

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Book Chapters

Faculty Scholarship

2012

Refugees and Asylum

James C. Hathaway

University of Michigan Law School, jch@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/53

Follow this and additional works at: https://repository.law.umich.edu/book_chapters



Part of the [Human Rights Law Commons](#), [Immigration Law Commons](#), and the [International Law Commons](#)

Publication Information & Recommended Citation

Hathaway, James C. "Refugees and Asylum." In *Foundations of International Migration Law*, edited by B. Opeskin, R. Perruchoud, and J. Redpath-Cross, 177-204. Cambridge: Cambridge Univ. Press, 2012.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Refugees and asylum

JAMES C. HATHAWAY¹

During the late nineteenth and early twentieth centuries, European governments enacted a series of immigration laws under which international migration was constrained in order to maximise advantage for States. These new, largely self-interested laws clashed with the enormity of a series of major population displacements within Europe, including the flight of more than a million Russians between 1917 and 1922, and the exodus during the early 1920s of hundreds of thousands of Armenians from Turkey. The social crisis brought on by the *de facto* immigration of so many refugees – present without authorisation in countries where they enjoyed no protection and no ability to support themselves legally – convinced European governments that the viability of the overall migration control project depended on building into that regime a needs-based exception for refugees. Providing specifically for refugees would legitimate what was, in any event, an unstoppable phenomenon; it would thus reinforce the viability of the protectionist norm. Equally important, enfranchising those who were unlawfully present would defuse social tensions in States of reception and position refugees to make a positive contribution to their new societies.

7.1. THE EVOLUTION OF INTERNATIONAL REFUGEE LAW

Between 1920 and 1950, the League of Nations and other intergovernmental bodies were given the task of administering refugee protection, commencing with the mandate of Fridtjof Nansen in the 1920s. This was an extraordinarily fluid era, with the refugee definition evolving from an initial focus on groups of *de jure* stateless persons; then refocussing on groups of persons who were *de facto* disfranchised (i.e., deprived of the substantive benefits of nationality) under the National Socialist regime in Germany; and, in the post-war era, embracing individuals in

¹ The assistance of Research Scholar Simone Alt is acknowledged with appreciation. Portions of this analysis draw on the author's earlier work, in particular: James Hathaway, *The Law of Refugee Status* (Butterworths, 1991); James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005). Cases referred to herein may be accessed on the Refugee Caselaw Site (www.refugeecaselaw.org).

search of escape from perceived injustice in their home State.² Not only did the definition of a refugee shift from a juridical, to a social, and finally to an individualist perspective, but the actual rights guaranteed to refugees under the succession of refugee treaties also changed over time. Drawing on the normative structures of international law of aliens and the interwar minorities treaties, the duties owed to refugees were sometimes defined in mandatory terms, sometimes as benchmarks to be strived for. The critical duty of *non-refoulement* – not to return refugees to a territory where they may face persecution – first appeared in 1933.³ But the predominant focus of refugee treaties was on ensuring access to key socio-economic rights – for example, relief from foreign labour restrictions, access to education, and the right to receive medical and welfare benefits. International agencies were not engaged simply in oversight, but were the lead entities entrusted with protecting refugees.

7.1.1. The 1951 *Convention relating to the Status of Refugees*

The primary standard of refugee protection today is the *Convention relating to the Status of Refugees* (1951) ('Refugee Convention'), to which roughly 80 per cent of the world's States have bound themselves.⁴ While the Refugee Convention provides for the continuing protection of all persons deemed to be refugees under any of the earlier accords, its definition is fundamentally individualist and forward-looking ('a well-founded fear of being persecuted'), and limited to persons who have already fled their own country and whose risk derives from civil or political discrimination. When first adopted, States could restrict their commitments to pre-1951 and European refugees, though few in fact chose to do so.

While clearly born of the strategic goals of Western States in the immediate post-Second World War era, an extraordinary judge-led commitment in the years since 1990 has ensured the continuing viability of this definition to meet most modern needs.⁵ A real strength of the Refugee Convention is its rights regime,

2 James Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33(2) *International and Comparative Law Quarterly* 348.

3 Walter Kälin, *Das Prinzip des Non-Refoulement* (Lang, 1982); Gunnell Stenberg, *Non-Expulsion and Non-Refoulement* (Iustus Förlag, 1989).

4 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). The drafting history of the Refugee Convention is collected in Alex Takkenberg and Christopher Tabhaz (eds.), *The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees* (Dutch Refugee Council, 1989).

5 Leading national analyses of refugee law have played a critical support role in this process of normative reinvigoration. See Frédéric Tiberghien, *La protection des réfugiés en France* (Economica, 1988); Walter Kälin, *Grundriss des Asylverfahrens* (Helbing & Lichtenhahn, 1990); Geoffrey Coll and Jacqueline Bhabha (eds.), *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (Federal Publications, 1992); Vitit Muntarbhorn, *The Status of Refugees in Asia* (Clarendon Press, 1992); Mary Crock (ed.), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Federation Press, 1993); Hélène Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff, 1995); Vincent Chetail and Vera Gowlland-Debbas (eds.), *Switzerland and the International Protection of Refugees* (Kluwer Law International, 2002); Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (Oxford University Press, 2003); Mark Symes and Peter Jorro, *Asylum Law and Practice* (International Specialized Book Service, 2003); Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006); Mirko Bagaric et al., *Migration and Refugee Law in Australia: Cases and Commentary*

which not only guarantees such critical rights as non-penalisation for illegal entry, non-expulsion and *non-refoulement*, but provides for the most far-reaching guarantees of socio-economic rights granted to any category of non-nationals under international law. Read together with the subsequently enacted norms of international human rights law, the refugee rights regime is an extraordinarily resilient and comprehensive normative structure.

In exchange for these progressive commitments, however, the States that drafted the Refugee Convention insisted that they – not the international oversight agency, now the United Nations High Commissioner for Refugees ('UNHCR') – would control the refugee protection system. While State parties agree to cooperate with UNHCR in its duty to supervise the application of the Refugee Convention – and while UNHCR has leveraged its convention-based and statutory authority (described below, Section 7.1.4) to establish itself as both the leading source of normative guidance and a critical on-the-ground actor in less developed countries – governments nonetheless remain the lead entities for refugee protection under the terms of the Refugee Convention.

7.1.2. The 1967 *Protocol relating to the Status of Refugees*

At the global level, the most critical legal development since the Refugee Convention was the advent of the *Protocol relating to the Status of Refugees* (1967) ('Protocol').⁶ This treaty eliminated the option for States to restrict protection efforts to pre-1951 refugees, or European refugees, or both. While the Protocol is sometimes said to have 'universalised' the Refugee Convention, it did not in fact vary the criteria of the Convention (a well-founded fear of being persecuted for reasons of civil or political status) or broaden its rights guarantees (e.g., to include a right to basic physical security). As such, many involuntary migrants in the less developed world remain excluded from the refugee regime where, for example, their flight is prompted solely by natural disaster, war, or broadly based political and economic turmoil, or where migration does not involve crossing an international border. But because most States are parties to both the Refugee Convention and the Protocol,⁷ there is a legal duty to read the Convention's protection responsibilities in the geopolitically and temporally inclusive way mandated by the Protocol:

Because the Convention is universal, it does not speak only of the grounds of persecution that have been most familiar to Western countries ... [I]n other societies, and in modern times,

(Cambridge University Press, 2007); Martin Jones and Sasha Baglay, *Refugee Law* (Irwin Law, 2007); Osamu Arakaki, *Refugee Law and Practice in Japan* (Ashgate, 2008); Deborah Anker, *The Law of Asylum in the United States* (West Group, 2011).

6 *Protocol relating to the Status of Refugees*, opened for accession 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

7 The Protocol incorporates by reference most of the provisions of the Refugee Convention. A small number of countries (including the United States) that are parties to the Protocol but not the Convention are thus bound to respect the Convention's refugee definition and rights regime.

different cultural norms and social imperatives may give rise to different sources of persecution. . . . The concept is not a static one. Nor is it fixed by historical appreciation.⁸

7.1.3. Regional developments

In addition to this duty to interpret global norms in an inclusive way, greater geopolitical inclusivity has also been promoted by regional organisations (see Chapter 14). The African Union administers the *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) ('OAU Convention').⁹ This treaty broke new ground by extending protection to all persons compelled to flee across national borders by reason of any man-made disaster. In contrast to the Refugee Convention, it does not require a link between risk and civil or political status, and extends protection to persons fleeing harm that affects only a portion of their country of origin. In 2009, the African Union also adopted binding norms on the protection of internally displaced persons, although these are not yet in force.¹⁰

A similar but somewhat more modest step was taken in Latin America via adoption of the *Cartagena Declaration on Refugees* (1984), approved by the Assembly of the Organization of American States ('OAS') in 1985.¹¹ While acknowledging the refugee status of groups of persons fleeing widespread occurrences, the OAS standard does not extend protection to persons in flight from problems affecting only a part of their country of origin. Nor is it legally binding, though some States (e.g., Bolivia and Brazil) have incorporated it into their domestic law.

