

Oxford Public International Law



Refugees

Dieter Kugelman

Content type: Encyclopedia entries

Product: Max Planck Encyclopedia of Public International Law [MPEPIL]

Article last updated: March 2010

Subject(s):

Internally displaced persons — Non-refoulement

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Notion

1 The notion 'refugee' can be understood from a sociological, political, or legal point of view. In a broader sense, a refugee is a person who flees his habitual place of residence and seeks refuge elsewhere. Persons may leave their homes because of natural disasters or because of man-made situations, especially out of fear of persecution, war, or other circumstances, menacing their individual sphere of interest. After a certain period of time they may return to their home countries or may stay in the destination country for an unlimited time. However, this description does not yet entail concrete legal consequences, because there is no consent on a general legal definition of the term refugee at the level of → *customary international law*.

1. Treaty Definitions

2 The fundamental legal instrument for the protection of refugees is the 1951 Convention relating to the Status of Refugees ('Refugee Convention'), modified by the 1967 Protocol relating to the Status of Refugees ('Refugee Protocol'). Both the Refugee Convention and the Refugee Protocol are in force for 144 States, with a slight difference of States Parties as of March 2010. There are further legally binding international provisions relating to the situation of refugees or their status, eg Art. 44 Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV' [adopted 12 August 1949, entered into force 21 October 1950] 75 UNTS 287; → *Geneva Conventions I-IV [1949]*), which deal with refugees and displaced persons, and Art. 73 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ([adopted 8 June 1977, entered into force 7 December 1978] 1125 UNTS 3; → *Geneva Conventions Additional Protocol I [1977]*), which stipulates that refugees and → *stateless persons* shall be protected persons under parts I and III Geneva Convention IV.

3 Art. 1 (1) Convention relating to the Status of Stateless Persons ([adopted 28 September 1954, entered into force 6 June 1960] 360 UNTS 117) defines the term 'stateless person' as a person who is not considered a national by any State under the operation of its law (→ *Nationality*). It further prescribes the standards of treatment to be accorded to stateless persons. The Agreement relating to Refugee Seamen of 23 November 1957 grants specific protection to a special group of refugees. The non-binding Declaration on Territorial Asylum, United Nations General Assembly ('UNGA') Resolution 2312 (XXII) of 14 December 1967, lays down a series of fundamental principles in regard to territorial asylum (→ *Asylum, Territorial*) stating that the granting of territorial asylum 'is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State' (at para. 4).

4 Under international law, Art. 1 A (2) Refugee Convention defines the notion 'refugee' as a person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Refugee Protocol extended the application of the Refugee Convention to the situation of 'new refugees', ie persons who, while meeting the Refugee Convention definition, had become refugees as a result of events that took place after 1 January 1951. This definition requires that the fear of persecution was the reason for fleeing the State and it requires

that the person crosses a border. Persons fleeing from natural disasters, civil wars (→ *Armed Conflict, Non-International*), or economic crisis do not fall into the scope of the Refugee Convention. However, the responsibility of the United Nations High Commissioner for Refugees (→ *Refugees, United Nations High Commissioner for [UNHCR]*) was extended, *ratione personae*, by unanimous consent of the Member States to displaced persons in refugee-like situations. This includes persons who are compelled to leave their home because of man-made disasters, eg armed conflicts or other political and social upheavals.

5 Although the legal definition of refugees given in the Refugee Convention is a definition solely for the purposes of the Convention, it is in practice recognized for the purpose of humanitarian assistance on a worldwide basis. It can be seen as the core of a minimum standard definition for the status of a person as refugee. The law of the European Union contains a definition which is based on the Refugee Convention. According to Art. 2 lit. c Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, the term refugee means

a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of [his] nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country, or [it refers to] a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.

6 Within the → *Organization of American States (OAS)*, two legal instruments of 28 March 1954 relate to refugees: the Convention on Diplomatic Asylum (→ *Asylum, Diplomatic*) and the Convention on Territorial Asylum (so-called Caracas Convention). The notion of refugee used in these conventions is close to the notion used in the Refugee Convention. A broader notion of refugee is endorsed by the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa ('SARPA Convention'). Taking into account the definition of the Refugee Convention, Art. 1 (2) SARPA Convention defines a refugee as a 'person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence'. Refugee protection is not centred on the reason for persecution but on the individual need of the refugee to be protected. This notion, however, does not correspond with an enlargement of the rights of the refugee.

7 Basic components of a general refugee definition may be identified in accordance with the Refugee Convention, providing for a minimum standard of treatment of refugees. For the purposes of international law, the crucial element of the definition is the identification of the relevant grounds of persecution in order to qualify a person as refugee and give rise to State obligations towards the person.

2. Grounds and Criteria of Persecution

8 For the purposes of the Refugee Convention, a person is persecuted if life, freedom, or other substantial rights of the person are endangered or threatened by measures or a menacing situation which can be ascribed to a State or a State-like entity. Thus, persecution is a concept based on the possible or actual violation of substantial rights of the refugee. Persecution is mostly intentional, but the violation of the individual sphere of a refugee can also be caused by a situation without an intentional measure directed against the refugee. Persons can be persecuted as victims of armed conflicts, of violence motivated by ethnic

conflicts (→ *Ethnicity*) or other political and social upheavals. The prerequisites and the scope of persecution are subject to discussion.

