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

November 2011

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

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

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


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

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

The Reader first deals with the international refugee law regime and its foundations: the history of population movements and theories of migration, the evolution of the international refugee regime, the 1951 Geneva Convention Relating to the Status of Refugees, the expanding mandate of UNHCR and regional developments which have a bearing on the universal perception of the rights and duties of forced migrants. The concepts and the processes are analysed in light of the formative hard and soft law documents and discussed in an up-to-date, high standard
and detailed academic commentary. Issues underlying the global dilemmas of refugee law are tackled, taking into account developments in related areas of human rights and humanitarian law, as well as research advances in the field of migration.

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

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

Accessing Source Material

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

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

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

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

**Adapting The Reader to Specific Course Needs**

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

**Recommended hours for module teaching**

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

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

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

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

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

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

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

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

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

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

Please send any correspondence to the editorial board at:

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E-mail: reader@helsinki.hu
SECTION I

Introduction to International Refugee Law: Background and Context

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

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

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

Main Points
Unlimited exit v. limited entry rights
Trade-offs between regular and irregular routes
Migration as a pervasive feature of the human experience

I.1.1 The Concepts

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

Main Points
Sociological, demographic, historical and legal perspectives on migration
Understanding fundamental terms of reference:
- international migrant
- asylum seeker
- refugee
- undocumented (illegal) migrant
- ‘of concern’ to UNHCR

Readings
Core
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**


**Extended**


**Editor’s Note**

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

### I.1.3 The Actual Movements

**Main Debates**

Is the boat really full? Where?

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

Does the European Union need an immigration policy?

**Main Points**

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

Readings

Core


Extended


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

Explication of trends and patterns in refugee migration should identify the changing numbers of refugees, their countries of origin, and the uneven distribution of asylum seekers among host countries.
I.2 The Legal and Institutional Framework for Refugee Protection

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

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

I.2.1 The Evolution of the International Refugee Regime

Readings
Core

Extended
Editor’s Note

Note the three phases of the modern international refugee regime:

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

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

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

Soft Law


Readings

Core


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

Treaties

International

Soft Law

Readings
Core

I.2.2.3 Expansion by the 1967 Protocol

Treaties
International

Soft Law

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

I.2.3 Contemporary Alternative Refugee Definitions

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

I.2.3.1 Africa

*Treaties*

*Regional*


*Editor’s Note*

See also Section III.

I.2.3.2 Latin America

*Soft Law*


*Editor’s Note*

See also Section VI.

I.2.3.3 Europe

*Soft Law*


*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.


Editor’s Note
See also Section V.

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

Readings
Core

Editor’s Note
UNHCR has changed its perceived mission several times, first extending protection to victims in situations not falling under its original mandate and second by becoming an agency involved in complex humanitarian missions in acute conflict zones. This extended responsibility could not be discharged without an ever growing cooperation with other member organizations and programs of the UN family and without the expanding engagement of national and international non-governmental organizations as implementing partners. The outreach of the UN-centred refugee regime depends on its precarious relationship with the major donor governments. Since December 2005 UNHCR has become actively involved in the protection of internally displaced persons.
I.3.1 UNHCR

Main Debates
Should the role of UNHCR extend beyond protection to include humanitarian aid and/or return and reconstruction?
What procedural standards does UNHCR apply in its expansive role in status determination?
Has, and can, UNHCR put up effective resistance against restrictive tendencies in Europe and elsewhere?

Main Points
UNHCR conducts status determination in over 70 countries with significant variations in practice and standards
Necessity of networks for co-operation and engagement
Dependency on major donor governments

Treaties
International

Soft Law

UNHCR Documents
Readings:

Core


Extended


I.3.2 Other Agencies and Their Interaction

Readings

Core


*Extended*


*Editor’s Note*

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

*See UNCHR’s website on donors and partners of UNHCR.*
SECTION II

International Framework for Refugee Protection

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

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

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

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

Main Debates
How broadly should the legal definition of ‘refugee’ be drawn?
How long is a state legally obliged to protect refugees?
To what extent is a state obliged to develop durable solutions as opposed to temporary protection?
When must human rights protection trump migration control?
What are the implications of extraterritorial policies that threaten refugee protection?

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

II.1.1 Non-refoulement

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

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

**International**

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


**Soft Law**

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

**UNHCR Documents**


**Readings**

**Core**


**Extended**


II.1.2 Asylum

Main Debates
Are states obliged to provide asylum?
How do extradition and other criminal law measures interact with the principle of asylum?

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

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

UNHCR Documents

Readings
Core

Extended
II.1.3 Non-discrimination

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

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

**Treaties**

**Readings**

**Core**

**Extended**
II.1.4  Family Unity

Main Debate
What is the definition of a family?

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

Treaties
International

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

UNHCR Documents

Readings

Core


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

II.1.5 Durable Solutions

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

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

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

Core


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

II.1.6 Burden Sharing and International Cooperation

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

Burden sharing v. burden shifting

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

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

Core

Extended

II.2 The 1951 Geneva Convention

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

II.2.1 Criteria for Granting Refugee Protection

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

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

II.2.1.1 Alienage

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

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

Readings
Core

Extended

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

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

See Section II.4 concerning IDPs.

II.2.1.1.1 Outside the Country of Nationality

Soft Law

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

Soft Law

Editor’s Note
See Section II.2.1.4 concerning the nexus between the unavailability of state protection and the existence of a Convention ground.
II.2.1.1.3 Dual or Multiple Nationality

Soft Law

II.2.1.1.4 Statelessness

Treaties

Soft Law

Readings
Core
II.2.1.2 Well-founded Fear

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

**Main Point**
Shifting standards concerning the likelihood of risk

**Soft Law**

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

**Readings**

**Core**

**Extended**
Editor’s Note
See also Section II.2.5.2 concerning evidentiary issues.
Many State Parties interpret this term to require showings of both subjective and objective fear. Debates surrounding the interpretation of the well-founded fear requirement centre upon whether there is a need to demonstrate two elements: 1) the asylum seeker’s subjective emotion of fear and 2) the objective factors which indicate that the asylum seeker’s fear is reasonable; or whether the inquiry should be solely the objective assessment of the situation, limiting protection only to those who objectively risk persecution.
Whether viewed as two elements or one, the major focus is on showing a risk in the future. One must consider all the circumstances, the context and the conditions that have occurred in the past in order to evaluate the degree of likelihood of the actions and threats that might take place in the future. Many commentators and tribunals confuse the discussions of subjective and objective elements of fear with concerns about credibility and consistency of the asylum seekers’ narratives.
See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1), Section 4) in Section II.3.3.3.

II.2.1.3 Persecution

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

Main Points
Persecution by non-state actors
  • domestic violence
  • pressure from the community
  • organized groups
The threshold for persecution

- discrimination
- prosecution under laws of general application

Editor’s Note

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

II.2.1.3.1 Acts of Persecution

Soft Law


UNHCR Documents

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

Cases

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

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

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

Core


Extended


II.2.1.3.2 Agents of Persecution

Soft Law


UNHCR Documents


Cases

Readings

Core


Extended


Editor’s Note

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

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

II.2.1.4.1 Multiple Grounds and General Issues

Main Debate

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

Main Point

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


**Treaties**

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

**Soft Law**


**Readings**

**Core**


**Extended**


**Editor’s Note**

It should be noted that many forms of persecution may be related to overlapping grounds under Article 1. Gender-related persecution and persecution based on sexual orientation tend to be viewed as an issue of social group, but may also implicate religious grounds as well as political opinion. See Section II 2.5.2.3.2.2 for further resources concerning gender-related persecution. Persecution related to military conscription tends to be viewed as issues of political opinion, but may also implicate religious grounds.
II.2.1.4.2  Race

*Treaties*
Convention on the Elimination of All Forms of Racial Discrimination (CERD),

*Soft Law*

*Readings*

*Core*


*Extended*

II.2.1.4.3  Religion

*Main Point*
Public religious activity v. private worship

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

**UNHCR Documents**


**Cases**

*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).


