RELATE Manual

for Teachers of International Refugee Law

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RELATE

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1 Introduction: How to use this manual

This manual is intended to guide teachers of law to teach a survey course on international refugee law. International refugee law is a broad and complex topic. It is possible to spend an entire semester investigating just one narrow part of it.

We have written this manual with the instructor in mind. It is not intended as a textbook for students. Nor is it a work of original research for scholars. This manual aims to organize the broader subject into one coherent course. It offers summaries aimed at a law instructor who may not already be an expert in refugee law. And it offers lists of additional references that an instructor can offer to students or use to expand his or her own knowledge.

In organizing a course on international refugee law, our goal is to present this topic in a manner that is applicable anywhere in the world. However, we encourage instructors to customize the course by increasing attention on topics that are especially relevant where and when the course is offered.

Refugee law is an urgent topic that is constantly in the news. It is also a timeless topic. We encourage teachers to bring current events into the classroom. We hope that this manual helps to introduce the main ideas, problems, complexity and debate of refugee law. But we hope that students and instructors also understand that refugee law is an ongoing challenge. It is essential that legal professionals learn the rules of law, but also learn to deal with the challenges involved.

Please note that this Manual does not address the unique legal regime governing refugee protection in Latin America, including the 1984 Cartagena Declaration on Refugees. For instructors in Latin America, we recommend referring to *Manual RELATE para la Elaboración de un Curso de Introducción al Derecho Internacional de las Personas Refugiadas*, which covers Latin American refugee law.

2 How to Teach the Law Affecting Refugees

This manual aims to help instructors teach a survey course on international refugee law. Thinking about teaching such a course requires first thinking about student-centered instruction.

2.1 What Makes Good Teaching?

What does "good teaching" actually mean and what course design decisions do I have to make as a teacher? What knowledge and skills are needed for people working in the refugee field? What additional competences should be fostered in students in order to train them to become responsible, reflective and socially competent lawyers? How can these competences be specifically promoted? This section is intended to provide helpful ideas and food for thought on the design of teaching and learning in general, which could also be of particular interest for teaching refugee law.

Today, teaching/learning research agrees that learning is not a passive process. In the following, some of the most relevant criteria for good teaching will be examined.

2.2 Shift from teaching to learning - student-centeredness

A foundational concept to good teaching is summarized as a shift from teaching to learning. Implications of this paradigm shift are an increased student-centredness through the promotion of self-organized and active learning and the turning away from purely instructional didactics as well as a changed understanding of the role of teachers in the sense of learning support.

Good teaching consists of enabling and supporting students' independent learning. In this sense, good teaching today is study-centered. On the other hand, teaching that sees itself purely as imparting knowledge and neglects the active processing of knowledge by the students gives away a large part of its potential impact. The design of the learning environment by the teachers makes the difference between good and not so good teaching.

For the planning and implementation of a course, such a student-centered orientation of teaching means promoting the participation and personal responsibility of the learners in their own learning process. Important building blocks for this are, in particular, the common understanding of learning objectives, the targeted linking to students' prior knowledge and experience, the promotion of their intrinsic motivation, support in the development of individual learning strategies and the increased use of activating and cooperative methods.

2.3 Competence and learning goal orientation

Competency-oriented teaching goes beyond the mere imparting of subject knowledge and aims to enable students to apply certain abilities, knowledge, skills, attitudes and behavior in a solution-oriented manner in a complex situation.

For the planning and implementation of a study programme or an individual course, competence-oriented teaching means that the competences to be acquired must be formulated in advance as a learning objective. Competences can be divided into subject-specific, methodological, social and personal competences. The teacher should then derive forms of assessments and methods from these learning objectives.

Learning objectives describe the knowledge and competencies that learners should have acquired at the end of a session, a series of events or an entire course (learning outcomes). Competencies are divided into professional, methodological, social and personal competencies.

The determination of learning objectives is important in two respects: on the one hand, they are a basic prerequisite for planning and assessing one's own teaching. On the other hand, if the learning objectives are made transparent to them, the learners can orient themselves to them and control and review their learning process themselves. This promotes self-determined and self-directed learning.

In a refugee law course, an obvious objective is for students to acquire specialized legal competencies in refugee law. This guide is designed to provide an instructor with summary specialist knowledge in the special field of refugee law, with the goal of aiding student learning. This guide is not intended to be a comprehensive treatise on refugee law. It is intended to frame and highlight important issues for instructors, so that they can help students to learn them.

It is however important that what is learned must not remain abstract. Students must also know how to apply it in a targeted manner. This requires knowledge of the actors, the procedure, the different forms of protection as well as strategic considerations. However, what expertise is required depends on the trainees, the objective of the training and the overall context of the course.