9 The definition of persecution in Art. 7 (2) lit. g Rome Statute of the International Criminal Court ([adopted 17 July 1998, entered into force 1 July 2002] 2187 UNTS 90) is limited to the intentional and severe deprivation of fundamental rights, since—for the purposes of the Rome Statute—persecution is part of the concept of → *crimes against humanity* committed by individuals against other individuals. However, the question of individual guilt of a person is different from the question of responsibility of a State and the protection of the victims of persecution (→ *Individual Criminal Responsibility*; → *State Responsibility*). The purpose of the Refugee Convention is the protection of refugees, implying a wider notion of persecution.

10 Originally, the concept of persecution referred to State persecution. Still, State authorities are responsible for many cases of persecution, causing individuals to flee their countries. However, → *non-State actors* can also be held responsible, for example in civil wars or in a failing State situation (→ *Failing States*). As the Refugee Convention does not limit the concept of persecution, the well-founded fear of persecution can be a result of any danger to individual integrity and human dignity resulting in a lack of protection in the territory the refugee leaves to seek refuge elsewhere.

11 The list of the five grounds of persecution laid down in Art. 1 A (2) Refugee Convention limits the concept of persecution. Although the Refugee Convention creates a specific regime, other international instruments may be consulted in interpreting the terms (see Art. 31 → *Vienna Convention on the Law of Treaties [1969]* 1155 UNTS 331). With regard to race, the definition of Art. 1 (1) International Convention on the Elimination of all Forms of Racial Discrimination ([opened for signature 7 March 1966, entered into force 4 January 1969] 660 UNTS 195) contributes to the determination of the notion in refugee law. Racial discrimination can be based on race, colour, descent, or national ethnic origin (→ *Racial and Religious Discrimination*). Persecution on grounds of religion has a long history. The violation of the freedom of religion as set forth by Art. 18 → *International Covenant on Civil and Political Rights (1966)* ('ICCPR') constitutes a breach of international law (→ *Religion or Belief, Freedom of, International Protection*). Violations of Art. 18 ICCPR can lead to a qualification as refugee under the Refugee Convention. Nationality in Art. 1 A (2) Refugee Convention does not only refer to the situation that a State persecutes its own nationals, but can be interpreted as including origins and even the membership of particular ethnic, religious, cultural, and linguistic communities. This overlaps with the persecution on account of the membership of a particular social group. Cross-over effects occur with the international protection of minorities (→ *Minorities, International Protection*). With respect to the wide notion of social groups, this ground of persecution implies an extensive interpretation. The self-perception of a person as member of a social group may play an important role. Therefore, criteria for the membership of a social group may be sexual orientation or the linguistic or economic background. Part of the concept is the gender-related persecution of women (see also → *Women, Rights of, International Protection*). Even if details may be of controversial character, the persecution due to the membership of a particular social group represents an evolving concept which enables States and international organizations to include recent social developments into refugee law. However, a possible restrictive State practice should be taken into account. With respect to persecution due to political opinion, the Refugee Convention can be understood as a safeguard for the right to freedom of opinion and expression (→ *Opinion and Expression, Freedom of, International Protection*). This right is laid down in Art. 19 → *Universal Declaration of Human Rights (1948)* ('UDHR') and in Art. 19 ICCPR. As the expression of a

political opinion is linked to political activity, members of the political opposition or a minority in their respective home States can refer to this reason of persecution.

12 There can be other grounds for persons to flee their home States than the grounds set forth in Art. 1 A (2) Refugee Convention. Persons may leave their home on grounds of war or famine, natural disasters, over-population, or mass expulsions of populations (→ *Forced Population Transfer*). Purely economic reasons do not entitle to refugee status (→ *Migration*). However, in combination of several reasons motivating a person to leave his home and to seek refuge, one of the relevant grounds of Art. 1 A (2) Refugee Convention may play an important role, eg in the combination of economic reasons and membership of a particular social group. Then, it is possible to qualify the person as a refugee under the Refugee Convention.

3. Asylum Seekers and Refugees

13 The concept of refugee law includes the protection of asylum seekers. However, the scope of asylum in relation to refugee protection cannot be easily determined. Diplomatic asylum and territorial asylum are granted by a sovereign State to protect a foreign national against the exercise of jurisdiction by another State (see *Asylum [Colombia/Peru]* [1950] ICJ Rep 266 at 274-75). The asylum seeker needs protection because there is an individual fear of persecution. This concept of asylum is laid down in Art. 14 UDHR and in the 1967 Declaration on Territorial Asylum. However, not even these non-binding international instruments detail the reasons for granting asylum and the content of the protection of asylum seekers. In contrast, the Refugee Convention lists the relevant grounds of persecution and sets forth a regime of high complexity on the position of the refugee in the State of refuge.

