a safe-conduct to leave the country of origin – in which the Embassy of the country granting asylum is based – nor extends protection for the time necessary to solve such a request).

Readings
Core

Editor’s Note
Please note that the Latin American effort to technically differentiate between territorial asylum and diplomatic asylum through the adoption of regional conventions ended in 1954 with the Caracas conventions. In State practice, both forms of “asylum” remain
as distinct categories based on whether the protection to the persecuted is granted inside (territorial asylum) or outside (diplomatic asylum) the asylum country. The previous regional conventions in reality, used the terms “asylum”, “refugio (refuge), “political refuge” and “political asylum” sometimes as interchangeable concepts. This has led to the confusion by States and some traditional scholar opinion that in Latin America the term “asylum” only refers to the Latin American conventions and its two modalities of “asylum” (territorial and diplomatic) while the term “refugio” (refuge) refers to refugee status under the 1951 Convention and/or its 1967 Protocol. In contemporary State practice, however, very few cases still apply for asylum under the Latin American conventions. Recent scholar opinion and the developments of the Inter-American System have underlined the relationship between the regional human rights instruments and refugee protection as well as the need to refer to the 1951 Convention and/or its 1967 Protocol to define the content and scope of the right of asylum, as enshrined in the regional human rights instruments.

IV.2 Refugee Protection in the Framework of the Inter-American Human Rights System

IV.2.1 Human Rights Instruments

IV.2.1.1 The Right to Seek and Receive/Be Granted Asylum and the Rights of Refugees

Main Debate
What is the content and scope of the right to seek and receive/be granted asylum in the Americas from a human rights perspective and its relationship to refugee protection under the 1951 Convention and/its 1967 Protocol?

Main Points
Relevance of the regional framework of human rights protection in ensuring the right to seek and receive/be granted asylum and the rights of refugees in the Americas
The importance of the 1951 Convention and its 1967 Protocol to define the scope and content of the right to seek and receive/be granted asylum in the Americas (art. 27 of the 1948 American Declaration of the Rights and Duties of Man in relation with articles 22.7 and 29 b) and 29 d) of the 1969 American Convention on Human Rights)
New conceptualization of the right of asylum from a human rights perspective

*Treaties*
Inter-American Convention against Terrorism, 3 June 2002 (arts. 11 and 12)
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994 (art. 9)
Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series No. 67, Art. 15
American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, UN Register 08/27/1979 No. 17955 (art. 22.7)

*Soft Law*
American Declaration of the Rights and Duties of Man, 1948, Art. 27
Inter-American Court of Human Rights
Inter-American Commission on Human Rights

*Cases*
*Inter-American Court of Human Rights*

*Article 22.7*
Article 8.2

Case Tribunal Constitucional v. Peru. Judgment of 31 January, 2001, Inter-American Court of Human Rights, paras 68–71. (The Court establishes that the minimum judicial guarantees should be respected in any state act related to the determination of rights of individuals and that they are not restricted to procedures of criminal nature).

Article 25

Case Castillo Páez. Judgment of 27 November 1998, (according to the judgement, Peru has to indemnify for the material and moral harms caused, the family members of a disappeared person, including the father, the mother and the sister, who were forced to leave their country and seek asylum in The Netherlands).

Advisory Opinion “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection” OC-21/14, Inter-American Court of Human Rights (IACtHR), 19 August 2014.

UNHCR, UNHCR Letter to the Inter-American Court of Human Rights in the Framework of Request for an Advisory Opinion on Migrant Children presented by MERCOSUR, 17 February 2012.

Inter-American Commission on Human Rights

Individual Petitions

Admissibility of the case Rumaldo Juan Pacheco Osco y Otros v. Bolivia, Report No. 53/04, 13 October 2004, (Petition No. 301/2002) (possible violation of the right to personal integrity, to personal liberty, to judicial guarantees, the rights of the child, the freedom of movement and residence with regard to refugees recognised in Chile wishing to reside in Bolivia). Case already decided by the Inter-American Court of Human Rights in November, 2013 (see above reference).

Admissibility of the case 120 Cuban citizens and 8 Haitian citizens detained in Bahamas, Report No. 6/02, 3 April 2002, (Petition No. 12.071) (indications of the violation of Art. 27 of the American Declaration of the Rights and Duties of Man, concerning the right to seek and receive asylum).
Merits of the case interdiction of Haiti, Report No. 51/96, 13 March 1997, (Case No. 10.675) (the Commission considered that the USA violated the right of Haitian citizens to seek and receive asylum when returning them to their country of origin despite that their life would be in danger there, after a summary proceeding of their asylum claims).

Admissibility of the case Joseph v. Canada, Report No. 27/93, 6 October 1993, (Case No. 11.092) (following the analysis of existing domestic remedies concerning the recognition of refugee status, the application was declared inadmissible).

Merits of the case Honduras, Report No. 5/87, 28 March 1987, (Case No. 9.619) (the State has the obligation to guarantee the situation, the security and the integrity of refugees hosted on its territory).

Annual Reports
Annual Report (2003), 29 December 2003 (OEA/Ser.L/V/II.118) (obligation of States to ensure a reasonable possibility for asylum-seekers to substantiate their claim for refugee status and the reasons for which they fear being tortured if sent to a certain country, including the country of origin).


Special Reports
Report on Terrorism and Human Rights, 22 October 2002, (OEA/Ser.L/V/II.116) (in the framework of anti-terrorist policies, the Commission analyses the situation of migrant workers, asylum-seekers, refugees and foreigners, particularly with regard to the right to liberty and security, to humane treatment, to due process and fair trial, and to non-discrimination).

Recommendation on Asylum and International Crimes, 20 October 2000, (OEA/Ser./L/V/II.111, Doc. 20 Rev.) (recommendation for States to refrain from granting asylum to supposed perpetrators of international crimes).
Country Reports

Precautionary Measures
Precautionary measures, 27 January 1999, in order that the Bahamas suspend the deportation of a Cuban family, the members of which asked for asylum and that this process should respect the relevant procedural guarantees.
Precautionary measures, 14 August 1998, in order that the Bahamas refrain from deporting a group of 120 Cuban nationals who applied for refugee status, while the Commission is examining in detail their allegations of human rights violations.
Precautionary measures, 16 January 1998, in order that Canada refrains from deporting a Sri Lankan national, recognised by Canada as refugee in 1991, while the Commission is investigating the human rights violations reported in the application.

General Assembly of the Organisation of American States Resolutions
Resolution AG/RES. 838 (XVI-O/86), 1986. Inter-American action on behalf of refugees.

Readings
Core


Extended


IV.2.1.2 The Non-refoulement Principle and Its Expansion in the Americas

Main Debate

What is the concrete impact of the explicit recognition of the right to seek and receive asylum by the American Declaration of the Rights and Duties of Man and of the right to seek and be granted asylum by the American Convention on Human Rights in relation to the incorporation of the principle of *non-refoulement* in a broader manner in the American Convention on Human Rights (Art. 22.8). Is there a right of *non-refoulement* in the Americas for aliens under certain grounds?
**Main Points**

Relevance of the regional framework of human rights protection in ensuring the principle of *non-refoulement* in the Americas

Comparison, in theoretical and practical terms, between the protection offered by the European Convention on Human Rights and the Inter-American Convention on Human Rights

Recent evolution of the principle of *non-refoulement* by the human rights organs of the Inter-American System and its use to protect the right to family unity, right to health, etc.

**Treaties**

Inter-American Convention against Terrorism, 03 June, 2002 (Art. 15).


Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, OAS Treaty Series No. 73.


**Soft Law**

Inter-American Court of Human Rights

Inter-American Commission on Human Rights
Cases

Article 22.8

Case Pacheco Tineo v. Bolivia. Judgment of 25 November 2013, Inter-American Court of Human Rights, paras 151–153. (The Court highlights that the principle of non-refoulment is both broader in the Inter-American System, and is complementary to the protection accorded by International Refugee Law and International Human Rights, and is reinforced by the recognition of the right to seek and receive asylum, as enshrined in the regional human rights instruments).

Article 8

Case Baena Ricardo and others v. Panama. Judgment of 2 February 2001, (the Court states that the minimum due process guarantees set forth in Article 8.2 must be observed in the course of an administrative procedure, as well as in any other procedure leading to a decision that may affect the rights of persons).

Article 8.2

Case Tribunal Constitucional v. Peru. Judgment of 31 January, 2001, Inter-American Court of Human Rights, paras 68–71. (The Court establishes that the minimum judicial guarantees should be respected in any State act related to the determination of rights of individuals and that they are not restricted to procedures of criminal nature).

Advisory Opinions

Advisory Opinion on “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection” OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, (the Court refers to the the principle of non-refoulement in international refugee law, and particularly to its evolution in the Americas from a human rights perspective).

Advisory opinion on the juridical condition and rights of the undocumented migrants, 17 September 2003, (OC-18/03, Series A N° 18) (the fundamental principles of equality and non-discrimination, as rules of jus cogens, entail erga omnes obligations of protection that bind all states and affects third countries as well,
regardless of any circumstance or condition of a person concerned, including his/her regular or irregular migrant status).

**Provisional Measures**

Provisional measures in the case of Haitian and Haitian-origin Dominican persons in the Dominican Republic, 18 August 2000, in order that the Dominican Republic refrains from deporting or expelling from its territory two of the applicants, that it enables the immediate return to its territory of two others and that it enables the immediate family reunification on its territory of two applicants with their minor children.

Provisional measures, 12 November 2000, in order that the Dominican Republic stops the massive expulsion of foreigners and guarantees the requirements of due process in cases of deportation.

**Inter-American Commission on Human Rights**

**Individual Petitions**

Merits of the case John Doe and others v. Canada, Report No. 78/11, 21 June 2011, (Case 12.586) (due process of law for persons seeking asylum in a foreign territory and direct-back policy). The Commission concluded that Canada was responsible for the violation of articles XXVII and XVIII of the American Declaration for not protecting the right of the alleged victims to seek and receive asylum in a foreign territory, for not making a basic individualized assessment on the risk of refoulement, and not having permitted the John Does to seek recourse before a competent court to challenge the direct-back decisions to United States without an assessment of their asylum claims.

Merits of the case Wayne Smith, Hugo Armendariz et al v. United States of America, Report No. 81/10, 12 July 2010 (Case 12.562) (due process of law on a case-by-case basis in immigration removal proceedings, humanitarian defenses to removal, application of balancing test to individual cases that duly considers humanitarian defenses, and right to family life). The Commission concluded that in expulsion cases the State should permit the alleged victims to present their humanitarian defenses to removal, that a competent, independent immigration judge should apply a balancing test to individual cases that duly considers their humanitarian defenses and can provide meaningful relief, and
the implementation of laws to ensure that non-citizen residents’ right to family life are protected and given due process on a case-by-case basis in immigration removal proceedings.

**Admissibility of the case Rumaldo Juan Pacheco Osco y Otros v. Bolivia**, Report No. 53/04, 13 October 2004, (Petition No. 301/2002) (possible violation of the right to personal integrity, to personal liberty, to judicial guarantees, the rights of the child, the freedom of movement and residence with regard to refugees recognised in Chile wishing to reside in Bolivia). This case has already been decided by the Inter-American Court (see reference above).

**Admissibility of the case 120 Cuban citizens and 8 Haitian citizens detained in Bahamas**, Report No. 6/02, 3 April 2002, (Petition No. 12.071) (indications of the violation of Art. 27 of the American Declaration of the rights and duties of man, concerning the right to seek and receive asylum).

**Merits of the case Rafael Ferrer-Mazorra and others v. United States**, Report No. 51/01, 4 April 2001, (Case No. 9903) (possible violation of the Articles 1, 2, 17, 18 and 25 of the American Declaration of the Rights and Duties of Man, with regard to the deprivation of liberty of the applicants, based on their illegal entry to US territory).

**Merits of the case interdiction of Haiti**, Report No. 51/96, 13 March 1997, (Case No. 10.675) (the Commission considered that the USA violated the right of Haitian citizens to seek and receive asylum when returning them to their country of origin despite that their life would be in danger there, after a summary proceeding of their asylum claims).

**Annual Reports**

Annual Report (2003), 29 December 2003, (OEA/Ser.L/V/II.118) (obligation of States to ensure a reasonable possibility for asylum-seekers to substantiate their claim for refugee status and the reasons for which they fear being tortured if sent to a certain country, including the country of origin).

**Special Reports**


Report on Terrorism and Human Rights, 22 October 2002, (OEA/Ser.L/V/II.116) (in the framework of anti-terrorist policies, the Commission analyses the situation of migrant workers, asylum-seekers, refugees and foreigners, particularly with regard to the right to liberty and security, to humane treatment, to due process and fair trial, and to non-discrimination).

Recommendation on Asylum and International Crimes, 20 October 2000, (OEA/Ser./L/V/II.111, Doc. 20 Rev.) (recommendation for States to refrain from granting asylum to supposed perpetrators of international crimes).

**Country Reports**


**Precautionary Measures**

Precautionary measures, 27 January 1999, in order that the Bahamas suspend the deportation of a Cuban family, the members of which asked for asylum and that this process should respect the relevant procedural guarantees.

Precautionary measures, 14 August 1998, in order that the Bahamas refrain from deporting a group of 120 Cuban nationals who applied for refugee status, while the Commission is examining in detail their allegations of human rights violations.

Precautionary measures, 16 January 1998, in order that Canada refrains from deporting a Sri Lankan national, recognised by Canada as refugee in 1991, while the Commission is investigating the human rights violations reported in the application.

**General Assembly of the Organisation of American States**

**Resolutions**


Readings
Core

IV.2.1.3 Protection against Extradition

Main Debate
To what extent does the regional practice in Latin America apply international principles concerning the extradition of asylum seekers and refugees?

Main Point
Comparison between protection against extradition and asylum granted to refugees

Treaties
Inter-American Convention against Terrorism, 3 June 2002, AG/RES. 1840 (XXXII-O/02), Arts. 11, 12 and 13.
Montevideo Convention on Extradition, 26 December 1933, Arts 3 and 17.

Inter-American Court of Human Rights
Precautionary Measures
Precautionary measures, 27 October 1999, in order that the government of Argentina refrains from extraditing a Peruvian citizen to his country of origin, in connection with political reasons, while his asylum claim is being assessed.
Inter-American Commission on Human Rights

Merits of the case Wayne Smith, Hugo Armendariz et al v. United States of America, Report No. 81/10, 12 July 2010, (Case 12.562) (due process of law on a case-by-case basis in immigration removal proceedings, humanitarian defenses to removal, application of balancing test to individual cases that duly considers humanitarian defenses, and right to family life). The Commission concluded that in expulsion cases the State should permit the alleged victims to present their humanitarian defenses to removal, that a competent, independent immigration judge should apply a balancing test to individual cases that duly considers their humanitarian defenses and can provide meaningful relief, and the implementation of laws to ensure that non-citizen resident’s right to family life are protected and given due process on a case-by-case basis in immigration removal proceedings.

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 2249 (XXXVI-O/06), 2006. Extradition of and denial of safe haven to terrorists: mechanisms for cooperation in the fight against terrorism.

IV.2.1.4 Other Norms

Treaties

Havana Convention on Rights and Duties of States in the event of civil strife, 20 February 1928, Art. 3.

IV.2.2 The Use of Soft Law to Advance International Refugee Protection: Specific Regional Instruments

Editor’s Note

The advancement of international refugee protection in Latin America has taken place through the adoption of soft law instruments, underlining the importance of regional approaches, international cooperation and solidarity. This development started
with the adoption of the 1984 Cartagena Declaration on Refugees as a pragmatic humanitarian response to forced displacement in Latin America. The Cartagena Declaration, besides reiterating important principles and norms of international refugee law, calls for the treatment of refugees using norms and standards of the different branches of international law; it covers all the phases of forced displacement from entry to the territory to durable solutions, and it is better known for the inclusion of a recommendation for States to use a broader regional refugee definition. As part of the commemoration of the anniversary of the Cartagena Declaration, every 10 years, Latin American States have had the opportunity to reflect on current challenges and opportunities for the international protection of refugees. In this vein, in 1994 the San Jose Declaration on Refugees and Displaced Persons was adopted. In 2004, the Mexico Declaration and Plan of Action brought a new impetus in the region for the search of durable solutions with the inclusion of three main programmes: cities of solidarity, borders of solidarity and solidarity resettlement, based on cooperation south-south and regional solidarity. As part of the preparations for the commemoration of the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness, the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas was adopted at the end of 2010. The Brazil Declaration and Plan of Action was adopted by 33 States and territories from Latin American and the Caribbean at the end of 2014 as part of the commemoration of the 30th Anniversary of the Cartagena Declaration on Refugees. At present, with the exception of Cuba which is still not party to the international refugee instruments, all Latin American States have adopted national legislation on refugees and have refugee status determination procedures. The broader refugee definition recommended by the Cartagena Declaration on Refugees has been included in national legislation of 14 States in the region.