2.4 Critical reflection skills

Especially in the area of refugee law, students' critical thinking, their autonomy and their ability to reflect should be promoted. Refugee law is a topic on which there is little consensus at the local, national or global level, especially on certain issues. Students should be encouraged to think of themselves as actors in an evolving field.

The aim should be to encourage students to act ethically, responsibly and in solidarity by sensitizing them to social, ecological and economic challenges. Students' ability to reflect critically can be promoted on the one hand by the choice of the learning format. In particular, courses that integrate elements of discovery and research-based learning create scope for independent reflection and for students' own cognitive processes. On the other hand, at the content level, it should be taken into account that topics are always examined from an overall societal perspective and discussed together.

This is a law course. However, it is important to acknowledge that people working in refugee law often experience frustration with the limits of the law. The realization that law is not neutral, but rather (re)produces social inequalities, is an important part of the development of a critical understanding of law among students, which is of fundamental importance particularly in this field of law. Therefore, a course on the law affecting refugees should create spaces to reflect on the relationship between law and justice, to become aware of the protection gaps in the existing legal system and to discuss alternatives to existing solutions. This can be built into in-depth exercises that follow a knowledge acquisition phase.

2.5 Diversity-friendly teaching

Good teaching – especially in the field of refugee law - must also be designed to be diversity-friendly. This is the only way to ensure that students with different previous experiences, prerequisites and backgrounds can participate on an equal footing. This requires an appreciative approach to diversity and teaching that does not discriminate against students on the basis of certain characteristics or life plans and that dismantles exclusion mechanisms.

Aspects of "good teaching"

- Good teaching is study-centered.
- Good teaching is competence- and learning goal-oriented.
- Good teaching encourages critical reflection and responsible action in society.

- Good teaching offers sufficient space for reflection and promotes the individual's capacity for autonomy.
- Good teaching promotes scientific work and judgment through formats of research-based learning.
- Good teaching is diversity-appropriate and critical of discrimination.
- Good teaching requires an appreciative and error-friendly learning atmosphere and a constructive feedback culture.
- Good teaching needs reflective teachers.

2.6 Course planning

When planning a course on refugee law, the teacher must determine the learning content with regard to the defined guideline and general objectives. The objective and content levels are closely interwoven and mutually dependent.

In a first step, "the subject matter" (here the refugee law) must be examined from an expert's perspective. This is followed in a second step by the so-called didactic analysis, which on the one hand helps to select and weight the contents; on the other hand it deals with the question of how the "material" can be divided, arranged and presented.

But how is it possible to transform refugee law into an object of learning? A major challenge is to prepare the complex legal subject of refugee law in a way that is manageable for the learners and to set meaningful focal points.

When it comes to didactic preparation, teachers often face the familiar problem: the material is overwhelming, but there is too little time available. However, a course cannot teach every detail. The teacher should not take away the students' responsibility for their own learning process. There should be an expectation that a successful course sets a foundation for future learning, because not everything can be learned in one class. Therefore, the focus should be on conveying overview and structural knowledge and acquiring research skills. A selection, arrangement and illustration of the contents that is appropriate for the target group ideally leads to the students being enabled to independently find further knowledge and practical solutions. For this, didactic reduction decisions must be made with regard to the amount of material, the complexity of the content and its presentation. In addition, the material must be structured in a meaningful way. It is equally important to be aware of the exemplary significance of each content.

A didactic analysis helps to illuminate the content from the students' perspective. Questions to be asked are, for example, the exemplary significance of the subject matter, possible prior knowledge of the students and the significance of the subject matter for them in the future, possibilities of structuring the subject matter into individual blocks and its accessibility and presentability.

2.7 Teaching Methodology

At the level of methodological design of teaching-learning formats, the use of diverse and varied methods can help to enable different learning approaches and to meet different learning needs. For example, the choice of methods should take into account that different channels of perception (visual, auditory, cognitive, haptic) are addressed. Also, different learning media should be integrated and the social and action forms should be varied.

Furthermore, the complexity of the law affecting refugees can best be understood in a practical context rather than in a purely conceptual and theoretical way. Therefore, experimental learning methods, such as clinical legal education and interactive teaching methods, may generate high level of engagement amongst students and that, as a result, maximizes the learning opportunities.

Some examples of Interactive Teaching Methods are: Brainstorming, Ranking exercises, Small group discussions, Case studies, Role plays, Question and answer, Simulations, Debates, Games, Hypothetical problems, Moots, Mock trials, Open-ended stimulus, Opinion polls, Flipped classroom, Participant presentations, Taking a stand, the PRES formula, Problem-solving, Problem-based learning, Values clarification, Fishbowl, Jigsaw, Each one teach one, Visual aids, Use of experts, Field trips, etc.