*Dobrican v. INS 77*, F 3d 164 (7th Cir 1996). (US judicial decision on religious objections to military service by Jehovah’s Witness in Romania).

**Readings**

**Core**


**Extended**


**Editor’s Note**

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

II.2.1.4.4 Nationality

Soft Law

Readings
Core

Extended

II.2.1.4.5 Particular Social Group

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

Main Points
Gender-related issues
  • domestic violence
• female genital mutilation
• social mores

Sexual orientation
Transsexuality
Family members
Caste or clan

_Treaties_

_Soft Law_

_UNHCR Documents_

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

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


*Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Cir 2001). (US judicial decision granting asylum to a Mexican woman based on physical abuse by father).


Extended

*Federal Administrative Court* (German), 15 March 1988, 9 C 378.86, vol. 79, Collection of Decisions143 (German judicial opinion recognising Iranian homosexual faces persecution based on social group).

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


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

*STCB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2006] HCA 61, 14 December 2006 (High Court of Australia). (Australian judicial decision holding that blood feud in Albania did not constitute persecution based on social group).
**Ramos v. Holder**, 589 F. 3d 426 (7th Cir. 2009). (US judicial decision ruling that former gang members can constitute a particular social group that is socially visible).

**Readings**

**Core**


**Extended**


II.2.1.4.6 Political Opinion

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

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

Soft Law

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

Core


Extended


Editor’s Note

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

It may also be useful to think about the scope of protected activities under the 1951 Geneva Convention. With regard to political opinion, does, or should, it include racist or anti-Semitic political statements?
II.2.1.5 Internal Protection Alternative

Main Debates
Is it sufficient that there is an absence of persecution or must there be access to genuine protection?
Does the existence of an internal protection alternative pre-empt the need for international protection?

Main Point
Multiple factors affect practical access to protection elsewhere within country of origin
- logistical
- linguistic
- familial
- financial

Soft Law

UNHCR Documents

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

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

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

Readings
Core


Extended


Editor’s Note
Consider the impossibility in many national contexts for people to move from one area to establish a life in another region without family or other ties, financial resources, or skills and analysis of internal protection alternatives does not end when there is an absence of persecution in a certain region, but must proceed to assess the realistic likelihood of access to protection.
See also Section V.1.2 concerning the European Practice concerning internal protection alternatives.

II.2.1.6 Exclusion from Convention Refugee Status

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

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

**Treaties**
Arts 1.D, 1.E, 1.F, and Annex VI.  

**Soft Law**
UNHCR Documents

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

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

Mugesera v. Canada, [2005] 2 S.C.R. 100, 28 June 2005 (Supreme Court). (Canadian judicial decision ruling that ‘reasonable grounds to believe’ standard requires an objective basis with compelling and credible information for the belief).

K. v. Secretary of State for the Home Department, [2004] 7 May 2004 (UK Immigration and Asylum Tribunal). (characterising acts as ‘terrorist’ is not sufficient for exclusion based on acts contrary to the purposes of the UN).

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

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

Readings

Core


Extended


**Editor’s Note**
Some claimants are excluded because they are already receiving protection from other UN agencies, such as UNRWA. Those claimants residing in another state with the rights and obligations of a national of that state are also excluded. Others are excluded because they are deemed unworthy of protection, having committed:
1) serious non-political crimes
2) crimes against peace, war crimes, or crimes against humanity
3) acts contrary to the purposes of the UN.

**II.2.1.7 Cessation of Refugee Status**

**II.2.1.7.1 Cessation Grounds**

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

**Main Point**
Criteria for determining ceased circumstances

**Treaties**
   Art. 1.C.

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

UNHCR, ‘Note on Cessation Clauses’, 30 May 1997.

Cases

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

Minister for Immigration and Multicultural and Indigenous Affairs v. Qaah of 2004, [2006] HCA 53, 15 November 2006 (Australia). (Australian judicial decision holding that government can expel Afghan granted temporary protection visa only if government establishes that the safe conditions in the country of origin are settled and durable).

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

Readings

Core


Refugee status may cease for among the following reasons:

1) acts voluntarily taken by refugees, such as the voluntary return to live at the site where persecution was earlier feared

2) changed circumstances in the home country that eliminate the fear of persecution

3) short-term trips to homelands that may be triggered by family illness or other compelling circumstances, yet may indicate that persecution is no longer feared.

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

II.2.1.7.2 Procedures

Main Debate
Who carries the burden of showing changed circumstances?

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

UNHCR Documents
Readings
Core

**II.2.2 Access to Territory**

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

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

Readings
Core

Extended
II.2.2.1 Visa Requirements

Readings
Core

II.2.2.2 Carrier Sanctions

Readings
Core

II.2.2.3 Extraterritorial Immigration Control

Readings
Core

II.2.2.4 Interceptions and Rescue at Sea

Treaties

Soft Law
UNHCR Documents

Readings
Core

Extended

Editor’s Note
It is important to analyze whether the non-refoulement obligation is applicable on the high seas.
See Section II.1.1 on non-refoulement and Section V.2.3 for an overview of Access to Territory within the European context.
II.2.3 Access to Procedures

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

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

Readings
Core

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

Soft Law

UNHCR Documents

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

Cases

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

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

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

Readings

Core


Extended

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

II.2.4. Reception Conditions

Main Debates
Who should maintain law and order in refugee camps?
How should armed asylum seekers be demobilized?

Soft Law

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

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

Readings
Core
Extended


Editor’s Note

Detention is dealt with in Section II 2.7.

**II.2.5. Procedures for Determining Refugee Status**

**II.2.5.1. Basic Procedural Requirements**

*Main Debate*

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

*Main Points*

Minimum standards for refugee status determination

Prima facie recognition

Impact of absence of legal representation

Impact of barriers of communication for

- asylum seekers and advocates
- asylum seekers and decision makers

Editor’s Note

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


**UNHCR Documents**


**Readings**

**Core**


**II.2.5.2 Evidentiary Issues**

**Main Point**

Burden of persuasion and benefit of doubt

**II.2.5.2.1 Standards of Proof**

**UNHCR Documents**

**Soft Law**


**Readings**

**Core**


**Cases**


II.2.5.2.2 Credibility

**Main Debate**

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

**Main Points**

Linguistic, psychological, and cultural barriers to credibility assessment

Frequent absence of documentary or corroborative evidence

**Readings**

**Core**


**Extended**


**II.2.5.2.3 Factors Affecting Evidentiary Assessment**

**II.2.5.2.3.1 Post Traumatic Stress**

**Soft Law**

Readings

Core


Extended

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

UNHCR Documents
UNHCR EXCOM, ‘Refugee Children and Adolescents’, Conclusion No. 84 (LXVIII), 1997.

Readings

Core

Extended

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

II.2.5.2.3.2.2 Women

Treaties
UNHCR Documents
UNHCR EXCOM, ‘Refugee Protection and Sexual Violence’, Conclusion No. 73 (XLIV), 1993.
UNHCR EXCOM, ‘Refugee Women and International Protection’, Conclusion No. 64 (XLI), 1990.

Readings
Core

Extended
II.2.6 Content of Refugee Status

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

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

Readings
Core


Extended

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

II.2.7 Detention

Main Debates
Is detention contrary to Art. 31 of the 1951 Geneva Convention?
Under what circumstances and for how long may asylum seekers be detained?
Is it lawful to use detention for the purpose of deterrence?

Main Points
Refugees often subject to penalties for illegal entry contrary to the 1951 Geneva Convention
Detention of children and other vulnerable populations
Standards for conditions of detention

Treaties

Soft Law


**UNHCR Documents**


**Cases**


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


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

II.3 Other Forms of International Protection

II.3.1 Temporary Protection

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

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

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

_UNHCR Documents_

_Readings_
_Core_

_Extended_
II.3.2 Complementary (Subsidiary) Protection

Main Debates
Is the 1951 Geneva Convention adequate in the context of forced displacement? How can the protection needs of victims of generalised violence and armed conflict be met? Should there be a ‘sliding scale’ or other connection between the various kinds of protection needs and the ensuing entitlements? Is complementary protection a humanitarian issue under state discretion or a matter of state duty?