The initial focus of activity in Europe was the Council of Europe, which recognised the notion of *de facto* refugees in 1976.¹² The momentum today, however, is with the European Union, which has enacted binding directives commencing in 2004 on the recognition of refugee status and a broader 'subsidiary protection' class,¹³ detailing the content of protection and stipulating the procedures by which protection is to be implemented.¹⁴ Expressly framed as 'minimum standards' and as subordinate to Refugee Convention requirements, since 2009 these directives have been interpreted and applied by the European Court of Justice. In contrast to the principled expansion at the root of African and Latin American initiatives, regional asylum activity in the European Union has been prompted by the protection dictates of European human rights law and, in particular, by the determination of

8 A v. *Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, 293–4.

9 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

10 *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, adopted 23 October 2009 (not yet in force).

11 *Cartagena Declaration on Refugees*, OEA/Ser.L/II.66, doc 10 rev 1 (22 November 1984) 190–3.

12 *Parliamentary Assembly Recommendation 773 on the Situation of De Facto Refugees*, Council of Europe (26 January 1976).

13 Elspeth Guild and Carol Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart, 2001).

14 Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006).

States to achieve regional harmonisation in refugee law. This has been required by national courts – especially those of the United Kingdom¹⁵ – as a legal precondition for the allocation of asylum claims on a regional basis in Europe.

7.1.4. The mandate of the United Nations High Commissioner for Refugees

Beyond these formal legal developments, the institutional protection mandate of UNHCR now encompasses groups and forms of intervention that go significantly beyond its 1950 Statute,¹⁶ as the result of ‘good offices’ and other mandates approved by the United Nations General Assembly and financed through voluntary contributions. These enhancements of its competence have enabled the agency to respond to mass movements of refugees outside Europe and, more controversially, to assume responsibility for internally displaced persons. UNHCR sees itself as responsible to respond not just to risks of being persecuted, but to any risk giving rise to a protection need in the context of involuntary migration. In pursuit of this extremely broad mandate, UNHCR has transformed itself into an operational agency in which the resources devoted to oversight of legal protection, while still significant, are dwarfed by the commitments made to relief on the ground.

7.1.5. Complementary developments in human rights and humanitarian law

Refugee-specific treaties and institutions at both the global and regional levels are also complemented in critical ways by broader norms of international human rights and humanitarian law. In particular, art. 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984),¹⁷ and the prohibition in art. 7 of the *International Covenant on Civil and Political Rights* (1966) (‘ICCPR’)¹⁸ of subjection to torture or to inhuman or degrading treatment or punishment, provide the bases for an expanded category of persons entitled to benefit from the duty of *non-refoulement*. So too does art. 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) at the regional level.¹⁹ The 1949 Geneva Conventions that form the basis of modern international humanitarian law have also been interpreted to preclude the forced return of civilians to ongoing conflict.²⁰ While claims that there is a comprehensive

15 *R v. Secretary of State for the Home Department; Ex parte Adan and Aitseguer* [2000] UKHL 67 (19 December 2000).

16 *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950).

17 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

19 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953).

20 *In re Santos*, US Imm. Ct. Dec. No A29–564–781 (24 August 1990); *Oreliev v. Canada (Minister of Employment and Immigration)* [1992] 1 FC 592.

duty of *non-refoulement* binding all States by force of customary law are overstated,²¹ there is no doubt that many involuntary migrants outside the Refugee Convention definition of a refugee are today entitled to treaty-based protection at the international or regional level. Equally important, many of these treaties can be relied on to expand the scope and quality of protection owed to classically defined refugees, perhaps most importantly in the realm of civil and political rights.

7.2. REFUGEE STATUS

The refugee definition – the central criterion of which is a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group’ – is to be interpreted purposively and in context, rather than literally.²² To that end, interpretation is to promote an understanding of refugee law as surrogate or substitute national protection,²³ owed to persons who can no longer benefit from the protection of their own country.

As the House of Lords has observed, while each State party interprets the refugee definition independently, ‘as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning ... without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation’.²⁴ To this end, ‘[c]onsidered decisions of foreign courts, in particular appellate decisions, should be treated as persuasive in order to strive for uniformity of interpretation’.²⁵ The lively transnational judicial conversation among judges – significantly aided by the International Association of Refugee Law Judges, established in 1997 – has proved to be the critical means by which interpretation of the refugee definition has been continually updated, allowing it to be ‘a living instrument in the sense that while its meaning does not change over time its application will’.²⁶

While some courts (and UNHCR) persist in recommending what is sometimes referred to as a ‘holistic’ interpretive method, by which a general sense of conformity to the definition is sought, ‘experience shows that adjudicators and tribunals give better reasoned and more lucid decisions if they go step by step’.²⁷ Indeed, ‘[a]lthough the definition must be read as a whole, each of the elements must be present’.²⁸

21 James Hathaway, ‘Leveraging Asylum’ (2010) 45(3) *Texas International Law Journal* 503.

22 *A v. Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225.

23 *Canada (Attorney General) v. Ward* [1993] 2 SCR 689; *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37 (6 July 2000).

24 *R v. Secretary of State for the Home Department; Ex parte Adan and Aitseguer* [2000] UKHL 67 (19 December 2000).

25 *NBGM v. Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 60 (12 May 2006) [158].

26 *Sepe v. Secretary of State for the Home Department* [2003] UKHL 15 (20 March 2003) [6].

27 *Svazas v. Secretary of State for the Home Department* [2002] EWCA Civ 74 (31 January 2002) [30].

28 *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 (11 April 2002) [147].

There are six criteria that have to be fulfilled for a person to be a refugee:

- 1 the person has to be outside his or her country;
- 2 due to a genuine risk;
- 3 of the infliction of serious harm;
- 4 resulting from a failure of state protection;
- 5 which risk is causally connected to a protected form of civil or political status; and
- 6 the person must be in need of and deserving of protection.

7.2.1. Alienage

The first element of refugee status under the Refugee Convention is that the claimant be outside his or her own country. The purpose of this alienage requirement is to define the scope of refugee law in a realistic and workable way, dictated by the limited reach of international law. Equally important, the restriction of refugee status to persons outside their own country aligns with the treaty's rights regime, which is attuned precisely to the needs of involuntary *aliens* – and is, as such, not relevant to persons who are displaced internally.

Refugee status is acquired as soon as a person *leaves* his or her own country for a relevant reason, though no State is obliged to protect the person until he or she comes under its formal or *de facto* jurisdiction. Protection is owed to a person meeting the definition (whether or not status has been formally assessed) who is under a State party's jurisdiction. It matters not whether the entry or presence is lawful, and immigration penalties may not be imposed for unlawful entry or presence dictated by flight from persecution.

There is also no duty on the part of refugees to seek protection either in their own region or in the first safe country to which they travel. Despite the proliferation of so-called 'country of first arrival rules', which purport to force refugees to seek protection in a single designated State,²⁹ a transfer of protective responsibility is lawful under the Refugee Convention only where effected in a timely way and without infringing the refugee's acquired rights (see below). If, and only if, these standards are met, protective responsibility may lawfully be transferred to another State party, whether or not the refugee consents to that transfer.

Assuming that no such transfer occurs, all criteria of the refugee definition are assessed in relation to circumstances in the applicant's country of nationality, whatever the person's relationship with other States. A person with more than one nationality must satisfy the refugee definition in relation to each country of

²⁹ 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 ('Dublin II Regulation') [2003] OJ L 50/1; 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 ('Safe Third Country Agreement'), Canada Gazette Vol 138 No 22 (5 December 2002).

nationality, while a stateless person may qualify for refugee status if he or she can show a relevant fear of being persecuted in the 'country of former habitual residence' – that is, the *de facto* home, where he or she enjoyed an ongoing protective relationship.³⁰ The goal in all cases is to restrict refugee status to persons deprived by persecution of the effective enjoyment of their most critical national bond.