3 Contextual Issues

Before diving into the complex provisions of international refugee law, it is important to situate this topic without international law, and within international relations. Refugee law exists because of the way governments have come to control – or seek to control – migration. As this phenomenon of strict regulation of migration emerged, it immediately confronted the problem of refugees who have no choice but to migrate, whether governments want them to or not.

3.1 Refugee Law in the Context of Migration Law

3.1.1 Refugee law and the problem of migrant rights

At the most general level, refugee law concerns the status and rights of people who leave the country of their nationality in fear of human rights violations, violence, and hardship. Refugee law is necessary because the act of migrating across a border generally deprives a person of many rights that are normally guaranteed to a citizen. From a narrow perspective, refugee law grants rights to a group of people who are in need of special protection. From a broader perspective, refugee law is an exception to the general norm that states may restrict non-citizens from their territories and exclude migrants from enjoying many important human rights. In view of this, before launching a study of refugee law it is important to understand the broader context of migration law.

Because refugee law focuses on people who are outside their countries of nationality, it may be important to begin by more precisely defining nationality and citizenship in the international context. Make sure students understand that citizenship rules vary around the world. Introduce the basic concepts of citizenship based on *jus soli* (citizenship by place of birth) and *jus sanguinis* (citizenship by blood or ancestry). Note that some countries persist in only allowing men to pass on citizenship to children, and that countries vary on whether they allow foreigners to acquire citizenship if they were not born with it.

Students may see distinctions between the rights of citizens and non-citizens as normal and natural. It may be useful to ask students to think about what rights a person should have simply because s/he is a human being. Note that these rights should be guaranteed to migrants no matter what their status.

If truly universal rights for all were accepted, refugee law might not be necessary because people would always have all of their rights protected, no matter if they emigrated across a border. Ask students to also think about what rights a person should have because s/he is a citizen of a particular country. These are the rights that a migrant might normally be denied. The general denial of key rights to migrants – starting with the right to enter and remain in a country's territory – is what makes refugee law necessary.

3.1.2 General state authority to control migration

Modern migration control emerged in the 19th and 20th centuries and was built on multiple intersecting historical trends. These include the growth of the power of central governments,

the rise of nationalism, racism and xenophobia, self-determination and anti-colonialism. Such historical forces gave governments more capacity to try to control who could enter their territories, while also giving the question of who belongs in a national community more political importance. It may be useful to discuss with students the moral dimensions of these trends, highlighting the fact that we may look at some of them as admirable (i.e. movements for self-determination) while others are considered morally suspect (i.e. xenophobia, extreme nationalism).

International law recognizes that states have sovereign authority to control migration. The Universal Declaration of Human Rights calls for every person to have a "right to change his nationality," though this is an inherently vague aspiration, and it is non-binding. The binding International Covenant on Civil and Political Rights says only that "every child has a right to acquire a nationality." The ICCPR recognizes that "everyone shall be free to leave any country, including his own," but does not say that the State must allow non-nationals to enter.

The texts of international human rights treaties differentiate between rights of all people and rights guaranteed only to citizens. For example, the right to take part in public affairs, including the right to vote, is limited to citizens (ICCPR, art 25). The International Covenant on Economic, Social and Cultural Rights says that "Developing countries … may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

Perhaps most important, the ICCPR limits freedom of movement only to people "lawfully within the territory of a State" (article 12). It embraces states' authority to expel non-nationals so long as the expulsion is governed by law and there is access to a fair procedure (article 13).

3.1.3 Historical development of migration restrictions

It would be overly simplistic to say that migration control is a creature of the last 250 years. However, we can say that before the 19th Century migration control was inconsistent and often quite localized. In part, this reflects the reality that national governments were often fragmented and weak by modern comparisons. The era of empires, especially before the rise of nationalist movements, tended to reduce the impulse to restrict movements across borders. People could travel vast distances that today might involve multiple international borders, and remain within the territory of a single sovereign.

Our modern era of migration control, and correspondent national regulation of nationality and citizenship, is often dated to the era of the French Revolution. By this time, growing nationalist movements and an emerging strong central government increased political interest

in controlling the entry of foreigners. International conflict increased fear and anxiety about foreigners, while intense racism, xenophobia and anti-Semitism began to find expression in laws targeting migrants.

During and after the French Revolution, several features that are essential to modern migration control began to emerge. Governments began to issue various types of identity documents, and to more formally regulate who could be considered a national. By the end of the 19th Century, many countries in Europe and North America had established some standardized forms of border control, including rules prohibiting entry by certain types of people. Some of these rules were directed at people suspected of carrying communicable diseases, while others reflected uglier prejudices, such as North American exclusions of Chinese nationals. These trends accelerated and solidified after World War I. In the resulting system between the world wars, it was far more difficult to cross borders legally in Europe than it would have been a century earlier.

