

THE REFUGEE LAW READER

Editor-in-Chief

Jens Vedsted-Hansen

CASES, DOCUMENTS, AND MATERIALS

Editorial Board

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Sylvie Sarolea

Priyanca Mathur Velath



Hungarian Helsinki Committee



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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.

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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

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

* *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:

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

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(ECRE), Denver Journal of International Law & Policy, European Parliament, European Policy Centre, Fordham International Law Journal, Forced Migration Review, Foreign Correspondents' Club of Thailand, Fundamental Rights Agency, Global Commission on International Migration, Hans Zell Publishers, Hart Publishing, Harvard Human Rights Journal, House of Lords, Human Rights Watch, Immigration and Law Practitioners' Association, Immigration and Refugee Board of Canada, Institute for Jewish Policy Research, Internal Displacement Monitoring Centre, Irish Refugee Council, John Wiley & Sons Ltd., Juta and Company Ltd., LexisNexis Canada Inc., Makerere University, Malawi Law Society, Manak Publications, McGill Law Journal, Meijers Committee, N.P. Engel Publisher, Ohio State Journal on Dispute Resolution, Oxford Monitor of Forced Migration, Oxford University Press, Physicians for Human Rights, Refuge, Refugee Law Project, Refugee Watch, RSDWatch.org, Southwestern Journal of International Law, Sussex Centre for Migration Research, Sweet and Maxwell, T.M.C. Asser Press, Texas International Law Journal, UNHCR Bureau for Europe, University of Michigan Law School, U.S. Committee for Refugees and Immigrants, Vanderbilt Journal of Transnational Law, Victoria University of Wellington Law Review, VUB Press Brussels, Wiley, Wolf Legal Publishers, Wolters Kluwer Law & Business, Yale Journal of International Law.

The Hungarian Helsinki Committee would like to thank the following staff members and affiliates who have generously contributed to the completion of The Reader:

Gábor Gyulai, Benedetta Mangialardo, Mona Mojtabavi, Ildikó Nemes and Freya Nicholls.

Reader Feedback

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

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

Please send any correspondence to the editorial board at:

HUNGARIAN HELSINKI COMMITTEE

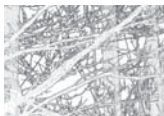
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SECTION I



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

- R. Bedford, 'Contemporary patterns of international migration', in B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds.), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), pp. 17–55.
- R. King, 'Towards a New Map of European Migration', *International Journal of Population Geography*, vol.8 (2002), pp. 89–106.

Extended

- A. Demuth, 'Some Conceptual Thoughts on Migration Research', in B. Agozino (ed.), *Theoretical and Methodological Issues in Migration Research* (Aldershot: Ashgate Publishing, 2000), pp. 21–58.
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- A. Pécoud and P. de Guchteneire, 'Introduction: The Migration without Borders Scenario', in A. Pécoud and P. de Guchteneire (eds), *Migration without Borders Essays on the Free Movement of People* (Paris: UNESCO Publishing, New York: Berghahn Books, 2007), pp. 3–30.
- V. Bader, 'The Ethics of Immigration', *Constellations*, vol. 12, no. 3 (2005), pp. 331–361.

I.1.2 The Theories

Main Debates

What are the causes of migration?

Is the model of push-pull factors adequate?

Can migratory processes be managed?

Does migration management simply redirect or reclassify migrants?

Main Points

Absence of a single theory explaining migration

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

Migration management:

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

Readings

Core

- D. Massey, J. Arango, G. Hugo, A. Kouaci, A. Pellegrino, and E. Taylor, 'Theories of International Migration: A Review and Appraisal', *Population and Development Review*, vol. 19, no. 3 (September 1993), pp. 431–466.
- R. King, 'Theories and Typologies of Migration: An Overview and a Primer', *Willy Brandt Series of Working Papers in International Migration and Ethnic Relations*, vol. 3, no. 12, (Malmö University: Institute for Studies of Migration, 2012).
- G. S. Goodwin-Gill, *The UN Audiovisual Library of International Law: 'International Migration Law: General Introduction'*.

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- E. Fussell, 'Space, Time, and Volition: Dimensions of Migration Theory, in M.R. Rosenblum and D.J. Tichenor (eds.) *The Oxford Handbook of the Politics of International Migration*, (Oxford: Oxford University Press, 2012), pp. 25–52.
- S. Castles, H. De Haas, and M. J. Miller, *The Age of Migration: International Population Movements in the Modern World*, (Houndmills: Palgrave, 2013), pp. 25 – 54.
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- C. B. Brettel and J. F. Hollifield, 'Migration Theory Talking across Disciplines', in C. B. Brettel and J. F. Hollifield (eds), *Migration Theory Talking across Disciplines* (New York: Routledge, 2008), pp. 1–29.

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- E. Guild, *Security and Migration in the 21st Century* (Cambridge: Polity Press, 2009), pp. 176–191.
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- A. Zolberg, 'Matters of State: Theorizing Immigration Policy', in C. Hirschman, P. Kasinitz and J. DeWind (eds), *The Handbook of International Migration: The American Experience* (New York: Russell Sage Foundation, 1999), pp. 71–93.

Editor's Note

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

I.1.3 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

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

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

'International Migration Report 2013', *United Nations Department of Economic and Social Affairs Population Division*, ST/ESA/SER.A/346, December 2013.

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S. Castles, H. De Haas, and M. J. Miller, *The age of migration: international population movements in the modern world*, (Houndmills: Palgrave, 2013), pp. 84 – 197, 215–239.

C. Dauvergne, *Making People Illegal – What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

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

OECD, *International Migration Outlook* (Paris: OECD, 2014).

UN, *International Migration and Development Report of the Secretary General*, A/68/190, 23 July 2013.

UNHCR, 'Global Trends 2013, War's Human Cost', 20 June 2014.

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

B. Nagy, 'Indeed why? Thoughts on the reasons and motivations for protecting refugees', in: B. L. Kristiansen, S. Schaumburg-Müller, T. Gammeltoft-Hansen, I. E. Koch (eds), *Protecting the Rights of Others. Festschrift til Jens Vedsted-Hansen*, (Copenhagen, DJØF Publishing, 2013), p. 583–607.

I.2.1 The Evolution of the International Refugee Regime

Readings

Core

J. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, vol. 31, no. 1 (Spring 1990), pp. 129–147.

- G. Loescher, 'The Origins of the International Refugee Regime', in *Beyond Charity: International Co-operation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993), pp. 32–55.
- A. Suhrke, 'Refugees and Asylum in the Muslim World', in R. Cohen (ed.), *The Cambridge Survey of World Migration* (Cambridge: Cambridge University Press, 1999), pp. 457–460.

Extended

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

Editor's Note

Note the three phases of the modern international refugee regime:

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

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

1.2.2.1 Prior Definitions: Group Specific: Geographically and Temporarily Limited

Soft Law

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

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 15–20. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 4–6].

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

Treaties

International

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

Soft Law

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

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 20–24, 35–37. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–8, 18–19].
- N. Robinson, *Convention Relating to the Status of of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953).

I.2.2.3 Expansion by the 1967 Protocol

Treaties

International

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

Soft Law

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

Editor's Note

For detailed analysis see Section II.2.1.

I.2.3 Contemporary Alternative Refugee Definitions

Editor's Note

This section traces the 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

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

Editor's Note

See also Section III.

I.2.3.2 Latin America

Soft Law

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

Editor's Note

See also Section IV.

I.2.3.3 Europe

Soft Law

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

EU Documents

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 August 2001.

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.

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

Soft Law

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

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

REFWORLD, UNHCR's on-line database: www.refworld.org.

UNHCR, *'State of the World's Refugees: In search of Solidarity'*, (Oxford: Oxford University Press, 2012).

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

UNHCR, 'Agenda for Protection', October 2003.

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

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

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

UNHCR, *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157.

Readings

Core

V. Türk, 'The UNHCR's role in supervising international protection standards in the context of its mandate' in J. Simeon (Ed.), *The UNHCR and the supervision of international refugee law* (Cambridge: Cambridge University Press, 2013), Chapter 2, pp. 39–58.

B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, vol. 11, no. 4 (December 1998), pp. 350–357, 365–368.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 20–32. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–17].

M. Jones, 'The governance question: the UNHCR, the Refugee Convention and the international refugee regime' in J. Simeon (Ed.), *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013), pp. 75–96.

Extended

- M. Barutciski, 'The limits to the UNHCR's supervisory role' in J. Simeon (Ed.), *The UNHCR and the supervision of international refugee law* (Cambridge: Cambridge University Press, 2013). pp. 59–74.
- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.
- G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).
- M. Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination', in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Heidelberg: Springer, 2009), pp. 399–405.

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).
- AMM and others v. Secretary of State for the Home Department – Statement on behalf of the Office of the United Nations High Commissioner for Refugees (UNHCR)*, 6 June 2011.

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.

1.3.2 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).

UNHCR, '*Global Report 2012*', chapter on 'Working in partnership'.

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

Cases

Abed El Karem El-Kott and Others v Bevándorlási és Állampolgársági Hivatal, C-364/11, Court of Justice of the European Union, 19 December 2012.

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

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 441–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 222–230].

- T. Bartholomeusz, 'The Mandate of UNRWA at Sixty', *Refugee Survey Quarterly*, vol. 28. vol. 2–3 (2010), pp. 452–74.
- T. Clark, 'The NGO role in supervising the application of the Convention and beyond' in J. Simeon (ed), *The UNHCR and the supervision of international refugee law* (Cambridge: Cambridge University Press, 2013), Chapter 15, pp. 302–310.
- O. Aarakaki, 'Supervision of the Refugee Convention: non-state actors' in J. Simeon (ed), *The UNHCR and the supervision of international refugee law*, (Cambridge: Cambridge University Press, 2013), Chapter 14, pp. 286–301.
- N. Kelly, 'International Refugee Protection Challenges and Opportunities', *International Journal of Refugee Law*, vol. 19, no. 3 (October 2007), pp. 432–439.

Extended

- E. Ferris, 'The role of Non-governmental Organisations in the International Refugee', in N. Steiner, M. Gibney, G. Loeshcer (eds) *Problems of Protection The UNHCR, Refugees, and Human Rights* (London Routledge, 2013), pp. 117–137.
- J. Lindsey, 'Fixing UNRWA: Repairing the UN's Troubled System of Aid to Palestinian Refugees', Policy Focus no. 91 (Washington: Washington Institute, 2009).
- C. Phuong, 'Improving United Nations Response to Crises of Internal Displacement', *International Journal of Refugee Law*, vol. 13, no. 4 (October 2001), pp. 491–517.
- S. Petcharamamesree, 'International protection and public accountability: the roles of civil society' in J. Simeon (ed), *The UNHCR and the supervision of international refugee law* (Cambridge: Cambridge University Press, 2013), Chapter 13, pp. 275–285.
- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Art. 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.

Editor's Note

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

- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 23 May 2009.

Soft Law

- The Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2 (11 February 1998).
- 'London Declaration of International Law Principles on Internally Displaced Persons', *International Journal of Refugee Law*, vol. 12, no. 4 (2000), p. 672.

Readings

Core

- Internal Displacement: A Global Overview of Trends and Developments in 2013*, Global IDP Project, Norwegian Refugee Council, Geneva 2014.
- A. Adebé, 'The African Union Convention on Internally Displaced Persons: its Codification Background, Scope, and Enforcement Challenges', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 28–57.
- R. Cohen, 'Strengthening Protection of IDPs: The UN's Role', *Georgetown Journal of International Affairs* (Winter/Spring 2006), pp. 101–109.
- W. Kälin, 'The Role of the Guiding Principles on Internal Displacement', *Forced Migration Review*, (October 2005), pp. 8–9.

Extended

- H. Entwisle, 'Tracing Cascades: The Normative Development of the U.N. Guiding Principles on Internal Displacement', *Georgetown Immigration Law Journal*, vol. 19 (2004–2005), pp. 369–390.
- N. Geissler, 'The International Protection of Internally Displaced Persons', *International Journal of Refugee Law*, vol. 11, no. 3 (1999), pp. 451–478.
- W. Kälin, 'Internal Displacement' in: E Fiddan-Qasmiyeh, G. Loescher, K. Long, N. Sigona (eds): *The Oxford Handbook of Forced Migration and Refugee Studies*, (Oxford: Oxford University Press, 2014), pp. 163–175.
- K. Koser, 'Internally Displaced Persons' in A. Betts, *Global Migration Governance*, (Oxford: Oxford University Press, 2011), pp. 210–223.
- K. Luopajarvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?', *International Journal of Refugee Law*, vol. 15, no. 3 (2003), pp. 678–714.
- B. Ní Ghráinne, UNHCR's Involvement with IDPs – 'Protection of that Country' for the Purposes of Precluding Refugee Status?, *International Journal of Refugee Law*, vol. 27, no. 1 (2015), pp. 1–19.
- P. Orchard, 'Perils of Humanitarianism: Refugee and IDP Protection in Situations of Regime-induced Displacement', *Refugee Survey Quarterly*, vol. 29, no. 1 (2010), pp. 38–60.

Editor's Note

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 principle of avoidance of statelessness

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

Treaties

International

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

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

Regional

European Convention on Nationality, 1997.

Soft Law

UNHCR, ‘Handbook on Protection of Stateless Persons’, 30 June 2014.

Readings

Core

- A. Edwards, and L. van Waas, *Nationality and Statelessness under International Law*, (Cambridge: Cambridge University Press, 2014), pp. 1–43, 64–143.
- A. Edwards, and L. van Waas, “Statelessness” in E. Fiddian-Qasmiyeh, G. Loescher, K. Long, and N. Sigona, (eds), *Handbook in Refugee and Forced Migration Studies*, (Oxford:Oxford University Press, 2014), pp. 290–301.
- European Network on Statelessness, ‘Statelessness Determination and the Protection Status of Stateless Persons’, 2013.

Extended

- G. Gyulai, ‘Statelessness in the EU Framework for International Protection’, *European Journal of Migration and Law*, vol. 14 (2012) pp. 279–295, 285–289.

1.4.3. 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

- UNHCR, ‘Climate change, natural disasters and human displacement: a UNHCR perspective’, Policy Paper, August 14, 2009.

Readings

Core

- R. Black, 'Environmental refugees: myth or reality? New Issues in Refugee Research', *Working Paper N° 34* (University of Sussex, March 2001).
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- R. Zetter, 'Protecting People Displaced by Climate Change: some conceptual challenges', in: J. McAdam (ed.). *Climate Change and Displacement: multidisciplinary perspectives*, (Oxford: Hart Publishing, 2010), pp. 131–150.

Extended

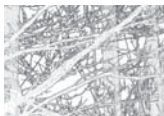
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- W. Kälin, 'Conceptualizing Climate-Induced Displacement', in J. McAdam (ed), *Climate Change and Displacement: multidisciplinary perspectives*, (Oxford: Hart Publishing, 2010), pp. 81–103.
- L. Westra, *Environmental Justice & the Rights of Ecological Refugees*, (London: Earthscan, 2009), pp. 3–45.

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.

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

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

Soft Law

Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09.

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.

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

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

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

Readings

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G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 201–267. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 117–155].