IV.2.2.1 Regional Definition and Proposals to Improve Protection

Main Debates
Has become the Cartagena Declaration on Refugees a source of international law as a regional custom?
What role does the Cartagena Declaration on Refugees as a humanitarian regional approach play within the framework of the global debate on refugee protection?
**Main Points**

Incorporation of the Cartagena principles into national legislation  
The importance of regional approaches in the search for solutions for refugees  
The use of soft law to advance international refugee law, including the adoption of national legislation  
The consistent application of the Cartagena refugee definition  

**Soft Law**

Brazil Declaration and Plan of Action: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, 3 December 2014.  
Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, 11 November 2010.  
Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, 16 November 2004.  
San José Declaration on Refugees and Displaced Persons, 7 December 1994.  
Cartagena Declaration on Refugees, 22 November 1984.  

**Inter-American Commission on Human Rights**

**Annual Reports**


**General Assembly of the Organisation of American States**

**Resolutions**

Resolution AG/RES. 1336 (XXV-O/95), 1995. The situation of refugees, returnees, and internally displaced persons in the hemisphere (recognition of the principles stated in the San José Declaration on Refugees and Displaced Persons, and a call for Member States to develop a process of legal harmonization in this regard).  
Resolution AG/RES. 774 (XV-O/85), 1985. The juridical situation of refugees, returnees, and internally displaced persons in the hemisphere
(recommendation to Member States to apply the 1984 Cartagena Declaration on Refugees, in case of refugees on their territory).

**Readings**

**Core**


**Extended**


IV.2.2.2 Durable Solutions in the Regional Framework

**Main Debates**
Does the Central American peace process after 1984 provide a framework for creating durable solutions for refugees or is its significance limited to the particular historical and political circumstances?
Is the Mexico Declaration and Plan of Action a rhetorical compromise or a regional action plan?
Does the Brazil Declaration and Plan of Action open up new perspectives for durable solutions in Latin America and the Caribbean?

**Main Points**
Peace process and assisted voluntary repatriation of refugees
Historical and comparative experiences of regional approaches
New focuses in the Mexico and Brazil Declarations and Plans of Action and their potential impact on the progressive development of international refugee law
Current refugee protection challenges in Latin America and the Caribbean

**Soft Law**
Brazil Declaration and Plan of Action: A framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, 3 December, 2014.
Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, 16 November, 2004.
Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Guatemala, 17 June 1994.
Inter-American Commission on Human Rights

Country Reports


General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1040 (XX-O/90), 1990. The situation of refugees in Central America and the regional efforts for solving their problems.


Readings

Core


Extended

IV.3 Application of the 1951 Geneva Convention through the Regional Mechanisms and National Legislations

Main Debate
Does the regional human rights protection framework (to the extent it is interpreted as legally binding by the Inter-American Court of Human Rights) effectively protect refugees’ rights?

Main Points
Reluctance to directly apply the international obligations derived from the 1951 Geneva Convention
Slow transposition of the 1951 Geneva Convention provisions into national legislation in Latin America and the Caribbean
Paucity of judicial decisions for the protection refugees in Latin America and the Caribbean

Inter-American Court of Human Rights
Advisory Opinion “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection” OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014. Reference is made to the progressive adoption of national refugee legislation in Latin America and the incorporation of the broader refugee definition recommended by the Cartagena Declaration on Refugees.

Country Reports
Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee Determination System, 20 February 2000, (OEA/Ser.L/V/ll.106) (detailed analysis about the access to refugee status determination, the right to asylum, exclusion and expulsion practices in Canada).

UNHCR Documents
Readings
Core

Extended

IV.4 Protection of Internally Displaced Persons with Special Attention to the Case of Colombia

Main Debates
In the case of Colombia, what have been the results achieved by the protection offered by national institutions, in contrast with the results of the protection offered by the international community?
What are the direct and indirect consequences of UNHCR’s activities beyond its traditional mandate in Colombia: does assistance to the internally displaced come at the expense of refugees?
Main Points
National status of ‘internally displaced person’ versus refugee status
Situation of the internally displaced in host communities
Problems related to voluntary return (as durable solution) in the framework of a conflict
Protection of human rights (including non-refoulement) versus concerns of regional security
Eventual reparation measures in the Inter-American framework of human rights protection versus situation of grave and massive human rights violations

Inter-American Court of Human Rights
Cases
Article 22
Case of the Massacre of Ituango v. Colombia, Judgment of 1 July 2006, (the state must ensure the return of displaced persons to their territories of origin in conditions of security, or if this cannot be ensured, provide the necessary and sufficient resources in order that they can be resettled in similar conditions at the place they freely and voluntarily choose).
Case of the Massacre of Mapiripán v. Colombia, Judgment of 15 September 2005, (the state must take the necessary measures to guarantee that the family members of the victims of displacement can return in conditions of security to Mapiripán when they so desire).
Case Moiwana v. Suriname, Judgment of 15 June 2005, (the state did not take the necessary measures to guarantee the safe and dignified return of displaced persons, nor did it carry out the necessary investigations about the human rights violations due to the forced displacement of this community, which caused them emotional, psychological, spiritual and economic suffering).

Provisional Measures
Provisional measures in the matter of the indigenous community of Kankuamo, 5 July 2004, (the Colombian State was required to guarantee the necessary conditions of security in order to respect the right to freedom of movement of the indigenous Kankuamo people, so that those who have been forcibly displaced could return to their home if they so desire).
Provisional measures in the matter of the communities of Jiguamiando and Curbarado, 6 March 2003, (the State of Colombia was required to ensure that the applicants can continue to live in their habitual residence as well as to adopt the necessary measures in order that the displaced persons of these communities could return to their home).

Provisional measures in the matter of the Peace Community of San Jose de Apartado, 24 November 2000, (the State of Colombia was requested to ensure the necessary conditions in order that the forcibly displaced persons of the Community of Paz de San Jose de Apartado could return to their home).

Inter-American Commission on Human Rights
Annual Reports


Country Reports
Report on the Situation of Human Rights in Guatemala, 6 April 2001, (OEA/Ser.L/V/ll.111) (analysis of the human rights situation of the population uprooted by the armed conflict, with special attention to its reintegration, the possession and ownership of land, the development and the access to basic services).

Report on the Situation of Human Rights in Haiti, 8 February 1995, (OEA/Ser.L/V.88) (analysis of the situation of internal displacement in Haiti as well as the situation of Haitian refugees, with special attention to the issues of rescue at sea and their transfer to the Guantanamo military base).

General Assembly of the Organisation of American States

Resolutions
Resolution AG/RES. 2229 (XXXVI-O/06). Internally Displaced Persons.

Readings:
Core

IV.5 The North American Regional Materials

Main Debates
Is the implementation of the 2002 Canada-USA “Safe Third Country” agreement leading to the violation of protection obligations by either country?
Treaties
Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, signed on 5 December 2002, as part of the Smart Border Action Plan, and entered into force on 29 December 2004.

Readings
Core

Extended
SECTION V

Asian Framework for Refugee Protection

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

Nonetheless, there are important materials available and the Section on Asia has organized them in three parts. The first presents general materials on the challenges to refugee protection in Asia. It includes readings that explain Asian exceptionalism, and thus provide a setting in which to appreciate the selected references. The second portion of this Section focuses on the State Parties to the 1951 Convention: Cambodia, China, Japan, Philippines, and South Korea. It examines national legislation, case law, and literature exploring the protection afforded to refugees. The concluding part of the Section on Asia addresses the protection concerns that arise in states that are not party to the 1951 Convention. Bangladesh, India, Pakistan, and Thailand were selected for this examination, based on the large numbers of refugees they host or the existence of a corpus of reasonably evolved practices and laws. It should be noted that three of these states are in South Asia; this contrasts to the State Parties to the 1951 Convention, all of which are located in Southeast Asia or East Asia. As materials on countries in Central Asia and West Asia have not been included, in this context the Section on Asia refers to South Asia and Southeast Asia.
V.1 Protection Challenges in Asia

Main Debates
Why are most Asian states not parties to the 1951 Convention?
Does the Comprehensive Plan of Action (CPA) offer a model for dealing with mass influx of refugees in Asia?

Main Points
Asian exceptionalism
Concerns of post-colonial states
UNHCR refugee status determination (RSD)
Mass influx of refugees
International burden sharing
Illegal migration

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

Readings
Core


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

*Extended*


V.2 States Party to the 1951 Refugee Convention

Main Debate
Has ratification of the 1951 Convention made a difference?

Main Points
National legislation or its absence
Urban refugees
Rights of refugees
Human rights

V.2.1 Cambodia

National Legislation
Law on Nationality, Cambodia, 9 October 1996.
Authorization to Enter, Exit and Reside in the Kingdom of Cambodia, of
Immigrant Aliens, Cambodia, 21 June 1996.

Readings
Core
United States Department of State, ‘2007 Country Reports on Human Rights
May 2008.

V.2.2 China

Readings
Core
E. Chan and A. Schloenhardt, ‘North Korean Refugees and International Refugee
J. Seymour, ‘China: Background Paper on the Situation of North Koreans in
Extended

V.2.3 Japan

**National Legislation**
Immigration Control and Refugee Recognition Act, Japan, 1951.

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

**Readings**
**Core**
**V.2.4 Philippines**

**National Legislation**
The Philippines Immigration Act of 1940 (Commonwealth Act of 613).

**Reading**

Core


**Extended**


**V.2.5 South Korea**

**National Legislation**


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

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

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

**Readings**

Core


Extended

V.3 States Not Party to the 1951 Refugee Convention

Main Debate
Is there a need for a national law on refugees?

Main Points
Status of aliens and refugees
Stateless refugees
Role of judiciary
Burden sharing

V.3.1 Bangladesh

National Legislation
Bangladesh Citizenship Order, 1972.
Bangladesh Control of Entry Act, 1952.

Reading
Core

Extended

V.3.2 India

National Legislation
Illegal Migrants Act, India, 1983.
Passport Act, India, 1967.
Foreigner’s Order, India, 1948.
The Foreigner’s Act, India 1946.
Registration of Foreigner’s Act, India, 1939.
Passport Act, India, 1920.
Indian Penal Code, 1860.

Case Law
The Sarbananda Sonowal v. Union of India (2005) 5 Supreme Court Cases 665 (Aliens; Aggression; Illegal Migrants; Powers of State).
Dr. Malvika Karlekar v. Union of India (Criminal Writ Petition No. 583 of 1992) (Right of asylum seekers to approach UNHCR).

Namgyal Dolkar v. MEA (Delhi High Court) – 22 December 2010 – W.P.(C) 12179. (Citizenship of Tibetans born in India).

Tenzin Cheophaea Ling Rinpoche v. Union of India (Karnataka High Court) – 7 August 2013 – No. 15437/2013. (Citizenship of Tibetans born in India).

Reading

Core


Extended


Model Law, drafted by the Eminent Persons Group (EPG), South Asia and PILSARC, and others.


V.3.3 Nepal

National Legislation

Reading
Core

Extended
Human Rights Watch, Nepal: Increased Pressure from China Threatens Tibetans, April 1 2014.

V.3.4 Pakistan

National Legislation
Foreigner’s (Amendment) Ordinance, Pakistan, 2000.
Foreigner’s Order of Pakistan, 1951.
Pakistan’s Citizenship Act, 1951.
The Foreigner’s Act of Pakistan, 1946.

Readings
Core

**Extended**


**V.3.5 Thailand**

**National Legislation**


**Readings**

**Core**


**Extended**


SECTION VI

European Framework for Refugee Protection

In this section The Refugee Law Reader turns to the legal norms developed in Europe regarding refugee protection. This is a complex area, as two quite separate actors both have significant impact on asylum and related protection issues. First, the Council of Europe, comprising 47 countries, addresses general human rights protection, and its activities have significant implications for the legal position of asylum applicants and refugees. Second, the European Union (EU) – an organization that is entirely separate from the Council of Europe, although the EU’s 28 Member States are simultaneously members of the Council of Europe – has embarked on an active programme to develop new legal norms affecting immigration, borders, and asylum.

The first part of Section VI focuses on the soft law that the Council of Europe has developed in its inter-governmental cooperation efforts. The backbone of these materials are the Recommendations and Resolutions of the Committee of Ministers and the Parliamentary Assembly relating to international protection. Although these documents are politically binding, they do not have immediate legal consequences. Nonetheless, they are useful as aids to interpretation of the undertakings of Council of Europe member states with regard to international protection. Next, Sub-Section VI.1.2 examines the European Convention on Human Rights, a core treaty of the Council of Europe. Although the Convention itself makes no reference to international protection of refugees, the judgments issued by the European Court of Human Rights impose important obligations regarding asylum on state parties. Furthermore, all members of the Council of Europe must adhere to the Convention, as interpreted by the Court, and must accept the jurisdiction of the European Court of Human Rights.

The second half of Section VI highlights the key EU legislation, both Regulations and Directives, concerning international protection of asylum seekers, refugees and persons in need of subsidiary protection. Although the central concern of the EU is the successful functioning of the internal market (a market for the free movement of goods, persons, services, and capital across the internal frontiers), the EU expanded its scope in 1999 to include immigration and asylum. Indeed, the EU has adopted three five-year programmes (the most recent Stockholm Programme lasting until 2014) in order to create a Common European Asylum System intended to be based on a harmonized interpretation and application of the 1951 Geneva Convention. Sub-
Section VI.2 also includes important decisions of the Court of Justice of the European Union, which is competent to issue binding interpretations of EU law, though it normally cannot receive complaints directly from individual asylum seekers.

Within the Council of Europe one of the main challenges to refugee protection stems from the ever increasing case load of the European Court of Human Rights. Protocol No. 14 to the Convention, intended to enhance the Court’s capacity, has thus far not resolved the growing backlog. Within the EU one of the central challenges is that, despite the goal of developing a Common European Asylum System, genuinely common standards and practices are still far from a reality, despite improvements in the recast asylum instruments adopted in 2011–13. In addition, the EU is placing increased priority on external migration control measures; these actions inevitably limit access to asylum procedures, and thereby restrict access to protection, for unknown numbers of persons in need of international protection.
VI.1. The Council of Europe

VI.1.1 Legal and Policy Framework for Refugee Protection

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

Main Points
Binding v. non-binding regional instruments
Committee of Ministers recommendations v. Parliamentary Assembly resolutions
Establishing harmonization between EU and non-EU states

Treaties
Regional Core
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, E.T.S. 126.
European Agreement on the Abolition of Visas for Refugees, 20 April 1959, E.T.S. 031.

Extended
European Convention on Nationality, 6 November 1997, E.T.S. 166.

Soft Law

Council of Europe: Committee of Ministers
Soft Law

Council of Europe: Parliamentary Assembly


**Soft Law**

*Commissioner for Human Rights*


Commissioner for Human Rights ‘Recommendation CommDH (01) 1 Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders’, 19 September 2001.

Readings
Core

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

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

Main Debates
Refugee protection under regional v. universal treaties
Subsidiary protection under human rights treaties – a potential challenge to the primacy of the 1951 Convention?
Has the European Court of Human Rights (ECtHR) exhibited too much or too little deference to national refugee decision-making bodies?

Main Points
Scope of protection against refoulement under Art. 3 of the ECHR v. Arts. 1 and 33 of the 1951 Convention
Effective remedies for rejected asylum seekers under the ECHR

Expulsion
Detention

_Treaties_

_Regional_

_Core_


_Cases_

_Core_

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

_T.K.H. v. Sweden_, ECtHR judgment of 19 December 2013 (finding no violation of Arts. 2 or 3 in a case concerning an Iraqi Sunni Muslim from Mosul who had served from 2003 to 2006 in the new Iraqi army which involved working with the US military forces and who had in 2006 been seriously injured in a suicide bomb explosion killing 30 soldiers, and in 2007 been hit by shots from a car passing in front of his house, and also alleged to have received a letter containing death threats; considering the general situation in Iraq in a similar manner as in _B.K.A. v. Sweden_ 19 December 2013 (see below), the Court stated that there was no indication that members of his family in Iraq had been subjected to attacks or other forms of ill-treatment since 2007, and held that the applicant had not substantiated that there was a remaining personal threat of treatment contrary to Arts. 2 or 3).