3.1.4 Historical development of refugee law

The newly closed border regime that emerged after World War I nearly immediately faced the challenge of multiple major refugee crises. The Russian Civil War and Turkish persecution of Armenians sent millions of refugees fleeing into Europe. These and subsequent forced migrations challenged the new legal regime of restricted migration, and led eventually to the development of refugee law as an exception to the usual regime.

In the 1920s, the League of Nations enacted a series of Arrangements to issue identity documents to Armenian and Russian refugees. In 1928, the League appointed the first High Commissioner for Refugees. This led to the first international Refugee Convention in 1933, which guaranteed rights for the refugees, including the right to not be forced back to countries where they would be harmed (non-refoulement). Another Convention, in 1938, aimed to protect German refugees, and a 1939 Protocol added Austrians.

These pre-World War II instruments defined refugees by naming particular nationalities – the Russians, Armenians, Germans and Austrians chief among them. This approach defined refugee status entirely by group identity. Migrants who were in a recognized group could benefit. Others were left out. This approach foreshadowed a practice that is still quite important: group-based refugee status. However, this approach left out any individuals who fled any situation other than the few that were named, and it could not quickly adapt to any new crises. Governments had to continually add nationalities to the list, until this approach was finally abandoned with the outbreak of the Second World War.

After World War II, there were millions of displaced people in Europe. The newly formed United Nations created an International Refugee Organization in 1946 to work on resettling refugees. The IRO was eventually supplanted by the UN High Commissioner for Refugees (UNHCR) (1950), who was given a mandate over refugees. The new UNHCR inherited a mandate over all of the pre-World War II refugee groups, but it was given a new, individualized definition covering people who had, among other things, a "well-founded fear of persecution." This new definition was amended and repeated in the 1951 Convention relating to the Status of Refugees, which became the central instrument of international refugee law.

The more open and individualized definition in the 1951 Convention proved better able to adapt to new situations than the pre-World War II approach had been. However, initially this treaty was past-looking as well. It was limited to refugees who had fled events before 1951. It was thus not available to people who fled subsequent crises, even if they could otherwise meet the definition. In 1967, the New York Protocol removed the date limitation on the definition. Refugee status was no longer limited to people who fled events before 1951, thus creating a global individualized refugee definition that could be readily applied to new situations.

3.1.5 General rights of migrants (regardless of refugee status)

Much of this course focuses on the special rights of refugees. Refugees need special protection of their rights because governments generally can restrict the freedoms of non-citizens, and refugees are not able to access the rights in their own countries. However, it is important to remember that many rights are in fact guaranteed to all people, including people who are outside the country of their nationality.

International human rights law guarantees some fundamental rights to everyone, no matter their citizenship status. For example, everyone has a right to be recognized as a person, to be free of torture and slavery, and to have her right to life respected. Free expression is protected for "everyone," according to the ICCPR (article 19).

It is important to remember that migrants maintain fundamental human rights, even if they are not refugees. Because refugee law is situated as an exception to a usual norm of strict migration control, it might seem that non-refugees are legally defenseless. That is not the case.

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3.2 Key Actors in Refugee Law

Refugee law governs the interaction of many different entities. This unit aims to identify the major players.

Sending States

Sending states are the countries from which refugees flee. Their internal problems create refugee situations. The future for many refugees depends on what happens inside sending states over time. If conditions improve, repatriation may become viable, for example. However, sending states are usually excluded from determining whether refugees get protection.

Host States

Host states are the countries to which refugees flee. They bear considerable responsibility for protecting asylum asylum-seekers and refugees, and they often become the sites of legal disputes about the limits of refugee law.

Domestic Courts

When asylum-seekers arrive in a host state but the host state resists granting them protection of some kind, the resulting dispute often ends up in court. Much of refugee law has developed through litigation in such cases. As a result, domestic legal systems have become major actors in the refinement and advancement of refugee law.

Regional Associations of States

Regional associations of states are critical in establishing norms for implementing refugee law, and for creating additional legal instruments that add protection for refugees beyond the 1951 Convention. As a result, Latin America, Europe and Africa all have their own bodies of refugee law.

Regional Courts

Just as domestic courts have been critical in adjudicating questions under refugee law, regional human rights courts and commissions have helped to define the meeting of regional human rights instruments vis-à-vis refugees.