Finally, because the Refugee Convention is concerned not with past harms but with forward-looking risk, it protects on equal terms refugees *sur place* – that is, persons who, while already abroad, find they cannot return by reason of the risk of being persecuted at home.

7.2.2. Genuine risk

The requirement of a genuine risk follows from the applicant's duty to show that he or she is outside his or her own country 'owing to a well-founded fear'. Common law jurisprudence has taken the view that the 'well-founded fear' requires not only evidence of forward-looking assessment of objective risk, but also demonstration of subjective fear in the sense of trepidation. However, this two-pronged approach is neither historically defensible nor practically meaningful.³¹ The concept of well-founded fear is inherently objective, intended to restrict the scope of protection to persons who fear harm in the sense that they anticipate it may occur – that is, who can demonstrate a present or prospective risk of being persecuted, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past. This interpretation is not only consistent with the Refugee Convention's drafting history, but the understanding of 'fear' as a forward-looking appraisal allows the English language text to conform to the objective focus of the equally authoritative French text, '*craignant avec raison*'.

Leading formulations of the well-founded fear test are 'reasonable possibility',³² 'reasonable degree of likelihood',³³ 'serious possibility',³⁴ and 'real chance',³⁵ – all intended to identify situations of risk that fall significantly below a probability of harm, but which give rise to more than a speculative chance that persecution may ensue.

The test is ordinarily met by some combination of credible testimony and country data.³⁶ There is no requirement of past persecution, though where such evidence exists it is usually good evidence of forward-looking risk. Nor is there any

30 A stateless person who has no well-founded fear of being persecuted is not a refugee, but may be entitled to protection on the grounds of statelessness as such (see Chapter 4).

31 *Yusuf v. Canada* [1992] 1 FC 629; *Win v. Minister for Immigration and Multicultural Affairs* [2001] FCA 132 (23 February 2001), approved in *Minister for Immigration and Multicultural Affairs v. Islam* [2001] FCA 1681 (20 December 2001).

32 *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 US 421 (1987).

33 *R v. Secretary of State for the Home Department; Ex parte Sivakumaran* [1988] 1 All ER 193.

34 *Adjei v. Canada (Minister of Employment and Immigration)* [1989] 2 FC 680.

35 *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412.

36 See Gregor Noll (ed.), *Proof, Evidentiary Assessment and Credibility Assessment in Asylum Procedures* (Martinus Nijhoff, 2005).

requirement for the applicant to show that he or she has been singled out or targeted; it suffices to show inclusion in a relevant at-risk group.

7.2.3. Serious harm

A person is a refugee only if he or she apprehends a form of harm that amounts to a risk of 'being persecuted'. This use of the passive voice (rather than 'persecution') signals the need to demonstrate a predicament of risk that calls for surrogate international protection. There is therefore strong support for the view that the risk of being persecuted requires evidence of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.³⁷

The first element of this test – requiring the demonstration of a risk of 'serious harm' in the sense of a risk to basic human rights – clearly does not restrict refugee status to persons able to show the possibility of consequences of life or death proportions. The Refugee Convention accepts that deprivation of basic civil and political freedoms is sufficient cause for surrogate international protection. In addition, threats to core social and economic rights are increasingly recognised as persecutory:

Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education, involve such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.³⁸

7.2.4. Failure of State protection

Because of the predicament-oriented nature of the requirement of 'being persecuted', there must not only be demonstration of a risk to basic human rights, but also evidence that the individual's own State cannot or will not respond to that risk. If the applicant's own country can and will remedy the risk, the predicament of 'being persecuted' does not exist. In a world in which many, perhaps most, threats emanate not from States but from non-State actors, this recognition is key to the continuing vitality of the refugee definition:

[T]he discriminatory practice of the state is at least as important as the discriminatory practice of the attackers. . . . If there are thugs about perpetrating serious acts of maltreatment against the population as a whole, but the state offers protection only to some of its citizens, and not to others, in my view those citizens are being persecuted in just the sort of way that merits the surrogate protection of other states under the Convention.³⁹

37 *Canada (Attorney General) v. Ward* [1993] 2 SCR 689; *R v. Immigration Appeal Tribunal; Ex parte Shah and Islam* [1999] 2 AC 629; *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37 (6 July 2000); *Sepet v. Secretary of State for the Home Department* [2003] UKHL 15 (20 March 2003); *R v. Special Adjudicator; Ex parte Ullah* [2004] UKHL 26 (17 June 2004); *Do v. Secretary of State for the Home Department* [2004] UKHL 26 (17 June 2004); *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31 (7 July 2010).

38 *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* [2000] HCA 19 (13 April 2000), [29].

39 *Secretary of State for the Home Department v. Horvath* [1999] EWCA Civ 3026 (2 December 1999) [17].

Even in those States that still embrace an understanding of 'being persecuted' focussed on the harm alone, there is increasing recognition that 'persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect'.⁴⁰ At the very least, such concerns are taken into account by virtue of the definition's requirement that a refugee is a person who is 'unable or . . . unwilling to avail himself of the protection' of his or her country (art. 1(A)(2)), though this approach raises difficulties meeting the definition's nexus requirement, which requires that the risk of 'being persecuted' be causally connected to a Refugee Convention ground.

The standard of a 'failure of State protection' remains disputed. The formalistic view – that the focus is on whether the home State has 'in place a system of domestic protection and machinery for the detection, prosecution and punishment of [rights abuse and] an ability and a readiness to operate that machinery'⁴¹ – does not conform with the Refugee Convention's focus on the realities of risk, which may persist despite the 'ability and readiness' to act. To be preferred therefore is the view that '[w]hatever the law provides and the officials attempt, if the country of nationality is unable, as a matter of fact, to afford protection . . . the conclusion may be reached that "protection is unavailable" in the person's country of nationality'.⁴²

Also still the subject of some controversy is whether there can be said to be a failure of state protection where the individual – while at risk in his or her home region – could nonetheless move internally rather than seek protection as a refugee abroad. While there is little doubt that the Refugee Convention's focus on risk in 'the country' of nationality requires consideration of internal alternatives to refugee status, the precise formulation of the test is unclear. It is generally agreed that the internal alternative must be accessible, must provide an antidote to the original risk, and must not present a new risk of being persecuted or of indirect return to the place of origin. The dominant view argues that, beyond these criteria, return need only be 'reasonable'.⁴³ However, the better view recognises that refugee status should not be subject to the whims of a 'reasonableness' test, given the Refugee Convention's requirement that a refugee 'is unable or, owing to such fear, is unwilling to *avail himself of the protection* of that country'.⁴⁴ Rather, refugee status is fairly denied only where the home State will in fact provide protection, evidenced by ensuring respect for basic rights, in the proposed site of internal relocation.⁴⁵

40 *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 (11 April 2002) [31].

41 *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37 (6 July 2000).

42 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 (3 May 2001) [198].

43 *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5 (15 February 2006); United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Internal Flight or Relocation Alternative' (UN Doc HCR/GIP/03/04, UNHCR, 23 July 2003).

44 See James Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003) 357, 381.

45 *Butler v. Attorney General* [1999] NZAR 205.

7.2.5. Nexus to civil or political status

If the peril a claimant faces cannot somehow be linked to his or her civil or political status ('race, religion, nationality, membership of a particular social group, or political opinion'), the claim to refugee status fails. Put succinctly, refugee law requires that there be a nexus between who the claimant is or what he or she believes and the risk of being persecuted in his or her home State (see Case Study 7.1).

A Refugee Convention ground need not be the sole, or even predominant, cause of the risk of being persecuted, though it must be a contributing factor to the risk. It also does not matter whether the risk accrues by reason of actual or (even incorrectly) imputed civil or political status, since in either case the non-discrimination logic of the nexus clause is engaged.

But just what must be causally connected to the Refugee Convention ground? In those States that have adopted the bifurcated understanding of 'being persecuted' described above, the nexus can be to either of the two constituent elements – the serious harm or the failure of State protection – since in either case the predicament of 'being persecuted' is by reason of the Refugee Convention ground. But where the more limited notion of 'being persecuted' focussed on serious harm alone prevails, refugee status will not be recognised where the only discrimination is in relation to the duty to protect, rather than in the infliction of the harm as such.⁴⁶ This approach fails to do justice to the protective goals of refugee law,⁴⁷ and has proved particularly problematic where the home State is unwilling to afford protection to women on the grounds of their sex (see Chapter 8).⁴⁸

The first ground of 'race' includes all forms of identifiable ethnicity. Closely linked is the concept of 'nationality', which encompasses not only formal citizenship, but also linguistic groups and other culturally defined collectivities. A risk is for reasons of 'religion' whether based on holding or refusing to hold any form of theistic, non-theistic or atheistic belief; or on actions (such as worship or proselytisation) within the scope of religion, as adumbrated in international human rights law.