_T.A. v. Sweden_, ECtHR judgment of 19 December 2013 (finding no violation of ECHR Arts. 2 or 3 in a case concerning an Iraqi Sunni Muslim from Baghdad who had from 2003 to 2007 been working for security companies with connections to the US military forces and who alleged to have been subjected to attacks and threats from two militias due to that employment; while considering the general situation in Iraq in a similar manner as in _B.K.A. v. Sweden_ 19 December 2013 (see below), the ECtHR noted that targeted attacks against the former international forces in Iraq and their subcontractors as well as individuals seen to be collaborating with these forces have been
widespread and that such individuals must therefore be considered to be at
greater risk in Iraq than the average population; as regards the applicant’s
personal situation, the Court found reasons to generally question his credibility
and thus considered that he had not been able to make it plausible that there is
a connection between the alleged incidents and his previous work for security
companies connected to the former US troops; there was consequently no
sufficient evidence of a real risk of treatment contrary to Arts. 2 or 3, yet two
judges dissented on the basis of the cumulative weight of factors pertaining
to both the general situation in Iraq and the applicant’s personal account).

*K.A.B. v. Sweden*, ECtHR judgment of 5 September 2013 (finding no violation
of ECHR Arts. 2 or 3 in case concerning a Somali asylum seeker, originating
from Mogadishu, who claimed that he had fled Somalia due to persecution
by the Islamic Courts and al-Shabaab, in particular by telephone calls
threatening him to stop spreading Christianity as he had been working for
American Friends Service Community from 1992 to 2005; while the Swedish
authorities intended to deport the applicant to Somaliland, the ECtHR did
not find it sufficiently substantiated that he would be able to gain admittance
and to settle there and therefore assessed his situation upon return to Somalia
in the context of the conditions prevailing in Mogadishu, his city of origin;
assessing the general situation of violence in the light of the criteria applied
in the judgment *Sufi and Elmi v. UK* 28 June 2011 (see above) against the
background of recent information, the Court’s majority held that the security
situation in Mogadishu had improved since 2011 or the beginning of 2012,
as the general level of violence had decreased, there was no frontline fighting
in the city, and there had been improvements for the ordinary citizens despite
the fact that al-Shabaab was still present performing attacks, and the human
rights and security situation in Mogadishu was serious and fragile. The
situation was therefore not of such a nature as to place everyone present in
the city at a real risk of treatment contrary to Arts. 2 or 3; the two dissenting
judges considered the majority’s analysis of the general situation deficient and
its conclusions premature, due to the unpredictable nature of the conflict
and the volatility and instability of the situation in Mogadishu; as regards the
applicant’s personal situation, the Court referred to the careful examination by
the Swedish authorities and the extensive reasons given for their conclusions,
and noted certain inconsistencies in the applicant’s submissions and found that there were credibility issues, further noting that the applicant did not belong to any group at risk of being targeted by al-Shabaab, and allegedly had a home in Mogadishu where his wife lived).

*M.E. v. France*, ECtHR judgment of 6 June 2013 (finding a violation of ECHR Art. 3 if the decision to deport the applicant were to be enforced, but no violation of Art. 13 due to examination in the ‘fast-track’ asylum procedure; the applicant was a Coptic Christian from Egypt where he had been exposed to a number of attacks due to his religious belief, his reports of the incidents to the police had been unsuccessful, and he had been accused of proselytizing for which he was sentenced in absentia to 3 years of imprisonment; the ECtHR referred to reports on numerous instances of violence and other persecution against Coptic Christians in Egypt in 2010–11 and on reluctance of Egyptian authorities to prosecute the perpetrators, and found no evidence that the situation had improved; there was strong evidence that the applicant as a convicted proselytizer would be a potential prime target of persecution and violence, and the Court pointed to the serious doubt about the applicant’s ability to receive adequate protection from the Egyptian authorities; contrary to the judgment in *I.M. v. France* 2 February 2012, the ECtHR did not consider the examination of this case in the French ‘fast-track’ asylum procedure incompatible with Art. 13; the Court emphasised the very substantial delay in the applicant’s lodging of his asylum request (almost 3 years) and the fact that he had been able to lodge an appeal with suspensive effect against the removal order as well as an asylum request with suspensive effect, thus he could not validly argue that the reduced and very short deadlines to prepare the asylum request in the special procedure had affected the accessibility of the remedies available to him).

*Mo.M. v. France*, ECtHR judgment of 18 April 2013 (violation of ECHR Art. 3 in case of expulsion of an asylum applicant who had been accused of spying for the rebels in Chad, and had been taken into custody for five days, interrogated and subjected to torture; in addition, his shop had been destroyed, his possessions confiscated, and his family threatened; the general situation in Chad was held to give cause for concern, particularly for persons suspected of collaboration with the rebels; as regards the applicant’s personal situation, the
Court considered the medical certificates produced by him as sufficient proof of the alleged torture, and noted that he had produced a warrant issued against him, the authenticity of which had not been seriously disputed by the French Government; due to the reasoning given by the French authorities and the fact that they had not been able to examine some of the evidence produced by the applicant, the Court could not rely on the French courts’ assessment of the applicant’s risk, and found a real risk that he would be subjected to treatment contrary to Art. 3).

Suñi and Elmi v. UK, ECtHR judgment of 28 June 2011 (finding a violation of Art. 3 in case of expulsion of the two Somali applicants to Mogadishu as the level of violence there was of sufficient intensity to pose a real risk of treatment reaching the Art. 3 threshold to anyone in the capital; in reaching this conclusion the Court had regard to the large quantity of objective information indicating the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict; while not excluding the possibility that a well-connected person might be able to obtain protection in Mogadishu, the Court considered that only persons exceptionally well-connected to ‘powerful actors’ would be able to assure protection, and that anyone having been outside Somalia for some time was unlikely to have such connections; as regards possible internal relocation, the Court considered that in the context of Somalia this could only apply if the applicant had close family connections in the area concerned where he could effectively seek refuge, stating that if he had no such connections, or if those connections were in an area which he could not safely reach, there would be a likelihood that he would have to have recourse to either an IDP or refugee camp; the two applicants were found to be likely to end up in such camps where conditions were so dire as to expose anyone seeking refuge there to treatment in breach of Art. 3).

N. v. Sweden, ECtHR judgment of 20 July 2010 (deportation of woman to Afghanistan would give rise to a violation of Art. 3; the Court observed that women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and
even the legal system; reference was here made to UNHCR observations that Afghan women having adopted a less culturally conservative lifestyle, such as those returning from exile in Iran or Europe, continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment; actual or perceived transgressions of the social behavioural code include not only social behaviour in the context of a family or a community, but also sexual orientation, pursuit of a professional career, and mere disagreements as to the way family life is conducted; as the applicant had resided in Sweden since 2004, had attempted to divorce her husband, and had expressed a clear, real and genuine intention of not resuming the marriage, the Court could not ignore the general risk to which she might be exposed should her husband decide to resume their married life together, or should he perceive her filing for divorce as an indication of an extramarital relationship; in these special circumstances, there were substantial grounds for believing that the applicant would face various cumulative risks of reprisals falling under Art. 3 from her husband, his or her family, and from the Afghan society).

See also Abdolkhani and Karimnia v. Turkey, ECtHR judgment of 22 September 2009 (reiterating the interpretation of Art. 3 in Salah Sheekh v. Netherlands as regards the non-insistence on further special distinguishing features if the applicant establishes being a member of a group systematically exposed to a practice of ill-treatment).

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

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

Salah Sheekh v. Netherlands, ECtHR judgment of 11 January 2007 (asylum seeker held to be protected against refoulement under Art. 3; there was a real chance that deportation to ‘relatively safe’ areas in Somalia would result in his removal to unsafe areas, hence there was no ‘internal flight alternative’ viable; the Court emphasised that even if ill-treatment be meted out arbitrarily or seen as a consequence of the general unstable situation, the asylum seeker would be protected under Art. 3, holding that it cannot be required that an applicant establishes further special distinguishing features concerning him personally in order to show that he would be personally at risk).
D. and others v. Turkey, ECtHR judgment of 22 June 2006 (deportation of woman applicant in view of the awaiting execution of severe corporal punishment in Iran would constitute violation of Art. 3, as such punishment would inflict harm to her personal dignity and her physical and mental integrity; violation of Art. 3 would also occur to her husband and daughter, given their fear resulting from the prospective ill-treatment of D).

Bader v. Sweden, ECtHR judgment of 8 November 2005 (asylum seeker held to be protected against refoulement due to a risk of flagrant denial of fair trial that might result in the death penalty; such treatment would amount to arbitrary deprivation of life in breach of Art. 2; deportation of both the asylum seeker and his family members would therefore give rise to violations of Arts. 2 and 3).

Said v. Netherlands, ECtHR judgment of 5 July 2005 (asylum seeker held to be protected against refoulement under Art. 3; the Dutch authorities had taken his failure to submit documents establishing his identity, nationality, or travel itinerary as affecting the credibility of his statements; the Court instead found the applicant’s statements consistent, corroborated by information from Amnesty International, and thus held that substantial grounds had been shown for believing that, if expelled, he would be exposed to a real risk of ill-treatment as prohibited by Art. 3).

Venkadajalasarma v. Netherlands, ECtHR 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).

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

H.L.R. v. France, ECtHR judgment of 29 April 1997 (finding no violation of Art. 3 in case of expulsion of the applicant to Columbia, as there was no relevant evidence of risk of ill-treatment by non-state agents; thereby recognising that ill-treatment caused by such actors would fall within the scope of Art. 3 if the authorities are not able to obviate the risk by providing adequate protection).
Vilvarajah and others v. UK, ECtHR judgment of 30 October 1991 (finding no breach of Art. 3 although applicants claimed to have been subjected to ill-treatment upon return to Sri Lanka; this had not been a foreseeable consequence of the removal of the applicants, in the light of the general situation in Sri Lanka and their personal circumstances; a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Art. 3, and there existed no special distinguishing features that could or ought to have enabled the UK authorities to foresee that they would be treated in this way).

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

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

Particular issues of evidence and proof

A.A. v. Switzerland, ECtHR judgment of 7 January 2014 (finding a violation of ECHR Art. 3, but no violation of Art. 13 in a case concerning a Sudanese asylum seeker claiming to originate from North Darfur and alleging to have fled his village after it had been attacked and burnt down by the Janjaweed militia that had killed his father and many other inhabitants, and mistreated himself; the Court noted that the security and human rights situation in Sudan was alarming and had deteriorated in the last few months, and that political opponents of the government were frequently harassed, arrested, tortured and prosecuted, such risk affecting not only high-profile people, but anyone merely suspected of supporting opposition movements; as the applicant had been a member of the Darfur rebel group SLM-Unity in Switzerland for several years, the Court noted that the Sudanese government monitors activities of political opponents abroad; acknowledging the difficulty in assessing cases concerning sur place activities, the Court had regard to the fact that the applicant had joined the organisation several years before launching
his present asylum request when it was not foreseeable for him to apply for asylum a second time; in view of the importance of Art. 3 and the irreversible nature of the damage resulting if the risk of ill-treatment materialises, the Court assessed the claim on the grounds of the political activities effectively carried out by the applicant, and as he might at least be suspected of being affiliated with an opposition movement, there were substantial grounds for believing that he would be at risk of being detained, interrogated and tortured on arrival at the airport in Sudan).

_N.K. v. France_, ECtHR judgment of 19 December 2013 (finding a violation of ECHR Art. 3, while the complaint under Art. 13 was inadmissible in a case on a Pakistani citizen seeking asylum on the basis of his fear of ill-treatment due to his conversion to the Ahmadiyya religion, alleging to have been abducted and tortured and that an arrest warrant had been issued against him for preaching this religion; observing that the risk of ill-treatment of persons of the Ahmadiyya religion in Pakistan is well documented, the Court stated that belonging to this religion would not in itself be sufficient to attract protection under Art. 3, so that the applicant would have to demonstrate being practising the religion openly and proselytising, or at least to be perceived as such; although the French authorities had questioned the applicant’s credibility, in particular regarding the authenticity of the documents presented by him, the Court did not consider their decisions to be based on sufficiently explicit motivations in that regard, and the Court did not find the respondent State to have provided information giving sufficient reasons to doubt the veracity of the applicant’s account of the events leading to his flight; there was therefore no basis of doubting his credibility, and it was concluded that the applicant was perceived by the Pakistani authorities not as simply practising the Ahmadiyya belief, but as a proselytiser and thus having a profile exposing him to the attention of the authorities in case of return).

_R.J. v. France_, ECtHR judgment of 19 September 2013 (finding a violation of Art. 3 in case of expulsion of a Tamil asylum seeker who claimed to have been persecuted by the Sri Lankan authorities because of his ethnic origin and his political activities in support of the LTTE; the Court referred to the principles applicable to the evidentiary assessment of asylum claims under Art. 3, as well as to the general criteria concerning the assessment of the risks
to which Tamils were exposed upon return to Sri Lanka after the end of armed hostilities in 2009 according to which there was no generalised risk of treatment contrary to Art. 3 for all Tamils returned to Sri Lanka, but only for those applicants representing such interest to the authorities that they may be exposed to detention and interrogation upon return; the risk therefore had to be assessed on an individual basis, taking into account the relevant factors pronounced by the Court in N.A. v. UK 17 July 2008; while there were certain credibility issues concerning the applicant’s account of his financial support of the LTTE and his detention conditions, the Court put emphasis on the medical certificate precisely describing his wounds; as the nature, gravity and recent infliction of these wounds created a strong presumption of ill-treatment, and as the French authorities had not effectively rebutted this presumption, the Court considered that the applicant had established the risk that he might be subjected to ill-treatment upon return).

I. v. Sweden, ECtHR judgment of 5 September 2013 (finding a violation of ECHR Art. 3 in a case concerning Russian asylum seekers of Chechen origin who submitted that they had been tortured in Chechnya and were at risk of further ill-treatment upon return to Russia because Mr. I had taken photographs and written reports about numerous crimes committed by the State against Chechens between 1995 and 2007; the Court referred to recent information on the human rights and security situation in Chechnya and stated that it was well aware of ongoing disappearances, arbitrary violence, impunity and ill-treatment in detention facilities, notably with regard to certain categories of persons such as former rebels and their relatives, political adversaries of the Kadyrov regime, journalists, human rights activists and individuals having lodged complaints with international organisations, as well as of reported interrogations of returnees and of harassment and possible detention and ill-treatment by the FSB, local law-enforcement officials and criminal organisations; nonetheless, the unsafe general situation was not considered sufficiently serious to conclude that the return of the applicants to Russia would amount to a violation of Art. 3; as far as the applicants’ individual situation was concerned, the Court noted that the Swedish authorities did not as such question that Mr. I had been subjected to torture, but had found that he had not established with sufficient certainty why and by
whom he had been subjected to it, and had thus found reason to question the credibility of his statements; the Court too found that there were credibility issues with regard to the applicants’ statements, noting that there were no indications that the domestic proceedings lacked effective guarantees and that he had failed to present any information that would lead it to depart from the domestic authorities’ conclusion that there were reasons to doubt his credibility; however, the Court emphasised that the assessment of a real risk for the persons concerned must be made on the basis of all relevant factors which may increase the risk of ill-treatment, and that due regard should be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk, but when taken cumulatively and considered in a situation of general violence and heightened security, the same factors may give rise to a real risk; in that connection it was noted that Mr. I had significant and visible scars on his body so that, in case of a body search in connection with his possible detention and interrogation by the FSB or local law-enforcement officials upon return, these would immediately see that Mr. I had been subjected to ill-treatment which could indicate that he took active part in the second war in Chechnya; taking those factors cumulatively, in the special circumstances of the case, the Court found that there were substantial grounds for believing that the applicants would be exposed to a real risk of ill-treatment if deported to Russia).

*S.F. and Others v. Sweden*, ECtHR judgment of 15 May 2012 (acknowledging that the national authorities are best placed to assess the facts and the general credibility of asylum applicants’ stories, the Court agreed that the applicant’s basic story was consistent notwithstanding some uncertain aspects that did not undermine the overall credibility of the story; observing that the human rights situation in Iran gave rise to grave concern, and that the situation appeared to have deteriorated since the Swedish domestic authorities determined the case and rejected the applicants’ request for asylum in 2008–09, the Court noted that it was not only the leaders of political organisations or other high-profile persons who were detained, but that anyone who demonstrates or in any way opposes the current regime in Iran may be at risk of being detained and ill-treated or tortured; while the applicants’ pre-flight activities and circumstances were not sufficient independently to constitute grounds for finding that they
would be in risk of art. 3 treatment if returned to Iran, the Court found that they had been involved in extensive and genuine political and human rights activities in Sweden that were of relevance for the determination of the risk on return, given their existing risk of identification and their belonging to several risk categories; their sur place activities taken together with their past activities and incidents in Iran therefore lead the Court to conclude that there would be substantial grounds for believing that they would be exposed to a real risk of treatment contrary to art. 3 if deported to Iran in the current circumstances).