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

Soft Law

UNHCR Documents

Readings
Core

Extended


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

Main Debates

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

Are refugees rights bearers under human rights treaties?

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

Main Points

Complementarity between 1951 Geneva Convention and other human rights instruments

International monitoring bodies and their protection-related practices
II.3.3.1 Universal Declaration of Human Rights

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

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

*Soft Law*

*Readings*

**Core**

**Extended**

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

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

*Main Points*
Standard setting v. quasi adjudicatory role of the Human Rights Committee
The extraterritorial application of Art. 7
Non-refoulement under Art. 7 v. non-refoulement under Art. 33 of the Geneva Convention

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

Treaties


Soft Law

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


Cases

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


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).


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

Readings

Core


Extended


Editor’s Note

Although there are only a small number of Human Rights Committee (HRC) opinions concerning asylum seekers, the HRC, in its Concluding Observations on State Party reports frequently addresses the circumstances of asylum seekers and refugees in their assessment of State Party compliance with specific articles under the ICCPR. This offers another channel for asylum rights advocacy.
II.3.3.3 The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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

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

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

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

Cases
Core
M.A. & L.G. v. Sweden, CAT 373/2009, 19 November 2010. (return of long-time PKK member to Turkey where he is wanted under anti-terrorism laws would constitute a breach of art. 3).
S.A. v. Denmark, CAT 339/2008, 15 November 2010. (return to Iran in the deteriorating situation since the elections of June 2009 would constitute a breach of art. 3 with regard to an individual who had suffered torture 7 years earlier for monarchist political activities).
M.G. v. Sweden, CAT 349/2008, 11 Nov. 2010. (return of low level, but long-time PKK member to Turkey where she is likely to be imprisoned under anti-terrorism laws would constitute a breach of art. 3).
E.N. v. Sweden, CAT 322/2007, 14 May 2010. (return of woman and her minor daughter to Democratic Republic of the Congo where widespread violence against women exists would constitute a breach of art. 3).

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


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

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

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


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


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


Extended
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).


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

Readings
Core

Extended


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

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

*Main Points*
Definition of a child
Vulnerability of children
Unaccompanied minors

*Treaties*

*Soft Law*
UNHCR EXCOM, ‘Refugee Children and Adolescents’, No. 84 (XLVIII), 1997.
**UNHCR Documents**


**Readings**

**Core**


**Extended**


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

**Main Debates**

Does suffering the violation of humanitarian law entitle one to refugee status?

What are the obligations of the international community to ensure protection of refugees in camps from military attacks?

**Main Points**

Actors for protection

Nexus between international refugee law and international humanitarian law

**Treaties**

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 on Cluster Munitions, 30 May 2008

*Soft Law*


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

*UNHCR Documents*


*Readings*

*Core*


*Extended*

II.4 Internally Displaced Persons

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

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

Treaty

Soft Law

Readings
Core


**Extended**


**Editor’s Note**

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

African Framework for Refugee Protection

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

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

The second major subdivision of this section highlights the multiple challenges to refugee protection in Africa. It explores the interaction between the exclusion clause and the international criminal justice regime, a high profile issue at present. It also examines many facets of the relationship between refugees and the territories to which they flee. For example, it addresses the interface between refugee law and immigration law, the different situations of urban refugees and those who live in camps, the relations between refugees and their host populations, and the impact of resettlement and the problems that arise when it is not an available durable solution. This portion of the section also devotes attention to two especially vulnerable populations, unaccompanied minors and those who are internally displaced. In its concluding entries, this section highlights the connection between governance and globalization and the continuing search for solutions to the refugee problems in Africa.
III.1. Overview of African Regional Legal Instruments for Refugee Protection

Main Debates
What are the regional legal bases for refugee protection in Africa?
How enforceable are these rules and standards proclaimed in the regional refugee law and human rights instruments at national courts?
Is refugee protection legal or political?

Main Points
Refugee rights and duties in the light of the African refugee law and human rights frameworks
States’ ratification of the relevant instruments v. their compliance
National legislation of refugee law v. policy-based administration of refugees
Complementarity between the regional and international refugee protection frameworks

Treaties

Soft Law
Constitutive Act of the African Union, 11 July 2000
Khartoum Declaration on Africa’s Refugee Crisis, Adopted by the OAU Seventeenth Extraordinary Session of the Commission of Fifteen on Refugees,


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


Readings

Core


*Extended*


### III.2. The OAU Refugee Convention

*Main Debate*

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

*Main Points*

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

Substantive elements v. procedural elements

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

*Main Debates*

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

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

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

*Main Points*

From whom should the country of origin information be obtained?
Group/Prima facie recognition
Procedural issues related to group/prima facie recognition
Other grounds of persecution, including ‘gender’, ‘sex’, ‘sexual orientation’ etc.

Treaties
OAU Convention Governing the Specific Aspects of Refugees Problems in Africa,

Readings
Core

Editor’s Note
See Section I.2.3.1 on Africa.

III.2.2 Family Unity

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

Main Points
Nuclear family v. extended family
Issues of polygamy v. monogamy
Traditional Africa practices v. Islamic practices
 Relatives v. dependants

Readings
Extended
Editor’s Note
See Section II.1.4 on Family Unity.

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

III.3.1 East Africa

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

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

Treaties

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

Extended


III.3.1.1 Kenya

Legislation


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

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

Readings

Core


Extended


### III.3.1.2 Uganda

**Legislation**

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

**Policy**

**Readings**

**Core**

**Extended**


### III.3.1.3 Tanzania

**Legislation**


**Policy**


**Readings**

**Core**


**Extended**


### III.4 Protection Challenges in Africa

**Main Debates**

Are African states willing and ready to deal with refugees who flee war, breakdown of public order, foreign invasion and persecution in their home country?

To what extent is the interface between Immigration law and Refugee law hurting protection of refugees in the region?

What is the relevance of regional cooperation or integration such as the East African community, SADC, COMESA, IGAD to the protection of refugees or forced migration?

To what extent will the plight of host populations be ignored in protection of refugees?

**Main Points**

Political willingness to accord refugee protection

Institutional preparedness

Professionalism of authorities responsible for refugee affairs

Resources demands on host countries, particularly in context of mass influx of refugees
III.4.1 Exclusion Clause

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

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

Treaties
Hague Convention Respecting the Laws and Customs of War on Land, 1907.
No. 17512 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.

*Soft Law*

*Readings*

**Core**

**Extended**

*Editor’s Note*
See Section II.2.1.6 on Exclusion from Convention Refugee Status.
III.4.2 The Interface between Refugee Law and Immigration Law

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

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

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

Readings
Core

Extended

III.4.3 Urban Refugees versus Camp Refugees

Main Debate
Legality of the encampment of refugees

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

**Soft Law**


**Readings**

**Core**

**Extended**


**III.4.4 Resettlement**

**Main Debates**
Is resettlement a right or privilege?
Who determines whether to resettle or not?
Are African states suitable to resettlement?
Main Points
Resettlement v. protection concerns
Absence of legal provisions for durable solutions

Readings
Core

Extended

Editor’s Note
See II.2.1.5 on Internal Protection Alternative.

III.4.5 The Plight of IDPs

Main Debates
Do we need to expand the UNHCR mandate to accommodate IDPs?
Who should be responsible for the plight of IDPs? Is it a local or international problem?

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


**Soft Law**


**Readings**

**Core**


**Extended**


*Editor’s Note*

*See Section II.4 for further discussions concerning IDPs.*

### III.4.6 Unaccompanied Minors

**Main Debates**

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

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

**Main Points**

Best interest of the child

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

Prospects of durable solution

**Soft Law**

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

**Readings**

**Core**

III.4.7 Governance and Globalization

Main Debates
Are resources in the protection of refugees shared equally?
Should each region shoulder its burden in the protection of refugees?