UN High Commissioner for Refugees (UNHCR)

Created at the end of 1950, the UNHCR is one of the most visible and complex actors in refugee protection and assistance. It has a vast global mandate, and plays very different roles

in different countries and contexts. Importantly, UNHCR depends on governments for funding and for access to refugees, but it is also charged with supervising the implementation of refugee law. Navigating these inherent tensions is a constant challenge for the agency. In addition, UNHCR often is engaged in assisting people who fall outside its original mandate, such as internally displaced people. This sprawling work and complex array of activities can make it difficult to summarize UNHCR's precise role. However, it may be useful to divide UNHCR's functions into two broad categories:

- *UNHCR as a supervisor of refugee law:*
  The 1951 Refugee Convention, article 35, assigns to UNHCR the "duty of supervising the application of the provisions of this Convention." In this role, UNHCR might seem more like the UN High Commissioner for Human Rights, which investigates and reports on suspected violations of human rights by states. UNHCR does sometimes make statements objecting to government policies that hurt refugees. But it does not usually investigate or report on countries' treatment of refugees the way the Human Rights Commissioner might. On the other hand, UNHCR is a major player in shaping the international understanding of refugee law. Its 1979 Handbook on Procedures and Criteria for Determining Refugee Status was extremely influential in the development of refugee law, and UNHCR has issued many more recent Guidelines and interpretive advice to governments about key questions in refugee law. UNHCR also frequently issues advice about how certain types of asylum-seekers and refugees should be treated.

- *UNHCR as a surrogate state and the challenge of responsibility shift:*
  In many places, UNHCR plays a far more active frontline role in the lives of refugees, and is much more than a mere advisor or supervisor. In many countries, UNHCR performs functions that might normally be thought to be the responsibility of the host governments. This includes having operational control over refugee camps, delivering health services and food, setting up shelter and utilities in refugee settlements, and adjudicating refugee status. Sometimes UNHCR takes on such roles by filling a vacuum in an emergency. In other cases, UNHCR performs these functions by formal agreement with the host government. Sometimes UNHCR acts by assisting the host state, which still takes the lead. But in other contexts the host state is less active at the frontlines, leaving UNHCR to play a government-like function. Commentators have referred to this phenomenon as the UNHCR "surrogate state," which results from responsibilities shifting *de facto* or *de jure* from host governments to UNHCR.

Non-Government Organizations

NGOs are essential to refugee welfare all over the world, but they are not all the same. For example, some NGOs receive funding to carry out activities on behalf of a host government or UNHCR. These NGOs are sometimes called "implementing partners." Others focus their work on advocating for better treatment of refugees, for example by engagement with host governments, or by providing legal assistance to refugees. NGOs take a wide range of approaches to refugee issues, and should not be presumed to all have the same agenda or priorities.

Refugees and refugee communities

It is critical to remember that refugees are themselves central to refugee law, though their voice and agency are too often forgotten. Refugees and migrants often organize themselves formally and informally for mutual support. Refugees sometimes find ways to have a voice in host government politics. Refugees also make choices about how to seek protection that may challenge official policies, for example by moving from one host state to another, or refusing to live where a host government assigns them. Such choices, what might be called voting with their feet, often produce clashes between refugees and authorities, but also become important ways for refugees to assert autonomy and influence over their futures.

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3.3 Key Global Instruments of Refugee Law Beyond the 1951 Convention

The study of refugee law rightly focuses on the 1951 Refugee Convention. Yet, it is critical to recognize that there are several other treaties and bodies of law that play an important role in defining the rights of refugees. We will highlight a few of the most important.

The three documents comprising the International Bill of Rights are especially important. The 1948 Universal Declaration of Human Rights is a non-binding international legal instrument that originated after World War II. It was proclaimed at the United Nations' General Assembly as a set of standards to be achieved by all peoples and nations across the globe. The Declaration comprises 30 articles that reflect basic human rights principles that were later detailed and explored in both the 1966 International Covenant for Civil and Political Rights (ICCPR) and the 1966 International Covenant for Economic, Social and Cultural Rights (ICESCR).

Despite its non-binding character, the Declaration is widely accepted as a source of moral authority and the principles within its text are embedded in many domestic constitutions as the basis for any human rights therein. In the context of migration and refugee law, the 1948 Declaration sets out the principles applicable to immigrants, asylum seekers and refugees in three specific articles (13, 14 and 15), although all of its principles are also suitable for them in a general human rights perspective.

The 1954 Statelessness Convention & Protocol has particular complementarity with refugee law. Although normally taken for granted in immigration and refugee studies, nationality represents the starting point to both subjects as well as to the legal, political and social dimensions of statelessness which, for its turn, is based solely on domestic legislation when it deliberately excludes the right to a nationality to individuals.

Despite states' reserved authority to recognize nationality to people either born in their territory (jus soli rule) or related to its nationals (jus sanguinis rule), the right to a nationality recognized under article 15 of the 1948 Declaration of Human Rights should be understood in light of the consequences the lack of nationality entail upon individual and collective human rights - especially considering the obstacles to the full achievement of those rights and how discrimination usually plays a central role in restrictive nationality laws, respectively.