14 Asylum implies a long-term stay; accordingly, in most cases, the admission to residence and asylum guarantees the asylees a set of rights. The prohibition of refoulement on the other hand is linked to the time of the existing risk of persecution and only encompasses a minimum standard of State obligations. An asylum seeker may be denied asylum, but the State may be obliged to grant protection under refugee law, for example as a de facto refugee. From the point of view of State → *sovereignty*, asylum is a more intensive concept than the protection of refugees. This assumption is recognized in the preamble of the Refugee Convention. Therefore, States are reluctant to take over the obligations and to acknowledge the right to asylum as an individual right. The Refugee Convention provides for the criteria of refugee status and imposes concrete obligations on States Parties. However, the State obligations do not necessarily amount to a set of rights for refugees similar to asylum.

4. Internally Displaced Persons

15 According to data given by the UNHCR most of the persons in the world fleeing their home are → *internally displaced persons*, moving within the frontiers of a country. The International Organisation of Migration ('IOM', www.iom.int) has collected data and estimates that in 2007 there were about 26 million internally displaced persons in at least 52 countries as a result of conflict. They do not satisfy the criteria of Art. 1 A (2) Refugee Convention as they are not outside the country of their nationality. Internally displaced persons flee their home on similar grounds as refugees, but they stay in the territory of their home country and do not seek refuge in another State. The responsibility of the State for its nationals continues to exist, even if State authorities do not want, or are not able, to protect the person (→ *Responsibility to Protect*). In most cases, internally displaced persons fear for their lives and personal security in situations of natural disasters, of conflicts, or even civil wars. If the State is not able to protect its nationals within its frontiers, they need protection which can only be granted by other States and the → *international community*

(see also → *Humanitarian Intervention*). There is no fundamental difference between internally displaced persons and international refugees regarding the humanitarian problems. Internally displaced persons need protection because their individual → *human rights* are endangered. Insofar as internally displaced persons need protection in a refugee-like situation, they fall under the responsibility of the UNHCR. There are several programmes to help internationally displaced persons. In 2008, UNHCR ran programmes like the Iraq Situation Response (US\$ 261.1 million), the China Earthquake Response (US\$ 5 million), and especially internally displaced persons programmes in Africa, eg in the Democratic Republic of the Congo (US\$ 30.5 million; → *Congo, Democratic Republic of the*), → *Liberia* (US\$ 3.2 million), Somalia (US\$ 26.1 million; → *Somalia, Conflict*), Uganda (US\$ 15.4 million), Chad (US\$ 15.9 million), Zimbabwe (US\$ 10 million ; → *Rhodesia/Zimbabwe*), → *Côte d'Ivoire* (US\$ 1.1 million), Central African Republic (US\$ 3 million), and Kenya (US\$ 19.2 million).

5. De Facto Refugees and Clandestines

16 De facto refugees are refugees, especially asylum seekers, whose applications are pending or were denied and who cannot be expelled due to humanitarian reasons (→ *Aliens, Expulsion and Deportation*). They have neither the formally recognized status of a refugee according to the Refugee Convention nor a status of asylum according to other international or national legal instruments. Although the notion 'de facto refugees' is not mentioned by the Refugee Convention, some provisions of the Refugee Convention apply to every refugee falling under a State's jurisdiction or having entered its territory. However, they may be accorded a specific status or the State of refuge may generally legalize the stay of a group of de facto refugees fulfilling certain preconditions. Their legal and personal situation depends on the municipal law of the State of refuge. De facto refugees enjoy human rights, but human rights do not necessarily entail the right of residence or the right to work. The State of refuge decides on the conditions of their residence and on their equipment with rights.

17 The *sans-papier* or 'clandestines' are persons who have left their home State and live in another State without possessing a formal legal admission of the authorities. They enter the territory by breaching the entry regulations or they enter the territory legally, but overstay in breach of → *immigration* regulations. Clandestines do not possess a legal status under national or international law except for human rights. They enjoy individual rights under the international instruments of human rights protection but in practice they do not claim these rights in court since they fear expulsion. The problems of irregular migration are part of the general discussion on migration. De facto refugees and clandestines may fall under the scope of international labour law (→ *Labour Law, International*), especially under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ([adopted 18 December 1990, entered into force 1 July 2003] 2220 UNTS 3; → *Migrant Workers*).

B. Historical Evolution of Legal Rules on Refugees and Refugee Movements

18 In the history of mankind, there have always been people fleeing their habitual place of residence and seeking refuge elsewhere. However, it was only in the 20th century that refugees became an issue on the international level. Before World War I, refugees were treated in accordance with national laws concerning → *aliens*. There were no rules of customary international law taking into account the specific situation of refugees; nor did any bilateral or multilateral agreement exist to regulate their status. As a consequence of the → *peace treaties after World War I*, huge numbers of people had to seek refuge in foreign countries. The → *League of Nations* had to cope not only with the protection of

minorities within States but also with complicated refugee problems across borders. Initially, the Assembly of the League of Nations and the States in general thought that the refugee problem would be a temporary phenomenon. But within a short period of time, the problem turned out to be serious and of lasting character (see also → *Refugees, League of Nations Offices*).