Main Points
Disparities between the south and the north
The south-north debate

Readings
Core

Extended


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

**Main Debates**
Given the African states political, social, cultural and economic reality, can refugees get durable solutions within Africa?

Should countries that produce refugees be held accountable and asked to contribute to their protection in the country of asylum?

Refugees’ assistance v. local host communities

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

**Readings**

**Core**


**Extended**


### III.4.9 Protection During Mass Repatriation Programmes

**Main Debates**

Forced return v. voluntary return during mass repatriation

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

**Main Points**

Monitoring the repatriation exercise to ensure voluntary and safe return

The various stakeholders in the repatriation exercise

**Reading**

**Core**

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

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

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

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

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

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


*Extended*


IV.2 States Party to the 1951 Refugee Convention

Main Debate
Has ratification of 1951 Convention made a difference?

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

IV.2.1 Cambodia

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

Readings
Core

IV.2.2 China

Readings
Core
Extended

IV.2.3 Japan

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

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

Readings
Core


## IV.2.4 Philippines

### National Legislation

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

### Reading

#### Core


#### Extended


## IV.2.5 South Korea

### National Legislation

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

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

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

### Readings

#### Core


#### Extended

B. Adams, ‘Korea needs to Open its Doors’, *JoongAng Daily*, (21 August 2007).
IV.3 States Not Party to the 1951 Refugee Convention

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

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

IV.3.1 Bangladesh

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

Reading
Core

Extended
IV.3.2 India

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

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

Reading
Core

**Extended**


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


### IV.3.3 Nepal

**National Legislation**


**Reading**

**Core**


**Extended**

**IV.3.4 Pakistan**

*National Legislation*

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

*Readings*

*Core*


*Extended*


**IV.3.5 Thailand**

*National Legislation*


*Readings*

*Core*


Extended


SECTION V

European Framework for Refugee Protection

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

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

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

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

V.1.1 Legal and Policy Framework for Refugee Protection

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

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

Treaties

Regional

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

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

**Soft Law**

*Council of Europe: Committee of Ministers*


**Soft Law**

**Council of Europe: Parliamentary Assembly**


Soft Law

Commissioner for Human Rights

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


Readings
Core

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

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

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

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

Cases
Core
Art. 3 – prohibition of torture, inhuman or degrading treatment or punishment
Soering v. UK, ECtHR Judgement of 7 July 1989 (holding extradition from UK to USA of a German national charged with capital crime and at risk of serving on death row would be a violation of ECHR Art. 3, recognising the extra-territorial effect of ECHR provisions).
Cruz Varas and others v. Sweden, ECtHR judgement of 20 March 1991 (recognizing the extra-territorial effect of ECHR Art. 3 similarly applicable to rejected asylum seekers; finding no Art. 3 violation in expulsion of a Chilean national denied asylum, noting that risk assessment by State Party must be based on facts known at time of expulsion).
Vilvarajah and others v. UK, ECtHR judgement of 30 October 1991 (finding no breach of Art. 3 although applicants claimed to have been subjected to ill-treatment upon return to Sri Lanka; this had not been a foreseeable consequence of the removal of the applicants, in the light of the general situation in Sri Lanka and their personal circumstances; a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Art. 3, and there existed no special distinguishing features that could or ought to have enabled the UK authorities to foresee that they would be treated in this way).
H.L.R. v. France, ECtHR judgement of 29 April 1997 (finding no violation of Art. 3 in case of expulsion of the applicant to Columbia, as there was no relevant evidence of risk of ill-treatment by non-state agents; thereby recognising that ill-treatment caused by such actors would fall within the scope of Art. 3 if the authorities are not able to obviate the risk by providing adequate protection).
Jabari v. Turkey, ECtHR judgement of 11 July 2000 (holding violation of Art. 3 in case of deportation that would return a woman who has committed adultery to Iran; Art. 13 violated as well due to the lack of an effective remedy with suspensive effect to challenge the rejection of her asylum claim).
Venkadajalasarma v. Netherlands, ECtHR judgement of 17 February 2004 (current situation in Sri Lanka makes it unlikely that Tamil applicant would run a real risk of being subject to ill-treatment after his expulsion from the Netherlands).

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

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

D. and others v. Turkey, ECtHR judgement of 22 June 2006 (deportation of woman applicant in view of the awaiting execution of severe corporal punishment in Iran would constitute violation of Art. 3, as such punishment would inflict harm to her personal dignity and her physical and mental integrity; violation of Art. 3 would also occur to her husband and daughter, given their fear resulting from the prospective ill-treatment of D).

Salah Sheekh v. Netherlands, ECtHR judgement of 11 January 2007 (asylum seeker held to be protected against refoulement under Art. 3; there was a real chance that deportation to ‘relatively safe’ areas in Somalia would result in his removal to unsafe areas, hence there was no ‘internal flight alternative’ viable; the Court emphasised that even if ill-treatment be meted out arbitrarily or seen as a consequence of the general unstable situation, the asylum seeker would be protected under Art. 3, holding that it cannot be required that an applicant establishes further special distinguishing features concerning him personally in order to show that he would be personally at risk).
**Sultani c. France**, ECtHR judgement of 20 September 2007 (finding no violation of Art. 3, despite the applicant’s complaint that the most recent asylum decision within an accelerated procedure had not been based on an effective individual examination; the Court emphasized that the first decision had been made within the normal asylum procedure, involving full examination in two instances, and held this to justify the limited duration of the second examination which had aimed to verify whether any new grounds could change the previous rejection; in addition, the latter decision had been reviewed by administrative courts at two levels; the applicant had not brought forward elements concerning his personal situation in the country of origin, nor sufficient to consider him as belonging to a minority group under particular threat).

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

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

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

Particular issues of evidence and proof

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

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

Particular issues of national security and criminal offences

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

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

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

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

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

Bensaid v. UK, ECtHR judgement of 6 February 2001 (high threshold set by Art. 3, according to which a schizophrenic suffering from psychotic illness does not face a sufficiently real risk after his return to Algeria; not compelling humanitarian considerations as required under Art. 3, once the necessary treatment is available in the country of destination).

Aoulmi v. France, ECtHR judgement of 17 January 2006 (high threshold set by Art. 3, in particular if the 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).

N. v. UK, ECtHR judgement of 27 May 2008 (the ECtHR Grand Chamber maintained the high threshold set in D v. UK concerning cases of removal of aliens suffering from a serious mental or physical illness to a country where the facilities for treatment of that illness are inferior to those available in the CoE State; such decisions may raise an issue under Art. 3, but only in very exceptional cases where the humanitarian grounds against the removal are compelling; Art. 3 was held principally to prevent deportation where the risk of ill-treatment in the destination country would emanate from intentional acts or omissions of public authorities, or from non-State bodies when the authorities are unable to afford the applicant appropriate protection;
the fact that the alien’s circumstances, including life expectancy, would be significantly reduced is not sufficient in itself to give rise to breach of Art. 3; the applicant had been diagnosed as having two AIDS defining illnesses, but was not presently considered critically ill, so her case was not found to disclose very exceptional circumstances such as in *D v. UK*, and implementation of the removal decision would therefore not give rise to a violation of Art. 3).  

**Internal protection alternative**

*Hilal v. UK*, ECtHR judgement of 6 March 2001 (expulsion of Tanzanian opposition party member, having previously suffered serious ill-treatment in detention, would be contrary to Art. 3; no ‘internal flight alternative’ found to be viable in his case).

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

**Family issues**

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

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

See also *D. and others v. Turkey*, ECtHR judgement of 22 June 2006 (summary above).
Procedural issues

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

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

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

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

**Extended**

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

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

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

*R (on the applications of Adam, Tesema, and Limbuela) v. Secretary of State for the Home Department* (2004), 2004 EWCA 540, All ER (D) 323, Judgements of 21 May 2004 (UK judicial decision holding failure to provide shelter and assistance to destitute asylum seekers violates ECHR Art. 3.