*R.C. v. Sweden*, ECtHR judgment of 9 March 2010 (asylum seeker protected against deportation under Art. 3, despite the Swedish authorities’ doubts about his credibility; while acknowledging the need to give asylum seekers the benefit of the doubt, the Court held that they must adduce evidence capable of proving that there are substantial grounds for believing that they would be exposed to a real risk of ill-treatment, and that they must provide a satisfactory explanation for alleged discrepancies if there are strong reasons to question the veracity of their submissions; if such evidence is adduced, it is for the State to dispel any doubts about it; and while accepting that national authorities are generally best placed to assess the facts and the credibility, the Court did not share their conclusion about the applicant’s general credibility; the Court referred to a medical report concluding that the applicant’s injuries were consistent with his alleged exposure to torture, thus corroborating his story about political activities in Iran, and to information on ill-treatment of demonstrators in Iran; as the applicant’s account was consistent with that general information, he was held to have discharged the burden of proving that he had already been tortured, so that the onus to dispel any doubts about the risk was resting with the State; the current situation in Iran, and the specific risk facing Iranians returning from abroad without evidence of their legal departure from the country, were adding a further risk; the cumulative effect of these factors led the Court to conclude that there were substantial grounds for believing in a real risk of detention and ill-treatment of the applicant if deported to Iran).

*N. v. Finland*, ECtHR judgment of 26 July 2005 (asylum seeker held to be protected against refoulement under Art. 3, despite the Finnish authorities’ doubts about his identity, origin, and credibility; two delegates of the Court
were sent to take oral evidence from the applicant, his wife and a Finnish senior official; while retaining doubts about his credibility on some points, the Court found that the applicant’s accounts on the whole had to be considered sufficiently consistent and credible; deportation would therefore be in breach of Art. 3).

**Particular Issues of National Security and Criminal Offences**

*Ismailov v. Russia*, ECtHR judgment of 17 April 2014 (violation of ECHR Art. 3 and Art. 5 (1)(f) and (4) in case of expulsion of an Uzbek whose extradition to Uzbekistan had been requested, but refused, while in parallel proceedings his application for asylum in Russia had also been refused; the general human rights situation in Uzbekistan was held to be ‘alarming’, the practice of torture in police custody being described as ‘systematic’ and ‘indiscriminate’, and the issue of ill-treatment of detainees a pervasive and enduring problem; the Court observed that the applicant was wanted by the Uzbek authorities on charges of participating in a banned extremist organisation ‘the Islamic Movement of Uzbekistan’, and a terrorist organisation ‘O’zbekiston Islomiy Harakati’, and that he was held to be plotting to destroy the constitutional order of Uzbekistan; referring to international reports and its own findings in a number of judgments, and pointing to the risk of ill-treatment which could arise in similar circumstances, the Court held that forced return to Uzbekistan, in the form of expulsion or otherwise, would give rise to a violation of Art. 3).

*Rafaa c. France*, ECtHR judgment of 30 May 2013 (violation of ECHR Art. 3 in case where the Moroccan authorities had requested the applicant’s extradition under an international arrest warrant for acts of terrorism, and the applicant initiated procedures contesting his extradition and a parallel procedure requesting asylum in France; the French asylum authorities apparently recognising the risk of ill-treatment in Morocco due to the applicant’s alleged involvement in an Islamist terrorist network, the Court reconfirmed the absolute nature of prohibition under Art. 3 and the impossibility to balance the risk of ill-treatment against the reasons invoked in support of expulsion; given the human rights situation in Morocco, the persisting ill-treatment of persons suspected of participation in terrorist activities, and the applicant’s profile, the Court considered the risk of violation of Art. 3 in case of his return to be real).
**Labsi v. Slovakia**, ECtHR judgment of 15 May 2012 (violation of Arts. 3, 13 and 34; an Algerian man, convicted in France of preparing a terrorist act, and convicted in his absence in Algeria of membership of a terrorist organisation, had been expelled to Algeria upon rejection of his asylum request in Slovakia; on the basis of information about the situation in Algeria for persons suspected of terrorist activities, the Court found that there had been substantial grounds for believing that he faced a real risk of being exposed to treatment contrary to Art. 3; the responding government’s invocation of the security risk represented by the applicant was dismissed due to the absolute guarantee under Art. 3; assurances given by the Algerian authorities concerning the applicant’s treatment upon return to Algeria were found to be of a general nature, and they had proven insufficient since the request for a visit by a Slovak official to the applicant, held in detention upon return, had not been followed; the applicant’s expulsion only one working day after the Slovak Supreme Court’s judgment, upholding the dismissal of his asylum request, had effectively prevented him from attempting redress by a complaint to the Slovak Constitutional Court; expulsion of the applicant in disregard of an interim measure issued by the Court under Rule 39, preventing the Court from properly examining his complaints and from protecting him against treatment contrary to Art. 3, was a violation of the right to individual application under Art. 34).

**Othman (Abu Qatada) v. UK**, ECtHR judgment of 17 January 2012 (finding no violation of Art. 3 in case of deportation to Jordan, notwithstanding widespread and routine occurrence of torture in Jordanian prisons, and the fact that the applicant as a high profile Islamist was in a category of prisoners frequently ill-treated in Jordan; the applicant was held not to be in real risk of ill-treatment if deported to Jordan, due to information provided about ‘diplomatic assurances’ that had been obtained by the UK government in order to protect his Convention rights upon deportation; the Court took into account the particularities of the memorandum of understanding agreed between the UK and Jordan, as regards the specific circumstances of its conclusion, its detail and formality, as well as the modalities of monitoring Jordanian compliance with the assurances; holding that Art. 5 applies in expulsion cases, but that there would be no real risk of flagrant breach of Art.
5 in respect of the applicant’s pre-trial detention in Jordan; but holding that deportation of the applicant to Jordan would violate Art. 6 due to the real risk of flagrant denial of justice by admission of torture evidence against him in the retrial of criminal charges).

*Saadi v. Italy*, ECtHR judgment of 28 February 2008 (reconfirming the absolute nature of the prohibition in Art. 3 of torture and inhuman or degrading treatment or punishment, and hence of the protection against *refoulement*, irrespective of the victim’s conduct; the applicant had been prosecuted in Italy for participation in international terrorism and, as a result, his deportation to Tunisia was ordered, whereas in Tunisia he had been sentenced in absentia to 20 years’ imprisonment for membership of a terrorist organization and for incitement to terrorism; noting the immense difficulties faced by States in protecting their communities from terrorist violence, the Court held that this cannot call into question the absolute nature of Art. 3, thus reaffirming the principle stated in *Chahal v. UK* that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion; the ‘diplomatic assurances’ sought by Italy from the Tunisian authorities were not accepted by the Court, stating that the existence of domestic law and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR; even if diplomatic assurances had been given by the receiving State, the weight to be given to such assurances would depend on the circumstances in each case, and the Court would still have to examine whether the assurances provided in their practical application sufficient guarantee against the risk of prohibited treatment).

*Ahmed v. Austria*, ECtHR judgment of 17 December 1996 (reconfirming the absolute nature of Art. 3; deportation of a Somali convicted of serious criminal offences would therefore be a violation of Art.3, as the applicant was under the risk of being subjected to inhuman and degrading treatment by non-state agents upon expulsion).

*Chahal v. UK*, ECtHR judgment of 15 November 1996 (holding that deportation of a Sikh separatist to India on national security grounds would be in breach
of ECHR Art. 3, as he would face real risk of being subjected to treatment contrary to Art. 3; the prohibition in Art. 3 is absolute also in expulsion cases, and the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration).

See also Muminov v. Russia, ECtHR judgment of 11 December 2008; Ben Khemais v. Italy, ECtHR judgment of 24 February 2009; O. v. Italy, ECtHR judgment of 24 March 2009; Abdolkhani and Karimnia v. Turkey, ECtHR judgment of 22 September 2009; Trabelsi v. Italy, ECtHR judgment of 13 April 2010; A. v. Netherlands, ECtHR judgment of 20 July 2010 (all reiterating the interpretation pronounced in Saadi v. Italy as regards the absolute nature of the prohibition in Art. 3).

Health Issues
Josef v. Belgium, ECtHR judgment of 27 February 2014 (summary below).
I.K. v. Austria, ECtHR judgment of 28 March 2013 (summary below).
S.H.H. v. UK, ECtHR judgment of 29 January 2013 (finding no violation of ECHR Art. 3 by the refusal of asylum to an applicant who had been seriously injured during a rocket launch in Afghanistan in 2006 and left disabled, following several amputations, for the UK in 2010; the Court reiterated that ECHR Art. 3 does not imply an obligation on States to provide all illegal immigrants with free and unlimited health care; referring to the applicant’s assertion that disabled persons were at higher risk of violence in the armed conflict in Afghanistan, the Court held that expulsion would only be in violation of Art. 3 in very exceptional cases of general violence where the humanitarian grounds against removal were compelling, pointing out that the applicant had not complained that his removal to Afghanistan would put him at risk of deliberate ill-treatment from any party, nor that the levels of violence were such as to entail a breach of Art. 3; it was emphasised that the applicant had received medical treatment and support throughout the four years he spent in Afghanistan after his accident, and the Court did not accept the applicant’s claim that he would be left destitute due to total lack of support upon return to Afghanistan, as he had not given any reason why he would not be able to make contact with his family there).
N. v. UK, ECtHR judgment of 27 May 2008 (the ECtHR Grand Chamber maintained the high threshold set in D v. UK concerning cases of removal of aliens suffering from a serious mental or physical illness to a country where the facilities for treatment of that illness are inferior to those available in the CoE State; such decisions may raise an issue under Art. 3, but only in very exceptional cases where the humanitarian grounds against the removal are compelling; Art. 3 was held principally to prevent deportation where the risk of ill-treatment in the destination country would emanate from intentional acts or omissions of public authorities, or from non-State bodies when the authorities are unable to afford the applicant appropriate protection; the fact that the alien’s circumstances, including life expectancy, would be significantly reduced is not sufficient in itself to give rise to breach of Art. 3; the applicant had been diagnosed as having two AIDS defining illnesses, but was not presently considered critically ill, so her case was not found to disclose very exceptional circumstances such as in D v. UK, and implementation of the removal decision would therefore not give rise to a violation of Art. 3).

Aoulmi v. France, ECtHR judgment of 17 January 2006 (high threshold set by Art. 3, in particular if the deporting State has no direct responsibility for the potential infliction of harm due to substandard health services in country of origin; not proven that the applicant could not receive adequate medical treatment upon expulsion to Algeria; the binding nature of Rule 39 indications was reconfirmed, hence deportation despite such indication was held to violate ECHR Art. 34).

Bensaid v. UK, ECtHR 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 compelling humanitarian considerations as required under Art. 3, once the necessary treatment is available in the country of destination).

D. v. UK, ECtHR judgment of 2 May 1997 (applicant suffering from advanced stages of a terminal HIV/AIDS illness; expulsion to the country of origin, known for its lack of medical facilities and appropriate treatment in case, and where he would have no family or friends to care for him, would amount to inhuman treatment prohibited by Art. 3; the Court stressed the very exceptional circumstances of the case and the compelling humanitarian considerations at stake).
**Internal Protection Alternative**

*A.M. v. Sweden*, ECtHR judgment of 3 April 2014 (finding no violation of ECHR Art. 3 in a case concerning an Iraqi Sunni Muslim originating from Mosul; despite certain credibility issues concerning an alleged arrest warrant and in absentia judgment, the ECtHR considered him to be at real risk of ill-treatment by al-Qaeda in Iraq due to his refusal to apologise for offensive religious statements and having had an unveiled woman in his employment; based on considerations similar to those in *W.H. v. Sweden* 27 March 2014 (see above), the Court found that the applicant would be able to relocate safely in KRI, and that his deportation would therefore not involve a violation of Art. 3 provided that he not be returned to parts of Iraq situated outside KRI; one dissenting judge considered this insufficient in order to comply with the guarantees for internal relocation as required under the Court’s case law).

*W.H. v. Sweden*, ECtHR judgment of 27 March 2014 (finding no violation of ECHR Art. 3 in a case concerning an Iraqi asylum seeker of Mandaean denomination, originating from Baghdad and invoking that she, as a divorced woman belonging to a small and vulnerable minority and without a male network or remaining relatives in Iraq, would be at risk of persecution, assault, rape and forced conversion and forced marriage; the Court held that the general situation in Iraq, even while it included indiscriminate and deadly attacks by violent groups, discrimination and heavy-handed treatment by authorities, was not so serious as to cause by itself a violation of Art. 3 in the event of return to that country; the general risks attached to the status of being a single woman in Iraq could also not be considered of themselves to reach the threshold prohibited by Art. 3; as regards the applicant’s personal circumstances, the Court noted that in addition to being a single woman she was also a member of a small religious minority, and stated that minority women face a particular security risk, being subjected to violence, discrimination and pressure to convert or change appearance, thus considering that women with these characteristics in general may well face a real risk of being subjected to ill-treatment in southern and central Iraq; however, the Court examined the possibility of internal relocation in the Kurdistan Region of Iraq, and concluded that the applicant could reasonably relocate to KRI where she would not face such a risk as neither the general
situation in KRI nor her personal circumstances were indicating an Art. 3 risk; the Court took account of various sources considering KRI as a relatively safe area, and the fact that many members of the Mandaean community have taken refuge in KRI, and of available information to the effect that it would be possible for the applicant to obtain identity documents and to enter and reside in KRI without being required to have a sponsor in the region; based on the information on socio-economic conditions in KRI the Court held that internal relocation would be a viable alternative, the Court expressly stating that, as a precondition of relying on an internal relocation alternative certain guarantees must be in place: the person must be able to travel to the area concerned, to gain admittance there and to settle there; it was therefore stipulated that the applicant could not be returned to parts of Iraq situated outside KRI).

_B.K.A. v. Sweden_, ECtHR judgment of 19 December 2013 (finding no violation of ECHR Art. 3 in a case concerning an Iraqi Sunni Muslim from Baghdad who claimed to be at risk of persecution because he had worked as a professional soldier in 2002–03 during the Saddam Hussein regime and had been a member of the Ba’ath party, and because of a blood feud after he had accidentally shot and killed a relative in Iraq; the ECtHR first considered the general situation in Iraq, and referred to international reports attesting to a continued difficult situation, including indiscriminate and deadly attacks by violent groups, discrimination and heavy-handed treatment by authorities; however, it appeared to the Court that the overall situation had been slowly improving since the peak in violence in 2007; as regards the applicant’s personal situation, while noting that the Swedish Migration Court had found his story coherent and detailed, the ECtHR considered former members of the Ba’ath party and the military to be at risk only in certain parts of Iraq and only if some other factors were at hand, such as the individual having held a prominent position in either organisation; given the long time passed since the applicant left these organisations and the fact that neither he nor his family had received any threats because of this involvement for many years, the Court found no indication of risk of ill-treatment on this account, but it did accept the Swedish Court’s assessment of the risk of retaliation and ill-treatment from his relatives as part of the blood feud, noting that it may
be very difficult to obtain evidence in such matters; the Court’s majority also accepted the Swedish authorities’ finding that the risk of ill-treatment was geographically limited to Diyala and Baghdad and that he would be able to settle in another part of Iraq, for instance in Anbar governorate, the largest province in the country, whereas one of the judges held this finding to reflect a failure to test the requisite guarantees in connection with internal relocation of applicants under Art. 3).