19 In 1928 the first international instrument with relevance to the legal status of refugees was developed within the League of Nations, the Arrangement relating to the Legal Status of Russian and Armenian Refugees. It was followed by the first legally binding treaty, the 1933 Convention relating to the International Status of Refugees, which was limited in its application to the then existing refugees. As a model instrument, it dealt not only with the issue of travel documents (see also → *Passports*) but with a variety of matters affecting the daily lives of refugees such as personal status, employment, social rights, education, exemption from reciprocity, and expulsion.

20 Based on preparatory work under the auspices of the United Nations, especially within the Economic and Social Council ('ECOSOC') (→ *United Nations, Economic and Social Council [ECOSOC]*), the Refugee Convention was adopted on 28 July 1951 as a fundamental legal instrument of refugee law. As the application of the Refugee Convention was limited to the refugee problems known at the time of its adoption, its terms were later made applicable to all new refugee situations by the 1967 Refugee Protocol.

C. Regional Activities and Instruments

21 The growing number of refugees fleeing wars and internal conflicts in Africa, starting in the late 1950s, led to the adoption of what is generally considered the most comprehensive and significant regional treaty dealing with refugees. On 10 September 1969, the Organization of African Unity (→ *African Union [AU]*) adopted the SARPA Convention. The primary importance of this convention is its expanded definition of the term refugee (see above). The SARPA Convention complements rather than duplicates the Refugee Convention. Apart from the broad refugee definition, the SARPA Convention regulates the question of asylum (Art. 2 SARPA Convention). It also contains important provisions on voluntary → *repatriation* (Art. 5 SARPA Convention) and on the prohibition of subversive activities by refugees (Art. 3 SARPA Convention).

22 Latin America has a long tradition of asylum. The Treaty on International Penal Law ([signed 23 January 1889, entered into force 3 September 1889] OAS Treaty Series No 34 [1967]) was the first regional instrument to deal with asylum. Within the OAS, two legal instruments of 28 March 1954 are concerned with refugees, the Convention on Diplomatic Asylum and the Convention on Territorial Asylum. The notion of refugee is very close to the notion laid down in the Refugee Convention. In the 1980s the outbreak of civil strife in → *Central America* resulted in mass exoduses of nearly a million people, posing serious economic and social problems for the countries towards which this massive flow was directed. In 1984, these host countries adopted the Cartagena Declaration on Refugees which laid down the legal foundations for the treatment of Central American refugees, including the principle of non-refoulement, the importance of integrating refugees, and undertaking efforts to eradicate the causes of the refugee problem. The definition of refugee in the Cartagena Declaration on Refugees is similar to that of the SARPA Convention encompassing 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order' (part III para. 3). The Cartagena Declaration on Refugees is not

binding on States. It is, however, applied in practice by a number of Latin American States and, in some cases, has been incorporated into domestic legislation.

23 The → *Council of Europe (COE)* has adopted several instruments concerning refugees. Among the most important are the 1959 European Agreement for the Abolition of Visas for Refugees, the 1967 Resolution on Asylum to Persons in Danger of Persecution, the 1980 European Agreement on Transfer of Responsibility for Refugees, the 1981 Recommendation to Member States on the Harmonisation of National Procedures relating to Asylum, and the 1984 Recommendation to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised Refugees. European Conventions on extradition and social security also contain provisions on refugees (→ *Extradition*). Taking into account the status of ratification of each binding agreement, the work of the COE has not led to a coherent set of refugee law. Nevertheless, it has contributed to the improvement and consolidation of the protection of refugees in Europe.

24 The fastest development of refugee law can be observed in the law of the European Union. Art. 18 → *Charter of Fundamental Rights of the European Union (2000)* grants a right to asylum with due respect for the Refugee Convention. It repeats the content of Art. 78 Treaty on the Functioning of the European Union ('TFEU' [signed 13 December 2007, entered into force 1 December 2009] [2008] OJ C115/47; Art. 78 TFEU was formerly Art. 63 EC Treaty), limiting the scope of the right to asylum, because the provisions do not aim at exceeding the already existing international obligations of the Member States. However, the law of the European Union provides for precise and detailed rules applicable to refugees and asylum seekers. Arts 67–79 TFEU (formerly Arts 61–69 EC Treaty) provide for a common policy on visa, asylum, immigration, and other policies concerning the free circulation of persons.

25 The approximation of rules on the recognition and content of refugee status and subsidiary protection status is implemented by secondary law. Some of the most important legislative acts are Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention; 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, which was enacted as a reaction to the situation during the civil wars on the Balkan peninsula since 1990 (see also → *Yugoslavia, Dissolution of*); Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, according to whose Art. 2 lit. b application for asylum is defined as application made by a third-country national or a stateless person which can be understood as a request for international protection by a Member State; 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; and Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification providing for conditions of family reunification in the Member States of the EU and the specific rights of third-country nationals under given circumstances. Yet, its definition of family is more restrictive than the understanding of family eg in parts of Asia and includes only the core family, especially parents and children. Of particular importance are also Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted creating a legal status of subsidiary protection; Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status asserting the importance of procedural rules and procedural

rights for a person seeking refuge; and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, which entered into force on 13 January 2009 and whose deadline for implementation is 24 October 2010.