*S.D. v. Greece*, ECtHR judgement of 11 June 2009 (violation of Art. 3 due to the conditions of detention in holding centres for foreigners).

*A.A. v. Greece*, ECtHR judgement of 22 July 2010 (violation of Art. 3 both due to the conditions in detention centre and to the Greek authorities’ lack of diligence in providing the applicant with appropriate medical assistance).

**Art. 1 – territorial scope of applicability**

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

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

**Medvedyev and Others v. France**, ECtHR judgement of 10 July 2008, upheld by Grand Chamber judgement of 29 March 2010 (case not regarding asylum issues; however, the Court interpreted Art. 1 so as to imply State responsibility in an area outside national territory when, as a consequence of military action, it exercises control of that area, or in cases involving activities of its diplomatic or consular agents abroad and on-board aircraft and ships registered in the State concerned; as France had exercised full and exclusive control over a cargo vessel and its crew, at least de facto, from the time of its interception, and the crew had remained under the control of the French military, the applicants were held to have been effectively within the jurisdiction of France).

**Art. 5 – deprivation of liberty**

**Saadi v. UK**, ECtHR judgement of 11 July 2006, upheld by Grand Chamber judgement of 29 January 2008 (detention of an asylum seeker for 7 days to facilitate the examination of the case found to be justified under Art. 5 (1) (f); it was considered a necessary adjunct to the right of States to control aliens’ entry and residence that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not; until the State has authorised entry, any entry is ‘unauthorised’ and detention is permissible under Art. 5 (1) (f), provided that such detention is not arbitrary; this requires that detention must be carried out in good faith, be closely connected to the purpose of preventing unauthorised entry, the place and conditions of detention should be appropriate, and the duration should not exceed that reasonably required for the purpose pursued; however, informing the applicant’s lawyer of the reason for the detention of his client after 76 hours of detention was incompatible with the requirement under Art. 5 (2) to provide such information promptly).
S.D. *v. Greece*, ECtHR judgement of 11 June 2009 (violation of Art. 5, since detention with a view to expulsion of the applicant had no legal basis in Greek law, and the applicant had been unable to have the lawfulness of his detention reviewed by the courts).

*A.A. v. Greece*, ECtHR judgement of 22 July 2010 (violation of Art. 5 as the period of detention subsequent to the registration of the applicant’s asylum request had been unnecessary for the aim pursued; the applicant had further been unable to have the judicial review of the lawfulness of his detention).

*Louled Massoud v. Malta*, ECtHR judgement of 27 July 2010 (reiterating the interpretation of Art. 5 pronounced in *Saadi v. UK* as regards the protection from arbitrariness; Art. 5 held to be violated due to the failure of the national system to protect the applicant from arbitrary detention, and his prolonged detention could not be considered to have been lawful; it had not been shown that the applicant had at his disposal under domestic law an effective and speedy remedy for challenging the lawfulness of his detention).

*Art. 9 – right to freedom of religion*

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

*Art. 13 – right to effective remedy*

*Conka v. Belgium*, ECtHR judgement of 5 February 2002 (the detention of rejected Roma asylum seekers before deportation to Slovakia constituted a violation of Art. 5; due to the specific circumstances of the deportation the prohibition against collective expulsion under Protocol 4 Art. 4 was violated; the procedure followed by the Belgian authorities did not provide an effective remedy in accordance with Art. 13, requiring guarantees of suspensive effect).

*Gebremedhin v. France*, ECtHR judgement of 26 April 2007 (holding that the particular border procedure declaring ‘manifestly unfounded’ asylum applications inadmissible, and refusing the asylum seeker entry into the territory, was incompatible with Art. 13 taken together with Art.3; emphasising that in order to be effective, the domestic remedy must have suspensive effect as of right).
Abdolkhani and Karimnia v. Turkey, ECtHR judgement of 22 September 2009 (holding a violation of Art. 13 in relation to complaints under Art. 3; the notion of an effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim to risk of refoulement under Art. 3, and a remedy with automatic suspensive effect; the Court was not persuaded by the respondent State’s argument that the applicants had failed to request asylum when entering Turkish territory, as this argument was not supported by any documents; in the absence of a legal procedure governing deportation and providing procedural safeguards, there were reasons to believe that their requests would not have been officially recorded; the administrative and judicial authorities had remained totally passive regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran, amounting to a lack of the rigorous scrutiny required by Art. 13).

See also Jabari v. Turkey, ECtHR judgement of 11 July 2000 (summary above); Keshmiri v. Turkey, ECtHR judgement of 13 April 2010 (violation of Art. 13, case almost identical to Abdolkhani and Karimnia v. Turkey).

Readings

Core


Extended


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

V.2. The European Union

The EU comprises 27 Member States. It was established through three treaties signed by six European states in the 1950s, the most important being the EEC Treaty of 1957. Its original objectives were to achieve economic integration in the region. Three main transformations have subsequently taken place, which have significantly impacted upon the asylum field. These have resulted, firstly, from the continued enlargement of the group of states participating to 27 at present; secondly, through the consolidation of EU law in this area, which now takes priority over the national law of the Member States; and thirdly, the widening of the Union’s responsibilities with the addition of justice and home affairs, including asylum and migration, as a Union or Community competence, in
1999. From that date the EU has been a central actor in determining the law of international protection in the Member States. The EU’s structure incorporates several key institutions including the European Parliament, the European Council and the Court of Justice of the European Union (CJEU).

In addition, EU asylum law and practice has great potential to influence significantly the development of the international protection system more broadly. This is in part because many countries look to the EU as a leading standard-setter in legal and normative terms. In addition, however, given that State practice is a source of international law, harmonized practice (if and when it is achieved) in 27 EU Member States will be extremely important in contributing to the evolution of international refugee law worldwide.

*Editor’s Note*
*This section is structured to provide an overview of EU developments of refugee law. The section starts with the criteria and contents of protection and then follows the road of the asylum seeker attempting to access the procedure in order to be recognised as in need of protection.*

**V.2.1 Towards a Common European Asylum System (CEAS)**

*Main Debates*
What are the objectives of EU involvement in asylum law? Does it aim at human rights protection, application of asylum in the context of the EU internal market, or establishment of fortress Europe? Is the EU involvement in asylum law raising or lowering standards in practice? What is the relationship of the 1951 Geneva Convention with EU asylum law? What is the relationship between the 1951 Geneva Convention and Member States’ national law enacted pursuant to the European community instruments? What are the possible implications of the EU’s decision to work towards full establishment of a common European asylum system by 2010?

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

Readings
Core

V.2.1.1 Evolution of the CEAS

EU Documents

UNHCR Documents

Readings

Core


Extended


V.2.1.2 Ongoing Development of the CEAS

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

**Readings**

*Core*
**Extended**
ECRE, Comments on the Proposal for a Regulation establishing a European Asylum Support Office, 29 April 2009.

**Editor’s Note**
The Court of Justice of the European Union (CJEU) has begun its work providing common definitions of the core legal measures adopted as part of the CEAS. We can expect over the next years that important and unresolved issues of the CEAS will come before the Court. The rules on access to the CJEU changed in 2009 when the Lisbon Treaty created two new treaties and the restrictions precluding lower courts from referring questions to the CJEU were lifted. Among the outstanding question is how the CJEU will interpret the CEAS in the light of the 1951 Geneva Convention.
The Treaty of Lisbon amended the Treaty on European Union (TEU), which retains its name, and the Treaty Establishing the European Community (TEC), which is renamed as the Treaty on the Functioning of the European Union (TFEU).
The legislative procedure for measures in the CEAS now follows the normal EU procedures of co-decision with the European Parliament. The Commission, as guardian of the Treaties, is responsible for ensuring that there is a common application of the CEAS in the Member States. This is challenging and the Commission has begun a number of enforcement procedures against Member States for failure to comply with the CEAS.