While it is clear that the political 'opinion' ground does not require an individual to have acted on those beliefs, there is a lively debate about the breadth of what opinions (and cognate actions) are to be deemed 'political'. The traditional broad view comprising an opinion 'on any matter in which the machinery of state, government, and policy may be engaged'⁴⁹ has been challenged on the grounds that while the Refugee Convention's understanding 'clearly is not limited to party politics . . . [i]t is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society.'⁵⁰

46 *Immigration and Naturalization Service v. Elias Zacarias*, 502 US 478 (1992).

47 *Sepet v. Secretary of State for the Home Department* [2001] EWCA Civ 681 (11 May 2001).

48 The contrary approach has been applied to the benefit of female refugee claimants: *R v. Immigration Appeal Tribunal; Ex parte Shah and Islam* [1999] 2 AC 629; *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 (11 April 2002). See also Heaven Crawley, *Refugees and Gender: Law and Practice* (Jordan, 2001); Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate, 2000).

49 *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, 693.

50 *V v. Minister for Immigration and Multicultural Affairs* [1999] FCA 428 (14 April 1999) [33].

CASE STUDY 7.1 Refugees expelled to North Korea

Hundreds of thousands of North Koreans have fled into China since 1995, hoping to escape starvation and political repression (see Map 5.1). Critical food shortages are endemic in North Korea, with national resources distorted to support the country's militarisation and political elite. Even access to basic healthcare and education often depends on demonstrated loyalty to the regime.

Despite being a party to the Refugee Convention, China refuses to assess these protection claims. It instead stigmatises the North Korean arrivals as 'illegal economic migrants', refusing to provide them with even food or other essentials. China prohibits United Nations agencies, including UNHCR, from meeting these needs, and arrests any of its nationals found to be assisting North Koreans to survive.

China, moreover, routinely removes North Koreans found in its territory, relying on a 1986 bilateral repatriation agreement. Fear of forcible return drives many North Koreans underground, making them especially vulnerable to traffickers.

In truth, the Chinese labelling of the North Koreans as 'illegal economic migrants' is legally irrelevant. Persons who face only a generalised risk of starvation are not Refugee Convention refugees because they cannot show that their risk, while grave, stems from one of the five Convention grounds of race, religion, nationality, membership of a particular social group or political opinion. But Convention refugee status is established if the risk derives from actual or implied political opposition to the regime and consequential denial of access to core economic rights. It is 'well-established that persecution can take the form of economic deprivation as well as physical mistreatment'.⁵¹

More generally, so long as an individual or group faces the risk of being persecuted for a Refugee Convention reason, the fact that their flight to safety is partly motivated by economic destitution does not compromise their refugee status. Refugee status is to be recognised so long as 'the threat of persecution [is] a material reason, among a number of complementary reasons'.⁵²

Given that many (perhaps most) North Korean migrants are, therefore, refugees, they are entitled to benefit from arts. 2–34 of the Refugee Convention – for example, access to rationing and other support systems, work and protection against *refoulement*. China cannot plead its own failure to assess the claims, much less its bald assertion of non-refugee status, as grounds for failing to honour these obligations. Much less can it invoke a bilateral treaty with North Korea to justify breach of international responsibilities to refugees.

Indeed, China is duty-bound to assist refugees to access their Refugee Convention rights (art. 25) and to cooperate with UNHCR's oversight of Convention rights (art. 35). But as this case study shows, the absence of any binding system to enforce the Refugee Convention makes it difficult to bring obligations to bear. Given UNHCR's political and fiscal vulnerability (only about 2 per cent of its annual income is guaranteed), there is presently little it can do when a powerful State such as China decides to breach its freely assumed duties.

⁵¹ *Chenv. Holder*, 604 F 3d 324 (7th Cir, 2010), 334.

⁵² *HJ and HTV. Secretary of State for the Home Department* [2010] UKSC 31 (7 July 2010) [62].

Most controversial of all is interpretation of the notion of ‘membership of a particular social group’ – an understandable controversy, since this concept was introduced with little explanation as a last-minute amendment to the Refugee Convention, and is not a recognised term of art. Construction based on the principle of *ejusdem generis* (requiring an ambiguous word to be interpreted in consonance with the meaning of words with which it forms a common class) has resulted in a focus on groups defined by an immutable characteristic, aligning this ground with the other four grounds, all of which derive from norms of non-discrimination law. This approach has resulted in the recognition of, for example, sex or gender, sexual orientation and linguistic groups as ‘particular social groups’.⁵³ The alternative ‘social perception’ test – which focusses on groups seen to be set apart from society, whether or not for a fundamental reason⁵⁴ – has gained traction in recent years. UNHCR has advocated an instrumentalist interpretation that requires recognition as a social group if *either* of the two tests is met. The European Union responded to this view by suggesting instead the need to meet *both* tests – meaning that even groups identified by their ‘immutable characteristic’ are now potentially at risk of non-recognition as ‘particular social groups’.

7.2.6. Cessation and exclusion

Because refugee protection is conceived as protection for the duration of the risk, art. 1C of the Refugee Convention recognises several categories of persons deemed no longer to need international protection because they can once more benefit from the protection of their own country. Refugee status ceases in the case of a refugee who voluntarily and with full understanding seeks out diplomatic protection in his or her country of origin; who lost his or her original nationality but voluntarily elects to reacquire it; who re-establishes himself or herself in the country of origin, in the sense of resuming ongoing presence there; or who it is felt can and should return to the State of origin in view of a fundamental and demonstrably durable change of circumstances that restores protection to that person.

Second, because refugee law is designed to afford surrogate international protection to those who need it, an individual who can already access an approved form of alternative surrogate protection is excluded from refugee status – namely, protection by the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (‘UNRWA’) in the case of Palestinians (art. 1D), or acquisition by any refugee of nationality or *de facto* nationality in a country that will protect that person (art. 1E).

53 *Canada (Attorney General) v. Ward* [1993] 2 SCR 689, adopting *Matter of Acosta*, United States Board of Immigration Appeals, A-24159781 (1 March 1985).

54 *A v. Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225.

Finally, in order to ensure that it is not sullied by the admission of persons understood to be undeserving of the benefits of refugee status, refugee status is denied under art. 1F to persons reasonably suspected of being international criminals; of having acted contrary to the principles and purposes of the United Nations; or of having committed serious common crimes outside the asylum State that remain justiciable or in relation to which lawful punishment has yet to occur. There is regrettable confusion in practice between this last category and the broader authority under art. 33(2) to remove serious criminals on grounds of danger to the host country. Article 1F is designed to ensure the alignment of refugee law with extradition law, thereby ensuring that asylum does not provide a haven to persons escaping the force of legitimate criminal prosecution or punishment. Article 33(2) permits State parties to send truly dangerous refugees away, even to their home country if necessary. But in contrast to the low threshold for exclusion that applies under art. 1F(b) to persons evading legitimate criminal law prosecution or punishment abroad, art. 33(2) allows security-based removal only if there are ‘reasonable grounds’ for a determination of danger based on ‘final’ conviction for a crime that is ‘particularly’ serious – thus striking a balance not possible under the peremptory exclusion provisions of art. 1(F).⁵⁵

7.3. REFUGEE RIGHTS

The universal rights of refugees today derive from two primary sources – the Refugee Convention itself and general standards of international human rights law. Despite the post-1951 development of a broad-ranging system of international human rights law that can ordinarily be invoked by any person under a State’s jurisdiction, the Refugee Convention rights remain critical to ensuring meaningful protection.

First, general human rights norms do not address many refugee-specific concerns (such as non-rejection at the frontier, or non-penalisation for illegal entry). Second, the economic rights in the Refugee Convention are both more extensive than those under general human rights law (e.g., binding rights to private property and to benefit from public relief and assistance) and are defined as absolute and immediately binding (in contrast to general human rights norms). Third, even in the realm of civil rights, where general human rights law is of greatest value to refugees, relevant provisions of the Refugee Convention speak to more specific concerns (such as access to the courts) than are assumed under general norms. Fourth, the ability to withhold civil rights during a national emergency is also much

⁵⁵ *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 US 415 (1999); *Attorney-General v. Tamil X and Refugee Status Appeals Authority* [2010] NZSC 107 (27 August 2010).

more limited under the Refugee Convention than under general human rights law, as a consequence of which refugees can invoke refugee-specific norms even when general standards are suspended under the ICCPR. Fifth, the Refugee Convention mandates rights that lead to solutions to refugeehood, reflecting an understanding that refugee status is inherently a temporary status – protection for the duration of risk – that must ultimately be brought to an end in the interests of both the refugee and the receiving State.