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

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

J. Hathaway, 'Leveraging asylum', *Texas International Law Journal*, vol. 45 (2009–2010) pp. 503–536.

Extended

- P.C.W. Chan, 'The Protection of Refugees and Internally Displaced Persons: Non-refoulement under Customary International Law?', *The International Journal of Human Rights*, vol. 10, no. 3 (2006), pp. 231–239.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 268–277. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 155–171, 195–204].
- W. Kälin, 'Article 33, Paragraph 1', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 1327–1396.
- A. Zimmermann, P. Wennholz, Article 33, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 1307–1423.
- G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*', *International Journal of Refugee Law*, 2011 (3), pp. 443–457.

Soft Law

Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, preambular para. 4.

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

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

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

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

Readings

Core

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

Extended

C. Wouters, ‘International refugee and human rights law: partners in ensuring international protection and asylum’, in N. Rodley and S. Sheeran (eds.), *Handbook on International Human Rights Law*, (Routledge, 2013), pp. 231–244.

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

A. L. Purkey, ‘Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship’, *International Journal of Refugee Law*, vol 4, (2013), pp. 693–716.

K. Long, 'In Search of Sanctuary: Border Closures, 'Safe' Zones and Refugee Protection', *Journal of Refugee Studies*, vol 3, (2013), pp. 458–476.

II.1.3 Non-discrimination

Main Debate

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

Main Points

Non-discrimination and the enjoyment of refugee rights

Non-discrimination as a norm of customary international law

Treaties

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

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

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

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

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

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

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

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 446–450. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 230–234].

Extended

- A. Edwards, 'Age and gender dimensions in international refugee law', in Feller, Türk and Nicholson, *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), pp. 46–80.
- T. Einarsen, 'Discrimination and Consequences for the Position of Aliens', *Nordic Journal of International Law*, vol. 64, no. 3 (1995), pp. 429–452.
- J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 123–147.
- M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl, Strasbourg, Arlington: N.P. Engel, 2. Edition, 2005), pp. 45–57, 597–634.

II.1.4 Family Unity

Main Debate

What is the definition of a family?

Main Points

Family unity as a principle

Right of family reunification is not included in the Geneva Convention

Right to respect for family life under human rights treaties

Treaties

International

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

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

Soft Law

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

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

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

- UNHCR EXCOM, 'Family Reunification', Conclusion No. 24 (XXXII), 1981.
- UNHCR EXCOM, 'Protection of the Refugee's Family', Conclusion No. 88 (L), 1999.
- UN Human Rights Committee, 'General Comment No. 19: The Family' (1990), UN Doc.
- HRI/GEN/1/Rev.7, 12 May 2004, at 149, paras. 2, 5.

UNHCR Documents

- UNHCR, 'UNHCR Guidelines on Reunification of Refugee Families', July 1983.
- UNHCR, 'Global Consultations on International Protection, Geneva Expert Round Table', 8–9 November 2001.
- UNHCR, '*Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*', February 2012.
- UNHCR, 'Resettlement Handbook', Revised Edition, Chapter 6.6, July 2011.

Readings

Core

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

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- A. Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum', *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.
- J. Vedsted-Hansen, 'Refugees, Asylum-Seekers and Migrant Workers', in C. Krause and M. Scheinin (eds), *International Protection of Human Rights: A Textbook*, (Turku: Åbo Akademi University, 2nd Edition, 2012), pp. 316–320.

Editor's Note

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

II.1.5 Durable Solutions

Main Debates

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

Main Points

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

UNHCR Documents

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

UNHCR, 'Resettlement Handbook', Revised Edition, 2011. Chapter 2.

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

UNHCR, 'Policy Framework and Implementation Strategy: UNHCR's Role in Support of the Return and Reintegration of Displaced Populations', August 2008.

UNHCR, 'Implementation of the Strategic Use of Resettlement', September 2011.

UNHCR, 'A New Beginning: Refugee Integration in Europe', September 2013.

Readings

Core

D. Anker, J. Fitzpatrick, and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (Spring 1998), pp. 295–309.

B.S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', *Refugee Survey Quarterly*, vol. 23, no. 3 (2004), pp. 55–73.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 489–501. [G. Goodwin-Gill,

The Refugee in International Law (Oxford: Oxford University Press, 1996), pp. 268–282.]

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

Editor's Note

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

II.1.6 Burden- 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, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities', 28 June 2011.

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

UNHCR, 'State of the World's Refugees: in search of solidarity', (Oxford: Oxford University Press, 2012).

UNHCR, 'International Solidarity in all its aspects: national, regional and international responsibilities for refugees', UN doc. A/AC/96/004, 7 September 1998.

Readings

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- A. Betts, 'International cooperation between south and north to enhance refugee protection in regions of origin', *Refugee Studies Centre Working Paper no. 25*, July 2005.
- A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), Introduction.
- A. Suhrke and A. Hans, 'Responsibility-sharing' in J. Hathaway (ed), *Reconceiving Refugee Law* (Leiden: Nijhoff, 2007).
- D. Anker, J. Fitzpatrick, and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (Spring 1998), pp. 295–310.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 502–505.
- J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10 (Spring 1997), pp. 115–151, 187–209.
- P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, vol. 23 (1997), pp. 243–297.

Extended

- R. Towle, 'Processes and critiques of the Indochinese Comprehensive Plan of Action: an instrument of burden-sharing?' in *International Journal of Refugee Law*, vol. 18 (2006), pp. 537–570.
- A. Betts, 'Comprehensive Plans of Action: insights from CIREFCA and the Indochinese CPA' in UNHCR, *New Issues in Refugee Research*, Working paper 120, January 2006.
- C. Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea', *Human Rights Quarterly*, vol. 25, no. 3 (2003), pp. 741–774.

- A. Edwards, 'A Numbers Game: Counting Refugees and International Burden-Sharing', *University of Tasmania Law Review*, vol 32, no. 1 (2013), pp. 1–19.
- E. R. Thielemann and T. Dewan, 'The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing', *West European Politics*, vol. 29, no. 2 (2006), pp. 351–369.
- A. Vibeke Egli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhof Publishers, 2002), pp. 40–54, 72–87.

UNHCR Documents

UNHCR, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities', Amman, Jordan, 28 June 2011.

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

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948, Art. 13.
International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N. T. S. 171, Art. 12.

Regional

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (213 E.T.S. 222), Article 2.2 of Protocol 4.

Soft Law

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

Commissioner for Human Rights of the Council of Europe, 'The Right to Leave One's Country', October 2013.

Cases

Stamose v. Bulgaria, European Court of Human Rights, Application no. 29713/05, 27 November 2012.

Readings

Core

C. Harvey and R. Barnidge, 'The right to leave one's country under international law', *Global Commission on International Migration*, September 2005.

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

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

UNHCR Documents

UNHCR, Summary Conclusions: Article 31 of the 1951 Convention, November 2001, in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003). pp. 253–58.

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

Cases

R v. Mateta & others, [2013] EWCA Crim 1372.

R v. Jaddi, [2012] EWCA Crim 2565.

R v. Asfaw, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008.

R v. Uxbridge Magistrates Court and Another, Ex parte Adimi, [1999] EWHC Admin 765; [2001] Q.B. 667, High Court (England and Wales), 29 July 1999.

Readings

Core

G. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 217–218.

P. Weis, *The Refugee Convention 1951: The travaux préparatoires with a commentary*, (1995), Art. 31.

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

T. Einarsen, The 1951 Convention, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 48–68.

T. Einarsen, The 1967 Protocol, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 68–73.

II.2.1 Criteria for Granting Refugee Protection

Main Debate

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

UNHCR Documents

UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, re-issued December 2011, HCR/1P/4/ENG/REV.3.

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

Editor’s Note

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

J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 17–23. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 29–33.]

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

Extended

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

Editor's Note

In 1951, the conceptual scope of international law was much more limited than it is today. Many then viewed international law as limited to duties between states that lacked the competence to impose duties on states regarding their own nationals. There is also a sort of common sense notion that those who are outside of their own borders and fear persecution by authorities within their own state are quite clearly and visibly in need of international protection. The requirement that individuals must be outside their own state in order to qualify as a refugee accomplished multiple goals:

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

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

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

Editor's Note

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

II.2.1.1.3 Dual or Multiple Nationality

Soft Law

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

II.2.1.1.4 Stateless Refugees

Treaties

International

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

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

Soft Law

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

UNHCR, 'Handbook on Protection of Stateless Persons', 30 June 2014.

UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', 21 December 2012, HCR/GS/12/04.

UNHCR, 'Note on statelessness', 4 June 2013, EC/64/SC/CRP.11.

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.

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 67–70. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 41–43].
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 64–75. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 59–63].

Extended

- G. Gyulai, ‘Statelessness in the EU Framework for International Protection’, *European Journal of Migration and Law*, 14 (2012) pp. 279–295.

II.2.1.2 Well-founded Fear

Main Debate

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

Main Point

Shifting standards concerning the likelihood of risk

Soft Law

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

Cases

- R. v. Secretary of State for the Home Department ex parte Sivakumaran*, (1988) 1 All ER 193 (HL) (UK judicial decision analysing objective element).
- INS v. Cardoza – Fonseca*, 480 US 421 (1987) (US judicial decision stating that one in ten probability of harm can constitute well-founded fear).

Readings

Core

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 91–118. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 69–97].
- ‘The Michigan Guidelines on Well-Founded Fear’, March 2004.

Extended

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 118–181.
- H. Cameron, ‘Risk Theory and “Subjective Fear”: The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations’, *International Journal of Refugee Law*, vol. 20, no. 4 (2008), pp. 3567–585.
- J. Hathaway and W. Hicks, ‘Is There a Subjective Element in the Refugee Convention’s Requirement of Well-founded Fear?’, *Michigan Journal of International Law*, vol. 26, no. 2 (Winter 2005), pp. 505–560.
- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, (Oxford: Oxford University Press, 2011), pp. 335–345.

Editor’s Note

See also Section II.2.5.2 concerning evidentiary issues.

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

Whether viewed as two elements or one, the major focus is on showing a risk in the future. One must consider all the circumstances, the context and the conditions that have occurred in the past in order to evaluate the degree of likelihood of the actions and threats that might take place in the future. Many commentators and tribunals

confuse the discussions of subjective and objective elements of fear with concerns about credibility and consistency of the asylum seekers' narratives.

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

II.2.1.3 Persecution

Main Debates

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

Does the lack of state protection constitute persecution?

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

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

UNHCR 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

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 90–94. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 66–70.]

J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 182–208. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 99–124.]

Extended

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

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

UNHCR Documents

UNHCR, 'Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/01.

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, 'Guidance Note on Refugee Claims relating to Female Genital Mutilation', May 2009.

UNHCR, 'Position Paper on Agents of Persecution', 14 March 1995.

Cases

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

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 98–100. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 70–74.]
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 292–319. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 124–131.]
- J. Moore, ‘Whither the Accountability Theory: Second-Class Status for Third-party Refugees as a Threat to International Refugee Protection’, *International Journal of Refugee Law*, vol. 13, nos. 1–2 (January 2001), pp. 32–50.

Extended

- V. Türk, ‘Non-State Agents of Persecution’ in V. Chetail and V. Gowlland-Debbas (eds), *Switzerland and the International Protection of Refugees* (The Hague: Kluwer Law International, 2002), pp. 95–109.
- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 358–372.

Editor’s Note

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

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

UNHCR, 'Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees', 3 December 2013, HCR/GIP/13/10.

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

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 70–90, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 43–49, 54–59.]

J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 390–394. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 141–185.]

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

Extended

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

Editor's Note

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

II.2.1.4.2 Race

Treaties

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

Soft Law

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

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

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 70–71. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), p. 43.]
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 394–397. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 141–143.]

Extended

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

II.2.1.4.3 Religion

Main Point

Public religious activity v. private worship

Soft Law

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

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

UNHCR Documents

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

UNHCR, 'UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive', 17 June 2011, C-71/11 & C-99/11.

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

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 71–72, 104–116. [G.

Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 44–45, 54–59.]

- J. Hathaway and M. Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014), pp. 399–405. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 145–148.]
- K. Musalo, ‘Claims for Protection Based on Religion or Belief’, *International Journal of Refugee Law*, vol. 16, no. 2 (2004), pp. 165–226.

Extended

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 262–274.
- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 379–387.

Editor’s Note

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

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

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 72–73. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 45–46.]

J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 397–399. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 144–145.]

Extended

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

II.2.1.4.5 Particular Social Group

Main Debates

Must the group be defined by its protected characteristics and/or by society’s perception of it? 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

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

Soft Law

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

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

UNHCR Documents

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

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

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

UNHCR, 'Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement', Need to Know Guidance 2, 2011.

UNHCR 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity', 23 October 2012.

UNHCR, '*Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*', 7 April 2006, HCR/GIP/06/07.

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).
- R. v. Immigration Appeal Tribunal ex parte Shah; Islam v. Secretary of State for the Home Department*, (1999) 2 AC 629. (UK judicial decision holding Pakistani women accused of adultery feared persecution based on their social group).
- A and Another v. Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997, available at: <http://www.refworld.org/docid/3ae6b7180.html> (Australian High Court decision on forced sterilization under China’s one child policy constitutes persecution on account of social group. Establishes the ‘social perception’ approach).
- Matter of Kasinga*, 21 Immigration & Nationality Decisions 357 (BIA 1996). (US administrative decision recognizing as a social group women who fear female genital mutilation).
- Matter of Acosta*, 20 Immigration & Nationality Decisions 211 (BIA 1985). (US administrative decision concerning group sharing common immutable characteristic).

Readings

Core

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 423–436.

- M. Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, UNHCR Legal and Protection Policy Research Series, PPLA/2012/02, August 2012.
- T. Aleinikof, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group" Determination', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 263–311.

Extended

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 436–461.
- B. Lobo, Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom, *Georgetown Immigration Law Journal*, vol. 26, no. 2 (2012), pp. 361–404.
- J. Wessels, *HJ (Iran)* and *HT (Cameroon)*—Reflections on a New Test for Sexuality-based Asylum Claims in Britain, *International Journal of Refugee Law*, vol. 24, no. 4 (2012), pp. 815–839.
- M. McPherson, L. Horowitz, D. Lusher, S di Giglio, L. Greenacre, & Y. Saalman, 'Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-seeking Women in Australia', *Journal of Refugee Studies* (2011), vol. 24, no. 2, pp. 323–347.
- N. LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary', *International Journal of Refugee Law*, vol. 22, no. 2 (July 2010), pp. 173–208.
- N. LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines', *International Journal of Refugee Law*, vol. 19, no. 2 (July 2007), pp. 169–214.
- US DHS, 'Written Clarification Regarding the Definition of "Particular Social Group"', 13 July 2010.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 390–398.

II.2.1.4.6 Political Opinion

Main Debate

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

Main Point

'Political' depends on the context

- neutrality in civil war
- withholding support from the government

Soft Law

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

Cases

Core

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).

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

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

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

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 86–90, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 48–49, 54–59].
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 405–423. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 149–157.]
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Extended

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 268–274.
- C. Bailliet, ‘Assessing *Jus ad Bellum* and *Jus in Bello* within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum’, *Georgetown Immigration Law Journal*, vol. 20, no. 3 (2006), pp. 337–384.
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- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 398–404.

UNHCR Documents

- UNHCR, ‘Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees’, 3 December 2013, HCR/GIP/13/10.

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

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

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

Cases

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

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 332–342.
- ‘The Michigan Guidelines on the Internal Protection Alternative’, April 1999.