V.2.2 Criteria for Granting Protection

V.2.2.1 Harmonization of the 1951 Geneva Convention

**Refugee Definition**

**Main Debates**
Is the EU legislation on qualification for protection consistent with the 1951 Geneva Convention?
How should the 1951 Geneva Convention exclusion clauses be applied in the context of the ‘fight against terrorism’?

**Main Points**

Different interpretations of the refugee definition among Member States
Persecution by non-state agents
Protection by non-state agents
Gender and sexual orientation
Refugee sur place
Internal flight alternative
Compatibility of rules on exclusion, revocation, cessation with 1951 Geneva Convention
Differentiation in rights accorded to 1951 Geneva Convention refugees and subsidiary protection beneficiaries
Cessation and exclusion

**EU Documents**


**UNHCR Documents**


UNHCR, ExCom Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, No. 103 (LVI), 7 October 2005, paragraph (k).


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

Cases

*Federal Republic of Germany v. B* (C-57/09), *D* (C-101/09), Court of Justice of the EU, 9 November 2010.

*Aydin Salahadin Abdulla and others v. Federal Republic of Germany*, C-175/08, Court of Justice of the EU, 2 March 2010.

Opinion in the case of *Abdulla*, joined cases C-175/08, C-176/08, C-178/08, C-179/08 by Advocate General Mazák, Court of Justice of the EU, 15 September 2009.

Opinion in the case of *Germany v. B and D*, joined cases C-57/09 and C-101/09, by Advocate-General Mengozzi, Court of Justice of the EU, 1 June 2010.


Opinion in the case of *Bolbol Nawras* by Advocate General Sharpston, C-31/09, Court of Justice of the EU, 4 March 2010.

*Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department*, 2006 UKHL 46.

See also the cases *Chahal v. UK* (V.1.2) and *Adan and Aitseguer* (V.2.4.1).

Readings

Core


*Extended*


### V.2.2.2 Subsidiary Protection

**Main Debates**

Does subsidiary protection threaten the 1951 Geneva Convention?

Are the needs of subsidiary protection beneficiaries less pressing or durable than those of refugees?

Is there a justification for giving different levels of entitlements to refugees and subsidiary protection beneficiaries?

**Main Points**

Relationship between directive and refugee determination process

Diminished rights under the EC temporary protection regime compared with 1951 Geneva Convention rights

**EU Documents**


UNHCR Documents
UNHCR, Statement on subsidiary protection under the EC Qualification Directive for people threatened by indiscriminate violence (Art 15(c)), January 2008.
See also the UNHCR documents in Section V.2.2.1.

Cases
Opinion in the case of Elgafaji, by Advocate-General Poiares Maduro, Court of Justice of the EU, 9 September 2008.

Readings
Core
ECRE, Complementary Protection in Europe, 29 July 2009.

Extended

Editor’s Note
See Section II.3.2 about other forms and instruments of protection after the 1951 Convention.
V.2.2.3 Temporary Protection

Main Debate
Does temporary protection threaten the 1951 Geneva Convention?

Main Point
Diminished rights under the EC temporary protection regime compared with 1951 Geneva Convention rights

EU Document

Readings
Core

Readings
Extended

Editor’s Note
Temporary Protection is not in itself a status. Rather it is an administrative measure to deal with mass influx situations for a limited period of time. It can be combined with a suspension of the examination of individual claims. Temporary Protection can only apply on a group basis following a political decision by the Council.
Compare the substantive rights for a person in an EC Temporary Protection regime with those for asylum seekers provided for in the Directive on Reception Conditions, on the one hand, and those for refugees provided for in the Geneva Convention and the Qualification Directive on the other.

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

**Main Debates**
Displacement activities v. duty to provide protection  
Non-entrée policies v. duty to provide protection

**Main Point**
Tension between objectives of migration control, particularly control of irregular migration, and protection obligations

**EU Document**

**UNHCR Document**

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

**Readings**
**Core**
J. van der Klaauw ‘Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?’, in B. Bogusz, R. Cholewinski, A. Cygan, and E.

**Extended**


**Editor’s Note**

Examine how attempts to reconcile migration control and protection have been made when EC legislation was proposed and applied in practice and when the legislation was adopted.

**V.2.3.1 The EU’s External and Internal Borders**

**Main Debates**

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

**Main Points**

The claim to state sovereignty as regards the control of borders

Absence of a right to cross a border as such under international law

Borders in asylum regions

**EU Documents**


**UNHCR Document**


**Readings**

**Core**


**Extended**


*Editor’s note*

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

### V.2.3.2 Interception and Rescue at Sea

**Main Debates**

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

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

international waters?

the waters of third states?

**Main Point**

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

**EU Documents**


**UNHCR Documents**


UNHCR, Selected Reference Materials: Rescue at Sea, Maritime Interception and Stowaways, November 2006.


**Readings**

**Core**


**Cases**

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

**V.2.3.3 Visas**

**Main Debates**

Are visas a mechanism to move border control beyond the physical border?
Do protection seekers have a right to a visa even if they are in their country of origin?

Immigration control v. human rights protection

Main Points
Content of EU visa rules, particularly visa list and visa format
Connections between visa rules and asylum issues

EU Documents


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.

Readings

Extended


Editor’s Note

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

V.2.3.4 Carrier Sanctions

Main Debates

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

Main Point

Carrier sanctions as a deflection mechanism

EU Documents


Readings

Core

Extended

V.2.3.5. Extraterritorial Immigration Control and Extraterritorial Processing

Extraterritorial immigration control refers inter alia to the system of immigration liaison officers used for some time by EU Member States which post officials from their border services in other countries, to reinforce checks and controls on entry to their territory from the point of departure. In addition, recent years have seen several debates about the possibility of obliging asylum seekers to request asylum of the EU from countries outside the Union, with the implication that this would be accompanied by restrictions on entry and/or rights to seek asylum within the EU.
Main Debates
What are the potential arguments for and against the legality of processing requests for asylum in the EU while claimants remain outside EU territory?
What practical problems could result from such a policy?
What are the potential implications of making financial assistance to non-EU States conditional upon more restrictive border control?

Main Points
External relations policy as tool to persuade non-EU States to carry out EU policies
Future prospect of external processing of asylum applications

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

UNHCR Document

Readings
Core
M. Garlick & J. Kumin, ‘Seeking Asylum in the EU: Disentangling Refugee Protection from Migration Control’, in B. Martenczuk and S. van Thiel


Extended


Editor’s Note:
See also Section V.2.4.4.3 on Safe Third Country.
V.2.3.6 Biometrics and Databases

**Main Debate**
Interoperability v. the purpose limitation principle

**Readings**

**Core**

**Extended**

**V.2.4 Procedures for Granting Protection**

**Main Debates**
Has the first phase of harmonisation of EC asylum law brought about consistency of decision-making and harmonisation in practice? If not, what further steps are required to achieve these aims?
What do the extensive exceptions and qualifications to protection criteria and procedural safeguards in EU instruments mean for access to a fair and effective refugee status determination process?
Readings

Core


V.2.4.1 Responsibility: The Dublin System

Main Debates

Distribution mechanisms v. protection obligations.
Who controls the identity of the asylum seeker?
Does the Dublin system provide sufficient safeguards against *refoulement*?
Are there risks that asylum seekers will not receive any substantive claim examination in the EU as a result of the Dublin system?

Main Points

Allocating responsibility for determining asylum claims
Implementing Dublin without prior harmonization in asylum policies
Identity and data protection

EU Documents


Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 050, 25 February 2003 (Dublin II).

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 Comments on Dublin II and Eurodac Proposals, 18 March 2009.

Cases
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see also Section V.I.2).

Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010: NS v Secretary of State for the Home Department, Case C-411/10, OJ C 274/21, 9 October 2010; joined with Reference for a preliminary ruling from the High Court of Ireland on 15 October 2010: M.E. & others v Refugee Applications Commissioner, Case C-493/10, OJ C 13/32, 15 January 2011.