7.3.1. Structure of entitlement

Refugee rights inhere in consequence of one's refugee status. Refugee rights are not dependent on formal status recognition, reflected in the fact that State parties are actually under no duty formally to assess status, and many do not:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁵⁶

But this does not mean that all the rights stipulated in arts. 2–34 of the Refugee Convention are immediately owed to all persons who meet the refugee definition. Under an ingenious system of 'levels of attachment', refugees become entitled to an expanding array of rights as their relationship with the asylum State deepens.⁵⁷ At the lowest level of attachment, some rights (e.g., protection against *refoulement* and access to the courts) are owed to any refugee under a State's *jurisdiction*, in the sense of being under its control or authority. A second set of rights inheres when the refugee is *physically present* within a State's territory (e.g., restrictions on freedom of movement must be justified, and religious freedom rights accrue). Once a refugee is deemed to be *lawfully present* in a State, which may occur tacitly as well as by formal decision, a third group of rights applies (e.g., the right to take up self-employment, and freedom of internal movement). Fourth, when a refugee is *lawfully staying*, which may occur by effluxion of time, especially where no formal refugee status determination process exists, he or she becomes entitled to additional rights (e.g., the right to take up employment and to benefit from public housing). A final group of rights inheres in refugees who are *durably resident* in the asylum country (e.g., entitlement to legal aid and to exemption from legislative reciprocity requirements). The structure of the attachment system is incremental: because the levels build on one another (a refugee in a State's territory

⁵⁶ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, 1992) [28].

⁵⁷ The structure of entitlement is explained in detail in Hathaway, *The Rights of Refugees under International Law*, above n. 1, 154 ff.

is also under its jurisdiction; a refugee lawfully present is also present; a refugee lawfully residing is also lawfully present; and a refugee durably residing is also lawfully residing), rights once acquired are retained for the duration of refugee status.

Not only do refugee rights inhere incrementally, but the standard of compliance with such rights is defined as a mix of absolute and contingent rights. At the very least, refugees receive the benefit of all laws and policies that apply to 'aliens generally'. But even rights defined at this lowest level of compliance generally require that refugees receive 'treatment as favourable as possible', requiring State parties to give good faith consideration to the non-application to refugees of any restrictions generally applied to aliens.

Most Refugee Convention rights mandate compliance at a significantly higher level. The rights to engage in non-political freedom of association and to engage in wage-earning employment, for example, must be guaranteed at the level granted to most-favoured foreign nationals – meaning that refugees are automatically entitled to whatever standard any group of foreigners receives, including under bilateral treaties, customs unions, and so on. Refugees must be assimilated to 'nationals' of the host country with regard to a significant range of rights, including education, welfare and social security. And there are some rights simply owed on an absolute basis – for example, administrative assistance (the duty of State parties to facilitate access to refugee rights), protection against expulsion and access to refugee travel documents. Importantly, the Refugee Convention prohibits any discrimination between and among refugees, meaning that an asylum State may not grant preferential treatment to any subset of the refugee population unless shown to be reasonable and objectively justifiable.

The primary responsibility to implement these rights is attributed to State parties, which must both establish mechanisms of administrative assistance to facilitate access to the rights formally guaranteed, and provide refugees with access to their courts. In addition, art. 35 of the Refugee Convention requires States to cooperate with UNHCR in implementing Convention duties, and art. 38 allows referral to the International Court of Justice in the case of any dispute between States on the interpretation or application of the Convention, though this authority has never been exercised. In practice, regional courts exercising jurisdiction under cognate human rights treaties have also relied on Refugee Convention rights to interpret the application to refugees of broader norms.

7.3.2. *Non-refoulement*

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted. Yet this fundamental

concern must somehow be reconciled to the fact that nearly all of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-nationals. Article 33's duty of *non-refoulement* – 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened' – is the primary response of the international community to this need, though it is less than a full affirmative right to receive asylum in at least two senses.

First, the duty of *non-refoulement* only prohibits measures that cause refugees to 'be pushed back into the arms of their persecutors';⁵⁸ it does not establish an affirmative duty to receive refugees. As an obligation 'couched in negative terms',⁵⁹ it applies only where there is a real risk that rejection will expose the refugee directly or indirectly to the risk of being persecuted for a Refugee Convention ground. In such circumstances, art. 33 often amounts to a *de facto* duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.

Second, because the *de facto* right of entry that flows from the duty of *non-refoulement* is a function of the existence of a risk of being persecuted, a State party need not allow a refugee to remain in its territory if and when that risk ends.⁶⁰

As one of the rights that inheres on a provisional basis even before refugee status has been formally assessed, the duty of *non-refoulement* applies as soon as an individual claiming to be a refugee comes under the jurisdiction of a State party, and continues until he or she has been fairly determined not to be a refugee. It constrains not simply ejection from within a State's territory, but also non-admittance.⁶¹ A critical challenge in recent years is the adoption by many States of '*non-entrée*' policies, pursuant to which an effort is made to divert refugees away from their jurisdiction by indirect means (such as visa requirements), or by taking action outside their jurisdiction (including on the high seas) to force refugees back to their home State. The latter tactic – despite one worrisome precedent from the United States Supreme Court⁶² – is proscribed by the Refugee Convention's attribution of art. 33 duties on the basis of jurisdiction (rather than arrival in a State's territory) if the result is direct or indirect *refoulement* (see Case Study 7.2).

58 *Statement of the Chairman Mr. Chance of Canada*, UN Doc E/AC.32.SR.21 (2 February 1950) 7.

59 *Applicant M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 131 (13 June 2003) [39].

60 *R v. Secretary of State for the Home Department; Ex parte Thangarasa*; *R v. Secretary of State for the Home Department; Ex parte Yogathas* [2002] UKHL 36 (17 October 2002).

61 Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Martinus Nijhoff, 2000); Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press, 2011).

62 *Sale v. Haitian Centers Council*, 509 US 155 (1993).

CASE STUDY 7.2 Extraterritorial deterrence: a way to avoid obligations?

In May 2009, Italy implemented a policy of interdicting refugees and other migrants on board ships headed for its shores. Detection was facilitated by reports from 'Frontex', the European Union's agency charged with patrolling European Union sea borders. In most cases, the Italian Navy stopped ships believed to be destined for Lampedusa or other Italian territory, and forcibly transferred the passengers onto the Italian vessel. Once on board, the detained persons were not interviewed to assess any protection claims, but were summarily returned to North African ports. During the first three months of the programme Italy carried out seven operations, resulting in the return of at least 600 people to Libya and a smaller number to Algeria.

The European Committee for the Prevention of Torture reported in April 2010 that among the migrants summarily repelled by Italy were persons registered as refugees with UNHCR. Many others from Somalia and Eritrea were later interviewed by UNHCR, which confirmed that they had plausible claims to international protection.

Libya has no functioning national asylum system and is not a party to the Refugee Convention, though it is bound by the regional *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).⁶³ Human Rights Watch reports that migrants forcibly returned there are subject to indefinite detention, and are often mistreated.

In one of the few cases by a senior court to consider such a scheme, the United States Supreme Court held that the Refugee Convention is silent on such extraterritorial action.⁶⁴ This holding provoked a United States drafter of the Refugee Convention, the late Professor Louis Henkin, to retort that

[i]t is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape.⁶⁵

Both the Inter-American Commission on Human Rights⁶⁶ and the English Court of Appeal⁶⁷ determined that the *Salé Case* was wrongly decided. First, the duty of *non-refoulement* in art. 33 is among a handful of critical rights that inhere as soon as a person claiming to be a refugee (or whose circumstances, including flight from a known refugee-producing State, suggest such status) comes under a State's *de facto* jurisdiction, including being on board a ship flying its flag. The protection obligations of Italy (and of Australia when operating its 'Pacific Solution', as well as of the United States

63 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

64 *Salé v. Haitian Centers Council*, 509 US 155 (1993).