Extended

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- J. Hathaway and M. Foster, ‘International Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’, in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 357–417.
- N. Kelley, ‘Internal Flight/Relocation/Protection Alternative: Is It Reasonable?’, *International Journal of Refugee Law*, vol. 14, no. 1 (2002), pp. 4–44.
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- A. Zimmerman, C. Mahler, ‘Article 1A, Paragraph 2’, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 445–460.
- ‘The Michigan Guidelines’.

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

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

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

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

Rome Statute of the International Criminal Court, 17 July 1998. 2187 U.N.T.S. 90.

Soft Law

'The Michigan Guidelines on the Exclusion of International Criminals', March 2013.

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

UNHCR Documents

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

UNHCR, 'Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees', March 2009.

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

UNHCR, 'Note on the Applicability of Art. 1D of the 1951 Convention relating to the Status of Refugees to o Palestinian Refugees', October 2002.

UNHCR, '*UNHCR Statement on Article 1F of the 1951 Convention*', July 2009.

UNHCR, '*Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*', September 2003.

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 those 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

rebel group that committed many atrocities should not be excluded because he acted under duress).

Readings

Core

- G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 425–478.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 421–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 205–229.]
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 499–537. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 205–229.]

Extended

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 537–598.
- European Council on Refugees and Exiles, 'Position on Exclusion from Refugee Status', March 2004, *International Journal of Refugee Law*, vol. 16, no. 2 (2004), pp. 257–285.
- M. Gallagher, 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum', *International Journal of Refugee Law*, vol. 13, no. 3 (2001), pp. 310–353.
- M. Gottwald, 'Asylum Claims and Drug Offences: The Seriousness Threshold of Art. 1F(b) and the UN Drug Conventions', *International Journal of Refugee Law*, vol. 18, no. 1 (2006), pp. 81–117.
- J. Hathaway, and C. Harvey, 'Framing Refugee Protection in the New World Disorder', *Cornell International Law Journal*, vol. 34, no. 2 (2001), pp. 257–320.
- S. Kapferer, 'Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection', *Refugee Survey Quarterly*, vol. 27, no. 3 (2008), pp. 53–75.

- J. Rikhof, 'War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context', *International Journal of Refugee Law*, vol. 21, no. 3 (2009), pp. 453–507.
- G. Gilbert, 'Running Scared since 9/11: refugees, UNHCR and purposive approach to treaty interpretation', in J. Simeon (ed), *Critical Issues in International Refugee Law* (Cambridge University Press, 2010), pp. 85–118.
- J. Simeon, 'Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11', *Refugee Survey Quarterly*, vol. 29, no. 4 (2010), pp. 104–137.
- A. Zimmermann, P Wennholz, 'Article 1 F', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 579–610.

Editor's Note

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

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

II.2.1.7 Cessation of Refugee Status

II.2.1.7.1 Cessation Grounds

Main Debates

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

Main Point

Criteria for determining ceased circumstances

Treaties

- Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.
Art. 1.C.
Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

Soft Law

- UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 118–139.
UNHCR EXCOM, 'Cessation of Status', Conclusion No. 69 (XLIII), 1992.

UNHCR Documents

- UNHCR, 'Guidelines on Exemption Procedures in respect of Cessation Declarations', December 2011.
UNHCR, 'The Cessation Clauses: Guidelines on their Application', 1999.
UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Art. 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees', February 2003.
UNHCR, 'Summary Conclusions: Cessation of Refugee Status, Expert Roundtable, Lisbon', May 2001.
UNHCR, 'Note on Cessation Clauses', 30 May 1997, EC/47/SC/CRP.30.

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).
- Hoxha & Anor v. Secretary of State for the Home Department* [2005] UKHL 19, 10 March 2005 (UK House of Lords decision arguing for a 'strict' and 'restrictive' approach to cessation clauses in general).
- Minister for Immigration and Multicultural and Indigenous Affairs v. Qaah of 2004*, [2006] HCA 53, 15 November 2006 (Australia). (Australian judicial decision holding that government can expel Afghan granted temporary protection visa

only if government establishes that the safe conditions in the country of origin are settled and durable).

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

Readings

Core

- J. Fitzpatrick and R. Bonoan, 'Cessation of Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 491–544.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 139–142. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 84–87.]
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 462–499. [J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 191–205, 209–211.]
- D. Milner, 'Exemption from Cessation of Refugee Status in the Second Sentence of Art. 1C(5)/(6) of the 1951 Refugee Convention', *International Journal of Refugee Law*, vol. 16, no. 1 (2004), pp. 91–107.

Extended

- S. Kneebone, M O'Sullivan, 'Article 1C', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 483–535.
- M. O'Sullivan, 'Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons from Australia', *International Journal of Refugee Law*, vol. 20, no. 4 (2008), pp. 586–610.
- M. E. Cwik, 'Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice', *Vanderbilt Journal of Transnational Law*, Vol.44 (2011), pp. 711–743.

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

UNHCR, 'Guidelines on Exemption Procedures in respect of Cessation Declarations', December 2011.

UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', April 2013.

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

J. Fitzpatrick and R. Bonoan, 'Cessation of Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 514–517, 538–542.

J. Hathaway, 'The Right of States to Repatriate Former Refugees', *Ohio State Journal on Dispute Resolution*, vol. 20 (2005), pp. 175–216.

II.2.2 Access to Territory 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

UNHCR, '*Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*', May 2013.

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).

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.).

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).

Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al., (1993) 509 U.S. 155; 113 S. Ct. 2549, United States Supreme Court, 21 June 1993 (U.S. Supreme Court opinion ruling that interdiction on the high seas did not violate national or international law).

Readings

Core

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

Extended

S. Hamood, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', *Journal of Refugee Studies*, vol. 21 (2008), pp. 19–42.

G. Noll, 'Article 31', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011), pp. 1243–1276.

- K. Wouters and M. Den Heijer, 'The *Marine I* Case: a Comment', *International Journal of Refugee Law*, vol. 22 (2010), pp. 1–19.
- G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', *International Journal of Refugee Law*, 2011 (3) pp. 443–457.
- T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).
- M. Giuffrè, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' *International Journal of Refugee Law*, 2012 (4), pp. 692–734.
- K. Long, 'In Search of Sanctuary: Border Closures, 'Safe' Zones and Refugee Protection', *Journal of Refugee Studies*, 2013 (3) pp. 458–476.

II.2.2.1 Visa Requirements

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 374–375. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 191–193.]

Cases

- R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, (Imposition of visa requirements and carrier sanctions made it almost impossible for asylum-seekers to travel without false documents.).

II.2.2.2 Carrier Sanctions

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 377–380. [G. Goodwin-Gill,

The Refugee in International Law (Oxford: Oxford University Press, 1996), pp. 191–194.]

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

- A. Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', *International Journal of Refugee Law*, vol. 20, no. 2 (July 2008), pp. 273–313.
- G. Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law?', *International Journal of Refugee Law*, vol. 17, no. 3 (2005), pp. 542–573.

Extended

- A. Shachar, 'The Shifting Border of Immigration Regulation', *Stanford Journal of Civil Rights & Civil Liberties*, vol. 3 (2007), pp. 165, reprinted in *Michigan Journal of International Law*, vol. 30, no. 3 (Spring 2009), pp. 809–839.
- T. Gammeltoft-Hansen, 'Extraterritorial migration control and the reach of human rights', in V. Chetail and C. Bauloz, *Research Handbook on International Law and Migration* (Cheltenham: Edward Elgar, 2014), pp. 113–131.

II.2.2.4 Interception and Rescue at Sea

Treaties

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

Soft Law

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

'Asylum-Seekers at Sea / Rescue at Sea' and 'Interception' in UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6th edition, June 2011.

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

UNHCR Documents

UNHCR, '*Global Initiative on Protection At Sea*', May 2014.

UNHCR, '*Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials*', 2nd Edition, December 2011.

UNHCR, '*Refugee Protection and Mixed Migration: The 10-Point Plan in Action*', February 2011.

UNHCR, '*Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Summary Conclusions ('Djibouti Conclusions')*', 5 December 2011.

UNHCR, '*Co-chairs' Summary: International Workshop on the Protection of Irregular Movements of Persons at Sea*', Jakarta, Indonesia, 21–22 April 2014.

UNHCR, '*Co-Chairs' Summary: Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea*', 4 March 2014.

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

Cases

J.H.A. v. Spain, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008.

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

- R. Barnes, ‘Refugee Law at Sea’, *International and Comparative Law Quarterly*, vol. 53, no. 1 (January 2004), pp. 47–77.
- A. Fischer-Lescano, T. Löhr, and T. Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, *International Journal of Refugee Law*, vol. 21(2009), pp. 256–296.
- B. Miltner, ‘Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception’, *Fordham International Law Journal*, vol. 30 (2006–2007), pp. 75–125.
- M. Pugh, ‘Drowning not Waving, Boat People and Humanitarianism at Sea’, *Journal of Refugee Studies*, vol. 17, no. 1 (2004), pp. 52–69.

Extended

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

Editor’s Note

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

See Section II.1.1 on non-refoulement, 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

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

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

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

UNHCR Documents

- UNHCR, 'Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers', May 2013.
- UNHCR, 'Global Consultations on International Protection, Background paper no. 1: Legal and practical aspects of the return of persons not in need of protection', May 2001.
- UNHCR, 'Global Consultations on International Protection, Background paper no. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees', May 2001.
- UNHCR, 'Global Consultations on International Protection, Background paper no. 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim', May 2001.
- UNHCR, 'Refugee Protection and Mixed Migration: The 10-Point Plan in action', Chapter 8, February 2011.
- UNHCR, 'Convention Plus Core Group on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers: Joint Statement by the Co-Chairs', 8 November 2005, FORUM/2005/7.
- UNHCR, 'Convention Plus: Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers', 11 March 2004, FORUM/CG/SM/03.
- UNHCR, 'Informal Record: Open Meeting of States and Interested Parties on Secondary, Irregular Movements of Refugees and Asylum-Seekers', (Geneva, 16 December 2003), 21 December 2003, FORUM/CG/SM/01.
- UNHCR, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers', (Lisbon Expert Roundtable, 9–10 December 2002), February 2003.
- UNHCR, 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', 31 May 2001, EC/GC/01/12.
- UNHCR, 'Global Consultations on International Protection/Regional Meetings: Conclusions', (Regional Meeting in Budapest, 6–7 June 2001), 15 June 2001, EC/GC/01/14.
- UNHCR, 'Considerations on the 'Safe Third Country' Concept', July 1996.

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

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

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

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

Extended

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

'The Michigan Guidelines'.

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

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

E. Umlas, '*Cash in hand: Urban refugees, the right to work UNHCR's advocacy activities*', 5 May 2011, PDES/2011/05, [Part of the Policy Development and Evaluation Service's New Issues in Refugee Research Series].

UNHCR, '*UNHCR Policy on Refugee Protection and Solutions in Urban Areas*', September 2009.

UNHCR, '*UNHCR Policy on Alternatives to Camps*', 22 July 2014, UNHCR/HCP/2014/9.

UN Documents

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

UN Committee on Economic, Social and Cultural Rights (CESCR), '*General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*', 6 February 2006, E/C.12/GC/18.

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

L. K. Newman, M. Dudley, and Z. Steel, 'Asylum, Detention, and Mental Health in Australia', *Refugee Survey Quarterly*, vol. 27 (2008), pp. 110–127.
University of Michigan Law School, *The Michigan Guidelines on the Right to Work (2010)*, 16 March.

Extended

- C. Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing', *International Journal of Refugee Law*, vol. 20 (2008), pp. 611–636.
- P. Kissoon, 'From Persecution to Destitution: A Snapshot of Asylum Seekers' Housing and Settlement Experiences in Canada and the United Kingdom', *Journal of Immigrant & Refugee Studies*, vol. 8, no. 1 (2010), pp. 4–31.
- K. Vitus and H. Lidén, 'The Status of the Asylum-seeking Child in Norway and Denmark: Comparing Discourses, Politics and Practices', *Journal of Refugee Studies*, vol. 23 (2010), pp. 62–81.
- M. Janmyr, *Protecting Civilians in Refugee Camps: Unwilling and Unable States, UNHCR and International Responsibility*, (Leiden: Martinus Nijhoff Publishers, 2014).

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 EXCOM, Conclusion No. 8 ‘Official Records of the General Assembly, Thirty-Second Session’, Supplement No. 12, A/32/12/Add.1, para. 53(6)(e).

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

UNHCR Documents

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

UNHCR, ‘UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures’, 21 May 2010.

UNHCR, ‘Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Detailed Research on Key Asylum Procedures Directive Provisions’, March 2010.

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

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 528–535. [G. Goodwin-Gill,

The Refugee in International Law (Oxford: Oxford University Press, 1996), pp. 324–332.]

- J. Simeon, 'A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration', *International Journal of Refugee Law*, vol. 22, no. 1 (March 2010), pp. 72–103.

Extended

- S. Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-utopian World', *Georgetown Immigration Law Journal*, vol. 14 (2000), pp. 619–640.

Editor's Note

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

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

Soft Law

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

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 53–60. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 34–40.]
- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 110–122.

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 likelihood'.)
- INS v. Cardoza-Fonseca* 480 US 421 (1987). (US judicial decision stating that one in ten probability of harm can constitute well-founded fear.)
- Immigration and Naturalization Service v. Stevic*, [1984] 467 US 407, The Supreme Court of the United States (US judicial decision stating that a noncitizen who establishes a 'clear probability' of persecution cannot be removed, even though denied asylum).
- 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

- J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd edn, (Cambridge: Cambridge University Press, 2014), pp. 136–161.
- R. Byrne, ‘Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals’, *International Journal of Refugee Law*, vol. 19, no. 4 (2007), pp. 609–638.
- H. Cameron, ‘Refugee Status Determinations and the Limits of Memory’, *International Journal of Refugee Law*, vol. 22, no. 4, (December 2010) pp. 469–511.
- J. Herlihy, K. Gleeson, and S. Taylor, ‘What Assumptions About Human Behaviour Underlie Asylum Judgments?’, *International Journal of Refugee Law*, vol. 22, no. 3 (2010), pp. 351–366.
- J. Sweeney, ‘Credibility, Proof and Refugee Law’, *International Journal of Refugee Law*, vol. 21, no. 4 (2009), pp. 700–726.

Extended

- S. Rempel, ‘Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason’, *Georgetown Immigration Law Journal* (Winter 2011), vol. 25, no. 2, pp. 377–406.

- S. Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective', *International Journal of Refugee Law*, vol. 19, no. 2 (2007), pp. 273–292.
- Refugee Review Tribunal (Australia), 'Guidance on the Assessment of Credibility', October 2006.
- J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers', *International Journal of Refugee Law*, vol. 13, no. 3 (July 2001), pp. 293–309.
- A. Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context', in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, IARLJ Conference* (Ottawa: International Association of Refugee Law Judges, 14–16 October 1998).
- W. Kälin, 'Troubled Communication: Cross-cultural Misunderstandings in the Asylum Hearing', *International Migration Review*, vol. 20, no. 2 (1986), pp. 230–241.

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

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

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

M. Jakobsen, S. Thoresen, & L. Johansen, 'The Validity of Screening for Post-traumatic Stress Disorder and Other Mental Health Problems among Asylum Seekers from Different Countries', *Journal of Refugee Studies* (2011), vol. 24, no. 1, pp. 171–186.