_A.G.A.M., D.N.K., M.K.N., M.Y.H. and Others, N.A.N.S., N.M.B., N.M.Y. and Others, and S.A. v. Sweden_, ECtHR judgments of 27 June 2013 (no violation of ECHR Art. 3 in eight cases concerning Iraqi asylum applicants whose applications had been rejected by the Swedish Migration Board and the Migration Court, the ECtHR noting that both of these authorities had given extensive reasons for their decisions and that the general situation in Iraq was slowly improving and thus not so serious as to cause by itself a violation of Art. 3 in the event of return; relocation to other regions of Iraq was considered a reasonable alternative; the applicants in two of the cases alleged to be at risk of being victims of honour-related crimes, and the Court found that the events that had led the applicants to leave Iraq strongly indicated that they would be in danger upon return to their home towns, and that the applicants would be unable to seek protection from the authorities in their home regions of Iraq, nor would any protection provided be effective, given reports that ‘honour killings’ were being committed with impunity, but these applicants were considered able to relocate to regions away from where they were persecuted by a family or clan, as tribes and clans were region-based powers and there was no evidence to show that the relevant clans or tribes in their cases were particularly influential or powerful or connected with the authorities or militia in Iraq; the other applicants were Iraqi Christians whom the Court considered able to relocate to the three northern governorates forming the Kurdistan Region of Iraq since, according to international sources, this region was a relatively safe area where the rights of Christians were generally being respected and large numbers of this group had already found refuge, the Court further pointing to the preferential treatment given to the Christian group as compared to others wishing to enter the Kurdistan Region, and to the apparent availability of identity documents for that purpose; there was no
evidence to show that the general living conditions would not be reasonable, the Court noting in particular that there were jobs available in Kurdistan and that settlers would have access to health care as well as financial and other support from UNHCR and local authorities).

*H. and B. v. UK*, ECtHR judgment of 9 April 2013 (finding no violation of ECHR Art. 3 in cases concerning the removal to Kabul of failed Afghan asylum seekers who had claimed to be at risk of ill-treatment by Taliban in Afghanistan due to their past work as a driver for the UN and as an interpreter for the US forces, respectively, and thus essentially concerning the adequacy of Kabul as an internal flight alternative; the Court found no evidence to suggest that there is a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of being returned to Afghanistan, even while pointing to the disturbing picture of attacks carried out by the Taliban and other anti-government forces in Afghanistan on civilians with links to the international community, with targeted killing of civilians, and quoting reports about an ‘alarming trend’ of assassination of civilians by anti-government forces; at the same time, the Court considered that there was insufficient evidence to suggest that the Taliban had the motivation or the ability to pursue low level collaborators in Kabul or other areas outside their control; applicant H. had left the Wardak province as an infant and had moved to Kabul where he had lived most of his life with his family, he had worked as a driver for the UN in Kabul 2005–2008, and the ECtHR found no reason to suggest either that he had a high profile in Kabul such that he would remain known there or that he would be recognised elsewhere in Afghanistan as a result of his work; applicant B. had until early 2011 worked as an interpreter for the US forces in Kunar province with no particular profile, and had not submitted any evidence or reason to suggest that he would be identified in Kabul or that he would come to the adverse attention of the Taliban there, the Court pointing out that the UK Tribunal had found him to be an untruthful witness and finding no reason to depart from this finding of fact, and noting that he was a healthy single male of 24 years and that he had failed to submit evidence suggesting that his removal to Kabul, an urban area under Government control where he still had family members including two sisters, would be in violation of Art. 3).
Hilal v. UK, ECtHR judgment of 6 March 2001 (expulsion of Tanzanian opposition party member, having previously suffered serious ill-treatment in detention, would be contrary to Art. 3; no ‘internal flight alternative’ found to be viable in his case).

See also Chahal v. UK, ECtHR judgment of 15 November 1996; Salah Sheekh v. Netherlands, ECtHR judgment of 11 January 2007 (summaries above).

Family Issues and Reception Conditions

Tarakhel v. Switzerland, ECtHR judgment of 4 November 2014 (violation of ECHR Art. 3 in case the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept to together; the applicants were an Afghan family with six minor children who had entered Italy and applied for asylum; here they had been transferred to a reception centre where they considered the conditions poor, particularly due to lack of appropriate sanitation facilities, lack of privacy and a climate of violence; having travelled on to Switzerland, their transfer under the Dublin Regulation was tacitly accepted by Italy, and they complained to the Court that such transfer to Italy in the absence of individual guarantees would be in violation of the ECHR; the ECtHR noted the insufficient capacity of the reception system for asylum seekers in Italy, causing the risk of being left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions; while the overall situation of the Italian reception system could not act as a bar to all transfers of asylum seekers, the Court emphasised the specific needs and extreme vulnerability of children seeking asylum, reiterating that asylum seekers as a particularly underprivileged and vulnerable group require special protection under Art. 3).

B.M. v. Greece, ECtHR judgment of 19 December 2013 (finding violation of ECHR Art. 3 taken alone as well as in combination with Art. 13 in case concerning an Iranian journalist who alleged to have been arrested and tortured due to his involvement in protests against the government; after his arrival in Greece a decision had been taken to return him to Turkey, he had been held in custody in a police station and in various detention centres, and
his asylum application was first not registered by the Greek authorities, and later they dismissed the application; the ECtHR case mainly dealt with the conditions of detention, in particular overcrowding, unhygienic conditions, lack of external contact, and lack of access to telephone, translators and any kind of information; referring to its previous case law, the ECtHR held these conditions to be in violation of Art. 3, and as there had been no effective domestic remedy against that situation, Art. 13 in combination with Art. 3 had also been violated).

*C.D. and Others v. Greece*, ECtHR judgment of 19 December 2013 (violation of ECHR Art. 3 and Art. 5(4) due to detention conditions and lack of speedy review of the lawfulness of detention).

*Mohammed v. Austria*, ECtHR judgment of 6 June 2013 (finding a violation of ECHR Art. 13 in conjunction with Art. 3, but no violation of Art. 3 in a case on transfer under the Dublin Regulation; a Sudanese asylum seeker had arrived in Austria via Greece and Hungary, the Austrian authorities ordered his transfer to Hungary under the Dublin Regulation, and when placed in detention with a view to his forced transfer almost a year later he lodged a second asylum application which did not have suspensive effect in relation to the transfer order; the ECtHR considered the applicant’s initial claim against the Dublin transfer arguable, due to the ‘alarming nature’ of reports published in 2011–12 in respect of Hungary as a country of asylum, in particular as regards Dublin transferees; his second application for asylum in Austria could therefore not prima facie be considered abusively repetitive or entirely manifestly unfounded, and the applicant had been deprived of de facto protection against forced transfer and of a meaningful substantive examination of his arguable claim concerning the situation of asylum seekers in Hungary, thus Art. 13 had been violated; despite the initially arguable claim against transfer to Hungary, the Court noted the subsequent legislative amendments and the introduction of additional legal guarantees concerning detention of asylum seekers and their access to basic facilities, holding that the applicant would therefore no longer be at a real risk of treatment in violation of Art. 3 upon transfer to Hungary).

*Horshill v. Greece*, ECtHR judgment of 1 August 2013 (violation of ECHR Art. 3 due to detention conditions; no violation of Art. 5)
**Mohammed Hussein and Others v. Netherlands and Italy**, ECtHR decision of 2 April 2013 (finding no violation of ECHR Art. 3 in a case on pending return of a Somali asylum seeker and her two children from the Netherlands to Italy under the Dublin Regulation, with significant discrepancies between the applicant’s initial complaint that she had not been enabled to apply for asylum in Italy, had not been provided with reception facilities for asylum seekers, and had been forced to live on the streets in Italy, and her subsequent information to the ECtHR admitting that she had been granted a residence permit for subsidiary protection in Italy and provided with reception facilities, including medical care, during her stay in Italy; upholding its general principles of interpretation of Art. 3, the Court reiterated that the mere fact of return to a country where one’s economic position will be worse than in the expelling State is not sufficient to meet the threshold of ill-treatment proscribed by Art. 3, and that aliens subject to expulsion cannot in principle claim any right to remain in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State, absent exceptionally compelling humanitarian grounds against removal).

**Abmade v. Greece**, ECtHR judgment of 25 September 2012 (violation of ECHR Arts. 3, 5 and 13; the conditions of detention of an asylum seeker in two police stations in Athens were found to constitute degrading treatment in breach of Art. 3; since Greek law did not allow the courts to examine the conditions of detention in centres for irregular immigrants, the applicant did not have an effective remedy in that regard, in violation of Art. 13 taken together with Art. 3; an additional violation of Art. 13 taken together with Art. 3 resulted from the structural deficiencies of the Greek asylum system, as evidenced by the period during which the applicant had been awaiting the outcome of his appeal against the refusal of asylum and the risk that he might be deported before his asylum appeal had been examined; Art. 5 (4) was violated due to the lack of judicial competence to review the lawfulness of the deportation constituting the legal basis for detention).

**Mahmundi and Others v. Greece**, ECtHR judgment of 31 July 2012 (violation of ECHR Arts. 3, 5 and 13; the conditions of detention of the applicants – Afghan nationals detained in the Pagani detention centre upon being rescued from a sinking boat by the maritime police, and subsequently seeking asylum
in Norway – were held to be in violation of Art. 3; in the specific circumstances the treatment during 18 days of detention was not only degrading, but also inhuman, mainly due to the fact that the applicants’ children had also been detained, some of them separated from their parents, and a female applicant had been in the final stages of pregnancy and received insufficient medical assistance and information about the place of her giving birth and the future of her and her child; Art. 13, taken together with Art. 3, had been violated by the impossibility for the applicants to take any action before the courts to complain of their conditions of detention; Art. 5 (4) was violated due to the lack of judicial competence to review the lawfulness of the deportation constituting the legal basis for detention).

Popov v. France, ECtHR judgment of 19 January 2012 (finding a violation of Arts. 3, 5 and 8; the applicant couple and their two children aged 5 months and 3 years had been detained in an administrative detention centre authorised to accommodate families, but the conditions during their two weeks detention were held to have caused the children distress and to have serious psychological repercussions; thus, the children had been exposed to conditions exceeding the minimum level of severity required to fall within the scope of Art. 3, while there was no violation of Art. 3 in respect of the parents; Art. 5 was violated in respect of the children, both because the French authorities had not sought to establish any possible alternative to administrative detention (Art. 5 (1) (f)), and because children accompanying their parents were unable to have the lawfulness of their detention examined by the courts (Art. 5 (4)); Art. 8 was violated due to the detention of the whole family as there had been no particular risk of the applicants absconding, and the interference with the applicants’ family life resulting from their placement in a detention centre for two weeks had been disproportionate; in this regard the Court referred to Art. 3 of the UN Convention on the Rights of the Child and to Directive 2003/9 on Reception Conditions).

Zontul v. Greece, ECtHR judgment of 17 January 2012 (finding a violation of ECHR Art. 3 based on complaints that an irregular migrant had been raped with a truncheon by a Greek coastguard officer in a detention centre upon interception of the boat on which he and 164 other migrants attempted to go from Turkey to Italy; due to its cruelty and intentional nature, the Court
considered such treatment as amounting to torture under Art. 3; given the seriousness of the treatment, the penalty imposed on the perpetrator – a suspended term of six months imprisonment that was commuted to a fine – was considered to be in clear lack of proportion; the procedural handling of the case that had prevented the applicant from exercising his rights to claim damages at the criminal proceedings constituted an additional violation of Art. 3).

*M.S.S. v. Belgium and Greece*, ECtHR judgment of 21 January 2011 (upholding the principle previously adopted in *T.I. v. UK*, admissibility decision of 7 March 2000, according to which the deporting State is responsible under ECHR Art. 3 for the foreseeable consequences of the deportation of an asylum seeker to another EU Member State, even if the deportation is being decided in accordance with the Dublin Regulation; the responsibility of the deporting State comprises not only the risk of indirect *refoulement* by way of further deportation to risk of ill-treatment in the country of origin, but also the conditions in the receiving Member State if it is foreseeable that the asylum seeker may there be exposed to treatment contrary to Art. 3; thus, Greece was held to have violated Art. 3 due to the detention conditions and the absence of any measures to cover the applicant’s basic needs during the asylum procedure; Belgium too was in violation of Art. 3 by having returned the applicant to Greece and thereby having knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment; the deficiencies in the Greek asylum procedure and the consequent risk that the applicant might have been returned to Afghanistan without any serious examination of the merits of his asylum application, and without having access to an effective remedy in Greece, was held to be a violation of Art. 13 in conjunction with Art. 3; since the Belgian authorities knew or ought to have known that the applicant would have no guarantee that his asylum application would be seriously examined by the Greek authorities, the transfer from Belgium to Greece under the Dublin Regulation had given rise to a violation of Art. 3 by Belgium).

*Muskhadzhiyeva and others v. Belgium*, ECtHR judgment of 19 January 2010 (detention of four children aged 7 months, 3½ years, 5 years and 7 years, awaiting transfer to Poland under the Dublin Regulation, over a month in
the same closed centre as in the aforementioned case, not designed to house children, held to be in violation of Arts. 3 and 5; as the mother had not been separated from the children, her treatment had not reached the level of severity required to constitute inhuman treatment, and her detention had been lawful in accordance with Art. 5).

*Mayeka and Mitunga v. Belgium*, ECtHR judgment of 12 October 2006 (the arrest, detention and subsequent deportation of a 5 year old child, transiting Belgium in order to join her mother living as a refugee in Canada, held to be in violation of Arts. 3, 5, and 8; breaches of Art. 3 were found both due to the conditions of the child’s detention, the conduct of the deportation of the child to DR Congo, and the resulting distress and anxiety suffered by her mother).

*D. and others v. Turkey*, ECtHR judgment of 22 June 2006 (summary above).

**Procedural Issues**

*I.K. v. Austria*, ECtHR judgment of 28 March 2013 (violation of ECHR Art. 3, mainly due to procedural flaws; the applicant claimed that his removal to Russia would expose him to risk of ill-treatment as his family had been persecuted in Chechnya, his father had been working with the former separatist President Maskarov and was murdered in 2001, and the applicant claimed to have been arrested four times, threatened and at least once severely beaten by Russian soldiers in the course of an identity check in 2004; while the applicant had withdrawn his appeal against the refusal of his asylum application, allegedly due to wrong legal advice, his mother was recognised as a refugee and granted asylum in appeal proceedings in 2009; in the applicant’s subsequent asylum proceedings the Austrian authorities did not examine the connections between his and his mother’s cases, but held that his reasons for flight had been sufficiently examined in the first proceedings; the ECtHR was not persuaded that the applicant’s case had been thoroughly examined, and therefore assessed it in the light of the domestic authorities’ findings in his mother’s case which had accepted her reasons for flight as credible; there was no indication that the applicant would be at lesser risk of persecution upon return to Russia than his mother, and the alternative of staying in other parts of Russia had been excluded in her case as well; the Court observed*
the regularly occurring human rights violations and the climate of impunity in Chechnya, notwithstanding the relative decrease in the activity of armed groups and the general level of violence, referring to its numerous judgments finding violations of ECHR Arts. 2 and 3, and to reports about practices of reprisals and collective punishment of relatives and suspected supporters of alleged insurgents as well as occurrences of targeted human rights violations; the applicant’s mental health status – described as post-traumatic stress disorder and depression – was not found to amount to such very exceptional circumstances as required to raise a separate issue under Art. 3).

Ahmade v. Greece, ECtHR judgment of 25 September 2012 (summary above).

Labsi v. Slovakia, ECtHR judgment of 15 May 2012 (summary above).

M.S.S. v. Belgium and Greece, ECtHR judgment of 21 January 2011 (summary above).

Trabelsi v. Italy, ECtHR judgment of 13 April 2010 (violation of Art. 3 due to deportation of the applicant to Tunisia; ‘diplomatic assurances’ alleged by the respondent Government could not be relied upon; violation of Art. 34 as the deportation had been carried out in spite of an ECtHR decision issued under Rule 39 of the Rules of Court).

Ben Khemais v. Italy, ECtHR judgment of 24 February 2009 (violation of Art. 3 due to deportation of the applicant to Tunisia; ‘diplomatic assurances’ alleged by the respondent Government could not be relied upon; violation of Art. 34 as the deportation had been carried out in spite of an ECtHR decision issued under Rule 39 of the Rules of Court).

Mamatkulov and Askarov v. Turkey, ECtHR judgment of 4 February 2005 (evidence insufficient to find a violation of Art. 3 by the applicants’ extradition from Turkey to Uzbekistan; the extradition constituted Turkey’s non-adherence to the Court’s indication of interim measures under Rule 39 of the Rules of Court, thereby violating ECHR Art. 34).

Extended

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

Gayratbek Saliyev v. Russia, ECtHR judgment of 17 April 2014 (violation of ECHR Art. 3 and Art. 5 (4) in case of extradition of a Kyrgyz citizen of Uzbek ethnicity, wanted in Kyrgyzstan for violent offences allegedly committed
during inter-ethnic riots in 2010, detained pending extradition and released in 2013; considering the widespread and routine use of torture and other ill-treatment by law-enforcement agencies in the southern part of Kyrgyzstan in respect of members of the Uzbek community to which the applicant belonged, the impunity of law-enforcement officers and the absence of sufficient safeguards for the applicant in the requesting country, the ECtHR found it substantiated that he would face a real risk of ill-treatment if returned to Kyrgyzstan; that risk was not considered to be excluded by diplomatic assurances from the Kyrgyz authorities, as invoked by Russia).