26 Guidelines for further steps towards a common policy on visa, asylum, and immigration have been adopted in a basic political EU document on migration—the Hague Programme: Strengthening Freedom, Security and Justice in the European Union—endorsed by the European Council on 4–5 November 2004 and implemented by the Council and Commission Action Plan of 10 June 2005. The European Council has declared its will to introduce a Common European Asylum System by 2010, based on the existing directives and regulations on asylum.

D. Rights of Refugees

27 Within the scope of the Refugee Convention, refugees have a status under international law implying State obligations and individual rights. The Refugee Convention accords a variety of treatments and a variety of rights to persons satisfying different criteria. The set of rights granted to a refugee by a State accrues with the level of factual attachment to the State and the level of legal recognition. Some rights apply as soon as a refugee comes under a State's (de facto) authority, a second group of rights applies when the refugee enters the territory and falls under the effective jurisdiction of the State of refuge. A third group of rights applies once the refugee is lawfully in the territory of a State Party and a fourth group when the refugee lawfully stays or durably resides in the State's territory. It has to be carefully examined which refugee is entitled to hold which kind of rights according to the Refugee Convention.

1. Refugee Status

28 The recognition of refugee status by a State is of declaratory character, but it may often be necessary to assure an adequate protection of the refugee. States may grant the rights linked to the refugee status only if there was a formal determination of the status. Before the authorities of the State can take this decision, it has to be examined if the person satisfies the relevant criteria, especially if a ground of persecution provided for by Art. 1 A (2) Refugee Convention is given. During the procedure, the refugee is in most cases physically present in the State and enjoys procedural rights. The State of refuge is obliged to guarantee fairness and a minimum standard of substantial rights. Fair and effective procedures are an essential element in the full application of the Refugee Convention. The right to free access to the courts laid down in Art. 16 Refugee Convention can only be effectively exercised if the procedure for the determination of refugee status is fair. As the Refugee Convention does not explicitly provide for procedural rules, the content and realm of the procedural rights can not be easily identified and State practice is not coherent. In many countries, the UNHCR participates in the procedures or, at least, tries to influence the procedure of determination of refugee status.

2. The Principle of Non-refoulement

(a) Legal Basis

29 The principle of non-refoulement is embodied in Art. 33 Refugee Convention stipulating that

[n]o 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 on account of his race, religion, nationality, membership of a particular social group or political opinion.

For the international protection of refugees, the right not to be returned or expelled to a situation which would threaten one's life or freedom is of crucial importance. The principle of non-refoulement finds further expression in Art. 3 (1) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT' [adopted on 10 December 1984, entered into force 26 June 1987] 1465 UNTS 85; → *Torture, Prohibition of*) which stipulates that

[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Furthermore, Art. 3 (2) CAT lays down that

[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

30 The principle of non-refoulement affects State sovereignty because Art. 33 Refugee Convention gives rise to duties of the State of protection which may constrain the State to admit the refugee to its territory. Therefore, Art. 33 Refugee Convention is one of the most discussed provisions of the Refugee Convention. Bearing in mind that States are reluctant in acknowledging an individual right to asylum, the State duties resulting from Art. 33 Refugee Convention must nevertheless endorse an effective protection of the refugee. It has been evoked that a prohibition of refoulement has evolved on the level of customary international law. However, a careful examination of *opinio iuris* and State practice does not confirm this view for the time being.

(b) Scope of Application

31 The principle of non-refoulement laid down in Art. 33 Refugee Convention applies to refugees within the meaning of Art. 1 Refugee Convention. All refugees physically present give rise to an obligation for the State of refuge, to grant effective protection to persons falling under its de facto jurisdiction. The scope of application can be extended to all asylum seekers, although this interpretation of Art. 33 Refugee Convention may not yet be consented to by the majority of States and scholars. However, the development in the interpretation of effective protection, for example by the Member States of the European Union, seems to point in the direction of a wide interpretation of the obligation including asylum seekers.

32 Blunt denials of access or turn-back policies of States are hardly compatible with the principle of non-refoulement. States are entitled to introduce or continue a system of immigration control including the imposition of visa requirements. However, mechanisms of *non-entrée* like the 'safe country rules' must comply with Art. 33 Refugee Convention. These restrictions on the admission and the stay of aliens are applied, for example, in the European Union as a procedural device (Arts 26–27 and 29–31 Council Directive 2005/85/EC in relation to third States and Council Regulation [EC] 343/2003 between Member States). The 'first country of arrival rule' or 'safe third country rule' may lead to a deportation chain at the end of which the refugees will find themselves back in the country where they first arrived after leaving their home States out of fear of persecution. If the 'safe country of origin rule' is applied, the refugee is deported to his country of origin,

because the State of refuge estimates that there is no persecution in the country of origin. The design of these rules has to take into account that the refugees should enjoy sufficient protection in the State they are deported to. If a State sends back a refugee to a State, where the status determination procedure or the understanding of the refugee definition is deficient, this constitutes a breach of the duty to avoid the refoulement of a refugee 'in any manner whatsoever' (Art. 33 (1) Refugee Convention).