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

Extended

J. Herlihy, 'Evidentiary Assessment and Psychological Difficulties', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden: Martinus Nijhof Publishers, 2005), pp. 123–140.

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

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

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

Soft Law

Committee on the Rights of the Child, General Comment No. 6, 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin', CRC/GC/2005/6, 1 September 2005.

UNHCR EXCOM, 'Children at Risk', Conclusion No. 107 (LVIII), 2007.

UNHCR Documents

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

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

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

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

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

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

Extended

- L. Ottosson, M. Eastmond, & I. Schierenbeck, 'Safeguarding a Child Perspective in Asylum Reception: Dilemmas of Children's Caseworkers in Sweden', *Journal of Refugee Studies* vol. 26, no. 2, (2013) pp. 247–264.
- A Lundberg & L. Dahlquist, 'Unaccompanied Children Seeking Asylum in Sweden: Living Conditions from a Child-Centred Perspective', *Refugee Survey Quarterly* (2012) vol. 31, no. 2, pp. 54–75.
- Department of Justice (U.S.), '*Guidelines for Children's Asylum Claims*', 10 December 1998.
- Immigration and Refugee Board of Canada, '*Child Refugee Claimants: Procedural and Evidentiary Issues*', 30 September 1996.
- S. Maloney, 'Transatlantic Workshop on Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe', *Journal of Refugee Studies*, vol. 15, no. 1 (March 2002), pp. 102–119.
- Refugee Review Tribunal (Australia), '*Guidelines on Children Giving Evidence*', 2002.
- A. Zimmerman, C. Mahler, 'Article 1A, Paragraph 2', in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), pp. 404–408.

Editor's Note

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

II.2.5.2.3.2.2 Women

Treaties

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S. 513.
- 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 EXCOM, 'Women and Girls at Risk', Conclusion No. 105 (LVII), 2006.

UNHCR Documents

UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002.

UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006.

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.

UNHCR, *Ensuring Gender Sensitivity in the Context of Refugee Status Determination and Resettlement. Module 2: Ensuring Gender Sensitivity in Refugee Status Determination – Procedural Issues (Resource Package)*, October 2005.

UNHCR, *Ensuring Gender Sensitivity in the Context of Refugee Status Determination and Resettlement. Module 1: Ensuring Gender Sensitivity in Refugee Status Determination (Resource Package)*, October 2005.

Readings

Core

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

A. Edwards, 'Age and gender dimensions in international refugee law', in Feller, Türk and Nicholson, *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), pp. 46–80.

R. Haines, 'Gender-Related Persecution', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 319–350.

V. Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*. September 2012, PPLA 2012/06 [Part of the *Legal and Protection Policy Research Series* for the Division of International Protection].

Extended

‘Asylum and Withholding Definitions’, *Federal Register*, 65 (7 December 2000): 76588–76598.

Department of Immigration and Multicultural Affairs (Australia), *Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers*, July 1996.

Immigration and Refugee Board (Canada), *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, March 1993.

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

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

Editor’s Note

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

II.2.6 Content of Refugee Status

Main Debates

Should refugees enjoy the rights of citizens?

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

Main Points

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

Significance and definition of lawful stay in host country

Refugee specific standards v. universal human rights standards

Readings

Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 524–527. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 307–315].
- J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 156–160, 730–739, 786–828, 905–912.
- A. Edwards, ‘Human Rights, Refugees, and the Right “To Enjoy” Asylum’, *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.

Extended

- J. Field, ‘Bridging the Gap Between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context’, *International Journal of Refugee Law*, vol. 22, no. 4 (2010), pp. 512–557.
- Overseas Development Institute (ODI), ‘Realising Protection. The Uncertain Benefits of Civilian, Refugee and IDP Status’, *Humanitarian Policy Group Report 28*, September 2009.

Editor’s Note

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

II.2.7 Detention

Main Debates

Is detention 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

- Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.
Arts 26, 31, 36.
- International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 9.

Soft Law

- Human Rights Committee, 'General Comment No. 35: Article 9: Liberty and Security of Person', CCPR/C/GC/35, 28 October 2014.
- U.N. Human Rights Council, 'Report of the Working Group on Arbitrary Detention', A/HRC/10/21, 16 February 2009.
- UNHCR EXCOM, 'Detention of Refugees and Asylum-Seekers', Conclusion No. 44 (XXXVII) – 1986.
- Human Rights Committee, 'General Comment No. 27, Freedom of Movement (Art.12)', U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), 2 November 1999.
- 'Rules for the Protection of Juveniles Deprived of Their Liberty', UN General Assembly Resolution, A/RES/45/113, 14 December 1990.
- Commission on Human Rights United Nations Working Group on Arbitrary Detention, Deliberation No. 5, 'Situation Regarding Immigrants and Asylum Seekers', E/CN.4/2000/4, Annex II, 28 December 1999.
- 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', UN General Assembly Resolution, A/RES/43/173, 9 December 1988.

UNHCR Documents

- UNHCR, 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention', 2012.
- UNHCR and OHCHR, 'Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions', July 2011.
- UNHCR, '*Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees*', 2014–2018, 2014.
- UNHCR, '*Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*', 2014.

Cases

- Zimbabwe Exiles Forum v. Minister of Home Affairs*, 27294/2008, [2011] ZAGPPHC 29, 17 February 2011, (High Court of South Africa (North Gauteng, Pretoria)) (unlawful to arrest and detain asylum seekers without verifying their status or granting access to the refugee system).
- Refugee Council New Zealand Inc., The Human Rights Foundation of Aotearoa New Zealand Inc., and 'D' v. Attorney General*, M1881-AS01, 31 May 2002 (High Court of New Zealand). (NZ judicial decision limiting detention to rare cases where necessary to prevent flight or commission of crime).
- C. v. Australia*, HRC, Views of 28 October 2002, no. 900/1999, (lengthy detention causing mental illness is violation of Art. 9).
- Torres v. Finland*, HRC, Views of 2 April 1990, no. 291/1988 (failure of state to provide alien in detention for more than five days a right of access to the court proceedings for judicial review of the lawfulness of his detention constitutes a violation of Art. 9).
- A. v. Australia*, HRC, Views of 30 April 1997, no. 560/1993. (absence of individual consideration of reasons for detention of asylum seekers constitutes a violation of Art. 9).

Readings

Core

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

Extended

- A. Edwards, 'Less Coercive Means': The Legal Case for Alternatives to Detention of Refugees, Asylum-Seekers and Other Migrants' *Research Companion on Migration Theory and Policy*. Ed. S. Juss. Ashgate, 2012.
- A. Edwards, 'Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective', *Equal Rights Review*, vol. 7 (2011), pp. 117–142.
- M. Flynn, 'Who must be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy', *Refugee Survey Quarterly* (2012), vol. 31, no. 3, pp. 40–68.

- A. Nethery, B. Rafferty-Brown, & S. Taylor, 'Exporting Detention: Australia-funded Immigration Detention in Indonesia', *Journal of Refugee Studies* (2013), vol. 26, no. 1, pp. 88–109.
- M. Bull, E. Schindeler, D. Berkman, & J. Ransley, 'Sickness in the System of Long-term Immigration Detention', *Journal of Refugee Studies* (2013), vol. 26, no. 1, pp. 47–68.
- R. Levitan and S. Tabak, 'LGBTI Migrants in Immigration Detention', *Harvard Journal of Law and Gender*, vol. 37, p.1.
- A. Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', April 2011, *PPLA/2011/01*.Rev.1.
- C. Costello, 'Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva', June 2013, *PPLA/2013/02*.
- Amnesty International, 'Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-seekers and Refugees', November 2007.
- J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 413–439.
- A. Naumik, 'International Law and Detention of U.S. Asylum Seekers: Contrasting *Matter of D-J* – with the United Nations Refugee Convention', *International Journal of Refugee Law*, vol. 19, no. 4 (2007), pp. 661–702.
- S. Vohra, 'Detention of Irregular Migrants and Asylum Seekers', in R. Cholewinski and R. Perruchoud (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: T.M.C. Asser Press, 2007), pp. 49–69.

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

UNHCR Documents

UNHCR, '*Guidelines on Temporary Protection or Stay Arrangements*', February 2014.

UNHCR, 'Roundtable on Temporary Protection', Summary Conclusions, International Institute of Humanitarian Law, San Remo, Italy, 19–20 July

2012, reproduced in *International Journal of Refugee Law*, Vol.25, No.1 (2013), pp. 178–186.

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

Readings

Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, (Oxford: Oxford University Press, 2007), pp. 340–342. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 196–202.]

Extended

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

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

J-F. Durieux and A. Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees', *German Yearbook of International Law* Vol.47 (2004), pp.105–159.

A. Edwards 'Temporary Protection, Derogation and the 1951 Refugee Convention' *Melbourne Journal of International Law*, vol. 13, no.2 (2012), pp. 595–635.

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 EXCOM, 'General Conclusion on International protection', No. 89 (LI), 2000.

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

UNHCR Documents

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

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

UNHCR, 'Coping with Contemporary Conflicts: 'Conflict refugees' and the 1951 Convention protection regime', Opening lecture, 23 April 2013.

UNHCR, 'Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration'; Roundtable 15 and 16 October 2013, Montevideo, Uruguay, 7 July 2014.

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- V. Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*, September 2012, PPLA 2012/06 [Part of the *Legal and Protection Policy Research Series for the Division of International Protection*].

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

II.3.3 Universal Human Rights Instruments Relevant to Protection

Main Debates

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

A. Edwards, 'International Refugee Law', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2014), pp. 512–526.

J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 119–123.

II.3.3.1 Universal Declaration of Human Rights

Main Debate

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

Main Point

The legal and political significance of the Universal Declaration

Soft Law

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

Readings

Core

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

Extended

M. Kjaerum, 'Art. 14', in G. Alfredson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (The Hague: Nijhoff, 1999), pp. 279–296.

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

A. Edwards, 'International Refugee Law', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2014), pp. 512–526.

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

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

Soft Law

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

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

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

Cases

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

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

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).

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

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

- J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 119–123.
- A. Edwards, ‘Peter Pan’s fairies and genie bottles: UNHCR, UN human rights treaty bodies and “complementary supervision”, in J.C. Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013), pp. 159–181.
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- R. Plender and N. Mole, ‘Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments’, in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.

Extended

- J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 124–147.
- C. W. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), pp. 359–423.

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

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

Cases

Core

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

S.A. v. Denmark, CAT 339/2008, 15 November 2010. (return to Iran in the deteriorating situation since the elections of June 2009 would constitute a

- breach of art. 3 with regard to an individual who had suffered torture 7 years earlier for monarchist political activities).
- M.G. v. Sweden*, CAT 349/2008, 11 Nov. 2010. (return of low level, but long-time PKK member to Turkey where she is likely to be imprisoned under anti-terrorism laws would constitute a breach of art. 3).
- E.N. v. Sweden*, CAT 322/2007, 14 May 2010. (return of woman and her minor daughter to Democratic Republic of the Congo where widespread violence against women exists would constitute a breach of art. 3).
- A.T. v. France*, CAT 300/2006, 11 May 2007. (violation of the Convention when France charged dual French/Tunisian national of terrorism, revoked his French citizenship, and expelled him to Tunisia while his asylum and CAT claims were still pending).
- C.A.R.M. v. Canada*, CAT 298/2006, 24 May 2007. (discrepancies in testimony about threats from Mexican government officials and drug cartel were due to misunderstandings, but insufficient evidence of real, foreseeable, personal risk).
- E.P. v. Azerbaijan*, CAT 281/2005, 1 May 2007. (violation of the Convention when Azerbaijan disregarded Committee's request for interim measures and expelled applicant who had received refugee status in Germany back to Turkey where she had previously been detained and tortured).
- E.R.K. & Y.K. v. Sweden*, CAT 270 & 271/2005, 30 April 2007. (no violation of the Convention when claimants were expelled to Azerbaijan based on evidence that many supporting documents were false).
- C.T. & K.M. v. Sweden*, CAT 279/2005, 22 January 2007. (Rwandan women repeatedly raped in detention in Rwanda by state officials have substantial grounds to fear torture if returned while ethnic tensions remain high; complete accuracy seldom to be expected of victims of torture, and inconsistencies in testimony do not undermine credibility if they are not material).
- V.L. v. Switzerland*, CAT 262/2005, 20 November 2006. (late disclosure in asylum proceedings of rape does not impair claimant's credibility).
- Agiza v. Sweden*, CAT 233/2003, 20 May 2005. (*non-refoulement* under CAT is absolute even in context of national security concerns; insufficient diplomatic assurances were obtained by sending country).
- Mutombo v. Switzerland*, CAT 13/1993, 27 April 1994. (no violation of the Convention where applicant has established existence of gross violations of

human rights in country of return, absent sufficient evidence of the applicant's 'personal risk').

Tala v. Sweden, CAT 43/1996, 15 November 1996. (contradictions and inconsistencies in testimony of asylum seeker attributed to post-traumatic stress disorder resulting from torture).

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

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

Extended

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

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

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

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

Extended

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

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

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

Main Debate

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

Main Points

Definition of a child
 Vulnerability of children
 Unaccompanied minors

Treaties

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

Soft Law

- Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 1 September 2005, CRC/GC/2005/6.
- 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, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 213–219.
- UNHCR EXCOM, 'Children at Risk', Conclusion No. 107 (LVIII), 2007.
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- UNHCR EXCOM, 'Refugee Children', No. 59 (XL), 1989.
- UNHCR EXCOM, 'Refugee Children and Adolescents', No. 84 (XLVIII), 1997.

UNHCR Documents

- UNHCR, 'Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 22 December 2009.
- UNHCR, 'Guidelines on Determining the Best Interests of the Child', May 2008.
- UNHCR, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked', 7 April 2006.
- UNHCR, '*Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*', 3 December 2013, HCR/GIP/13/10.
- UNHCR and UNICEF, '*What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*', October 2014.

Readings

Core

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Extended

K. Touzenis, *Unaccompanied Minors: Rights and Protections* (Rome: Xledizioni, 2006). Separated Children in Europe Programme, *SCEP Statement of Good Practice*, 4th Revised Edition, March 2010.

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

Main Debates

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

Main Points

Actors for protection

Nexus between international refugee law and international humanitarian law

Treaties

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

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

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

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

Convention on Cluster Munitions, 30 May 2008.

Soft Law

31st International Conference of the Red Cross and Red Crescent, 'Resolution on Strengthening Legal Protection for Victims of Armed Conflicts', 1 December 2011.

UN Security Council, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict', 22 November 2013.

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

UNHCR and ICRC Documents

- ICRC, 'Strengthening legal protection for victims of armed conflicts – Report', 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011.
- UNHCR, 'Lessons from Arusha and Cape Town: UNHCR's Perspective on the Relationship between IHL and International Refugee Law', (paper presented by Alice Edwards, Senior Legal Coordinator, UNHCR, at the RSC and RLI conference, All Souls College, Oxford), 12 February 2012.
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- UNHCR, 'Note on Military and Armed Attacks on Refugee Camps and Settlements', 10 August 1987.