**Ghorbanov and Others v. Turkey**, ECtHR judgment of 3 December 2013 (violation of ECHR Art. 3 and of Art. 5(1) and (2) towards Uzbek citizens who had been recognised as refugees by the UNHCR both in Iran and in Turkey; the Turkish authorities had issued them asylum-seeker cards as well as temporary residence permits, nonetheless they had been summarily deported from Turkey to Iran twice in 2008; while the complaint about risk of further deportation from Iran to Uzbekistan had been declared manifestly ill-founded by the ECtHR as the applicants had been living in Iran as recognised refugees for several years before entering Turkey, the Court held the circumstances of their deportation from Turkey to have caused feelings of despair and fear as they were unable to take any step to prevent their removal in the absence of procedural safeguards; the Turkish authorities had carried out the removal without respect for the applicants’ status as refugees or for their personal circumstances in that most of the applicants were children with a stable life in Turkey; the suffering had been severe enough to be categorised as inhuman treatment.

**Savriddin Dzhurayev v. Russia**, ECtHR judgment of 25 April 2013 (finding a violation of ECHR Arts. 3, 5(4) and 34 in case concerning extraordinary rendition of a national of Tajikistan having been granted temporary asylum in Russia, abducted in Moscow, detained in a mini-van for one or two days and tortured, and then taken to the airport from where he was flown to Tajikistan without going through normal border formalities or security checks; here he had allegedly been detained, severely ill-treated by the police, and sentenced to 26 years’ imprisonment for a number of offences; based on consistent reports about the widespread and systematic use of torture in Tajikistan, and the applicant’s involvement in an organisation regarded as
terrorist by the Tajik authorities, the Court concluded that his forcible return to Tajikistan had exposed him to a real risk of treatment in breach of Art. 3; due to the Russian authorities’ failure to take preventive measures against the real and imminent risk of torture and ill-treatment caused by his forcible transfer, Russia had violated its positive obligations to protect him from treatment contrary to Art. 3; additional violations of Art. 3 resulted from the lack of effective investigation into the incident, and the involvement of State officials in the operation; Art. 34 had been violated by the forcible transfer of the applicant to Tajikistan by way of an operation in which State officials had been involved, in spite of an interim measure indicated by the ECtHR under Rule 39; pursuant to ECHR Art. 46, the Court indicated various measures to be taken by Russia in order to end the violation found and make reparation for its consequences, just as Russia was required under Art. 46 to take measures to resolve the recurrent problem of blatant circumvention of the domestic legal mechanisms in extradition matters, and ensure immediate and effective protection against unlawful kidnapping and irregular removal from the territory and from the jurisdiction of Russian courts, the Court once again stating that such operations conducted outside the ordinary legal system are contrary to the rule of law and the values protected by the ECHR).

*El-Masri v. ‘former Yugoslav Republic of Macedonia’*, ECtHR judgment of 13 December 2012 (violation of ECHR Arts. 3, 5, 8 and 13 in case concerning extraordinary rendition; a German national of Lebanese origin had been arrested by the Macedonian authorities as a terrorist suspect, held incommunicado in a hotel in Skopje, handed over to a CIA rendition team at Skopje airport, and brought to Afghanistan where he was held in US detention and repeatedly interrogated, beaten, kicked and threatened until his release four months later; the Court accepted evidence from both aviation logs, international reports, a German parliamentary inquiry, and statements by a former Macedonian minister of interior as the basis for concluding that the applicant had been treated in accordance with his explanations; in view of the evidence presented, the burden of proof was shifted to the Macedonian government that had not conclusively refuted the applicant’s allegations which therefore was considered as established beyond reasonable doubt; Macedonia was held to be responsible for the ill-treatment and unlawful detention during
the entire period of the applicant’s captivity; Arts. 3 and 13 had also been violated due to the absence of any serous investigation into the case by the Macedonian authorities).

Abdulkhakov v. Russia, ECtHR judgment of 2 October 2012 (violation of ECHR Arts. 3, 5 (1), 5 (4) and 34 in case concerning extraordinary rendition; the applicant had applied for asylum in Russia and was arrested immediately upon arrival as the Russian authorities had been informed that he was wanted in Uzbekistan for involvement in extremist activities; the applicant claimed to be persecuted in Uzbekistan due to his religious beliefs, and feared being tortured in order to extract confession to offences; his application for refugee status was rejected, but his application for temporary asylum was still pending when the Russian authorities ordered his extradition to Uzbekistan, referring to diplomatic assurances given by the Uzbek authorities; while the extradition order was not enforced, due to an indication by the ECtHR of interim measure under Rule 39, the applicant was meanwhile abducted in Moscow, taken to the airport and brought to Tajikistan; extradition of the applicant to Uzbekistan was considered to constitute violation of ECHR Art. 3, due to the widespread ill-treatment of detainees and the systematic practice of torture in police custody in Uzbekistan, and such risk would be increased for persons accused of offences connected to prohibited religious organisations; the Court found it established that the applicant’s transfer to Tajikistan had taken place with the knowledge and either passive or active involvement of the Russian authorities, and as Tajikistan is not a party to the ECHR, Russia had therefore removed the applicant from the protection of his ECHR rights without any assessment of the existence of legal guarantees in Tajikistan against removal of persons facing risk of ill-treatment; the applicant’s transfer to Tajikistan had been carried out in secret, outside any legal framework capable of providing safeguards against his further transfer to Uzbekistan without assessment of his risk of ill-treatment there, and extra-judicial transfer or extraordinary rendition, by its deliberate circumvention of due process, was held to be contrary to the rule of law and the values protected by the ECHR).

A.A. v. Greece, ECtHR judgment of 22 July 2010 (violation of Art. 3 both due to the conditions in detention centre and to the Greek authorities’ lack of diligence in providing the applicant with appropriate medical assistance).
S.D. v. Greece, ECtHR judgment of 11 June 2009 (violation of Art. 3 due to the conditions of detention in holding centres for foreigners).

Ayeh v. Sweden, ECtHR admissibility decision of 7 November 2006 (application declared inadmissible; the authenticity of documents invoked by the applicant was in dispute, and she was found not to have established a real risk to her life or physical integrity if deported to Iran; if the benefit of the doubt is to be given to asylum seekers, they must provide satisfactory explanation when the veracity of their submissions is questioned).

Gomes v. Sweden, ECtHR admissibility decision of 7 February 2006 (application declared inadmissible; the complaints of risk of death penalty, life imprisonment and torture held to be manifestly ill-founded due to the contradictory information given by the applicant to the Swedish authorities, and the lack of documents substantiating his allegations).

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 ECHR Art. 3.

Art. 1 – Territorial scope of applicability

Hirsi Jamaa and Others v. Italy, ECtHR judgment of 23 February 2012 (finding the applicants – 11 Somalian and 13 Eritrean nationals – to have been within Italian jurisdiction in the terms of ECHR Art. 1 when the boats on which they were bound for Italy in May 2009 had been intercepted by Italian military vessels, the passengers transferred to the Italian vessels and later returned to Libya and handed over to Libyan authorities; the Court noted that the events had taken place entirely on board ships of the Italian armed forces so that the applicants had been under continuous and exclusive de jure and de facto control of the Italian authorities; the ‘push-back’ to Libya was considered a violation of Art. 3 due to the risk of ill-treatment in Libya and of indirect removal to the applicants’ countries of origin; further violations were found of Art. 4 of Protocol 4 prohibiting collective expulsion, as well as of ECHR Art. 13 in conjunction with Art. 3 and Art. 4 of Protocol 4 due to the lack of remedy with suspensive effect).
Medvedyev and Others v. France, ECtHR judgment of 10 July 2008, upheld by Grand Chamber judgment of 29 March 2010 (case not regarding asylum issues; however, the Court interpreted Art. 1 so as to imply State responsibility in an area outside national territory when, as a consequence of military action, it exercises control of that area, or in cases involving activities of its diplomatic or consular agents abroad and on-board aircraft and ships registered in the State concerned; as France had exercised full and exclusive control over a cargo vessel and its crew, at least de facto, from the time of its interception, and the crew had remained under the control of the French military, the applicants were held to have effectively been within the jurisdiction of France).

Al-Adsani v. UK, ECtHR judgment of 21 November 2001 (state not responsible for torture that had taken place outside the Council of Europe Member State jurisdiction and was committed by agents of another State, even in case of an applicant of dual British/Kuwaiti citizenship; any positive obligation deriving from ECHR Arts. 1 and 3 could extend only to the prevention of torture).

Xhavara et al. c. Italie et Albanie, ECtHR admissibility decision of 11 January 2001 (Italian jurisdiction as regards the incident of a collision between an Italian military vessel and an Albanian boat that was intercepted by the Italian vessel, resulting in the death of irregular immigrants on-board the boat, was undisputed; the application to the ECtHR was declared inadmissible due to non-exhaustion of domestic remedies).

Art. 5 – Deprivation of liberty

Gayratbek Saliyev v. Russia, ECtHR judgment of 17 April 2014 (violation of ECHR Art. 5 (4) due to length of detention appeal proceedings; summary above).

Ismailov v. Russia, ECtHR judgment of 17 April 2014 (violation of ECHR Art. 5 (1)(f) and (4) on account of detention and unavailability of any procedure for judicial review of the lawfulness of detention; summary above).

Horshill v. Greece, ECtHR judgment of 1 August 2013 (finding no violation of Art. 5, the Court referring to the Greek decree transposing EU Directive 2005/85 on Asylum Procedures, the administrative court decision from which it was clear that the applicant’s detention had not been automatic, as well as the short period of detention and the fact that he had been immediately
released when assuring that he would be accommodated in a hostel run by an NGO).

Suso Musa v. Malta and Aden Ahmed v. Malta, ECtHR judgments of 23 July 2013 (finding violation of ECHR Art. 5(1) and (4) in cases on asylum applicants who had entered Malta in an irregular manner by boat; violation of Art. 5(1) mainly due to failure of the Maltese authorities to pursue deportation or to do so with due diligence, and of Art. 5(4) due to absence of an effective and speedy domestic remedy to challenge the lawfulness of their detention; according to Art. 46, the Court requested Malta to establish a mechanism allowing a determination of the lawfulness of immigration detention within a reasonable time-limit; Malta’s request for referral to the Grand Chamber was rejected by the ECtHR on 9 December 2013).

Savriddin Dzhurayev v. Russia, ECtHR judgment of 25 April 2013 (extraordinary rendition; summary above).

El-Masri v. ‘former Yugoslav Republic of Macedonia’, ECtHR judgment of 13 December 2012 (extraordinary rendition; summary above).

Abdulkhakov v. Russia, ECtHR judgment of 2 October 2012 (extraordinary rendition; summary above).

Mahmundi and Others v. Greece, ECtHR judgment of 31 July 2012, and Ahmade v. Greece, ECtHR judgment of 25 September 2012 (finding violation of Art. 5 (4) due to the lack of judicial competence to review the lawfulness of the deportation constituting the legal basis for detention; see further details above).

Othman (Abu Qatada) v. UK, ECtHR judgment of 17 January 2012 (holding that Art. 5 applies in expulsion cases, but that there would be no real risk of flagrant breach of Art. 5 in respect of the applicant’s pre-trial detention in Jordan; see further details above).

Louled Massoud v. Malta, ECtHR judgment of 27 July 2010 (reiterating the interpretation of Art. 5 pronounced in Saadi v. UK as regards the protection from arbitrariness; Art. 5 held to be violated due to the failure of the national system to protect the applicant from arbitrary detention, and his prolonged detention could not be considered to have been lawful; it had not been shown that the applicant had at his disposal under domestic law an effective and speedy remedy for challenging the lawfulness of his detention).
A.A. v. Greece, ECtHR judgment of 22 July 2010 (violation of Art. 5 as the period of detention subsequent to the registration of the applicant’s asylum request had been unnecessary for the aim pursued; the applicant had further been unable to have the judicial review of the lawfulness of his detention).

S.D. v. Greece, ECtHR judgment of 11 June 2009 (violation of Art. 5, since detention with a view to expulsion of the applicant had no legal basis in Greek law, and the applicant had been unable to have the lawfulness of his detention reviewed by the courts).

Saadi v. UK, ECtHR judgment of 11 July 2006, upheld by Grand Chamber judgment of 29 January 2008 (detention of an asylum seeker for 7 days to facilitate the examination of the case found to be justified under Art. 5 (1) (f); it was considered a necessary adjunct to the right of States to control aliens’ entry and residence that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not; until the State has authorised entry, any entry is ‘unauthorised’ and detention is permissible under Art. 5 (1) (f), provided that such detention is not arbitrary; this requires that detention must be carried out in good faith, be closely connected to the purpose of preventing unauthorised entry, the place and conditions of detention should be appropriate, and the duration should not exceed that reasonably required for the purpose pursued; however, informing the applicant’s lawyer of the reason for the detention of his client after 76 hours of detention was incompatible with the requirement under Art. 5 (2) to provide such information promptly).

Art. 6 – Right to fair trial

Othman (Abu Qatada) v. UK, ECtHR judgment of 17 January 2012 (holding that deportation of the applicant to Jordan would violate Art. 6 due to the real risk of flagrant denial of justice by admission of torture evidence against him in the retrial of criminal charges; see further details above).

Art. 9 – Right to freedom of religion

Z. and T. v. UK, ECtHR admissibility decision of 28 February 2006 (application declared inadmissible; the Court not ruling out the possibility that, in exceptional circumstances, there might be protection against refoulement on
the basis of Art. 9 where the person would run a real risk of flagrant violation of that provision in the receiving state).

**Art. 13 – Right to effective remedy**

*A.C. and Others v. Spain*, ECtHR judgment of 22 April 2014 (finding violation of ECHR Art. 13 in conjunction with Arts. 2 and 3 towards 30 asylum seekers of Sahrawi origin, claiming that their return to Morocco would expose them to the risk of inhuman and degrading treatment in reprisal of their participation in the Gdeim Izik camp in Western Sahara which they had fled upon its forcible dismantling by Moroccan police; the applicants had requested judicial review of the rejection by the Spanish Ministry of the Interior of their applications for international protection, and as they had applied for the stay of execution of the orders for their deportation, the Audiencia Nacional court had provisionally suspended the removal procedure for the first 13 applicants, and the following day rejected the applications for stay of execution, just as the decisions to reject the applications for stay of execution of the other 17 applicants’ deportation orders had been adopted very shortly after the provisional suspension, while appeals on the merits of the asylum applications were still pending before the Spanish courts; the ECtHR reiterated its previous considerations of the necessity of automatic suspension of the removal in order for appeals to comply with the requirement of effectiveness of the remedy under Art. 13 in cases pertaining to Arts. 2 or 3; even while recognising that accelerated procedures may facilitate the processing of asylum applications in certain circumstances, the Court held that in this case rapidity should not be achieved at the expense of the effective procedural guarantees protecting the applicants against *refoulement* to Morocco; as the applicants had not had the opportunity to provide any further explanations on their cases, and their applications for asylum did not in themselves have suspensive effect, the Court found a violation of Art. 13 and, according to Art. 46, stated that Spain was to guarantee, legally and materially, that the applicants would remain within its territory pending a final decision on their asylum applications).

*Josef v. Belgium*, ECtHR judgment of 27 February 2014 (finding no violation of ECHR Art. 3, but violation of Art. 13 in conjunction with Art. 3, in case concerning a Nigerian woman, diagnosed with HIV, who was to be returned
with her three children upon refusal of her request for asylum in Belgium; in line with previous case law, the Court did not find the applicant’s medical condition so critical as to make the considerations against her removal imperative for the purpose of prohibiting her return under Art. 3; referring to its case law on the automatic suspensive effect of appeals in order to comply with the requirements under Art. 13 in Art. 3 cases, the Court held that Belgian law did not provide such an effective opportunity to challenge the order for removal as only appeals for suspension under the ‘extreme urgency procedure’ have automatic suspensive effect, and this type of procedure has only limited application; the Belgian appeal system was in general considered too difficult to operate and too complex to fulfil the obligations under Art. 13, so the applicant had not had access to an effective remedy; according to Art. 46, the Court indicated to Belgium the need to amend its legislation in order for the system of appeals against removal to comply with Art. 13).

*M.E. v. France*, ECtHR judgment of 6 June 2013 (finding no violation of ECHR Art. 13 in conjunction with Art. 3 due to specific circumstances of the examination in the French ‘fast-track’ asylum procedure; summary above).