Petrosian and Others, ECJ, C-19/08, 21 March 2009.


Readings

Core

Extended
See also Section V.2.3.6 about Biometrics and Databases with regard to Eurodac.

Editor’s Note
An analysis of the Dublin rules should consider the following:
• Are they compatible with the 1951 Geneva Convention and the ECHR?
• What kind of disputes might arise as to how to interpret the Dublin II rules?
• Is Dublin II a burden-shifting mechanism? What can be done to balance its impact on the EU’s external border States?
V.2.4.2 Minimum Standards for Reception Conditions

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

Main Points
Purposes of EU power over reception conditions
Objectives of Directive 2003/9
Level of obligations in Directive
Exceptions from obligations
Application of the directive to particular groups: asylum seekers in detention; those under Dublin II

EU Documents

UNHCR Document

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

Readings
Core
Editor’s Note
Is the Directive likely to raise standards anywhere?
What disputes might arise concerning its interpretation?
What are the consequences (legal and otherwise) of States’ failure to respect their obligations to provide minimum reception conditions in practice?

V.2.4.3 Minimum Standards for Normal Procedures

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

Main Points
Low level of common minimum standards
Extended safeguards
Appeals
Remedies

EU Documents

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

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


Cases

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

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

Readings

Core


Extended


V.2.4.4 Minimum Standards for Specific Procedures

V.2.4.4.1 Accelerated and Manifestly Unfounded Procedures

Main Debate
Efficient v. fair procedures

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

EU Documents

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


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

Readings

Core


Editor’s Note

A discussion of accelerated and manifestly unfounded procedures should also consider their relationship to the notions of safe third country and safe country of origin. A consideration of procedural safeguards should consider issues such as, inter alia, legal representation, oral hearings, and appeals, with and without, suspensive effect.

V.2.4.4.2 Safe Country of Origin

Main Debate

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

Main Points

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

**EU Documents**


**UNHCR Document**

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

**Cases**

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

**Readings**

**Core**


**Extended**

V.2.4.4.3 Safe Third Country

Main Debates
Deflection and deterrence policies v. protection obligations
What minimum safeguards should there be for the implementation of safe third country returns?
Are European safe third country practices shifting the responsibility for refugees to transit states?

Main Points
Contrasts between UNHCR and EU criteria for determining safe third countries
Safe third country lists
European safe third country notion
Chain deportations

EU Documents

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

Cases
European Parliament v. Council of the European Union, European Court of Justice (Grand Chamber), C133/06, 6 May 2006.
M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, 21 January 2011 (see Section V.1.2).

Readings
Core
UNHCR, ‘Global Consultations in International Protection, Regional Meeting Budapest, 6–7 June 2001, Conclusions’.
**Extended**


**Editor’s Note**

See Section V.2.5.2 regarding Readmission agreements.

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

**V.2.4.5.1 Evidentiary Issues**

**Readings**

**Core**


**V.2.4.5.2 Persons with Special Needs**

**UNHCR document**

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

**Readings**

**Core**


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


V.2.4.6 Appeals

**Main Debates**

What is an effective remedy?

What is an independent tribunal?

Must appeal courts take into account new circumstances arising after the decision on the initial asylum claims?

Do appeals which do not have suspensive effect (ie. do not permit the appellant to remain in the country awaiting the outcome of the appeal) satisfy the requirements of an effective remedy?

**Main Points**

The meaning of ‘effective remedy’

Right to legal assistance in preparing appeals
EU Document
Procedures in Member States for Granting and Withdrawing Refugee Status,

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

Cases
M.S.S. v Belgium and Greece, Grand Chamber, (European Court of Human
Rights), 21 January 2011 (see Section V.1.2).
Opinion in the case of Samba Diouf, Case C-69/10 by Advocate General Cruz
Villalon, Court of Justice of the EU, 1 March 2011.
M.B. and others v. Turkey, (European Court of Human Rights) judgment of 26
August 2010, appl. 36009/08.
Gebremedhin v. France (European Court of Human Rights), judgment of 26 April
2007, appl. 25389/05.

Readings
Core
E. Brouwer, Digital borders and real rights: effective remedies for Third-Country
nationals in the Schengen Information System, (Leiden: Martinus Nijhoff:
2008), Chapters 9–10.
R. Byrne, ‘Remedies of Limited Effect: Appeals under the forthcoming Directive
on EU Minimum Standards on Procedures’, European Journal of Migration

Extended
I. Staffans, ‘Judicial Protection and the New European Asylum Regime’, European
V.2.5 Removal and Detention

V.2.5.1. Detention

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

Main Point
The use of detention as a deterrent or punishment, in addition to containment

Readings
Core

Extended

Cases
Saïd Shamilovich Kadzoev v. Direktsia ‘Migratsia’ pri Ministerstvo na vatreshnite raboti, Case C-357/09, 30 November 2009.
Opinion in the case of Kadzoev by Advocate General Mazák, Court of Justice of the European Union, C-57/09, 10 November 2009.
V.2.5.1 Return Policies

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

Main Point
Use of protection mechanisms to delay expulsion or removal

EU Documents


UNHCR Document
Readings

Core


Extended


Editor’s Note

*Note the practical relevance of these policies for rejected asylum-seekers and persons whose refugee status or Subsidiary Protection/Temporary Protection status has ceased.*
V.2.5.2 Readmission Agreements

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

Main Points
Objectives of readmission agreements:

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

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


Readings

Core


Extended


*Editor’s Note*

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

Framework for Refugee Protection in the Americas

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

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

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

The section next reviews the application of the 1951 Geneva Convention in the context of regional norms and national legislation adopted in Latin America. With the sole exception of Cuba, all the states in the region have ratified the 1951 Geneva Convention. The development of national laws and jurisprudence concerning refugee status and refugee rights is in its infancy, however.

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

The section concludes by noting the regional developments in North America between Canada and the United States.
VI.1 Political Asylum, Diplomatic Asylum and Refugee Status

Main Debates
What are the differences between diplomatic, political and territorial asylum within the Latin American protection framework?
To what extent does each of the three forms of asylum remain a discretionary right of a sovereign state?
In Latin America, is it preferable to apply regional treaties on asylum when individuals seek asylum in states parties to these instruments?

Main Points
Diplomatic asylum as regional customary law in Latin America
Confusion caused by the distinction between political asylum and asylum granted to refugees based on the 1951 Geneva Convention
Consequences of lack of domestic norms concerning the application of the 1951 Geneva Convention

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

Cases
Columbia v. Peru, Judgement of 20 November 1950, International Court of Justice, I.C.J. Reports 1950, p. 273. (The court declared that the granting of asylum by the Colombian Embassy to the instigator of a military uprising against the government of Peru did not fulfil the conditions envisaged in the Havana Convention in as much as the asylum country does not enjoy a right to qualify the nature of the offence upon which asylum is granted by a unilateral and definitive decision; also, the alleged regional custom on diplomatic asylum neither includes a safe-conduct to leave the country of origin – in which the Embassy of the country granting asylum is based – nor extends protection for the time necessary to solve such a request).
Editor’s Note
Please note that in reality, despite its title, the 1954 Convention on Territorial Asylum codifies the concept of political asylum as it has developed in the Latin American tradition. Likewise, the expression political refuge that appears in the 1939 Convention increases confusion in terminology in the Latin American legal context.

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

VI.2.1 Human Rights Instruments

VI.2.1.1 The Non-refoulement Principle and the Rights of Refugees

Main Debate
What is the concrete impact of the explicit recognition of the right to seek and receive asylum by the American Declaration of the rights and duties of man?

Main Points
Relevance of the regional framework of human rights protection in ensuring the right to asylum and the rights of refugees in Latin America
Comparison, in theoretical and practical terms, between the protection offered by the European Convention on Human Rights and the Inter-American Convention on Human Rights

Treaties
Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, OAS Treaty Series No. 73.
Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series No. 67, Art. 15.