65 Louis Henkin, Notes from the President (1993) 5 *American Society of International Law Newsletter* 1.

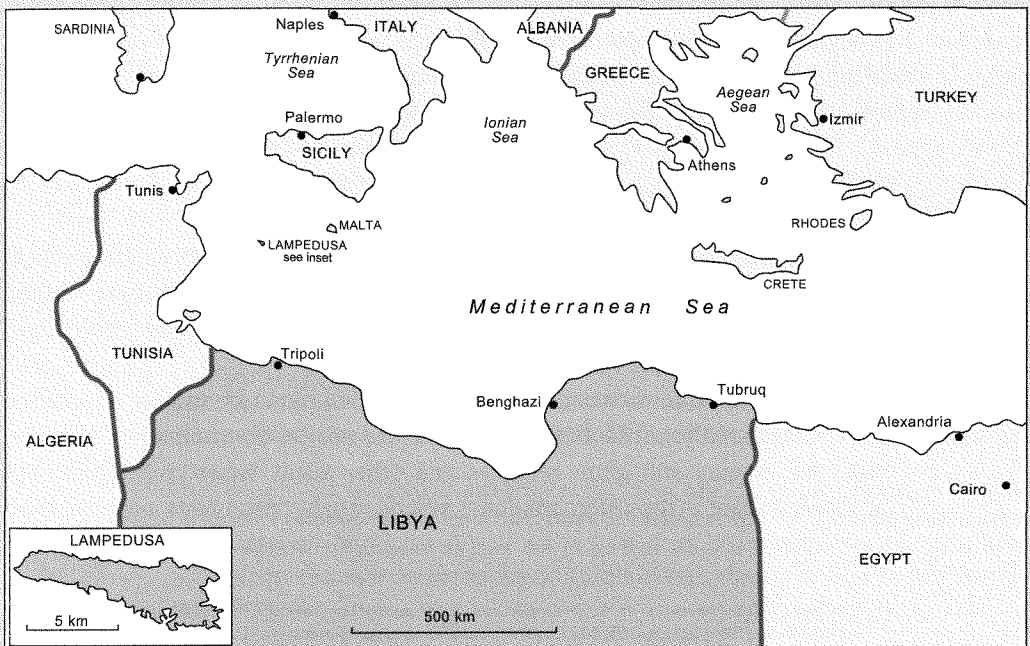
66 *Haitian Centre for Human Rights v. United States*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev at 550 (13 March 1997).

67 *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2003] EWCA Civ 666 (20 May 2003) [34]. In the House of Lords, Lord Hope nonetheless expressed some measure of support for the *Salé* decision: *R v. Immigration Officer at Prague Airport; Ex parte European Roma Rights Centre* [2004] UKHL 55 (9 December 2004) [68].

when it forcibly interdicted Haitians fleeing the murderous Cedrés regime) were thereby engaged.

Second, the drafters of the Refugee Convention were committed to ensuring that subterfuge could not be resorted to in order to avoid protection obligations, leading them to amend the draft treaty to set a duty of non-return 'in any manner whatsoever'. This was specifically said to embrace 'various methods by which refugees could be expelled, refused admittance or removed'.⁶⁸ Extraterritorial deterrence is therefore as much a breach of the Convention as expulsion from within a State's territory.

Even if refugees are not indirectly returned to their home countries (as in the case of those indefinitely detained in Libya), this does not make the interdiction scheme lawful. When the refugees were forced on board the Italian vessel, they came under the jurisdiction of a State party, thereby acquiring several core refugee rights in addition to protection against *refoulement*. Because Libya is not a party to the Refugee Convention, but only to the African Union's regional refugee convention (which requires member States only to use 'their best endeavors, consistent with their respective legislations to receive refugees': art. 2.1), any forcible removal of a refugee to Libya is an unlawful rights-stripping exercise. In any event, evidence that Libyan authorities detain and mistreat refugees would trump any *prima facie* argument in favour of requiring refugees to accept 'protection' in Libya predicated on that country's assumption of formal obligations.



Map 7.1 Lampedusa and the Mediterranean

68 *Ad Hoc Committee on Statelessness and Related Problems*, First Session, 22nd meeting, UN Doc E/AC.32/SR.22 (14 February 1950) 20 (Mr Cuvelier of Belgium).

Another tactic that raises difficult legal issues is the diversion of refugees to a non-party State conscripted to act as a buffer (such as Australia's 'Pacific Solution', under which refugees were sent to the Pacific Island country of Nauru). Article 33 is not likely infringed if, as in the case of the 'Pacific Solution', the consequence is long-term confinement without risk of being sent away to face the risk of being persecuted. The best argument against such schemes is rather the duty to ensure respect in the destination State for other Refugee Convention rights accrued by the sending country's exercise of jurisdiction (and possibly by presence in its territory, including its territorial sea).⁶⁹ In order to avoid the prospect of rights-stripping, any involuntary assignment of protective responsibility must be predicated on 'anxious scrutiny',⁷⁰ not only of respect for the duty of *non-refoulement* by the destination country, but also for other refugee rights already acquired.⁷¹ Responsibility can moreover only be shared with another State party to the Refugee Convention, since only in such States will the refugee continue to enjoy the acquired rights to UNHCR supervision under art. 35 and to international judicial oversight by virtue of art. 38. The termination of these means of effecting and enforcing rights following removal to a non-party State would be as much a deprivation of rights as is the denial of the rights themselves.

The use of visa controls, often enforced by carrier sanctions, poses a more vexing dilemma because jurisdiction over the persons intended to be deterred may never be established. While the duty of *non-refoulement* likely does not apply in such cases, reliance on the ICCPR's guarantee to all of the right to leave their own country may, in the view of the UN Human Rights Committee, afford a plausible avenue of redress.⁷²

7.3.3. Civil and political rights

In many instances, the civil rights of refugees, and most certainly their political rights, will be more effectively protected under the ICCPR than by reliance on the comparatively constrained list of guarantees in the Refugee Convention itself. There are three main provisos.

First, it is important to recognise that generic civil rights are usually afforded to non-nationals only on the basis of a guarantee of non-discrimination – that is, State parties may still grant refugees and other aliens lesser civil rights than nationals so long as the differentiation is adjudged to be 'reasonable and objective'.

69 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* [1996] ICJ Rep 595, 652 (Separate Opinion of Judge Weeramantry).

70 *R v. Secretary of State for the Home Department; Ex parte Thangarasa*; *R v. Secretary of State for the Home Department; Ex parte Yogathas* [2002] UKHL 36 (17 October 2002) [58].

71 *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

72 Human Rights Committee, *General Comment No 27: Freedom of Movement* (Article 12), 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [10].

Unfortunately, the UN Human Rights Committee has too frequently been prepared to see differentiation on the basis of nationality as presumptively reasonable. It has also paid insufficient attention to substantive differences that make formal equality an inadequate response, and has afforded governments an extraordinarily broad margin of appreciation, rather than engaging in careful analysis of both the logic and extent of the differential treatment.⁷³ Because the Refugee Convention guarantees its more constrained catalogue of civil rights on an absolute basis rather than simply without discrimination, it remains a critical source of civil rights entitlement.

Second, civil rights in the Refugee Convention are not subject to the sort of broad-ranging derogation for national emergencies that is provided for in the ICCPR. To the contrary, art. 9 of the Refugee Convention allows restrictions on refugee rights in the context of 'war or other grave and exceptional circumstances' only if such measures are 'essential', not just 'strictly required' as under the ICCPR. Such measures must moreover be individuated ('in the case of a particular person') and therefore cannot be collectively imposed on all refugees or even a subset of them. Perhaps most importantly, art. 9 of the Refugee Convention does not authorise general derogation, but only provisional suspension of rights before formal status verification is completed. Once refugee status is confirmed, no further suspension of rights is allowed.

Third, many of the civil rights in the Refugee Convention are framed in ways that respond to refugee-specific concerns not clearly addressed by general human rights norms. For example, there are provisions that explicitly address the right to religious education, a matter of clear concern to the Refugee Convention drafters in relation to Jewish refugees and other refugee groups of the Second World War era. There are also critical provisions on respect for previously acquired forms of personal status; strong rules prohibiting ongoing detention and affirming a full right to freedom of internal movement; and provisions that ensure that identity and travel documents are made available.