The following International Human Rights Instruments incorporate some of the main aspects of the Universal Declaration of Human Rights into specific Human Rights instruments, which are also generally applied to refugees:

- 1948 Universal Declaration of Human Rights.

- 1949 ILO Convention concerning Migration for Employment.
- 1951 UN Convention Relating to the Status of Refugees.
- 1954 Convention Relating to the Status of Stateless Persons.
- 1961 Convention on the Reduction of Statelessness.
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination.
- 1966 International Covenant on Civil and Political Rights.
- 1966 International Covenant on Economic, Social and Cultural Rights.
- 1967 Protocol Relating to the Status of Refugees.
- 1979 Convention on the Elimination of All Forms of Discrimination against Women.
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 1989 Convention on the Rights of the Child.
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
- 2006 Convention on the Rights of Persons with Disabilities.
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3.4 Regional human rights law

Some of the most important and effective advancements of human rights law have been regional, rather than global. Europe, Africa and Latin America have made especially important contributions to human rights through regional treaties. These treaties, in turn, offer important protection to refugees, in some cases explicitly, and in other cases through interpretation.

While w will examine leading examples of regional refugee law in separate units in this course guide, please find below a list of core conventions affecting the rights of refugees:

Treaties

Africa:

- 1963 Charter of the Organization of African Unity
- 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa
- 1981 African [Banjul] Charter on Human and Peoples' Rights
- 1990 African Charter on the Rights and Welfare of the Child
- 1997 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- 1998 Draft Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights
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Americas:

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- 1985 Inter-American Convention to Prevent and Punish Torture
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- 2013 Inter-American Convention Against All Forms of Discrimination and Intolerance
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- 2015 Inter-American Convention on Protecting the Human Rights of Older Persons

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3.5 Key Debates

➔ Is it morally justifiable to deprive migrants of some human rights based on their citizenship?

➔ Does advocating for special rights for refugees undermine a broad cause of expanded human rights for all migrants?

4 Rights of Refugees

Many courses in refugee law begin with a focus on the refugee definition. We recommend instead beginning with a focus on the rights that refugees have. The reason for this is two-fold. First, it is important that the many debates about the boundaries of the refugee definition must not displace the necessary focus on the rights of refugees. In some countries, there are systems in place to identify refugees (refugee status determination), and yet even recognized refugees enjoy few of the rights that they should. Second, many rights of refugees must be protected before it is possible to assess whether a person meets the definition.

4.1 Non-Refoulement

The principle of non-refoulement is the central, foundational rule of refugee law. It prohibits states from expelling or returning a person to a territory where her life or freedom would be in danger. The principle has multiple sources in international law, and is generally considered to be a principle of customary international law. Through the principle is broadly accepted in the abstract, its application in some situations is often debated by states, and violations are common.

4.1.1 Sources

The principle of non-refoulement is most famously articulated in the Refugee Convention's Article 33:

> 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 on account of his race, religion, nationality, member- ship of a particular social group or political opinion.

There are analogous provisions in regional refugee instruments as well. For example, the African Refugee Convention states:

> No person shall be subjected by a Member State to measures such as rejec- tion at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in [the African Refugee definition].

In addition, the Convention against Torture includes a strong rule against expelling a person to a place where she might be tortured. We will examine this provision in a separate section.

In 1967, the UN General Assembly unanimously endorsed the Declaration on Territorial Asylum, which stated that no refugee "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." General Assembly declarations are not generally binding, though they can be evidence of an accepted customary norm of international law.

In addition to these explicit provisions in international human rights treaties and declarations, international tribunals and human rights bodies have found the principle of non-refoulement implied by international human rights bodies. For example, the European Court of Human

Rights prohibits returning a person to a country where her fundamental human rights would be violated. This is based on the European Convention on Human Rights, which does not explicitly state a rule against refoulement. Similarly, the UN Committee on Human Rights has said that the obligation to respect and ensure the rights in the ICCPR "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm." (General Comment No. 31, 2002).

4.1.2 Prohibition on Mass Expulsion

A key application of the principle of non-refoulement is that states may not engage in mass expulsion of foreigners in which there is no opportunity for individual assessment of the risk of human rights violations. By way of example, this has been made explicit in the Art. 4 of Protocol 4 to the European Convention of Human Rights.

4.1.3 Refugees v. asylum-seekers

The clearest application of the principle of non-refoulement is with regard to recognized refugees. Since refugees by definition are in danger of persecution or other serious human rights violations, their expulsion would be illegal refoulement. Since the danger of persecution that they face has already been recognized, the applicability of the principle of non-refoulement is usually not debatable.