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

Cases

Article 8
Case Baena Ricardo and others v. Panama. Judgement of 2 February 2001 (the Court states that the minimum due process guarantees set forth in Article 8.2 must be observed in the course of an administrative procedure, as well as in any other procedure leading to a decision that may affect the rights of persons).

Article 25
Case Castillo Páez. Judgement of 27 November 1998 (according to the judgement, Peru has to indemnify for the material and moral harms caused, the family members of a disappeared person, including the father, the mother and the sister, who were forced to leave their country and seek asylum in the Netherlands).

Advisory Opinions
Advisory opinion on the juridical condition and rights of the undocumented migrants, 17 September 2003 (OC-18/03, Series A No. 18) (the fundamental principles of equality and non-discrimination, as rules of jus cogens, entail erga omnes obligations of protection that bind all states and affects third countries as well, regardless of any circumstance or condition of a person concerned, including his/her regular or irregular migrant status).
Provisional Measures

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

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

Inter-American Commission on Human Rights

Individual Petitions

Admissibility of the case Rumaldo Juan Pacheco Osco y Otros v. Bolivia, Report No. 53/04, 13 October 2004 (Petition No. 301/2002) (possible violation of the right to personal integrity, to personal liberty, to judicial guarantees, the rights of the child, the freedom of movement and residence with regard to refugees recognised in Chile wishing to reside in Bolivia).

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

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

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

Admissibility of the case Joseph v. Canada, Report No. 27/93, 6 October 1993 (Case No. 11.092) (following the analysis of existing domestic remedies concerning the recognition of refugee status, the application was declared inadmissible).
Admissibility of the case Honduras, Report No. 5/87, 28 March 1987 (Case No. 9.619) (the state has the obligation to guarantee the situation, the security and the integrity of refugees hosted on its territory).

Admissibility of the case Maria Eugenia Calvar Rivero and her daughter Maudie Valero Calvar, Report No. 6/82, 8 May 1982 (Case No. 7.602) (violation of the rights of the family, the right to work and the right to seek asylum as included in the American Declaration of the rights and duties of man).

Admissibility of the case Eduardo Eloy Alvarez Hernández, Report No. 11/82, 8 March 1982 (Case No. 7.898) (violation of the prohibition of arbitrary detention, the right to justice, the right to seek asylum and the rights of the family as included in the American Declaration of the Rights and Duties of Man).

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


Special Reports

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

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

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

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

Readings
Core
VI.2.1.2 Protection against Extradition

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

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

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

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

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

VI.2.1.3 Other Norms

Treaties
Convention on rights and duties of states in the event of civil strife, 20 February 1928, Art. 3.
VI.2.2 Specific Instruments of Refugee Protection

Editor’s Note
The most important instrument that specifically addresses the problems of forced migration in the region has a noticeable collective character and was elaborated ex post facto. This means that it was conceived in order to offer durable solutions for large groups of refugees, after their exodus had taken place. The other instruments maintain this collective character, which results in few references to the personal status of those concerned, other than the principle of non-refoulement. Moreover, these instruments do not have legally binding effect, except in a few concrete cases of forced displacement (such as in Guatemala). Nevertheless, the Cartagena Declaration – a soft law instrument – provides a written expression of a customary law definition in the regional framework. However, there is no recent practice concerning the application of the Cartagena Declaration, despite the occurrence of grave situations of forced displacement.

VI.2.2.1 Regional Definition and Proposals to Improve Protection

Main Debates
Is the Cartagena Declaration legally binding or is it a non-binding regional instrument?
What role does the Cartagena Declaration play within the framework of the global debate on refugee protection?

Main Points
Incorporation of the Cartagena principles into national legislation
Possibilities and likely impacts of applying the Cartagena Declaration in the framework of individualised refugee status determination

Soft Law
San José Declaration on Refugees and Displaced Persons, 7 December 1994.
Cartagena Declaration on Refugees, 22 November 1984.
Inter-American Commission on Human Rights

Annual Reports


General Assembly of the Organisation of American States

Resolutions

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

Resolution AG/RES. 774 (XV-O/85), 1985. The juridical situation of refugees, returnees, and internally displaced persons in the hemisphere (recommendation to Member States to apply the Cartagena Declaration in case of refugees on their territory).

Readings

Core


VI.2.2.2 Durable Solutions in the Regional Framework

Main Debates

Does the Central American peace process after 1984 provide a framework for creating durable solutions for refugees or is its significance limited to the particular historical and political circumstances?
Is the Mexico Declaration and Plan of Action a rhetorical compromise or a regional action plan?

**Main Points**
Peace process and assisted repatriation of refugees
Historical and comparative experiences
New focuses in the Mexico Declaration and Plan of Action and their potential impact on the progressive development of international refugee law

**Soft Law**
Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Guatemala, 17 June 1994.

**Inter-American Commission on Human Rights**

**Country Reports**

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

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

Core

Extended

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

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

Main Points
Reluctance to directly apply the international obligations derived from the 1951 Geneva Convention
Slow transposition of the 1951 Geneva Convention provisions into national legislation in Latin America
Paucity of national legislation and national administrative and judicial organs dedicated specifically to protecting refugees

Inter-American Commission on Human Rights
Country Reports
(detailed analysis about the access to refugee status determination, the right to asylum, exclusion and expulsion practices in Canada).

**UNHCR Documents**


**Readings**

Core


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

**Main Debates**

In the case of Colombia, what have been the results achieved by the protection offered by national institutions, in contrast with the results of the protection offered by the international community?

What are the direct and indirect consequences of UNHCR’s activities beyond its traditional mandate in Colombia: does assistance to the internally displaced come at the expense of refugees?

**Main Points**

National status of ‘internally displaced person’ versus refugee status

Situation of the internally displaced in host communities

Problems related to voluntary return (as durable solution) in the framework of a conflict

Protection of human rights (including *non-refoulement*) versus concerns of regional security

Eventual reparation measures in the Inter-American framework of human rights protection versus situation of grave and massive human rights violations
Inter-American Court of Human Rights

Cases

Article 22

Case of the Massacre of Ituango v. Colombia. Judgement of 1 July 2006 (the state must ensure the return of displaced persons to their territories of origin in conditions of security, or if this cannot be ensured, provide the necessary and sufficient resources in order that they can be resettled in similar conditions at the place they freely and voluntarily choose).

Case of the Massacre of Mapiripán v. Colombia. Judgement of 15 September 2005 (the state must take the necessary measures to guarantee that the family members of the victims of displacement can return in conditions of security to Mapiripán when they so desire).

Case Moiwana v. Suriname. Judgement of 15 June 2005 (the state did not take the necessary measures to guarantee the safe and dignified return of displaced persons, nor did it carry out the necessary investigations about the human rights violations due to the forced displacement of this community, which caused them emotional, psychological, spiritual and economic suffering).

Provisional Measures

Provisional measures in the matter of the indigenous community of Kankuamo, 5 July 2004 (the Colombian state was required to guarantee the necessary conditions of security in order to respect the right to freedom of movement of the indigenous Kankuamo people, so that those who have been forcibly displaced could return to their home if they so desire).

Provisional measures in the matter of the communities of Jiguamiando and Curbarado, 6 March 2003 (the state of Colombia was required to ensure that the applicants can continue to live in their habitual residence as well as to adopt the necessary measures in order that the displaced persons of these communities could return to their home).

Provisional measures in the matter of the Peace Community of San Jose de Apartado, 24 November 2000 (the state of Colombia was requested to ensure the necessary conditions in order that the forcibly displaced persons of the Community of Paz de San José de Apartado could return to their home).
Inter-American Commission on Human Rights

Annual Reports


Country Reports

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

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


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


VI.5 The North American Regional Materials

Main Debates
Is the implementation of the 2002 Canada-USA “Safe Third Country” agreement leading to the violation of protection obligations by either country?

Treaties
Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, signed on 5 December 2002, as part of the Smart Border Action Plan, and entered into force on 29 December 2004.

Readings
Core

Extended
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