7.3.4. Socio-economic rights

The primary goal of the drafters of the Refugee Convention was to ensure:

that the refugees will lead an independent life in the countries which have given them shelter. With the exception of the 'hard core' cases, the refugees will no longer be maintained by an international organisation as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families.⁷⁴

73 Hathaway, *The Rights of Refugees under International Law*, above n. 1, 129 ff.

74 Ad Hoc Committee on Refugees and Stateless Persons, 'Memorandum by the Secretary-General' (UN Doc E/AC.32/2, United Nations, 3 January 1950) 6–7.

It is therefore not surprising that there are very strong guarantees of socio-economic rights in the Refugee Convention – arguably the most extensive granted to any class of non-national, and in one case (the right to private property) actually providing for a right not yet guaranteed under general norms of international human rights law.

In contrast to general norms of human rights law, the Refugee Convention's socio-economic rights are immediate duties rather than obligations of progressive implementation as under art. 2 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁷⁵ Most importantly, there is no ability (as there is under art. 2(3) of the ICESCR) for poorer countries to deny economic rights to non-nationals, which is clearly a critical concern as the overwhelming majority of refugees are present in such States.

This is not to say that the Refugee Convention responds to all socio-economic rights concerns. For example, the urgency of flight frequently means that most refugees in the less developed world are not able to meet their own immediate subsistence needs. The drafters of the Refugee Convention paid surprisingly little attention to the importance of meeting such basic needs as access to food, water, healthcare or shelter. On the other hand, the Convention gives detailed attention to a variety of relatively sophisticated socio-economic rights, such as access to social security, fair treatment under tax laws, and even the protection of refugees' intellectual property.

Many of the Refugee Convention's economic rights are nonetheless of real value to modern refugees, in both the developed and less developed worlds. For example, the Convention broke with precedent by making a clear commitment to provide at least the most basic forms of education to refugees and their children immediately upon coming under a State party's authority, and on terms of equality with nationals (see Chapter 8). As soon as a refugee has complied with any requirements set by the State for seeking validation of the refugee claim, the claimant is entitled to engage in self-employment; once recognised as a refugee, rights to undertake both wage-earning and professional work ensue. Refugees also enjoy an immediate right to acquire both real and personal property, and to benefit from rationing systems. Once lawfully staying, refugees are entitled to access public housing, as well as public relief and social security systems.

Because most of these economic rights are framed in contingent terms, they do not require a host State to provide refugees with more than they have already agreed to provide to other aliens, most-favoured non-nationals or their own nationals – thus not imposing an obligation that would amount to a privileging of refugees over the host society. Yet by virtue of the same contingencies, refugees cannot be disfranchised within their new communities, but rather must be allowed

⁷⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

to participate in the economy in a way that genuinely enables them to meet their own needs.

7.3.5. Rights of solution

There is increasing impatience among States with the duty simply to honour the rights of persons who are Refugee Convention refugees. The focus of much contemporary discourse is instead on the importance of defining and pursuing so-called 'durable solutions' to refugee flight. Indeed, those who focus on achieving durable solutions increasingly regard respect for refugee rights as little more than a second-best option, to be pursued only until a durable solution can be implemented.

In contrast to this emphasis on the pursuit of durable solutions, the Refugee Convention gives priority to allowing refugees to make their own decisions about how best to respond to their predicament. The only circumstance under which a solution to refugee status may lawfully be imposed without the consent of the refugee is where there has been a fundamental and demonstrably durable change of circumstances in the refugee's State of origin, which has eliminated the refugee's need for the surrogate protection at the heart of refugee law. Refugee status comes to an end in such a case, and the former refugee may be mandatorily returned to the country of origin so long as the requirements of international human rights law are met.⁷⁶ The label often attached to this option – 'voluntary repatriation' – is thus not appropriate. The solution of requiring a refugee's departure once the need for protection comes to an end is better referred to simply as 'repatriation', thus avoiding confusion with a second solution, 'voluntary re-establishment'.

While repatriation involves the return of a person who is no longer a refugee (and hence need not be voluntary), a person who remains a refugee may voluntarily decide to re-establish himself or herself in the country of origin despite the risk of being persecuted there. A refugee, like any national, is always free in law to opt for return to his or her own country. Return under such circumstances, however, must be the result of the refugee's free choice if the State of asylum is to avoid breach of the duty of *non-refoulement*. Once there is evidence both of a genuinely voluntary return and of the refugee's *de facto* re-establishment in his or her own country, the Refugee Convention deems refugee status to have come to an end. This is so because the refugee's own actions signal that he or she no longer wishes to benefit from the surrogate protection of an asylum country.

Beyond repatriation and voluntary re-establishment, the third solution to refugee status is resettlement. This solution acknowledges the reality that time spent in an asylum State may afford a refugee the opportunity to explore and secure access

⁷⁶ Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, 1997).

to durable protection options better suited to his or her needs. The Refugee Convention explicitly envisages the possibility of onward movement by way of resettlement from the first country of arrival, and requires the government in the refugee's initial host State to facilitate that process. Once resettlement has occurred, the continuing need for refugee protection is at an end.

Fourth, and as a logical extension of the Refugee Convention's core commitment to affording refugees greater rights as their attachment to the asylum country increases over time, a point may be reached where the refugee and the authorities of that country agree to the refugee's formal naturalisation by the host State. If a refugee opts to accept an offer of nationality there, with entitlement to participate fully in all aspects of that State's public life, the need for the surrogate protection of refugee law ends. There is no further need for surrogate protection because the refugee is able and entitled to benefit from the protection of the new country of nationality.

7.4. CHALLENGES FACING THE REFUGEE REGIME

Governments of the developed world are now appropriating the language of 'burden sharing' to further a global apartheid regime under which most refugees remain in the less developed world, and do so under conditions that are often rights-abusive, if not life-threatening. These States have distorted the true object and purpose of the Refugee Convention, erroneously suggesting that it sets only protection obligations of 'last resort' – that is, that refugees may be routinely sent away to any other State that will admit them without risk of return to their country of origin. Governments have further stigmatised refugees who arrive without pre-authorisation as 'illegal', despite the fact that the Refugee Convention requires otherwise.⁷⁷

Perhaps most disingenuously, these same governments increasingly justify their harsh treatment of refugees arriving at their territory on the grounds that harshness is the necessary means to a more rational protection end. This end is said to be the reallocation of resources towards meeting the needs of the overwhelming number of refugees located in the less developed world, with resettlement in the developed world being made available only to those with the most acute need.

7.4.1. The uneven distribution of burdens and responsibilities

There is no doubt that the burdens and responsibilities of offering protection to refugees are unfairly apportioned today. Nearly 90 per cent of refugees remain in

⁷⁷ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008).

the less developed world, with some States – Chad, Iran, Jordan, Lebanon, Pakistan, Saudi Arabia, Syria – hosting more than one refugee for every hundred nationals. In contrast, Canada's ratio is nearly 1:460; the ratio for the United States and the European Union is roughly 1:1,900; and for Japan, approximately 1:41,000.⁷⁸ Not only is the less developed world doing the overwhelming share of refugee hosting, but it does so with a small fraction of the resources presently allocated to processing and assisting the tiny minority of refugees who reach richer States. In approximate terms, less than 50 US cents per day is available to look after each of the refugees under direct UNHCR care in poorer States.⁷⁹ Not even that tiny budget is guaranteed, but has to be garnered each year from the voluntary contributions to UNHCR of a small number of wealthier countries (there is no formula-based funding arrangement). Meanwhile, developed States spend on average USD 20,000 just to process the claim of each refugee able to reach them, with additional sums for transitional support.⁸⁰ As such, the world now spends more than a hundred times as much on a refugee arriving in the developed world as it does to protect a refugee who remains in the less developed world.

In such circumstances, it should come as no surprise that the situation of refugees in many less developed countries is often dire. In far too many cases, rights abuse is rampant and rationalised on the basis of extreme resource shortages. There is, thus, a very strong basis to consider apportioning resources more fairly relative to needs. To be taken seriously, however, that reallocation needs to be both much more significant than in the past and, most fundamentally, binding (in contrast to current charity-based models). Countries in regions of origin rightly protest that they cannot be expected to admit massive numbers of refugees, to whom they thus become legally obligated, on the basis of discretionary grants that ebb and flow with the political, budgetary and other preferences of wealthier governments.

More fundamentally still, the rights of refugees in the less developed world are not meaningfully vindicated by dollars sent to run UNHCR or other refugee camps, where rights abuse is often rampant and opportunities for self-reliance usually non-existent.⁸¹ If the transfer of resources is to be meaningful, there must be an ability to ensure verifiable respect for refugee law obligations in recipient States.