Cases

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Readings

Core

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- V. Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, PPLA/2012/05.
- S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', *International Review of the Red Cross*, vol. 843 (September 2001), pp. 651–674.
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Extended

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- H. Lambert, 'Causation in International Protection from Armed Conflict', in D. J. Cantor and J-F. Durieux *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, (Brill/Nijhoff, 2014), pp. 57–78.
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- S. Ojeda, 'Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects', *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 58–66.
- A. C. Trindade, 'Approximations and Convergencies Revisited: Ten Years of Interaction Between International Human Rights Law, International Refugee Law, and International Humanitarian Law', in G. Cohen-Jonathan and J.-F. Flauss (eds), *Le Rayonnement International de la Jurisprudence de la Cour Européenne des Droits de l'Homme* (Bruxelles: Bruyant, 2005), pp. 101–138.

Editor's Note

See Section II.2.1.6 concerning war crimes and other serious international crimes as bases for exclusion from refugee status.

II.4 Internally Displaced Persons

Main Debates

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

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

Main Points

Emergence of IDPs as a category of individuals in need of protection in the 1990s

International border as a defining criterion

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

Treaty

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted on 23 October 2009 and entered into force on 6 December 2012.

Soft Law

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

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

UNHCR Documents

UNHCR, *Internal Displacement: Responsibility and Action*, Handbook for Parliamentarians, No. 20, October 2013.

Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons*, June 2010.

Readings

Core

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Extended

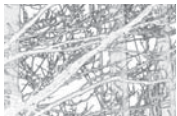
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Editor's Note

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

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.

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

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

Cases

African Institute for Human Rights and Development (on behalf of the Sierra Leonean Refugees in Guinea) v. Guinea, Communications No. 249/2002 (2004), AHRLR 5 (2004), pp. 57–66.

Recontre Africaine Pour la Defence des Droits de l'Homme v. Zambia, Communication No. 71/92(1996), AHRLR 1(2000), pp. 321–325.

Organisation Mondiale contre la torture v. Rwanda, Communications 27/89, 49/91 and 99/93 (1996), AHRLR 1(2000), pp. 282–286.

Soft Law

M. Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status'. January 2013, PPLA 2013/01 [Part of the *Legal and Protection Policy Research* Series for the Division of International Protection].

'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', Global. Consultations on International Protection, 1st mtg. U.N. Doc. EC/GC/01/4 (19 February 2001).

The African Charter on Democracy, Elections and Governance, 30 January 2007. Protocol on Amendments to the Constitutive Act of the African Union, 11 July 2003. Constitutive Act of the African Union, 11 July 2000.

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

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

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- OUA Doc BR/COM/ XV/55.90. The Assembly of Heads of State and Government of the Organization of African Unity, 12 June 1983.
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- UNHCR, EXCOM on Protection of Asylum Seekers in Situations of Large-Scale Influx, Conclusion No. 22 (XXXII), 1981.

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- M. Sharpe, 'Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011', *African Journal of International and Comparative Law*, vol. 21 (2013), p. 50.
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- G. Okoth-Obbo, 'Thirty years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', *Refugee Survey Quarterly*, vol. 20 (2001), pp. 79–138.
- A. Zimmermann and C. Mahler, 'General Provisions' in Zimmermann A. (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary*, (2011), pp. 185–203.

Extended

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

- M. Katzarova and A. Korkeakivi, *African Exodus-Refugee Crisis, Human Rights and the 1969 OAU Convention: a Report of the Lawyers Committee for Human Rights* (New York: Lawyers Committee for Human Rights, 1995).
- M. R. Rwelamira, 'Two decades of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa', *International Journal of Refugee Law Review*, 1(1989), pp. 557–561.

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

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

Readings

Core

- A. Edwards, 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, vol. 14 (2006), pp. 228–230.
- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal*, vol. 58, no. 1 (2012), pp. 19–26.

Extended

- T. Schreier, 'The OAU Refugee Convention Definition' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 86–88.
- M. Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On', *South African Journal of Human Rights*, vol. 21, no. 3 (2005), pp. 430–431.

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

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

Readings

Core

M. Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On', *South African Journal of Human Rights*, vol. 21, no. 3 (2005), pp. 432–434.

Extended

T. Schreier, 'The OAU Refugee Convention Definition' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 88–90.

T. Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' *Refuge*, vol. 24, no. 2, p. 53.

G. Goodwin-Gill, *The Refugee in International Law*, (Oxford: Oxford University Press, 1998), pp. 309–310.

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

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

Readings

Core

A. Edwards, 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, vol. 14 (2006), pp. 211–216.

Extended

- T. Schreier, 'The OAU Refugee Convention Definition' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 78–80.
- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal* vol. 58, no. 1 (2012), pp. 17–19.
- M. Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On', *South African Journal of Human Rights*, vol. 21, no. 3 (2005), pp. 421–429.

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
10 September 1969, 1001 U.N.T.S. 45.

UNHCR Document

M. Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status'. January 2013, PPLA 2013/01 [Part of the *Legal and Protection Policy Research Series* for the Division of International Protection].

Readings

Core

A. Edwards, 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, vol. 14 (2006), pp. 216–228.

Extended

- T. Schreier, 'The OAU Refugee Convention Definition' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 80–85.
- M. Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On', *South African Journal of Human Rights*, vol. 21, no. 3 (2005), pp. 421–429.

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
10 September 1969, 1001 U.N.T.S. 45.

Readings

Core

- UNHCR, 'Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees', 23 July 2003, HCR/GIP/03/04, para 5.
- University of Michigan Law School, *The Michigan Guidelines on the Internal Protection Alternative*, 11 April 1999, para 7.

Extended

- T. Schreier, 'The OAU Refugee Convention Definition' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 85–86.

T. Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' *Refuge*, vol. 24, no. 2, p. 53.

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

- B. Rutinwa, 'Prima facie status and refugee protection', *New Issues in Refugee Research*, Working paper No. 69, 24 October 2002.
- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal*, vol. 58, no. 1 (2012), pp. 17–19.
- A. Edwards, 'Refugee Status Determination in Africa', *African Journal of International and Comparative Law*, vol. 14, (2006), pp. 216–228.
- G. Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', *Refugee Survey Quarterly*, vol. 20, no. 1 (2001), pp. 118–122.

Extended

- T. Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' *Refuge*, vol. 24, no. 53, pp. 55–56.

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

- B. Rutinwa, 'The end of asylum? The changing nature of refugee policies in Africa', *New Issues in Refugee Research*, Working paper No. 5, 10 May 1999, pp. 5–6.
- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal*, vol. 58, no. 1 (2012), pp. 11–12.
- G. Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' *Refugee Survey Quarterly*, vol. 20, no. 1 (2001), pp. 118–122.

Extended

- F. Khan, 'The principle of non-refoulement' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014), pp. 3–19.
- O. Bueno, 'Perspectives on *Refoulement* in Africa', Canadian Council for Refugee Conference, Toronto, June 17, 2006.

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

G. Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' *Refugee Survey Quarterly*, vol. 20, no. 1 (2001), pp. 128–135.

J. Crisp, 'Africa's refugees: patterns, problems and policy challenges', *New Issues in Refugee Research*, Working paper No. 28 (2000).

Extended

M. Katarova and A. Korkeakivi, *African Exodus-Refugee Crisis, Human Rights and the 1969 OAU Convention: A Report of the Lawyers Committee for Human Rights* (New York: Lawyers Committee for Human Rights, 1995).

III.2.4 Burden-sharing

Main Debate

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

Main Points

While Article 20 of 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

UNHCR, 'Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR', 7 June 2004, EC/54/SC/CRP.11.

UNHCR, 'Global Consultations on International Protection/Third Track: Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', 19 February 2001, EC/GC/01/7.

UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements', February 2014.

Readings

Core

- A. Suhrke, 'Burden-sharing during refugee emergencies: The logic of the collective versus national action', *Journal of Refugee Studies*, vol.11, no. 4 (1998), pp. 396–415.
- G. Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', *Refugee Survey Quarterly*, vol. 20, no. 1 (2001), pp. 91–96.
- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal*, 58, no. 1 (2012) 58:1, pp. 13–17.
- B. Rutinwa, 'The end of asylum? The changing nature of refugee policies in Africa', *New Issues in Refugee Research*, Working paper No. 5, 10 May 1999, pp. 5–6.

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

UNHCR, 'Policy Framework and Implementation Strategy: UNHCR's Role in Support of the Return and Reintegration of Displaced Populations', August 2008.

UNHCR, 'UNHCR's Role in Support of the Return and Reintegration of Displaced Populations: Policy Framework and Implementation Strategy', 11 February 2008.

UNHCR, 'Legal Safety Issues in the Context of Voluntary Repatriation', EC/54/SC/CRP.12, 7 June 2004.

UNHCR, *Handbook for Repatriation and Reintegration Activities*, May 2004.
UNHCR, 'Global Consultations on International Protection/Third Track: Voluntary Repatriation', EC/GC/02/5, 25 April 2002.

Readings

Core

- M. Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' *McGill Law Journal*, vol. 58, no 1, (2012), pp. 13–17.
- G. Okoth-Obbo, 'Thirty Years on: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', *Refugee Survey Quarterly*, vol. 20, no. 1, (2001), pp. 122–128.

Extended

- B. Harrell-Bond, 'Repatriation: Under what Conditions is it the Most Desirable Solution for Refugees? An Agenda for Research', *African Studies Review*, vol. 32, (1989).
- M. Zieck, *UNCHR and Voluntary Repatriation of Refugees: A Legal Analysis*, (The Hague: Martinus Nijhoff Publishers, 1997).

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

UNHCR, *Clinical Guidelines for antiretroviral therapy management for displaced populations Southern Africa*, 2007.

Readings

Core

B. Rutinwa, 'Asylum and Refugee policies in Southern Africa: A historical perspective', Paper presented at SAMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2003.

Extended

C. D'Orsi, *Specific Characteristics and Challenges of Refugee and Asylum-seeker Protection in Sub-Saharan Africa: Lessons Learnt in Search of a Better Future*, (2013).

III.3.1.1 South Africa

Legislation

Refugees Act 130 of 1998.

Immigration Act 13 of 2002.

The South African Final Constitution of 1996.

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

Somali Association of South Africa and others v. Limpopo Department of Economic Development, Environment and Tourism, (48/2014) [2014] ZASCA 143, South Africa: Supreme Court of Appeal, 26 September 2014.

Bula and others v. Minister of Home Affairs and others, 2012 (4) SA 560 (SCA).

Arsa v. Minister of Home Affairs and others, 2012(4) SA 544 (SCA).

Ersumo v. Minister of Home Affairs and others, 2012 (4) SA 581 (SCA).

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

Minister of Home Affairs and Others v. Watchenuka and Another, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003.

Readings

Core

J. Handmaker, L. A. De La Hunt and J. Klaaren (eds), *Advancing Refugee Protection in South Africa* (New York: Berghahn Books, 2008).

Extended

- F. Khan and T. Schreier (eds.), *Refugee Law in South Africa*, (Cape Town: Juta, 2014).
- F. Khan, 'Reunification of the Refugee Family in South Africa: A Legal Right?' *Refugee*, vol. 28, no. 2, pp. 77–91.
- F. Khan, 'Interpreting for Refugees: "Where practicable and necessary only?"' *Refugee*, vol. 28, no. 2, pp. 93–105.
- J. De Jager, 'Addressing Xenophobia in the Equality Courts of South Africa', *Refugee*, vol. 28, no. 2, pp. 107–35.
- 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', *Refugee*, vol. 28, no. 2, pp. 61–75.
- R. Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection', *International Journal of Refugee Law*, vol. 23, no. 3 (2011), pp. 458–88.
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- L. A. De La Hunt, 'Refugee Law in South Africa: Making the road of the refugee longer', US Committee for refugees, *World Refugee Survey* (2002).
- Various working papers to be found at: http://www.refugeerights.uct.ac.za/research/working_papers/

III.3.1.2 Malawi

Legislation

Malawi Refugee Act of 1989.

Readings

Core

T. Nkhoma, 'The Institution of Asylum in Malawi and International Refugee Law: A Review of the 1989 Refugee Act' *Malawi Law Journal*, vol. 4, no. 1.

T. Maluwa, 'Domestic Implementation of International Refugee Law: A Brief Note on Malawi's Refugee Act of 1989', *International Journal of Refugee Law*, vol. 3 (1991).

III.3.1.3 Namibia

Legislation

Namibia Refugees (Recognition and Control) Act of 1999.

Readings

Core

- J. de Jager, 'Analysis of Namibia's Refugee Legislation', *University of Cape Town: Refugee Rights Unit Working Paper Series*, 2011.
- A. Groenewaldt, 'A Critical Assessment of Namibian Refugee Law in Light of Global and Regional Trends of Refugee Migration', PhD thesis, *University of Namibia*, 2010.

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

- Euro-Mediterranean Human Rights Network (EMHRN), *Study on Migration and Asylum in Maghreb Countries: Inadequate Legal and Administrative Frameworks Cannot Guarantee the Protection of Migrants, Refugees and Asylum Seekers*, July 2010.
- N. Messari and J. van der Klaauw, 'Counter-Terrorism Measures and Refugee Protection in North Africa', *Refugee Survey Quarterly*, vol. 29, no.4 (2010), pp. 83–103.

Extended

- A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin' *International Journal of Refugee Law*, (September–December 2006) vol. 18, no. 3–4, pp. 652–676.
- E. Fiddian-Qasmiyeh, 'Invisible Refugees and/or Overlapping Refugeeedom? Protecting Sahwaris and Palestinians Displaced by the 2011 Libyan Uprising', *International Journal of Refugee Law*, vol. 24, no. 2.

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

- S. Tucci, 'Libya and International Refugee and Asylum Law: Addressing the Protection of Refugees and Migrants Displaced by the 2011 Conflict', *Oxford Monitor of Forced Migration*, vol. 2, no. 2, pp. 48–54.

Extended

- S. Hamood, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' *Journal of Refugee Studies*, (2008) vol. 21, no. 1, pp. 19–42.
- S. Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea', *European Journal of Migration and Law*, vol. 12 (2010) pp. 1–21.

III.3.2.2 Egypt

Legislation

No domestic refugee legislation

The Egyptian Constitution guarantees the right of asylum
1954 Memorandum of Understanding with UNHCR

Readings

Core

M. Kagan, 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt', *Journal of Refugee Studies*, vol. 19 (2006).

Extended

H. Hafez, 'The Arab Spring and Migration in Egypt, one year on: Impacts, Perceptions and Attitudes', American University of Cairo: School of Global Affairs and Public Policy Center for Migration and Refugee Studies, October 2012.

M. Kagan, 'A strategy for refugee protection Shared responsibility in a new Egypt', American University of Cairo: School of Global Affairs and Public Policy Center for Migration and Refugee Studies, September 2011.

R. Jureidini, 'Irregular workers in Egypt: migrant and refugee domestic workers', *International Journal on Multicultural Societies*, vol. 11, no. 1 (2009) pp. 75–90.

E. Minnick and N. Nashaat, 'Stuck' in Egypt: Iraqi refugees' perceptions of their prospects for resettlement to third countries and return to Iraq', American University of Cairo: School of Global Affairs and Public Policy Center for Migration and Refugee Studies, February 2009.

K. Grabska, 'Who Asked Them Anyway? Rights, Policies and Wellbeing of Refugees in Egypt', American University of Cairo: School of Global Affairs and Public Policy Center for Migration and Refugee Studies, July 2006.

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.
- Economic Community of West African States (ECOWAS), 1979 Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, 29 May 1979.