33 States Parties to the Refugee Convention cannot escape their responsibilities by intercepting refugees or by deporting them to areas outside the State borders including the → *territorial sea* or the so-called international zones. Extraterritorial refoulement is subject to the same rules as any other refoulement. The practice of the US of intercepting Haitians in international waters and sending them back to Haiti was approved by the majority of the US Supreme Court (*Sale v Haitian Centers Council* [21 June 1993] 509 US 155), but it was found to breach Art. 33 Refugee Convention by the → *Inter-American Commission on Human Rights (IACommHR) (Haitian Interdiction Case 10.675 IACommHR Report No 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550 paras 156-58)*.

(c) Exceptions

34 Exceptions to the principle of non-refoulement are laid down in Art. 33 (2) Refugee Convention. If the refugee can be regarded as a danger to the security of the country, they can be expelled or deported. Unlike persons falling under the narrow scope of Art. 1 (F) Refugee Convention and thus being excluded from protection, individuals who are covered by the criminality provision of Art. 33 (2) Refugee Convention fulfil the requirements of the refugee definition. According to Art. 33 (2) Refugee Convention, the danger to national security must lie within the very person of the refugee. Hence, if a refugee arrives as part of a mass influx causing a danger to national security, the application of the principle of non-refoulement cannot be suspended. Scholars assuming an inherent exception for mass influx situations refer to the high costs and propose a more effective international burden-sharing. However, the concept of the principle of non-refoulement only allows exceptions on individual grounds.

3. Rights of Refugee Status

35 Refugees lawfully staying in the territory enjoy non-discrimination in relation to the nationals of the State with respect to public relief and assistance (Art. 23 Refugee Convention) or relating to aspects of labour legislation and social security (Art. 24 Refugee Convention). This group of refugees also enjoys the most favourable treatment accorded to nationals of a foreign country concerning the right to association (Art. 15 Refugee Convention; → *Association, Freedom of, International Protection*) and on behalf of wage-earning employment (Art. 17 Refugee Convention). Refugees lawfully staying in the territory enjoy a treatment as favourable as possible and, in any event, not less favourable than that generally accorded to aliens regarding the right to self-employment (Art. 18 Refugee Convention), the right to exercise liberal professions (Art. 19 Refugee Convention) or regarding housing (Art. 21 Refugee Convention; → *Housing, Right to, International Protection*). Refugees having their habitual residence in the State possess a non-discriminatory position concerning artistic rights and intellectual property (Art. 14 Refugee Convention; → *Intellectual Property, International Protection*). If they enter the territory of the State of protection and fall under the State's effective jurisdiction, refugees are entitled to exercise their freedom of religion (Art. 4 Refugee Convention), the State shall issue them identity papers (Art. 27 Refugee Convention), and they shall not be expelled save on grounds of national security or public order (Art. 32 (1) Refugee Convention). A number of core rights apply to refugees with no further qualification. The State applies the provision of the Refugee Convention without discrimination as to race, religion, or country of origin (Art. 3 Refugee Convention) and it accords to a refugee exercising his property rights a

treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances (Art. 13 Refugee Convention; → *Property, Right to, International Protection*). Every refugee has free access to courts (Art. 16 Refugee Convention) and enjoys the same treatment as accorded to nationals with respect to elementary education (Art. 22 Refugee Convention). Finally, the duty of non-refoulement obliges States not to return refugees to a place where they risk being persecuted for a reason laid down in the Refugee Convention (Art. 33 Refugee Convention).

4. Subsidiary Protection

36 Subsidiary protection is granted to persons who do not fulfil the criteria of Art. 1 A (2) Refugee Convention. It can guarantee the right not to be expelled. The relationship between subsidiary protection and refugee protection is not explicitly determined. Persons in a refugee-like situation and asylum seekers who fail to qualify as refugees under the Refugee Convention do nevertheless fall under the scope of international refugee law. As the Refugee Convention does not explicitly govern the granting of subsidiary protection, the safeguards and entitlements provided for by subsidiary protection widely depend on the interpretation of international law by States.

37 A common approach to subsidiary protection by the Member States of the European Union is laid down in Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection. According to its Art. 2 lit. e, a

‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, or in the case of a stateless person, to his country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail him or herself of the protection of that country.

Art 2 lit. f Council Directive 2004/83/EC stipulates that “‘subsidiary protection status’ means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection’.