78 US Committee for Refugees and Immigrants, 'World Refugee Survey 2009' (US Committee for Refugees and Immigrants, 2009) 31.

79 At the end of 2009, 10.4 million refugees were receiving protection or assistance from UNHCR: United Nations High Commissioner for Refugees, '2009 Global Trends' (UNHCR, 15 June 2010) 2. Total programme support expenditures in 2009 were USD 1.78 billion: United Nations High Commissioner for Refugees, 'Biennial Programme Budget 2010–2011' (UN Doc A/AC.96/1068, United Nations, 17 September 2009) 60. This equates to USD 172 per refugee per year, or approximately 47 cents per day.

80 Jenny Bedlington, 'Creating Shared Solutions to Refugee Protection: An Agenda for the International Community' (Speech delivered at the Advanced Study Center of the International Institute, University of Michigan, 14 April 2004).

81 Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn, 2005).

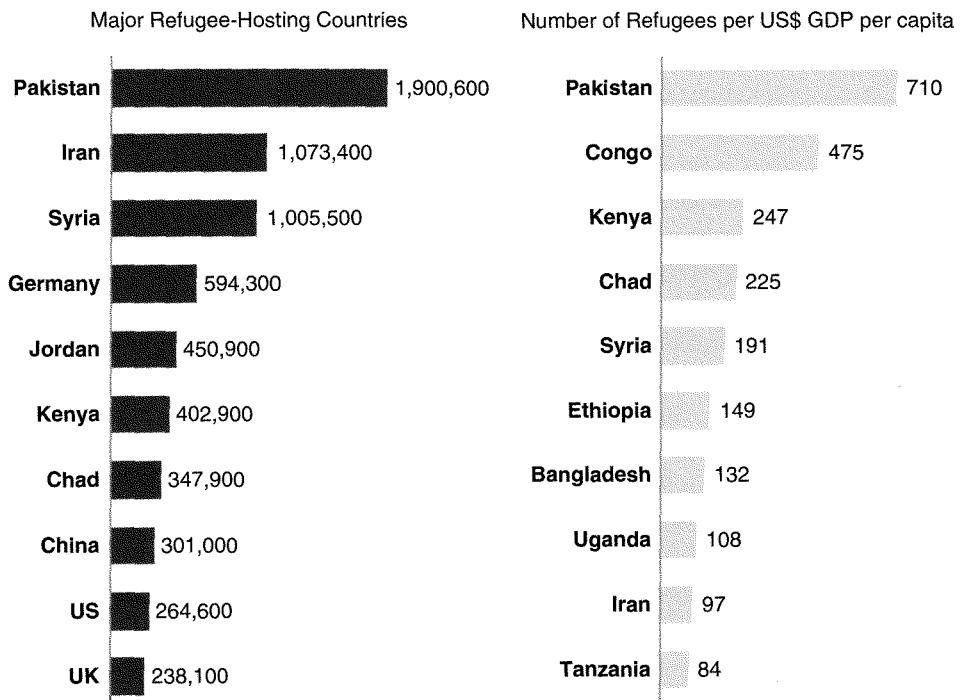


Figure 7.1 Refugee burden sharing, 2010

Source: United Nations High Commissioner for Refugees, Global Trends 2010 (UNHCR, 2011)

7.4.2. The logic of a shift to common but differentiated responsibility

The challenge, then, is to reinvigorate international refugee law in a way that States continue to see as reconcilable to their self-interests, in particular their migration control objectives, yet which does not compromise the right of refugees to access true protection. Given the uneven distribution of resources and protective responsibilities, the critical starting point is to acknowledge the Refugee Convention's flexibility, which allows State parties to allocate burdens and responsibilities among themselves. This process must be a genuine rights-regarding allocation of responsibility, not a simple dumping of refugees abroad on the ground that they will be admitted and protected from expulsion in the destination country. In particular, this operational flexibility may not under any circumstance override the core commitments to protection embodied in the Refugee Convention. This means that governments must allow access to their territory for all persons who wish to claim refugee protection, at least pending an assignment of responsibility, and it means that refugees arriving may not be stigmatised as unlawful entrants. It also means that account must be taken – both at the site of arrival and in any potential State to which protective responsibility is assigned – of the full requirements of refugee law and international human rights law, not just of the ability to

secure entry and be protected against *refoulement*. Two cornerstones for a principled and meaningful system to share burdens and responsibilities should be considered.⁸²

The first is to move away from a system of unilateral, state-by-state implementation of refugee law towards a system of 'common but differentiated responsibility'. The impetus for States to share refugee protection responsibilities would come from an appreciation that cooperation offers States a form of collective insurance when they, or States with which they have close ties, are faced with a significant refugee influx. It is only by ensuring the broad distribution of the responsibility of physical protection, and the availability of reliable fiscal support, that States will feel able to remain open to the arrival of refugees.

The precise allocation of burdens and responsibilities should be flexible, but should operate against a foundational principle that not even the significant assumption of fiscal burdens can justify withdrawing from human protective responsibilities. Every State would agree to participate in the sharing of both fiscal burdens and human responsibilities, though the precise mix of obligations would vary. Some States might focus on providing immediate protection in the wake of a mass influx; others would provide protection for the duration of risk; others might concentrate on providing an immediate solution for truly difficult cases, or on ensuring access to resettlement opportunities for refugees not able to return home within a reasonable time. As all of these roles are critical to a sound protection regime, there is no reason why every State must take on the same mix of responsibilities.

The second imperative is to establish a meaningful system to oversee the common but differentiated responsibility and resource transfer regimes. The approach on the ground should be based on the central importance of ensuring refugee autonomy and self-reliance, precisely in line with the rights regime established by the Refugee Convention.

In short, the normative structure of refugee law is sound. There is no need to revisit the content of refugee law – thanks to a combination of judicial reinvigoration of the refugee definition, the evolution of powerful general human rights standards to buttress the Refugee Convention's own creative rights regime, and the rise of ancillary regional protection regimes. But the long-term viability of refugee law is under threat from its atomised system of implementation, coupled with the absence of a meaningful mechanism to oversee respect for legal obligations and facilitate the sharing-out of burdens and responsibilities among State parties. The challenge is to update the mechanisms of implementation without undermining the ability of refugee law to continue to play its critical role of ensuring surrogate national protection to those fundamentally disfranchised by their own country.

82 A comprehensive model for reform is set out in James Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115. Relevant social science research is collected in James Hathaway (ed.), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997).

KEY REFERENCES

- Anker, Deborah, *The Law of Asylum in the United States* (West Group, 2011)
- Carlier, Jean-Yves *et al.* (eds.), *Who is a Refugee? A Comparative Case Law Study* (Kluwer Law International, 1997)
- Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007)
- Goodwin-Gill, Guy and McAdam, Jane, *The Refugee in International Law* (Oxford University Press, 3rd edn, 2007)
- Grahl-Madsen, Atle, *The Status of Refugees in International Law* (Sijthoff, 1966 and 1971)
- Grahl-Madsen, Atle, 'A Commentary on the Refugee Convention 1951' (UNHCR, 1963 and 1997)
- Hathaway, James, *The Rights of Refugees under International Law* (Cambridge University Press, 2005)
- Hathaway, James, *The Law of Refugee Status* (Butterworths, 1991)
- Hathaway, James (ed.), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997)
- McAdam, Jane, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007)
- Noll, Gregor, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Martinus Nijhoff, 2000)
- Robinson, Nehemiah, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (Institute of Jewish Affairs, 1953)
- United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, 1992)
- Weis, Paul, *The Refugee Convention 1951: The Travaux Préparatoires Analysed* (Cambridge University Press, 1995)
- Zieck, Marjoleine, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal, 2006)
- Zimmermann, Andreas (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011)

KEY RESOURCES

- European Commission, Home Affairs: http://ec.europa.eu/home-affairs/doc_centre/asylum/asylum_intro_en.htm
- European Council on Refugees and Exiles: www.ecre.org
- Forced Migration Online, Refugee Studies Centre, University of Oxford: www.forcedmigration.org
- International Association of Refugee Law Judges: www.iarlj.org
- International Journal of Refugee Law: <http://ijrl.oxfordjournals.org>
- Journal of Refugee Studies: <http://jrs.oxfordjournals.org>
- Refugee Caselaw Site, University of Michigan Law School: www.refugeecaselaw.org
- Refugee Law Reader: www.refugeelawreader.org
- RefWorld, UNHCR: www.refworld.org