Readings

Core

- UNHCR, *Protecting Refugees and Other Persons on the Move in the ECOWAS Space*, January 2001.
- UNHCR, *West Africa as a Migration and Protection Area*, November 2008.
- UNHCR, 'Regional Conferences on Refugee Protection and International Migration in Central America, Western Africa, Eastern Africa and Asia – Selected Conference Materials', June 2011. pp. 31–55.
- A. Adepoju, A. Boulton, and M. Levin, 'Promoting Integration Through Mobility: Free Movement Under ECOWAS' *Refugee Survey Quarterly*, vol. 29, no. 3 (2010), pp. 120–144.
- E. Lester, 'Work, the Right to Work and Durable Solutions: A Study on Sierra Leonean Refugees in the Gambia', *International Journal of Refugee Law*, vol. 17 (2005), pp. 331–393.

Extended

M. T. Ladan, 'Freedom of Movement and the Protection of the Rights of Refugees and Asylum Seekers', Paper presented at International Conference on the Free Movement of Persons, the Protection of Refugees and the Role of the Ecowas Community Court of Justice organized by UNHCR and the Ecowas Court of Justice, Abuja, 21–23 January 2009.

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.

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

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

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

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

Readings

Core

UNHCR, 'Regional Conferences on Refugee Protection and International Migration in Central America, Western Africa, Eastern Africa and Asia – Selected Conference Materials', June 2011, pp. 84–116.

Extended

- K. Kamanga, 'International Refugees Law in East Africa: An Evolving Regime', *Georgetown Journal of International Affairs*, vol. 3 (Winter/Spring 2002), pp. 25–35.
- K. Kamanga, 'Refugee Presence: Impact on the Environment and Economic Development', *The African*, 10 July 2004, p. 10.
- K. Kamanga, 'Impact of Refugee Presence on Internal and Regional Security', *The African*, 12 July 2004, p. 10.
- G. Loescher and J. Milner, *Protracted Refugee Situations: Domestic and International Security Implications*, (Oxford: Oxford University Press, 2005), pp. 35–50.

III.3.4.2 Kenya

Legislation

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III.3.4.3 Uganda

Legislation

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III.3.4.4 Tanzania

Legislation

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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

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III.4.2 The Interface between Refugee Law and Immigration Law

Main Debate

Border patrol and control v. entry of genuine refugees

Main Points

Non-refoulement

Refugee law v. immigration law

Illegal immigrants v. genuine refugees

Rejection at the frontier, expulsion of genuine refugees

Cases

Zimbabwe Exiles Forum v. Minister of Home Affairs, 27294/2008, [2011] ZAGPPHC29, 17 February 2011, (High Court of South Africa (North Gauteng, Pretoria)).

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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

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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

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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

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Soft Law

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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

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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.

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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

UNHCR, *Global Strategy for Livelihoods*, 2014–2018.

Readings

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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

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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

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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

- G. Loescher and J. Milner, *Protracted Refugee Situations: Domestic and International Security Implications*, (Oxford: Oxford University Press, 2005), pp. 35–50.
- E. Odhiambo-Abuya, 'From Here to Nowhere: Protracted Refugee Situations in Africa', in A. Edwards and C. Ferstman (eds), *Human Security and Non-Citizens in the New Global Order* (Cambridge: Cambridge University Press, 2008), pp. 125–165.
- J. Crisp and A. Slaughter, 'A surrogate country? The role of UNHCR in protracted refugee situations', *New Issues in Refugee Research*, UNHCR Research paper No. 168, September 2009.
- A. Fielden, 'Local Integration: an Under-Reported Solution to Protracted Refugee Situations', *New Issues in Refugee Research*, UNHCR Research paper No. 158, June 2008.
- UNHCR, 'Executive Committee conclusion on Protracted Refugee Situations', No. 109 (LXI) – 2009.

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.

- K. McMillan, 'Uganda's Invocation of Cessation regarding its Rwandan Refugee Caseload: Lessons for International Protection', *International Journal of Refugee Law*, vol. 24, no. 2, (2012), pp. 231–262.
- UNHCR, *Implementation of the Comprehensive Strategy for the Angolan Refugee Situation, including UNHCR's Recommendations on the Applicability of the "ceased circumstances" Cessation Clauses*, 15 January 2012.
- UNHCR, *Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, including UNHCR's Recommendations on the Applicability of the "ceased circumstances" Cessation Clauses*, 13 January 2012.
- UNHCR, *Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's Recommendations on the Applicability of the "ceased circumstances" Cessation Clauses*, 31 December 2011.
- UNHCR, *Note on Suspension of "General Cessation" Declarations in Respect of Particular Persons or Groups Based on Acquired Rights to Family Unity*, December 2011.
- UNHCR, *Guidelines on Exemption Procedures in respect of Cessation Declarations*, December 2011.

Extended

- T. Schreier, 'Cessation of Refugee Status' in F. Khan and T. Schreier (eds), *Refugee Law in South Africa*, (Cape Town: Juta, 2014).

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

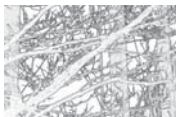
F. Khan, 'Reunification of the Refugee Family in South Africa: A Legal Right?' *Refugee*, vol. 28, no. 2, (2011) pp. 77–91.

Extended

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



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 (refugee)/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 (refugee)/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 Territorial Asylum, 28 March 1954, OAS Treaty Series No. 19.

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.

Montevideo Treaty on International Penal Law, 23 January 1889, Arts 15–18 (on Asylum).

Cases

Case Pacheco Tineo v. Bolivia. Judgment of 25 November 2013, Inter-American Court of Human Rights, paras 137–143. (The Court refers to the evolution of the right of asylum in the Americas and its relationship to refugee protection and in particular, the importance of the 1951 Convention and its 1967 Protocol).

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

H. Gros Espiell, ‘El Derecho Internacional Americano sobre Asilo Territorial y Extradición en sus relaciones con la Convención de 1951 y el Protocolo de 1967 sobre el Estatuto de los Refugiados’ in *Asilo y Protección Internacional de Refugiados en América Latina*, (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Serie E. Varios, Núm. 14, México, 1982), pp. 33–88.

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

Case Pacheco Tineo v. Bolivia. Judgment of 25 November 2013, Inter-American Court of Human Rights, paras 142–143, 154–155, and 197–198. (The Court refers to the right of asylum as enshrined in the regional human rights instruments, its relationship to refugee protection in particular, and the applicability of the minimum due process guarantees set forth in Articles 8 and 25 of the American Convention on Human Rights to refugee status determination procedures).

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 (IACrHR), 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).

Annual Report (1993), 11 February 1994 (OEA/Ser.L/V/II.85) (analysis of the universal and regional legal framework applicable for refugees, internally displaced and stateless persons, specific analysis of the situation in Colombia, El Salvador, Guatemala, Haiti, Nicaragua and Peru).

Special Reports

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

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

Country Reports

Report on Haiti, ‘Failed Justice or Rule of Law?’ Challenges Ahead for Haiti and the International Community, 26 October 2005, (OEA/Ser.L/V/II.123) (analysis of the deportation of Haitian citizens from other countries and the preventive detention of foreigners).

Precautionary Measures

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

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

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

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1971 (XXXIII-O/03), 2003. The protection of refugees, returnees, and stateless and internally displaced persons in the Americas.

Resolution AG/RES. 1504 (XXVII-O/97), 1997. The situation of refugees, returnees, and internally displaced persons in the hemisphere.

Resolution AG/RES. 838 (XVI-O/86), 1986. Inter-American action on behalf of refugees.

Readings

Core

M. Manly, ‘La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos’, in *El Asilo y la Protección Internacional de los Refugiados en América Latina: Análisis crítico del dualismo “asilo-refugio” a la luz del derecho internacional de los derechos humanos* (UNHCR, Editorama, 1st edition, San Jose, Costa Rica, 2004, pp. 126–160).

- M. T. Gil-Bazo and M.B. Nogueira, 'Asylum in the practice of Latin American and African states', *New Issues in Refugee Research*, Research Paper No. 249, January, 2013, pp. 1–15.
- UNHCR, 'The Inter-American System for the protection of human rights and forced displacement'. Document prepared for the Joint Council of Europe/ UNHCR Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons, held in Strasbourg, France, on 15–16 June, 2011.

Extended

- J. C. Murillo, 'La Protección internacional de los Refugiados en las Américas', in *XXXIII Inter-American Course of International Law*, Inter-American Juridical Committee, OAS, Washington D.C., 2007.
- F. Galindo Vélez, 'Asylum in Latin America. Use of the Regional Systems to Reinforce the United Nations System for the Protection of Refugee', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR, 2004), pp. 226–237, 240–245.
- M. C. Pulido and M. Blanchard, 'La Comisión Interamericana de Derechos Humanos y sus mecanismos de protección aplicados a la situación de los refugiados, apátridas y solicitantes de asilo', in *El Asilo y la Protección Internacional de los Refugiados en America Latina: Análisis crítico del dualismo "asilo-refugio" a la luz del derecho internacional de los derechos humanos* (UNHCR, Editorama, 1st edition, San Jose, Costa Rica, 2004, pp. 185–208).

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).
- Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999.
- Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994.
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994.
- Inter-American Convention on International Traffic in Minors, 18 March 1994, OAS Treaty Series No. 79.
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, OAS Treaty Series No. 73.
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, OAS Treaty Series No. 69.
- Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series No. 67, Art. 13 par. *in fine*.
- American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, UN Register 08/27/1979 No. 17955, Art. 22.8.

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-refoulement* 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 (IACrHR), 19 August 2014, (the Court refers to 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 resident' right to family life are protected and given due process on a case-by-case basis in immigration removal proceedings.

Admissibility of the case Rinaldo 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).

Annual Report (1993), 11 February 1994, (OEA/Ser.L/V/II.85) (analysis of the universal and regional legal framework applicable for refugees, internally displaced and stateless persons, specific analysis of the situation in Colombia, El Salvador, Guatemala, Haiti, Nicaragua and Peru).

Special Reports

Report on Immigration in the United States: Detention and Due Process, 30 December 2010, (OEA/Ser.L/V/II. Doc. 78/10). (The Commission severely denounces many forms of detention of foreigners in the US).

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

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

Country Reports

Report on Haiti, 'Failed Justice or Rule of Law?' Challenges Ahead for Haiti and the International Community, 26 October 2005, (OEA/Ser.L/V/II.123) (analysis of the deportation of Haitian citizens from other countries and the preventive detention of foreigners).

Precautionary Measures

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

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

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

General Assembly of the Organisation of American States

Resolutions

Resolution AG/RES. 1971 (XXXIII-O/03), 2003. The protection of refugees, returnees, and stateless and internally displaced persons in the Americas.

Resolution AG/RES. 1504 (XXVII-O/97), 1997. The situation of refugees, returnees, and internally displaced persons in the hemisphere.
Resolution AG/RES. 838 (XVI-O/86), 1986. Inter-American action on behalf of refugees.

Readings

Core

UNHCR, 'The Inter-American System for the protection of human rights and forced displacement'. Document prepared for the Joint Council of Europe/ UNHCR Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons, held in Strasbourg, France, on 15–16 June, 2011).

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.

Inter-American Convention on Extradition, 25 February 1981, OAS Treaty Series No. 60, Arts. 4 and 6.

Montevideo Convention on Extradition, 26 December 1933, Arts 3 and 17.

Montevideo Treaty on International Penal Law, 23 January 1889, Arts. 19–29.

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' right to family life are protected and given due process on a case-by-cae 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

Annual Report (1984–1985) 1 October 1985, (OEA/Ser.L/V/II.66) (analysis of the situation of refugees in the American States, with special emphasis on *en masse* displacement and the importance of the Cartagena Declaration on Refugees).

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

- UNHCR, 'Summary Conclusions on the Interpretation of the 1984 Cartagena Declaration's Refugee Definition, Expert meeting: Interpretation of the extended refugee definition contained in the 1984 Cartagena Declaration on Refugees', Montevideo, Uruguay, 15–16 October, 2013.
- L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR, Editorama, 2004), pp. 92–119.
- H. Gros Espiell, 'La Declaración de Cartagena como fuente del derecho internacional de los refugiados en América Latina', en *10 años de la Declaración de Cartagena sobre Refugiados: Memoria Coloquio Internacional*, (San Jose: IIDH-ACNUR, 1995), pp. 460–465.

Extended

- M. Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed conflict and other Situations of violence in Latin America', *Legal and Protection Policy Research Series*, UNHCR, Division of International Protection, June, 2013.
- M. Sepulveda, 'The treatment of asylum seekers and refugees based on the Cartagena Declaration on Refugees and the norms of international human rights law' in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (San Jose, UNHCR, Editorama, 2004), pp. 315–340.
- E. Arboleda, 'The Cartagena Declaration of Refugee and its Similarities to the 1969 OAU Convention – A Comparative Perspective', *International Journal of Refugee Law* (1995/7).
- E. Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism', *International Journal of Refugee Law* (1991/3).

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.
- Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, International Conference on Central American Refugees, CIREFCA, 30 May 1989, Doc. CIREFCA/89/9.
- Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, International Conference on Central American Refugees, CIREFCA, 30 May 1989, Doc. CIREFCA/89/13/Rev.1.

Inter-American Commission on Human Rights

Country Reports

Report on the Situation of Human Rights in Haiti, 11 February 1994, (OEA/Ser.L/V/II.85) (analysis of the situation of Haitian refugees and the situation of Haiti as country of origin).

General Assembly of the Organisation of American States

Resolutions

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

Resolution AG/RES. 1021 (XIX-O/89), 1989. Central American refugees and the International Conference on Central American refugees.

Readings

Core

UNHCR, 'The Mexico Plan of Action to Strengthen International Protection of Refugees in Latin America: Main Achievements and Challenges During the Period 2005–2010', November, 2010.

L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR, Editorana, 2004), pp. 81–88, 102–107.

Extended

UNHCR, 'Mexico Plan of Action: The Impact of Regional Solidarity 2005–2007', (San Jose: UNHCR, 2007), pp. 16–28.

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 (IACrHR), 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/II.106) (detailed analysis about the access to refugee status determination, the right to asylum, exclusion and expulsion practices in Canada).

UNHCR Documents

UNHCR, *Refugee Protection and International Migration in the Americas: Trends, Protection Challenges and Responses*, December 2009.

Readings

Core

- M. C. Pulido and M. Blanchard, 'La Comisión Interamericana de Derechos Humanos y sus mecanismos de protección aplicados a la situación de los refugiados, apátridas y solicitantes de asilo', in *El Asilo y la Protección Internacional de los Refugiados en America Latina: Análisis crítico del dualismo "asilo-refugio" a la luz del derecho internacional de los derechos humanos* (UNHCR, Editorama, 1st edition, San Jose, Costa Rica, 2004, pp. 185–208).
- A. C. Helton, 'Securing Refugee Protection in the Americas: The Inter-American System on Human Rights and the Rights of Asylum seekers', *Southwestern Journal of Law and Trade in the Americas* (now published under *Southwestern Journal of International Law*), Southwestern University School of Law, 129/1999.

Extended

- J. C. Murillo, 'La Protección internacional de los Refugiados en las Américas', in XXXIII Inter-American Course of International Law, Inter-American Juridical Committee, OAS, Washington D.C., 2007.
- L. Franco and J. S. de Noriega, 'Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America', in *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR, Editorama, 2004), pp. 66–75.