The situation for asylum-seekers often poses more challenges with governments. Every refugee must first be an asylum-seeker, and many asylum-seekers will be recognized as refugees once they have the opportunity to go through a fair refugee status determination procedure. This is why refugee status is recognized in an asylum-seeker, but the declaration of refugee status does not make someone a refugee; she became a refugee in fact the moment she left her country of origin.

In order to comply with the principle of non-refoulement, states must not expel asylum-seekers who have not had the chance to go through refugee status determination. However, states often find this rule challenging since it means that they will not be able to expel some migrants for a period of time while their refugee claims are pending. Moreover, since RSD systems are often quite backlogged, this period of time can last quite a while, sometimes years. Many controversial policies, such as the detention of asylum-seekers, result from this basic challenge.

4.1.4 Exceptions

The principle of non-refoulement has some limited exceptions. Most important, the Refugee Convention's Article 33 provides:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

It is important to note that this exception is narrow. The right against refoulement in other instruments, such as the Convention against Torture, contain no exceptions. Thus a government must not expel a person who is in danger of torture, even if the exceptions to the Refugee Convention apply.

There are often disputes over the extent of these exceptions. One problem concerns public health emergencies. During the COVID-19 pandemic, some countries closed their borders to asylum-seekers, claiming they posed a threat to public health. These measures likely violated the principle of non-refoulement.

4.1.5 Land Borders v. Sea Borders

For asylum-seekers, the clearest application of the principle of non-refoulement is when they arrive at a land border. The nature of a land border often means that a migrant will actually be on the territory of the receiving state before she encounters a government official. As a result, the receiving state has a clear obligation to assess her refugee claim before expelling her.

However, the extraterritorial application of the principle of non-refoulement has proven more contested. Many governments invest considerable resources to prevent asylum-seekers from reaching their territory. One way they do this is by interdicting boats carrying would-be asylum-seekers at sea, turning them back or redirecting them to other locations where their human rights may be in jeopardy. Courts have often allowed such policies, but they are also widely criticized by human rights organizations. Arguably, a government should not be allowed to use its resources to do outside its territory that it would not be allowed to do inside its territory. As a practical matter, such policies often lead asylum-seekers to take more dangerous voyages in an effort to evade interception, leading to many deaths en route.

Even at land borders, there is less clarity about the application of the principle of non-refoulement in conditions of mass migrations. Such emergencies are often difficult to define

with any precision. However, there are many examples of governments closing their borders to asylum-seekers when the number of arrivals grows large.

4.1.6 Non-entrée policies

States' efforts to prevent asylum-seekers from reaching their territories also include measures to stop them on land before arrival. These policies include requiring visas to enter, and sanctioning airlines and boat companies for transporting a person without a visa. These policies (known as carrier sanctions) make it difficult for many asylum-seekers to use safer forms of travel and often lead them to more dangerous migration, such as on foot through the desert or over sea on small vessels.

States have also endeavored to stop asylum-seekers by declaring transit or frontier zones for screening and turning back migrants before they are considered to reach their territories. Sometimes these are legal fictions, such as when a government declares part of its own territory to be a transit zone from which a person cannot apply for asylum. That approach is more clearly illegal. However, governments also sometimes persuade their neighboring states to allow them to screen migrants before they reach the border. Powerful governments also often ask other states to stop migrants from transiting their territories, and to tighten their own visa rules. These measures often involve complex diplomacy in which wealthier and powerful states induce cooperation from less powerful governments, and leads to more refugees being trapped in the global south, often in countries with less developed and effective asylum systems.

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4.2 No Sanctions for Illegal Entry

Recall from Unit 1 that refugee law emerged as an exception to strict government control over migration. It is thus unsurprising that a major problem in refugee law is the reality that asylum-seekers often arrive at a country's borders, or cross borders, in violation of domestic migration law.

The 1951 Refugee Convention provides some rules concerning how this should be handled in its Article 31:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened […] enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

This provision answers some questions. In theory, a refugee should not be punished for illegal entry. In other words, being a refugee entitles a person to an exemption from sanctions that might be imposed on another migrant.

But there are exceptions in the text. Article 31 only applies to refugees who come "directly from a territory where their life or freedom was threatened." Thus, the protection only explicitly applies to a first host country, typically a state bordering the sending state. If a refugee migrates again to a third country, the protection from migration sanctions does not apply, unless there is also evidence of danger in the first country. Moreover, the requirement that the refugee must show "good cause" for illegal entry adds ambiguity.