*Mohammed v. Austria*, ECtHR judgment of 6 June 2013 (finding a violation of ECHR Art. 13 in conjunction with Art. 3 in a case concerning transfer under the Dublin Regulation; summary above).

*Singh and Others v. Belgium*, ECtHR judgment of 2 October 2012 (finding a violation of ECHR Art. 13 taken together with Art. 3; the applicants were refused entry into Belgium, and their applications for asylum were rejected as the Belgian authorities did not accept their claim to be Afghan nationals, members of the Sikh minority in Afghanistan, but rather Indian nationals; the Court considered the claim to risk of chain *refoulement* to Afghanistan as ‘arguable’ so that the examination by the Belgian authorities would have to comply with the requirements of Art. 13, including close and rigorous scrutiny and automatic suspensive effect; the examination of the asylum case was therefore held to be insufficient, since neither the first instance nor the appeals board had sought to verify the authenticity of the documents presented by the applicants with a view to assessing their possible risk of ill-treatment in case of deportation; the Court noted that the Belgian authorities had dismissed copies of protection documents issued by UNHCR in New Delhi pertinent to the
protection request, although these documents could easily have been verified by contacting UNHCR).

Ahmade v. Greece, ECtHR judgment of 25 September 2012 (summary above).

Labsi v. Slovakia, ECtHR judgment of 15 May 2012 (summary above).

Mahmundi and Others v. Greece, ECtHR judgment of 31 July 2012 (summary above).

I.M. v. France, ECtHR judgment of 2 February 2012 (finding a violation of ECHR Art. 13 in conjunction with Art. 3 due to examination in the French ‘fast-track’ asylum procedure).

M.S.S. v. Belgium and Greece, ECtHR judgment of 21 January 2011 (summary above).

Abdolkhani and Karimnia v. Turkey, ECtHR judgment of 22 September 2009 (holding a violation of Art. 13 in relation to complaints under Art. 3; the notion of an effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim to risk of refoulement under Art. 3, and a remedy with automatic suspensive effect; the Court was not persuaded by the respondent State’s argument that the applicants had failed to request asylum when entering Turkish territory, as this argument was not supported by any documents; in the absence of a legal procedure governing deportation and providing procedural safeguards, there were reasons to believe that their requests would not have been officially recorded; the administrative and judicial authorities had remained totally passive regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran, amounting to a lack of the rigorous scrutiny required by Art. 13).

Gebremedhin v. France, ECtHR judgment of 26 April 2007 (holding that the particular border procedure declaring ‘manifestly unfounded’ asylum applications inadmissible, and refusing the asylum seeker entry into the territory, was incompatible with Art. 13 taken together with Art.3; emphasising that in order to be effective, the domestic remedy must have suspensive effect as of right).

Conka v. Belgium, ECtHR judgment of 5 February 2002 (the detention of rejected Roma asylum seekers before deportation to Slovakia constituted a violation of Art. 5; due to the specific circumstances of the deportation the prohibition against collective expulsion under Protocol 4 Art. 4 was violated;
the procedure followed by the Belgian authorities did not provide an effective remedy in accordance with Art. 13, requiring guarantees of suspensive effect). See also Jabari v. Turkey, ECtHR judgment of 11 July 2000 (summary above); Keshmiri v. Turkey, ECtHR judgment of 13 April 2010 (violation of Art. 13, case almost identical to Abdolkhani and Karimnia v. Turkey).

**Readings**

**Core**


**Extended**


V. Moreno-Lax, ‘*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?’, *Human Rights Law Review* vol. 4 (2012), pp. 574–598.


Editor’s Note
The use of case law and case studies is an effective method for teaching the scope of protection offered by the ECHR. Complex issues of State jurisdiction under Art. 1 ECHR arise in connection with the exercise of extra-territorial immigration controls, whether in foreign territories or in international maritime areas.
Note the practical importance of interim measures under Rule 39 of the Rules of Court, according to which the ECtHR may request the CoE Member State not to enforce a removal decision while the application submitted to the Court is still pending.
In addition to the general scope of protection against refoulement, ECtHR judgments may also illustrate the occurrence of human rights violations in certain CoE Member States from which asylum seekers in other European States originate, as well as EU Member States to which other Member States consider transferring asylum seekers under the Dublin Regulation.
To compare the absolute protection under ECHR Art. 3 with Arts. 1 F and 33 of the 1951 Convention, see Section II.1.1 and Section II.2.1.6.

VI.2. The European Union

The EU comprises 28 Member States. It was established through three treaties signed by six European states in the 1950s, the most important in its early years being the EEC Treaty of 1957. The initial instruments were elaborated and updated by successive treaties over the following decade, with the Treaty on
the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) defining the EU primary legal framework today. The EEC Treaty’s original objectives were to achieve economic integration in the region. Three main transformations have subsequently taken place, which have significantly impacted upon the asylum field. These have resulted, firstly, from the continued enlargement of the group of states participating to 28 at present; secondly, through the consolidation of EU law in this area, which now takes priority over the national law of the Member States; and thirdly, the widening of the Union’s responsibilities with the addition of justice and home affairs, including asylum and migration, as a Union or Community competence, in 1999. From that date the EU has been a central actor in determining the law of international protection in the Member States. The EU’s structure incorporates several key institutions including the European Parliament, the European Council and the Court of Justice of the European Union (CJEU), as well as independent agencies whose work is relevant to asylum, including the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA) and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

In addition, EU asylum law and practice has great potential to influence significantly the development of the international protection system more broadly. This is in part because many countries look to the EU as a leading standard-setter in legal and normative terms. In addition, however, given that State practice is a source of international law, harmonized practice (if and when it is achieved) in all EU Member States will be extremely important in contributing to the evolution of international refugee law worldwide.

Editor’s Note
This section is structured to provide an overview of EU developments of refugee law. The section starts with the criteria and contents of protection and then follows the road of the asylum seeker attempting to access the procedure in order to be recognised as in need of protection.
VI.2.1 Towards a Common European Asylum System (CEAS)

**Main Debates**
What are the objectives of EU involvement in asylum law?
Does it aim at human rights protection, application of asylum in the context of the EU internal market, or establishment of fortress Europe?
Is the EU involvement in asylum law raising or lowering standards in practice?
What is the relationship of the 1951 Geneva Convention with EU asylum law?
What is the relationship between the 1951 Geneva Convention and Member States’ national law enacted pursuant to the European Community instruments?
What have been the main results of the legislative process and other forms of common policy-making since 1999?
To what extent is the CEAS truly ‘common’?
What potential has the jurisprudence of the Court of Justice of the European Union in asylum cases to influence the development of refugee protection standards, not only in the EU, but also at global level?

**Main Points**
Historical development of EU law on asylum
Evolving EU competences over asylum matters
Human rights and the EU
Institutional actors and their powers and roles
Evolving roles of the different EU institutions in EU asylum law- and policy-making

**Readings**
**Core**
VI.2.1.1 Evolution of the CEAS to Date

**EU Documents**


**UNHCR Documents**


**Readings**

**Core**


**Extended**


VI.2.1.2 Ongoing Development of the CEAS

EU Documents
Protocol No 24 on Asylum for Nationals and Member States of the EU, OJ C 83/305, 30 March 2010.
The Charter of Fundamental Rights of the EU (including notably Arts. 18 and 19), OJ C 83/389, 30 March 2010.

Readings
Core


**Extended**


**Editor’s Note**

The Court of Justice of the European Union (CJEU) has pronounced itself on a number of important questions of interpretation related to the core legal measures adopted as part of the CEAS. We can expect over the next years that important further legal questions relating to the CEAS in application will come before the Court. The rules on access to the CJEU changed in 2009 when the Lisbon Treaty created two
new treaties and the restrictions precluding lower courts from referring questions to the CJEU were lifted. Among the outstanding questions is how the CJEU will interpret the CEAS in the light of the 1951 Geneva Convention; and also in light of the EU Charter of Fundamental Rights.
The Treaty of Lisbon amended the Treaty on European Union (TEU), which retains its name, and the Treaty Establishing the European Community (TEC), which is renamed as the Treaty on the Functioning of the European Union (TFEU).
The legislative procedure for measures in the CEAS now follows the normal EU procedures of co-decision with the European Parliament. The Commission, as guardian of the Treaties, is responsible for ensuring that there is a common application of the CEAS in the Member States. The Commission has begun a number of enforcement procedures against Member States for failure to comply with the CEAS, which initially focussed on non-transposition, but increasingly seek to address suspected violations of or failures to fulfil the substantive requirements of the asylum acquis.

VI.2.2 Criteria for Granting Protection

VI.2.2.1 Harmonization of the 1951 Geneva Convention
Refugee Definition

Main Debates
Is the EU legislation on qualification for protection consistent with the 1951 Geneva Convention?
How should the 1951 Geneva Convention exclusion clauses be applied in the context of the ‘fight against terrorism’?
Do notions such as internal protection and non-state agents of protection, as well as procedural devices such as accelerated procedures, undermine or threaten effective access to refugee protection under the 1951 Convention in some cases?

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
Refugees sur place
Internal flight alternative
Compatibility of rules on exclusion, revocation, cessation with 1951 Geneva Convention
Differentiation in rights accorded to 1951 Geneva Convention refugees and subsidiary protection beneficiaries
Cessation and exclusion

**EU Documents**
European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 339, 20 December 2011.

**UNHCR Documents**
UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’, 23 October 2012, HCR/GIP/12/01.
UNHCR, ‘Statement on the ‘Ceased Circumstances’ clause of the EC
UNHCR, ‘ExCom Conclusion on the Provision of International Protection
Including Through Complementary Forms of Protection’, No. 103 (LVI), 7
October 2005, paragraph (k).
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

Cases
X, Y and Z v Minister voor Immigratie en Asiel, joined cases C-199/12, C-200/12
and C-201/12, Court of Justice of the European Union, 7 November 2013.
Mostafa Abed El Karem El Kott and Others v. Bevándorlásügyi és Állampolgársági
Hivatal, C-364/11, Court of Justice of the European Union, 19 December
2012.
Bundesrepublik Deutschland v Y and Z, joined cases C-71/11 anbd C-99/11,
Court of Justice of the European Union, 5 September 2012.
Bolbol Nawras v. Bevándorlásügyi és Állampolgársági Hivatal, C-31/09, Court of
Federal Republic of Germany v. B (C-57/09), D(C-101/09), Court of Justice of the
European Union, 9 November 2010.
Aydin Salahadin Abdulla and others v. Federal Republic of Germany, C-175/08,
Court of Justice of the European Union, 2 March 2010.
Bolbol Nawras v. Bevándorlásügyi és Állampolgársági Hivatal, Case C-31/09,
Preliminary reference from the Fővárosi Bíróság (Hungary) lodged on 26
January 2009.
Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the
Home Department, 2006 UKHL 46.
See also the cases Chahal v. UK (VI.1.2) and Adan and Aitseguer (VI.2.4.1).
Readings

Core


Extended


VI.2.2.2 Subsidiary Protection

Main Debates
Does subsidiary protection threaten or undermine the 1951 Geneva Convention? Are the needs of subsidiary protection beneficiaries less pressing or durable than those of refugees? Is there a justification for giving different levels of entitlements to refugees and subsidiary protection beneficiaries? How does the protection afforded by Article 15(c) of the Qualification Directive, which applies to people fleeing indiscriminate violence in situations of armed conflict, differ from that afforded by Article 3 of the European Convention on Human Rights?

Main Points
Relationship between Directive and refugee determination process
Lesser rights under the EC subsidiary protection regime compared with 1951 Geneva Convention rights
The relationship between Article 15(c) of the Qualification Directive and Article 3 ECHR.

EU Documents


UNHCR Documents
UNHCR, ‘Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence’, 2011.
UNHCR, ‘Statement on subsidiary protection under the EC Qualification Directive for people threatened by indiscriminate violence (Art 15(c))’, 2008. See also the UNHCR documents in Section VI.2.2.1.

**Cases**


**Readings**

**Core**


**Extended**


Editor’s Note
See Section II.3.2 about other forms and instruments of protection after the 1951 Convention.

VI.2.2.3 Temporary Protection

Main Debates
Why has the EU Temporary Protection Directive never been applied? Can circumstances ever be envisaged where it might?
Could it improve burden-sharing in the EU in a mass influx situation?
Does the possibility of temporary protection at EU level threaten the 1951 Geneva Convention?

Main Points
Lesser rights under the EU temporary protection regime compared with 1951 Geneva Convention rights
Concern by Member States that temporary protection would consistute a ‘pull factor’

EU Document

Readings
Core


**Extended**


**Editor’s Note**

Temporary Protection is not in itself a status. Rather it is an administrative measure to deal with mass influx situations for a limited period of time. It can be combined with a suspension of the examination of individual claims. Temporary Protection can only apply on a group basis following a political decision by the Council.

Compare the substantive rights for a person in an EC Temporary Protection regime with those for asylum seekers provided for in the Directive on Reception Conditions, on the one hand, and those for refugees provided for in the Geneva Convention and the Qualification Directive on the other.

**VI.2.3 Access to Territory and Access to Procedures**

**Main Debates**

Assistance to those displaced outside the EU v. duty to provide protection within European state territory

Non-entrée policies v. duty to provide protection

**Main Point**

Tension between objectives of migration control, particularly control of irregular migration, and protection obligations
EU Documents

UNHCR Documents

Cases
Zakaria (C-23/12), Court of Justice of the European Union, 17 January 2013.
Adil (C-278/12 PPU), Court of Justice of the European Union, 19 July 2012.
ANAFE (C-606/10), Court of Justice of the European Union, 14 June 2012.
Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Grand Chamber, European Court of Human Rights, 23 February 2012.
Gaydarov (C-430/10), Court of Justice of the European Union, 17 November 2011.
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section VI.1.2).
R (on the application of European Roma Rights Centre et al) v Immigration Officer at Prague Airport & Anor (UNHCR intervening), 2004 UKHL 55; 2005, 2 AC 1. (See also Section VI.2.3.2).
Readings

Core


V. Moreno Lax, ‘Hirsi Jamaa and Others v Italy, or the Strasbourg Court versus Extraterritorial Migration Control?’, *Human Rights Law Review*, vol. 12, no. 3 (2012), pp. 574–598.


Extended


Pro Asyl, ‘*Pushed Back – systematic human rights violations against refugees in the aegean sea and at the greek turkish land border*’, November 2013.


Editor’s Note

Examine how attempts to reconcile migration control and protection have been made when EC legislation was proposed and applied in practice and when the legislation was adopted.
VI.2.3.1 The EU’s External and Internal Borders

Main Debates
Are states entitled to prevent arrival at their borders of persons seeking protection?
Do the 1951 Geneva Convention and Article 3 of the ECHR create a right of access to territory?

Main Points
The claim to state sovereignty as regards the control of borders
Absence of a right to cross a border as such under international law
Borders in asylum regions

EU Documents


as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199, 31 July 2007.


UNHCR Documents


UNHCR, Protection Training Manual for European Border and Entry Officials, 1 April 2011.

Readings

Core


Extended


Editor’s Note

See also the Gebremedhin v. France case in Section VI.1.2 and the Prague Airport case in Section VI.2.3.2.

VI.2.3.2 Interception and Rescue at Sea

Main Debates

Who has responsibility for asylum-seekers intercepted or rescued at sea?

How does the position change if they are intercepted or rescued by Member States’ registered vessels in

(a) Member States’ territorial waters?
(b) international waters?
(c) the waters of third states?
What are the legal responsibilities of State vessels taking part in joint maritime border control operations, such as those led by Frontex?

**Main Points**
Interaction between international law of the sea and rules of refugee and human rights law
Ensuring respect for the principle of *non-refoulement* in the operational context of border management
The (il)legality of the Italian ‘push-back’ policy

**EU Documents**

**UNHCR Documents**


Case


Readings

Core


Extended

E. Papastravridis, ‘“Fortress Europe” and FRONTEX: Within or Without International Law?’, *Nordic Journal of International Law*, vol. 79, no. 1 (2010), pp. 75–111.


**Cases**

*Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Grand Chamber, European Court of Human Rights, 23 February 2012 (See also Section VI.2.3).

*R (on the application of European Roma Rights Centre et al) v Immigration Officer at Prague Airport & Anor (UNHCR intervening)*, 2004 UKHL 55; 2005, 2 AC 1.

**VI.2.3.3 Visas**

**Main Debates**

Are visas a mechanism to move border control beyond the physical border?

Do asylum seekers have a right to a visa even if they are in their country of origin?

Immigration control v. human rights protection

**Main Points**

Content of EU visa rules, particularly visa list and visa format

Connections between visa rules and asylum issues

**EU Documents**


must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405, 30 December 2006.

Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism OJ L 141, 4 June 2005.


**Case**

*Vo (C-83/12)*, Court of Justice of the European Union, 10 April 2012.

**Readings**

**Core**


**Extended**


**Editor’s Note**

Note the imposition of visas on every country producing large numbers of refugees/asylum-seekers and the inevitable impact on the likelihood that they will enter illegally and/or use facilitators for smuggling them in. Readers should recall Article 31 of the 1951 Geneva Convention.

**VI.2.3.4 Carrier Sanctions**

**Main Debates**

Are carrier sanctions permitted under the letter of the 1951 Geneva Convention? Should non-state parties be responsible for pre-screening asylum seekers?

**Main Point**

Carrier sanctions as a deflection mechanism

**EU Documents**


**Readings**

**Core**


*Extended*


**VI.2.3.5. Extraterritorial Immigration Control and Extraterritorial Processing**

*Main Debates*

What are the potential arguments for and against the legality of processing requests for asylum in the EU while claimants remain outside EU territory?

What practical problems could result from such a policy?

What are the potential implications of making financial assistance to non-EU States conditional upon more restrictive border control?

*Main Points*

External relations policy as tool to persuade non-EU States to carry out EU policies

Potential future prospects for external processing of asylum applications

*EU Documents*


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.


UNHCR Document

Readings
Core


Extended


Editor’s Note
Extraterritorial immigration control refers inter alia to the system of immigration liaison officers used for some time by EU Member States which post officials from their border services in other countries, to reinforce checks and controls on entry to their territory from the point of departure. In addition, recent years have seen several debates about the notion of ‘extraterritorial processing’, which would involve the possibility of obliging asylum seekers to request asylum of the EU from countries outside the Union, with the implication that this would be accompanied by restrictions on entry and/or rights to seek asylum within the EU.
See also Section VI.2.4.4.3 on Safe Third Country.

VI.2.3.6 Biometrics and Databases

Main Debates
Interoperability v. the purpose limitation principle
Is law enforcement access to asylum seekers’ fingerprint data consistent with the right to privacy and protection rationale of the Dublin and Eurodac systems?

EU Document
Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013.

Readings
Core
VI.2.4 Procedures for Granting Protection

Main Debates
Has the first phase of harmonisation of EC asylum law brought about consistency of decision-making and harmonisation in practice? If not, what further steps are required to achieve these aims?

What do the extensive exceptions and qualifications to protection criteria and procedural safeguards in EU instruments mean for access to a fair and effective refugee status determination process?

Cases
See cases under sections VI.2.4.3, VI.2.4.4, VI.2.4.5 and VI.2.4.6 and their respective sub-sections.

Readings
Core


**Extended**


**VI.2.4.1 Responsibility, Including the Dublin System**

**Main Debates**

Distribution mechanisms v. protection obligations.

Who controls the identity of the asylum seeker?

Does the Dublin system provide sufficient safeguards against *refoulement*?

Are there risks that asylum seekers will not receive any substantive claim examination in the EU as a result of the Dublin system?

Can the Early Warning Mechanism in the recast Dublin III Regulation provide for more solidarity and fairer sharing of responsibility for asylum-seekers in the EU?

**Main Points**

Solidarity and ‘fair sharing of responsibility’ for asylum and refugee protection in the EU

Allocating responsibility for determining asylum claims

Implementing Dublin without prior harmonization in asylum policies

Identity and data protection

**EU Documents**

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013 (Dublin III).
Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013.


European Asylum Support Office, EASO fact-finding report on intra-EU relocation activities from Malta, July 2012.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, COM (2011) 835, 2 December 2011.


Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (signed in Dublin 15 June 1990, entered into force 1 September 1997) OJ C254, 19 August 1997.

**UNHCR Documents**


UNHCR, *R on the application of EM (Eritrea) and others v. The Secretary of State for the Home Department: Case for the Intervener*, 3 October 2013, UKSC 2012/2072-2075 – concerning returns to EU Member States on the Dublin Regulation and a real risk of inhuman or degrading treatment.

Cases
Tarakhel v. Switzerland, Grand Chamber, European Court of Human Rights, Application no. 29217/12, 4 November 2014 (see also Section VI.I.2).
Abdullahi v. Bundesasylamt, C-394/12, Court of Justice of the European Union, 10 December 2013.
MA and Others v. SSHD, C-648/11, Court of Justice of the European Union, 6 June 2013.
K v. Austria, C-245/11, Court of Justice of the European Union, 6 November 2012.
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section VI.I.2).
N.S. v. Secretary of State for the Home Department: M.E. & others v Refugee Applications Commissioner, joined cases C-411/10 and C-493/10, Court of Justice of the European Union, 21 December 2011.
Petrosian and Others, ECJ, C-19/08, 21 March 2009.

Readings
Core


Extended


See also Section VI.2.3.6 about Biometrics and Databases with regard to Eurodac.
Editor’s Note
An analysis of the Dublin rules should consider the following:

- Are they compatible with the 1951 Geneva Convention and the ECHR?
- What kind of disputes might arise as to how to interpret the Dublin II rules?
- Is Dublin II a burden-shifting mechanism? What can be done to balance its impact on the EU’s external border States?

VI.2.4.2 Minimum Standards for Reception Conditions

Main Debate
Has the EU set an adequate standard for reception conditions?

Main Points
Purposes of EU power over reception conditions
Objectives of the Reception Conditions Directive
Level of obligations in the Directive
Exceptions from obligations

EU Documents

UNHCR Documents
UNHCR, N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister

Cases
Saciri and Others, C-79/13, Court of Justice of the European Union, reference from the Arbeidshof te Brussels (Belgium), 15 February 2013.
Abdullabi v. Bundesasylamt, C-394/12, Court of Justice of the European Union, 10 December 2013.
N.S. v. Secretary of State for the Home Department: M.E. & others v Refugee Applications Commissioner, joined cases C-411/10 and C-493/10, Court of Justice of the European Union, 21 December 2011.
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section VI.1.2).

Readings
Core

Extended

Editor’s Note
Is the recast 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?

VI.2.4.3 Minimum Standards for Normal Procedures

**Main Debates**

What constitute appropriate minimum standards?
Harmonisation of standards v. deference to state law, policy and practice
Rights of vulnerable applicants to procedural protections (e.g. separated children, traumatized asylum-seekers)

**Main Points**

Low level of common minimum standards
Extended safeguards
Effective remedies

**EU Documents**


**UNHCR Documents**


Cases


N.S. v. Secretary of State for the Home Department: M.E. & others v Refugee Applications Commissioner, joined cases C-411/10 and C-493/10, Court of Justice of the European Union, 21 December 2011.

M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see Section VI.1.2).

European Parliament v. Council, C-133/06, 6 May 2008 (Annulment of Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status), European Court of Justice.


Readings

Core


VI.2.4.4 Minimum Standards for Specific Procedures

VI.2.4.4.1 Accelerated and Manifestly Unfounded Procedures

Main Debate
Efficient v. fair procedures

Main Points
Contrast between UNHCR and EU definition of ‘manifestly unfounded’ claims
Abridged safeguards
Shifts in the standard and burden proof
Procedural and formal grounds (as opposed to grounds related to the merits) for channelling claims into accelerated procedures

EU Documents

UNHCR Documents
UNHCR, ExCom Conclusion No 30 (XXXIV), ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’, 1983.
See also UNHCR, Improving Asylum Procedures, March 2010, in Section VI.2.4.3.

Cases
See also H.I.D. and B. A. in Section VI.2.4.3.

Readings
Core

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.

VI.2.4.4.2 Safe Country of Origin

Main Debate
Does the safe country of origin notion undermine the right to have a claim assessed individually?

Main Points
Safe country of origin notion:
- As a bar to access to procedures
- As a rebuttable presumption of unfoundedness of claim
‘White lists’ of safe countries of origin
Need for individual assessment of claims
Criteria for designating countries as ‘safe’

EU Documents
UNHCR Document
See also UNHCR, Improving Asylum Procedures, March 2010, in Section VI.2.4.3.

Cases
European Parliament v. Council of the European Union, European Court of Justice (Grand Chamber), C-133/06, 6 May 2006.

Readings
Core

Extended

VI.2.4.4.3 Safe Third Country

Main Debates
Deflection and deterrence policies v. protection obligations
What minimum safeguards should there be for the implementation of safe third country returns?
Are European safe third country practices shifting the responsibility for refugees to transit states?
Main Points
Contrasts between UNHCR and EU criteria for determining safe third countries
Safe third country lists
European safe third country notion
Chain deportations

EU Documents

UNHCR Documents
UNHCR, ‘Global Consultations on International Protection, Background paper no 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim’, May 2001.
See also UNHCR, Improving Asylum Procedures, March 2010, in Section VI.2.4.3.
Cases

Qurbani, Court of Justice of the European Union, C-481/13, 17 July 2014.
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see Section V.1.2).
European Parliament v. Council of the European Union, European Court of Justice (Grand Chamber), C133/06, 6 May 2006.

Readings

Core

Extended


*Editor’s Note*

See Section VI.2.5.2 regarding Readmission agreements.

**VI.2.4.5 Other Aspects of Decision-making**

**VI.2.4.5.1 Evidentiary Issues**

*EU Documents*


*UNHCR Document*


*Cases*


*A., B. And C.* Joined cases C-148/13, C149/13, C-150/13, Court of Justice of the European Union, referred by the Raad van State (Netherlands), 31 May 2013.
Readings

Core

Extended

VI.2.4.5.2 Persons with Special Needs

EU Documents
Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013 (Dublin III), Article 17.

UNHCR Documents
Case

Readings

Core

Extended
Care-Full Initiative, ‘*Principles and Recommendation by 35 Organisations Regarding Survivors of Torture and Ill-Treatment and Asylum Procedures*’, 2006.

VI.2.4.6 Appeals

Main Debates
What is an effective remedy?
What is an independent tribunal?
Must appeal courts take into account new circumstances arising after the decision on the initial asylum claims?
Do appeals which do not have suspensive effect (ie. do not permit the appellant to remain in the country awaiting the outcome of the appeal) satisfy the requirements of an effective remedy?

**Main Points**
The meaning of ‘effective remedy’
Right to legal assistance in preparing appeals
**EU Document**

**UNHCR Document**
See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section VI.2.4.3.

**Cases**


**M.S.S. v. Belgium and Greece**, Grand Chamber, (European Court of Human Rights), 21 January 2011 (see Section V.1.2).

**M.B. and others v. Turkey**, (European Court of Human Rights), judgment of 26 August 2010, appl. 36009/08.

**Gebremedhin v. France** (European Court of Human Rights), judgment of 26 April 2007, appl. 25389/05.
**Readings**

**Core**

**Extended**

**VI.2.5 Removal and Detention**

**VI.2.5.1. Detention**

**Main Debate**
Is detention of asylum seekers consistent with EU Member States’ international refugee and human rights obligations?

**Main Points**
The use of detention as a deterrent or punishment, in addition to containment
Different legal standards governing
(i) detention of asylum-seekers
(ii) detention of people with no right to remain, pending removal and
(iii) criminal detention, including for irregular entry
**EU Documents**


**UNHCR Documents**


UNHCR, ‘Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary’, 30 March 2012, Application No. 13457/11, – concerning detention of asylum-seekers, including those transferred to Hungary under the Dublin II Regulation, for the purposes of expulsion; prolonged detention; risk of refoulement.

**Cases**

Alexandre Achughbabin v. Préfet du Val-de-Marne, C-329/11, Court of Justice of the European Union, 6 December 2012.

Said and Al-Tayyar, Applications 13457/11 and 13058/11, European Court of Human Rights, 23 October 2012.


Saadi v. United Kingdom, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.
Readings

Core

Extended

VI.2.5.2 Return Policies

Main Debate
Is there adequate protection for rejected asylum-seekers in order to ensure that return policies do not infringe the *non-refoulement* principle?

Main Point
Use of protection mechanisms to delay expulsion or removal

EU Documents


**UNHCR Documents**


UNHCR, ‘Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR’s role’, November 2010.


of the Policy Development and Evaluation Service’s *UNHCR Evaluation Reports* Series].

**Readings**

**Core**


**Extended**


Editor’s Note
Note the practical relevance of these policies for rejected asylum-seekers and persons whose refugee status or Subsidiary Protection/Temporary Protection status has ceased.

VI.2.5.3 Readmission Agreements

Main Debate
Are the ‘safeguard’ provisions in readmission agreements sufficient?

Main Points
Objectives of readmission agreements:
• EU seeking to use readmission agreements to guarantee removal of irregular migrants, including those who have merely transited through other contracting party
• rules on proof and presumptive evidence for nationality and transit route
• safeguard clauses

EU Documents
Agreement between the European Union and Turkey on Readmission of Persons Residing without Authorisation, 16 December 2013.
Agreement between the European Community and Bosnia and Herzegovina on Readmission of Persons Residing without Authorisation, OJ L 332, 1 January 2008.

Readings
Core


Extended


Editor’s Note

Readmission agreements will apply to rejected asylum seekers and to people removed to supposedly safe third countries and safe countries of origin. But it must be questioned whether readmission agreements concluded by the EC to date do contain adequate safeguards to ensure that people in need of international protection are not returned to persecution.
NOTES ON THE EDITORS

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Jens Vedsted-Hansen earned his LL.M and LL.D. from Aarhus University where he is a Professor of Law. Having worked as a research scholar at the University of Aalborg, Faculty of Social Sciences, and as assistant and associate professor at the Aarhus University Law School, he became a research fellow at the Danish Centre for Human Rights in 1993. In 1997 he joined the Faculty of Law at the University of Copenhagen as an associate professor. Since 1999 he has been a professor of human rights law at the Aarhus University Law School where he is presently head of the INTRAlaw research centre. His research interests include international, European and Danish human rights law, immigration and asylum law as well as administrative and constitutional law. Among his recent works are contributions to *The EU Charter of Fundamental Rights. A Commentary* (2014), *Research Handbook on International Law and Migration* (2014), *International Protection of Human Rights: A Textbook* (2. Edition, 2012) and *Den Europæiske Menneskerettighedskonvention med kommentarer* (Danish ECHR Commentary, 3. Edition, 2011). He has participated in various international research projects as coordinator, commentator or panel member. He served as a member of the Danish Refugee Appeals Board from 1987 to 1994 and was appointed for a new term in 2013. Since 2009 he has been a member of the Board of the Danish Institute for Human Rights, and since 2012 a member of the Management Board of the EU Agency for Fundamental Rights.
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Elspeth Guild studied classics in Canada and Greece and law in London. She defended her thesis on European Community immigration law at the University of Nijmegen, where she now is the Jean Monnet Professor ad Personam of European Immigration Law at the Radboud University Nijmegen and at the Law Faculty, Queen Mary University of London. She is associate senior research fellow at the Centre for European Policy Studies, Brussels and a partner in the immigration department at the London law firm, Kingsley Napley. She also teaches at Sciences Po in Paris. She has published widely in the field of immigration and asylum law and policy in Europe. Her most recent monograph is *Security and Migration in the 21st Century*, Polity 2009. Professor Guild is the UK member of the Odysseus Network of academic experts in European Immigration and Asylum Law. She is frequently invited to advise both the European Commission and the Council of Europe on immigration and asylum issues.

**Fatima Khan**  
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Fatima Khan is the Director of the Refugee Rights Unit at the University of Cape Town, Law Faculty, where she lectures, supervises and conducts research. Her areas of expertise include refugee law and human rights, with her research focussing, in particular, on the local integration of refugees in an urban setting. Among her recent works are her co-authored book *Refugee Law in South Africa* (2014). Her teaching is informed by her extensive experience in the practice of refugee law at the Refugee Rights Clinic at the University of Cape Town where she is the principle Attorney. Fatima is an admitted attorney of the High Court of South Africa and the Refugee Clinic under her leadership has initiated several precedent setting cases in South Africa. The Refugee Clinic is an implementing partner of the UNHCR, which has
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Justin De Jager is the Senior Litigation Attorney at the University of Cape Town Refugee Law Clinic where he has been since 2007. He has worked extensively with refugees providing a direct legal service and has piloted cases in various judicial forums such as the Equality Court and the Labour Court to seek relief for his clients. Justin’s writing has been informed by his practice of the law and he has recently published in the Canadian Journal Refuge on his experiences in the Equality Court of South Africa. He has contributed toward the writing of the first textbook *Refugee Law in South Africa*. Justin earned his Bachelor’s degree at the University of Cape Town. He also completed an LLB and an LLM at UCT and is currently a PhD candidate. Justin has further published in the area of electronic evidence which is the focus of his PhD.

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