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

Annual Report (2005), 27 February 2006, (OEA/Ser.L/II.124) (analysis of the human rights situation in Colombia, with special emphasis on the internal armed conflict and its consequences on the civil population, particularly the forced displacement).

Annual Report (1998), 16 April 1999, (OEA/Ser.L/V/II.102) (recommendations for States to adopt, respect and apply the Guiding Principles on Internal Displacement).

Country Reports

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

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

Report on the Situation of Human Rights in Guatemala, 1 June 1993, (OEA/Ser.L/V/II.83) (historical analysis of the displacement in Guatemala, the signature of Agreements between the Government of Guatemala and the Permanent Commissions in 1992, and the specific problems experienced by this vulnerable population).

General Assembly of the Organisation of American States
Resolutions

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

Readings

Core

- A. A. Cançado Trindade, 'Approximations and Convergences Revisited: Ten Years of Interaction between International Human Rights Law, International Refugee Law, and International Humanitarian Law (from Cartagena – 1984 to San Jose – 1994 and Mexico – 2004)', in *Memoir of the Twentieth Anni-versary of the Cartagena Declaration on Refugees* (San Jose: UNHCR, Editorama, 2004), pp. 142–147.
- M. Gottwald, *Protecting Colombian Refugees in the Andean Region: The Fight against Invisibility* (Geneva: UNHCR, 2003), pp. 7–10, 14–18.
- R. Cohen, 'The evolution of internally displaced persons in the Americas, specific protection needs and the importance of an interagency framework', in *Memoir of the International Colloquium on the Tenth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR-IIDH-Government of Costa Rica, San Jose, 5–7 November 1994), pp. 305–312.
- R. Goldman, 'Internally Displaced Persons: Global and Regional Initiatives, Specific Protection Needs and the importance of an Inter-Agency Framework', in *Memoir of the International Colloquium on the Tenth Anniversary of the Cartagena Declaration on Refugees* (San Jose: UNHCR-IIDH-Government of Costa Rica, San Jose, 5–7 November 1994), pp. 292–303.

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

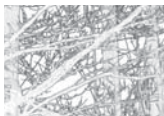
A. Macklin, *The Values of the Canada-US Safe Third Country Agreement* (Ottawa: Caledon Institute of Social Policy, 2003).

Extended

D. Anker and Harvard Law Student Advocates for Human Rights, *Bordering on Failure: the US-Canada Safe Third Country Fifteen Months after Implementation*, The International Human Rights Clinic, Human Rights Program, March 2006.



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

Bangkok Principles on Status and Treatment of Refugees, 2001.

UN Guidelines on Internally Displaced Persons, 1998.

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

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

Asian African Legal Consultative Organization (AALCO), 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees', 1966.

Readings

Core

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

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

- V. Muntharborn, *The Status of Refugees in Asia* (Oxford: Clarendon Press, 1992), pp. 3–29.
- UNHCR, ‘Putting Refugees on Development Agenda: How Refugees and Returnees can Contribute to Achieving the Millennium Development Goals’, *Forum*, 4/2005.
- 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

- H. Adelman (ed.), *Protracted Displacement in Asia: No Place to Call Home* (Aldershot: Ashgate, 2008).
- S. Bari, ‘Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment’, *International Journal of Refugee Law*, vol. 4, no. 4 (1992), pp. 487–513.
- A. Betts, ‘Comprehensive Plans of Action: Insights from CIREFCA and the Indo-Chinese CPA’, *New Issues in Refugee Research*, Working Paper no. 120 (2006).
- B. S. Chimni, ‘Cooption and Resistance: Two Faces of Global Administrative Law’, *New York University Journal of International Law and Politics*, vol. 37, no. 4 (2005), pp. 799–827.
- B. S. Chimni, ‘Outside the Bounds of Citizenship: The Status of Aliens, Illegal Migrants and Refugees in India’, in R. Bhargava and H. Reifeld (eds), *Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions*, (New Delhi: Sage Publications, 2005), pp. 277–313, pp. 295–297.
- B. S. Chimni, ‘Status of Refugees in India: Strategic Ambiguity’, in R. Samaddar (ed.), *Refugees and the State: Practices of Asylum and Care in India 1947–2000*, (New Delhi: Sage Publications, 2003), pp. 277–313.
- S. E. Davies, *Legitimizing Rejection: International Refugee Law in South East Asia* (Boston: Martinus Nijhoff, 2008).
- S. Davies, ‘The Asian Rejection: International Refugee Law in Asia’, *Australian Journal of Politics and History*, vol. 52, no. 4 (2006), pp. 562–575.
- A. Schloenhardt, ‘Immigration and Refugee Law in the Asia-Pacific Region’, *Hong Kong Law Journal*, vol. 32, no. 3 (2002), pp. 519–548.

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.

Law on Immigration, Cambodia, 22 September 1994.

Readings

Core

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

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

V.2.2 China

Readings

Core

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

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

Extended

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

V.2.3 Japan

National Legislation

Immigration Control and Refugee Recognition Act, Japan, 1951.

Case Law

- Afghan v. Japan* (Prosecutor) Heisei 14 (2002) U (Criminal Case) No.129. (Misapplication of Article 70-2 of the Immigration Act).
- 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 Jihō (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

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

Extended

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

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

V.2.4 Philippines

National Legislation

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

Reading

Core

'USCRI Country Report – Philippines', 2004.

Extended

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

V.2.5 South Korea

National Legislation

Republic of Korea: Law No. 11298 of 2012, Refugee Act [Republic of Korea], 1 July 2013.

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

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

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

Extended

- B. Adams, 'Korea needs to Open its Doors', *Joong Ang Daily*, (21 August 2007).
S. Kim, 'North Korean Refugees: 'Citizens' of South Korea?', *Sigma IOTA RHO Journal of International Relations*, (2014).

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

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

Extended

- ABM. I. H. Khan, 'Bangladesh's Obligation Towards Refugees', *Dhaka Tribune*, May 22, 2014.

- S. Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 1', *International Journal of Refugee Law*, vol. 11. no. 4 (1999), pp. 625–645.
- S. Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 2', *International Journal of Refugee Law*, vol. 12, no. 1 (2000), pp. 41–70.

V.3.2 India

National Legislation

- Protection of Human Rights Act, India, 1993.
 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).
- Anand Swaroop Verma v. Union of India* (2002) (VI AD (DELHI) 1025 CRLW. No. 746/2002 8.8.2002).
- National Human Rights Commission v. State of Arunachal Pradesh and Another*, 1996 SCC (1) 742 (Right to Life and Liberty) Article 21 of the Constitution of India.
- The State of Arunachal Pradesh v. Khudiram Chakmas*, 1994 Supp. (1) SCC 615 (Citizenship of Chakma Refugees).
- Dr. Malwika Karlekar v. Union of India* (Criminal Writ Petition No. 583 of 1992) (Right of asylum seekers to approach UNHCR).
- Saifullah Bajwa v. Union of India* (Delhi HC – Pakistani Mehdis) – W.P.(CRL) 1470/2008. (Access to UNHCR procedures).

- State v. Ranjeet Singh* (Delhi sessions court) – Sessions Case Number:61 of 2013. Unique Case ID Number:02401R0224952011 – 28.10.2013. (Rape of a refugee woman, conviction of Indian national and compensation ordered).
- Namgyal Dolkar v. MEA* (Delhi High Court) – 22 December 2010 – W.P.(C) 12179. (Citizenship of Tibetans born in India).
- Tenzin Cheophag Ling Rinpoche v. Union of India* (Karnataka High Court) – 7 August 2013 – No. 15437/2013. (Citizenship of Tibetans born in India).

Reading

Core

- S. Baruah, 'Citizens and Denizens: Ethnicity, Homelands and the Crisis of Displacement in Northeast India', *Journal of Refugee Studies*, vol. 16, no. 1 (2003), pp. 44–67.
- P. Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia*, (New Delhi: Oxford University Press, 2006), pp. 77–103.
- P. Saxena, 'Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future', *International Journal of Refugee Law*, vol. 19 (2007), pp. 246–272.

Extended

- R. Trakroo, A. Bhat and S. Nandi (eds), *Refugees and the Law* (New Delhi: Human Rights Law Network, 2006), pp. 68–76.
- B. S. Chimni, *International Refugee Law: A Reader*, (New Delhi: Sage, 2000), Chapter VIII.
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V.3.3 Nepal

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V.3.4 Pakistan

National Legislation

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V.3.5 Thailand

National Legislation

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Core

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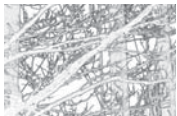
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SECTION VI



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

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 12 April 2011, E.T.S. 210.

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

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

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

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

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

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

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

Extended

Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, E.T.S. 197.

- Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, E.T.S. 196.
- Protocol Amending the European Convention on the Suppression of Terrorism, 15 May 2003, E.T.S. 190.
- European Convention on Nationality, 6 November 1997, E.T.S. 166.
- Framework Convention for the Protection of National Minorities, 1 February 1995, E.T.S. 157.
- European Convention on the Suppression of Terrorism, 27 January 1977, E.T.S. 090.
- European Convention on Repatriation of Minors, 28 May 1970, E.T.S. 071.
- European Convention on Consular Functions, 11 December 1967, E.T.S. 061.
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Soft Law

Council of Europe: Committee of Ministers

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- Committee of Ministers of the Council of Europe, 'Recommendation R (2001) 18 to Member States on Subsidiary Protection', 27 November 2001.
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- Committee of Ministers of the Council of Europe, 'Recommendation R (99) 23 on Family Reunion for Refugees and Other Persons in Need of International Protection', 15 December 1999.
- Committee of Ministers of the Council of Europe, 'Recommendation R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Art. 13 of the European Convention on Human Rights', 18 September 1998.
- Committee of Ministers of the Council of Europe, 'Recommendation R (97) 22 Containing Guidelines on the Application of the Safe Third Country Concept', 25 November 1997.
- Committee of Ministers of the Council of Europe, 'Recommendation No. R (94) 5 on Guidelines to Inspire Practices of the Member States of the Council of Europe Concerning the Arrival of Asylum-Seekers at European Airports', 21 June 1994.
- Committee of Ministers of the Council of Europe, 'Recommendation R (84) 21 on the Acquisition by Refugees of the Nationality of the Host Country', 14 November 1984.
- Committee of Ministers of the Council of Europe, 'Recommendation R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees', 25 January 1984.
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Soft Law

Council of Europe: Parliamentary Assembly

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- Parliamentary Assembly of the Council of Europe, 'Recommendation 1550 (2002) on Combating Terrorism and Respect for Human Rights', 24 January 2002.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1503 (2001) on Health Conditions of Migrants and Refugees in Europe', 14 March 2001.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1475 (2000) on Arrival of Asylum-seekers at European Airports', 26 September 2000.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1470 (2000) on Situation of Gays and Lesbians and Their Partners in Respect of Asylum and Immigration', 30 June 2000.
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- Parliamentary Assembly of the Council of Europe, 'Recommendation 1374 (1998) on Situation of Refugee Women in Europe', 26 May 1998.
- Parliamentary Assembly of the Council of Europe, 'Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-seekers in Europe', 24 April 1997.
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- Parliamentary Assembly of the Council of Europe, 'Recommendation 773 (1976) on *De Facto* Refugees', 26 January 1976.

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Commissioner for Human Rights

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

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

Editor’s Note

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

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

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

Cases

Core

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

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).

Sufi 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.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 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).

Ahmade 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.

Savridin 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 serious 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).

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

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 Somali 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 been effectively 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).

Savridin 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

- EU Fundamental Rights Agency and ECtHR, *Handbook on European law relating to asylum, borders and immigration*, 2nd edn, (Luxembourg 2014), chapters 3, 4 and 6.
- H. Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities', *Refugee Survey Quarterly*, vol. 24, no. 2 (2005), pp. 39–55, 40–49.

Extended

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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

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S. S. Juss, 'The Decline and Decay of European Refugee Policy', *Oxford Journal of Legal Studies*, vol. 25 (2005), pp. 749–792.

VI.2.1.1 Evolution of the CEAS to Date

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VI.2.1.2 Ongoing Development of the CEAS

EU Documents

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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 focused 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.

European Commission, Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/EC/EC of 29 April 2004, COM (2010) 314 final, 16 June 2010.

UNHCR Documents

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UNHCR, 'Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted', COM (2009) 551, 21 October 2009, 29 July 2010.

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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

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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 constitute a 'pull factor'

EU Document

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L212 12, 7 August 2001.

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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

Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council.

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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).

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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

Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council.

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22 November 2011.

Report on the Evaluation and Future Development of the FRONTEX Agency, COM (2008) 67.

Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004

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

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

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Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries, OJ C 221, 19 July 1997.

UNHCR Documents

UNHCR, 'Observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)', COM (2010) 61 final.

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

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House of Lords–European Union Committee, 'Frontex, the EU External Borders Agency', 9th Report of Session 2007–08.

Meijers Committee, *Views on the Commission Report on the Evaluation and Future Development of the FRONTEX Agency*, COM (2008) 67 final, 4 April 2008.

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- E. Haddad, 'The External Dimension of EU Refugee Policy: a New Approach to Asylum?', *Government and Opposition*, vol. 43, no. 2 (2008), pp. 190–205.
- S. Klepp, 'A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea', *European Journal of Migration and Law*, vol. 12 (2010), pp. 1–21.
- V. Mitsilegas, J. Monar & W. Rees, *The EU and Internal Security* (Basingstoke: Palgrave/ Macmillan 2003), pp. 109–111.
- S. Peers, 'Key Legislative Developments on Migration in the European Union: SIS II', *European Journal of Migration and Law*, vol. 10 (2008), pp. 77–104.
- S. Horii, 'It is about more than just Training: The Effect of Frontex Border Guard Training', *Refugee Survey Quarterly*, vol. 31, no. 4 (2012), pp. 158–177.

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

European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union, COM (2013) 197 final, 12 April 2013.

Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007.

UNHCR Documents

UNHCR, ExCom, 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 10 October 2003.

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

UNHCR, 'Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees', September 2006.

UNHCR, 'Global Initiative on Protection At Sea', May 2014, High Commissioner's Dialogue on Protection Challenges 2014.

UNHCR, 'Rescue at Sea, Stowaways and Maritime Interception: Selected Reference Materials', December 2011, 2nd Edition.

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UNHCR, 'Refugees and Asylum-Seekers in Distress at Sea – how best to respond? Summary Conclusions ('Djibouti Conclusions')', 5 December 2011.

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- UNHCR, 'UNHCR Central Mediterranean Sea Initiative (CMSI): EU solidarity for rescue-at-sea and protection of refugees and migrants', 13 May 2014.
- UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Hirsi and Others v. Italy*', 29 March 2011, Application no. 27765/09.

Case

EP v. Council (C-355/10), Court of Justice of the European Union, 5 September 2012.

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- R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, vol. 53, no. 1 (January 2004), pp. 47–77.
- A. Fischer-Lescano, L. Tillmann & T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, vol. 21, no. 2 (April 2009), pp. 256–296.
- M. Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies*, vol. 17, no. 1 (March 2004), pp. 50–69.
- R. Weinzierl & U. Lisson, *Border Management and Human Rights. A Study of EU Law and the Law of the Sea* (German Institute for Human Rights, 2008).