5. Refugees and Human Rights

38 There are relevant provisions on refugees in human rights instruments. The Universal Declaration of Human Rights stipulates some *habeas corpus* rights which are applicable without discrimination (Art. 9 UDHR), the right to seek and to enjoy in other countries asylum from persecution (Art. 14 UDHR), the right to a nationality (Art. 15 UDHR), and the right to freedom of movement and residence within the borders of each State (Art. 13 UDHR; → *Movement, Freedom of, International Protection*). The latter right is also provided for in Art. 12 ICCPR. The two Covenants are based on the non-discriminatory character of human rights. According to Art. 2 (1) ICCPR, each State Party must ensure the rights in the ICCPR to ‘all individuals within its territory and subject to its jurisdiction’. Referring to this provision, the → *Human Rights Committee* has adopted General Comment No 15: The Positions of Aliens under the Covenant ([9 April 1986] GAOR 41st Session Supp 40, 117), in which it holds that the ICCPR does not recognize the right of aliens to enter or reside in the territory of a State Party. Yet it also states that in certain circumstances the ICCPR may afford protection to an alien ‘even in relation to entry or residence, for example, when

considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise' (No 5 General Comment No 15).

39 The protection of children seeking refuge is guaranteed by Art. 22 Convention on the Rights of the Child ('CROC' [adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3). The duty of States to protect the family unity of refugees is in general affirmed by State practice, and the necessary *opinio iuris* can be derived from legal material. The obligation of States to protect the family is laid down in Art. 23 ICCPR and relating to family unification in Art. 10 CROC. The obligations of States do not necessarily result in an individual right of a family member.

40 The → *European Court of Human Rights (ECtHR)* holds the view that States have the right to control the entry, residence, and expulsion of aliens (*Vilvarajah v the United Kingdom* [ECtHR] Series A No 215 at 34 para. 102). There is no right to political asylum in the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') or its Protocols. Nevertheless, the ECtHR holds that the rights safeguarded by the ECHR can provide for a legal position of aliens implying far-reaching State obligations towards refugees.

41 Within the scope of Art. 3 ECHR, the ECtHR has strengthened the protection of aliens from torture or inhuman or degrading treatment or punishment (eg *Chahal v UK* [ECtHR] Reports 1996-V 1831 at 21 para. 74); see also → *Human Dignity, International Protection*). It is well established in the case-law of the ECtHR that expulsion or any other kind of removal by a State Party may engage the responsibility of that State. If substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Art. 3 ECHR in the receiving country, Art. 3 ECHR implies the obligation not to expel the person in question to that country (see → *Soering Case* [ECtHR] Series A No 161 at 35 paras 90–91; *Cruz Varas v Sweden* [ECtHR] Series A No 201 at 28 paras 69–70). In favour of third-country nationals, the right to family life guaranteed in Art. 8 ECHR can—on exceptional conditions—encompass the right to remain in a country (*Dalia v France* [ECtHR] Reports 1998-I 76 at 91 para. 52; *Boultif v Switzerland* [ECtHR] Reports 2001-IX 119 at 130 para. 46). For specific situations, the ECtHR holds that the right to family life provides for the right to legalize the stay by granting a formal residence permit or a similar document (*Sisojeva v Latvia* [ECtHR] App 60654/00 paras 104–107; in this case, the Grand Chamber struck the application in its judgment of 15 January 2007; in *Rodrigues da Silva v Netherlands* [ECtHR] Reports 2006-I 223, the Grand Chamber rejected the application on 3 July 2006).

42 Interpreting the law of the European Union, the European Court of Justice ruled in its judgment of 27 June 2006 (C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-05769) on some aspects of Council Directive 2003/86/EC on the Right to Family Reunification but also stressed in its judgment the human rights dimension and the State obligations in international law, especially stemming from the CROC.

E. Perspectives

43 The Refugee Convention is the fundamental instrument on rights of refugees and duties of States to protect refugees and asylum seekers. Therefore, the interpretation of the Refugee Convention should take into account all relevant risks for refugees. The purpose is to grant an effective protection to refugees. Since the Refugee Convention has come into force the notion of refugees has been the central issue of refugee law. Recently, the human rights dimension of refugee law has been stressed. As a consequence, the scope of international refugee law applies to all persons seeking refuge and needing international protection. If persons do not qualify for refugee status, they have a legal position which can entail obligations of the State of refuge. Refugee law is part of the general development in

international law of strengthening the position of the individual, a development which is closely intertwined with the evolution of human rights.