- G. Goodwin-Gill, 'Opinion. The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', *International Journal of Refugee Law*, vol. 23, no. 3 (2011), pp. 443–457.
- S. Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea', *International Journal of Refugee Law*, vol. 23, no. 3 (2011), pp. 538–557.

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

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ L 243/1, 15 September 2009.

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

Council Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 listing the third countries whose nationals

- must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405, 30 December 2006.
- Council Regulation (EC) No 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.
- Council Decision (EC) No 512/2004 establishing the Visa Information System (VIS), OJ L 213, 15 June 2004.
- Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, OJ L 99, 17 April 2003.
- Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas OJ L53 of 23 February 2002.
- Council Regulation (EC) No 1683/95 laying down a uniform format for visas, amended by Regulation (EC) 334/2002 of 18 February 2002 – consolidated version.
- Council Regulation (EC) No 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa OJ L150 of 6 June 2001.

Case

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

Readings

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S. Peers, 'Legislative Update, EC Immigration and Asylum Law: The New Visa Code', *European Journal of Migration and Law*, vol. 12, no. 1 (2010), pp. 105–131.

Extended

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

- A. Meloni, *Visa Policy within the European Union Structure* (Berlin/New York: Springer, 2006), pp. 24–41.
- S. Peers, ‘EC Immigration and Asylum Law 2008: Visa Information System’, *European Journal for Migration and Law*, vol. 11 (2009), pp. 69–94.

Editor’s Note

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

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

- Council Directive (EC) 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement OJ L187, 10 July 2001.
- Council Directive (EC) 2004/82 on the obligation of carriers to communicate passenger data OJ L261, 6 August 2004.
- Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air OJ L 321, 6 December 2003.

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- E. Basaran, ‘Evaluation of the Carriers Liability Regime as a Part of the EU Asylum Policy under Public International law’, *Uluslararası Hukuk ve Politika*, vol. 4, no. 15 (2008), pp. 149–163.

- F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', *International Comparative Law Quarterly*, vol. 46 (1997), pp. 586–634.

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- A. Cruz, *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (Stoke-on-Trent: Trentham Books Limited, 1995).
- P. Minderhoud & S. Scholten, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', *European Journal on Migration and Law*, vol. 2 (2008), pp. 123–147.

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 European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Common Immigration Policy for Europe: Principles, Actions and Tools, COM (2008) 359, 17 June 2008.

Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM (2005) 388, 1 September 2005.

Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions. 'Migration and Development: Some Concrete Orientations' COM (2005) 390.

Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin 'Improving access to durable solutions', COM (2004) 410, 4 June 2004.

UNHCR Document

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

Readings

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M. Garlick & J. Kumin, 'Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control', in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty and Security: New challenges for EU External Relations*, (Brussels: VUB Press, 2008).

B. Vandvik, '*Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE*', 26 September 2008.

C. Levy, 'Refugees, Europe, Camps/State of Exception: "Into The Zone", the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-seekers (Theories and Practice)', *Refugee Survey Quarterly*, vol. 29, no. 1 (2010), pp. 92–119.

M. den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012), ch 5, pp. 165–208.

Extended

M. Garlick, 'EU "Regional Protection Programmes": development and prospects', in M. Maes, M-C. Foblets and P. de Bruycker, (eds), *External Dimensions of EU Migration Law and Policy* (Brussels: Bruylant, 2011).

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- A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control. Legal Challenges* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), pp. 229–255.
- E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States' in B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control. Legal Challenges* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), pp. 199–228.
- S. Peers, 'EU Migration Law and Association Agreements', in B. Martenczuk and S. van Thiel, *Justice, Liberty and Security: New Challenges for EU External Relations* (Brussels: VUB Press, 2008).
- M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law*, vol. 18 (September/December 2006), pp. 601–629.
- M. Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', *International Journal of Refugee Law*, vol. 18 (September/December 2006), pp. 571–600.
- A. Klug & T. Houve, 'The Concept of State Jurisdiction and the Applicability of the *Non-Refoulement* Principle to Extraterritorial Interception Measures', in B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control, Legal Challenges* (Nijmegen: Martinus Nijhoff Publishers, 2010), pp. 69–102.
- S. Kneebone, C. McDowell, and G. Morrell, 'A Mediterranean Solution? Chances of Success', *International Journal of Refugee Law*, vol. 18 (2006), pp. 492–508.
- O. Lynskey, 'Complementing and Completing the Common European Asylum System: A Legal Analysis of the Emerging Extraterritorial Elements of EU Refugee Protection Policy', *European Law Review*, vol. 31, no. 2 (2006), pp. 230–250.
- G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, vol. 5 (2003), pp. 303–341.

Editor's Note

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

Meijers Committee, *Note on the EURODAC proposal* (COM (2012) 254), 10 October 2012.

E. Guild, 'Unreadable Papers?', in J. Lodge (ed.), *Are You Who You Say You Are? The EU and Biometric Borders* (Nijmegen: Wolf Legal Publishers, 2007), pp. 31–45.

Extended

- A. Baldaccini, 'Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases', *European Journal of Migration and Law*, vol. 1 (2008), pp. 31–49.
- E. Brouwer, 'Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection', in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate, 2006), pp. 137–154.
- E. Brouwer, 'Eurodac: Its Temptations and Limitations', *European Journal of Migration and Law*, vol. 4 (2002), pp. 231–247.

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

- K. Zwaan (ed.), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2008).
- R. Errera, 'Cessation and Assessment of New Circumstances: a Comment on Abdulla', CJEU, 2 March 2010, *International Journal of Refugee Law*, vol. 23, no. 3 (2011), pp. 521–537.

E. Guild and M. Garlick, 'Refugee Protection, Counter-Terrorism and Exclusion in the European Union', *Refugee Survey Quarterly*, vol. 29, no. 4 (2010), pp. 63–82.

Extended

H. Battjes, *European Asylum Law and International Law*, (Leiden/Boston: Martinus Nijhoff publishers, 2006) pp. 289–384.

S. Peers, 'Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive', *European Journal of Migration and Law*, vol. 14, no. 2 (2012), pp. 199–221.

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.
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- 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.
- Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system SEC (2007) 742, COM (2007) 0299.
- 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, ‘Observations on Bulgaria as a Country of Asylum’, January 2014.
- UNHCR, ‘The Dublin II Regulation. An UNHCR Discussion Paper’, April 2006.
- UNHCR, ‘Observations on Greece as a Country of Asylum’, December 2009.
- UNHCR, ‘Comments on Dublin II and Eurodac Proposals’, 18 March 2009.
- 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.

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 for Justice, Equality and Law Reform in Ireland* – Written Observations of the United Nations High Commissioner for Refugees, 1 February 2011, C-411/10 and C-493/10.

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.
- Puid v. Germany*, C-4/11, Court of Justice of the European Union, 14 November 2013.
- MA and Others v. SSHD*, C-648/11, Court of Justice of the European Union, 6 June 2013.
- Halaf v. Bulgarian State Agency for Refugees*, C-528/11, Court of Justice of the European Union, 30 March 2013.
- K v. Austria*, C-245/11, Court of Justice of the European Union, 6 November 2012.
- Kastrati v. Sweden*, C-620/10, Court of Justice of the European Union, 3 May 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.
- Asylum and Immigration Tribunal*, YI (Previous claims – Fingerprint match – EURODAC) Eritrea, 2007, UKAIT 00054.
- TI v. UK*, European Court of Human Rights 2000, Third Section Decision as to the Admissibility of Application 43844/98 (2000) 12 IJRL, pp. 244–267.

Readings

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- ECRE, Forum Réfugiés, Cosi and Hungarian Helsinki Committee, '*The Dublin II Regulation: Lives on Hold*', February 2013.
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- C. Filzwieser, '*The Dublin Regulation v. the European Convention of Human Rights – A Non-Issue or a Precarious Legal Balancing Act?*', December 2006.
- Meijers Committee, '*Comments on Dublin and Reception Directive*' (CM0902), 18 March 2009.
- M. Byrne, 'Fortifying Europe: Poland and Slovakia Under The Dublin System', in M. Killingsworth (ed.), *Europe: New Voices, New Perspectives* (Melbourne: Contemporary Europe Research Centre, 2007).
- R. Byrne, 'Harmonization and Burden Redistribution in the Two Europes', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 336–358.
- E. R. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, vol. 16, no. 3 (2003), pp. 253–273.
- See also Section 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

Directive 2013/33/EU of 26 June 2013 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013.

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

Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM (2007) 745.

UNHCR Documents

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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*

for Justice, Equality and Law Reform in Ireland – Written Observations of the United Nations High Commissioner for Refugees, 1 February 2011, C-411/10 and C-493/10.

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Abdullahi v. Bundesasylamt, C-394/12, Court of Justice of the European Union, 10 December 2013.

CIMADE and GISTI v. Ministry of Interior, C-179/11, Court of Justice of the European Union, 27 September 2012.

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.

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E. Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures', *European Law Review*, vol. 29 (2004), pp. 198–218.

Extended

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

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

Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.

Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status – COM (2010) 465, 8.9.2010.

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status OJ L 326, 13 December 2005.

European Commission, Communication from the Commission to the Council and the European Parliament “A More Efficient Common European Asylum System: The Single Procedure as the Next Step”, COM (2004) 503, 17 July 2004.

UNHCR Documents

UNHCR, ‘Comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on

procedures in Member States for granting and withdrawing international protection’, COM (2009)554, 21 October 2009, August 2010.

UNHCR, ‘Improving Asylum Procedures: Comparative analysis and recommendations for law and practice’, March 2010.

UNHCR, ‘Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, (Council Document 14203/04, Asile 64, 9 November 2004), 10 February 2005.

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

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Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration, C-69/10, Court of Justice of the European Union, 27 July 2011.

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D. Ackers, 'The Negotiations on the Asylum Procedures Directive', *European Journal of Migration and Law*, (2005) vol. 7, pp. 1–33.

J. van der Klaauw, 'Towards a Common Asylum Procedure', in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), pp. 165–194.

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

Directive 2013/32/EU of the European Parliament and of the Council on
common procedures for granting and withdrawing international protection
(recast), OJ L 180/60, 29 June 2013.

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on
Procedures in Member States for Granting and Withdrawing Refugee Status,
OJ 326 13, 13 December 2005, Arts. 23, 28, 34, 35, 39.

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

Resolution on Manifestly Unfounded Applications for Asylum, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG (London 30 Nov–1 Dec 1992).

UNHCR Documents

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

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

Cases

Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration, C-69/10, Court of Justice of the European Union, 27 July 2011.

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

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S. Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determination* (September 2001), pp. 59–65.

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P. Van Cleyenbreugel, ‘Case C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’immigration, Judgment of the Court of Justice (Second Chamber) of 28 July 2011’, *Common Market Law Review*, vol. 49, no. 1 (2012), pp. 327–347.

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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

Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.

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

UNHCR Document

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

Cases

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

H. Martenson and J. McCarthy, ‘Field Report. “In General No Serious Risk of Persecution” Safe Country of Origin Practices in Nine European States’, *Journal of Refugee Studies*, vol. 11, no. 3 (1998), pp. 304–325.

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

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

Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.
Resolution on a Harmonised Approach to Questions Concerning Host Third Countries Document WG I 1283, adopted 30 November 1992, (London Resolution).

UNHCR Documents

UNHCR, ExCom Conclusion No 15 (XXX), 'Refugees Without An Asylum Country', 1979.
UNHCR, ExCom Conclusion No 58 (XL), 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection', 1989.
UNHCR, 'Global Consultations on International Protection, Background paper no 1: Legal and practical aspects of the return of persons not in need of protection', May 2001.
UNHCR, 'Global Consultations on International Protection, Background paper no 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees', May 2001.
UNHCR, 'Global Consultations on International Protection, Background paper no 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim', May 2001.
UNHCR, 'Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers', May 2013.
See also UNHCR, *Improving Asylum Procedures*, March 2010, in Section VI.2.4.3.

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- Al-Rahal v. Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 698, 20 August 2001.
- TI v. UK*, European Court of Human Rights, 2000 European Court of Human Rights Third Section Decision as to the Admissibility of Application 43844/98 (2000) 12 IJRL, pp. 244–267.
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- E. Neumayer, 'Asylum Destination Choice: What Makes Some West European Countries more Attractive than Others', *European Union Politics*, vol. 5, no. 2 (2004), pp. 155–180.
- R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, vol. 9 (1996), pp. 190–196.

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- E. R. Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing’, *European Journal of Migration and Law*, vol. 6 (2004), pp. 47–65.

Editor’s Note

See Section 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

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.

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, section 4.

UNHCR Document

UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013.

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M.M. v. Minister for Justice, Equality and Law Reform and Attorney-General (Ireland), C-277/11, Court of Justice of the European Union, 22 November 2012.

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VI.2.4.5.2 Persons with Special Needs

EU Documents

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.

Directive 2013/33/EU of 26 June 2013 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013.

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UNHCR Documents

UNHCR, 'EXCOM Conclusion on Children at Risk', No. 107 (LVIII) – 2007, 5 October 2007.

UNHCR and UNICEF, *What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014.

Case

K. v. Austria, C-245/11, Court of Justice of the European Union, 6 November 2012.

Readings

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- L. Feijen, 'The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe', *Refugee Survey Quarterly*, vol. 27 (2008), pp. 63–73.

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- M. E. Kalverboer, A. E. Zijlstra and E. J. Knorth, 'The Developmental Consequences for Asylum-seeking Children Living With the Prospect for Five Years or More of Enforced Return to Their Home Country', *European Journal of Migration and Law*, vol. 11, no. 1 (2009), pp. 41–67.
- Life Projects for Unaccompanied Migrant Minors – Recommendation (2007) 9 and explanatory memorandum (2008).
- Refugee Women's Resource Project and European Women's Lobby, *Asylum is not gender neutral: a practical advocacy guide for protecting women seeking asylum*, 2007.
- STEPS Study for the European Parliament, *The Conditions in Centres for Third Country Nationals (detention camps, open centres as well as transit centres and transit zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States* IP/C/LIBE/IC/2006-181, December 2007.

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

Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013.

UNHCR Document

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

Cases

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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

Directive 2013/33/EU of 26 June 2013 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013, Articles 7, 8 & 9.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 December 2008, Chapter IV, 'Detention for the purposes of removal'.

UNHCR Documents

UNHCR, 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers', July 2012, (COM (2011) 320 final, 1 June 2011).

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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

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

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C. Smyth, 'Is the Right of the Child to Liberty Safeguarded in the Common European Asylum System?', *European Journal of Migration and Law*, vol. 15, no. 2 (2013), p. 111–136.

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

Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/EC/115, OJ L 348/98, 24 December 2008.

- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘Study on the links between legal and illegal migration’, COM (2004) 412, 4 June 2004.
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UNHCR Documents

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- UNHCR, ‘UNHCR Observations on the European Commissions Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final)’, 16 December 2005.
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- D. Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, vol. 11 (2009), pp. 19–39.
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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
- safe guard clauses

EU Documents

Agreement between the European Union and Turkey on Readmission of Persons Residing without Authorisation, 16 December 2013.

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- Agreement between the European Community and the Russian Federation on Readmission, OJ L 129, 1 June 2007.
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- D. Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States', *European Journal of Migration and Law*, vol. 3 (2003), pp. 359–377.
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- M. Schieffer, 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', *European Journal of Migration and Law*, vol. 3, no. 3 (2003), pp. 343–357.

Editor's Note

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

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