Select Bibliography

- O Kimminich *Der internationale Rechtsstatus des Flüchtlings* (Heymann Köln 1962).
- A Grahl-Madsen *The Status of Refugees in International Law* vol 1 *Refugee Character* (Sijthoff Leyden 1966).
- A Grahl-Madsen *The Status of Refugees in International Law* vol 2 *Asylum, Entry and Sojourn* (Sijthoff Leyden 1972).
- S Aga Khan 'Legal Problems relating to Refugees and Displaced Persons' (1976) 149 RdC 287-352.
- A Grahl-Madsen 'International Refugee Law Today and Tomorrow' (1982) 20 Archiv des Völkerrechts 411-67.
- O Kimminich 'Die Entwicklung des internationalen Flüchtlingsrechts: Faktischer und rechtsdogmatischer Rahmen' (1982) 20 Archiv des Völkerrechts 369-410.
- GS Goodwin-Gill 'Non-Refoulement and the New Asylum Seekers' (1985-86) 26 VaJIntL 897-920.
- A Takkenberg and CC Tahbaz (eds) *The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees* (2nd ed Vuchtelingenwerk Amsterdam 1989) vols 1-3.
- JC Hathaway *The Law of Refugee Status* (Butterworths Toronto 1991).
- W Kälin 'Refugees and Civil Wars: Only a Matter of Interpretation?' (1991) 3 IJRL 435-51.
- C Amann *Die Rechte des Flüchtlings: Die materiellen Rechte im Lichte der travaux préparatoires zur Genfer Flüchtlingskonvention und die Asylgewährung* (Nomos Baden-Baden 1994).
- P Weis (ed) *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a Commentary* (CUP Cambridge 1995).
- U Davy *Asyl und internationales Flüchtlingsrecht: Völkerrechtliche Bindungen staatlicher Schutzgewährung, dargestellt am österreichischen Recht* vol 1 *Völkerrechtlicher Rahmen* (Verlag Österreich Wien 1996).
- U Davy *Asyl und internationales Flüchtlingsrecht: Völkerrechtliche Bindungen staatlicher Schutzgewährung, dargestellt am österreichischen Recht* vol 2 *Innerstaatliche Ausgestaltung* (Verlag Österreich Wien 1996).
- K Hailbronner *Immigration and Asylum Law and Policy of the European Union* (Kluwer The Hague 2000).
- J Fitzpatrick (ed) *Human Rights Protection for Refugees, Asylum-seekers and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Transnational Ardsley 2002).
- W Kälin 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003) 613-66.
- E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of Non-Refoulement' in E Feller, V Türk, and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003) 87-177.
- N Nathwani *Rethinking Refugee Law* (Nijhoff The Hague 2003).
- JC Hathaway *The Rights of Refugees under International Law* (CUP Cambridge 2005).

D Kugelmann 'Einwanderungs- und Asylrecht' in R Schulze and M Zuleeg (eds) *Europarecht: Handbuch für die deutsche Rechtspraxis* (Nomos Baden-Baden 2006) 1827-87.

GS Goodwin-Gill and J McAdam *The Refugee in International Law* (3rd ed OUP Oxford 2007).

S Peers *EU Justice and Home Affairs Law* (2nd ed OUP Oxford 2007).

Select Documents

Agreement relating to Refugee Seamen (signed 23 November 1957, entered into force 27 December 1961) 506 UNTS 125.

Arrangement relating to the Legal Status of Russian and Armenian Refugees (signed 30 June 1928, entered into force 5 March 1929) 89 LNTS 53.

Cartagena Declaration on Refugees Refugees (adopted 22 November 1984) OEA/Ser.L/V/II.66/doc.10 Rev (1984) 190.

COE Committee of Ministers 'Recommendation to Member States on the Harmonisation of National Procedures relating to Asylum' (5 November 1981) CM/Rec (1981) 16.

COE Committee of Ministers 'Recommendation to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees' (25 January 1984) CM/Rec (1984) 1.

COE Committee of Ministers 'Resolution on Asylum to Persons in Danger of Persecution' (29 June 1967) CM/Res (64) 14E.

COE European Agreement for the Abolition of Visas for Refugees (signed 20 April 1959, entered into force 3 September 1960) 376 UNTS 85.

COE European Agreement on Transfer of Responsibility for Refugees (signed 16 October 1980, entered into force 1 December 1980) 1249 UNTS 383.

Convention concerning the Status of Refugees Coming from Germany (signed 10 February 1938, entered into force 26 October 1938) 192 LNTS 59.

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

Convention on Diplomatic Asylum (concluded 28 March 1954, entered into force 29 December 1954) 1438 UNTS 104.

Convention on Territorial Asylum (concluded 28 March 1954, entered into force 29 December 1954) 1438 UNTS 129.

Convention relating to the Status of Refugees (signed 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

Convention relating to the International Status of Refugees (signed 28 October 1933, entered into force 13 June 1935) 159 LNTS 199.

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof [2001] OJ L212/12.

Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18.

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12.

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees

or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13.

Council of the European Union 'Council and Commission Action Plan Implementing the Hague Programme on Strengthening Freedom, Security and Justice in the European Union' [2005] OJ C198/1.

Council Regulation (EC) 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 [2003] OJ L50/1.

Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2000] OJ L316/1.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals [2008] OJ L348/98.

European Council 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (4-5 November 2004).

Protocol relating to Refugee Seamen (signed 12 June 1973, entered into force 30 March 1975) 965 UNTS 445.

Protocol relating to the Status of Refugees (signed 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

UNGA Res 2312 (XXII) 'Declaration on Territorial Asylum' (14 December 1967) GAOR 22nd Session Supp 16 vol 1, 81.

UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1 January 1992) UN Doc HCR/IP/4/Eng/REV 1.