Apparent violations of Article 31 by states are common. In particular, many governments routinely detain asylum seekers who arrive without authorization while their asylum cases are pending. This practice exposes a practical problem. Even though refugees cannot generally be penalized for illegal entry, how can a government know if an asylum-seeker is a genuine refugee? Governments will often use the possibility that asylum-seekers will not be recognized as refugees to justify harsher treatment while their cases are pending. Governments will also sometimes argue that this detention is not a punishment, that it is administrative or civil. But of course, for the people who are detained it can seem quite punitive. Somewhat conversely, governments also sometimes argue that they need to detain asylum seekers to deter other migrants from arriving. This deterrence rationale seems to conflict with the purposes behind Article 31.

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4.3 Non-discrimination

Non-discrimination is a fundamental principle of international law and the foundation of all human rights treaties. Discrimination is prohibited, whether based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 of the Refugee Convention obliges States parties to apply its provisions without discrimination as to race, religion or country of origin. Article 2 of the OAU Refugee Convention uses the same wording, and further specifies that there should be no

discrimination on the ground of membership of a particular social group. Both the ICCPR and the ICESCR contain a common Article 3, which mandates that state parties shall undertake to ensure the equal right of all individuals to the enjoyment of all of the rights set forth in the respective Covenants. The forbidden grounds mirror those contained in Article 2 of the UDHR.

These provisions are minimalistic, in that the provisions protect merely those rights and freedoms expressly enumerated within the Covenants. However, the ICCPR also contains a freestanding non-discrimination provision, which extends considerably further than either Articles 2(1) or 2(2) (Article 26). Although the ICESCR does not contain an equivalent provision, the scope of Article 26 of the ICCPR makes clear that its application extends beyond the civil and political sphere to the proscription of any discrimination. The commitment to the principle of non-discrimination, as illustrated through the protections afforded under the UDHR, the ICCPR and the ICESCR, has led to the adoption of international instruments dealing with specific forms of discrimination.

According to Judge Tanaka, in the South West Africa Case [1966] ICJ Reports "[D]ifferent treatment comes into question only when and to the extent that it corresponds to the nature of the difference … The issue is whether the difference exists. … [D]ifferent treatment is permitted when it can be justified by the criterion of justice ... the concept of reasonableness. … Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness."

The 2004 EU Qualification Directive reads:

> (3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees. (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union... (11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination'. According the EU Charter of fundamental rights: Article 20 'Everyone is equal before the law'; Article 21(1) 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited'.

As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the Refugee Convention and international refugee law, the refugee definition must be interpreted and applied with due regard to them, including, for example, the prohibition on discrimination on the basis of sexual orientation and gender identity.

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4.4 Right to Recognition & Access to Courts

When an asylum-seeker is recognized as a refugee, he or she should be granted a secure legal residency status upon recognition. Refugees, like asylum-seekers, are entitled to be issued with identity papers. Recognized refugees are in addition entitled to receive travel documents. Providing refugees at a minimum with lawful stay, if not permanent residence, is a legitimate and necessary measure to enable a State to implement its obligations under the 1951 Convention and to enable refugees to enjoy the rights to which they are entitled under the Convention. A secure residency status is also one of the most effective measures States can adopt to facilitate refugees' integration, their prospects of establishing a definitive and permanent home, and assuming their role as full and equal members of society.

Where States decide under legislation to provide for a time-limited status that is renewable, the legal residency status granted to refugees upon recognition should be compatible with the form of residency ultimately required for naturalization. This means that if recognized refugees are not granted permanent residence, they should at minimum be granted a status that will allow them to apply for permanent residence before applying for naturalization.

States parties to the Refugee Convention are required to issue identity papers to any refugee in their territory (Article 27). Issuing identity documentation to refugees certifying their status enables them to access other services and rights and can help protect them from harassment

and refoulement. Such documentation should be issued to all adult refugees and to separated and unaccompanied child refugees, because of the protection and access to rights it affords.

Article 16 of the 1951 Convention stipulates that refugees be entitled to have access to the courts and to treatment on a par with nationals as regards legal assistance. In practice, refugees often face hurdles because of poverty, marginalization and discrimination. Ensuring that they have effective access to justice is essential for refugee protection systems based on the rule of law (*See also* New York Declaration for Refugees and Migrants, para 39).

> The Refugee Convention's Article 16 (Access to courts) provides:
>
> 1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same
>
> treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.
>
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

The term "access to justice" has increasingly been defined in a somewhat broader manner than an essentially procedural approach, with the focus being more on ensuring that legal and judicial outcomes are themselves "just and equitable." The broader view of access to justice can thus be seen as being particularly concerned with the substantive aspect of justice - notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives. It may thus be concerned as much with the ability to seek and exercise influence on law making as with ensuring access to law-implementing processes and institutions.

"Free access" to courts does not mean that a refugee is free from the payment of any fees or charges such as court fees that nationals have to pay in the same circumstances. In combination with Article 29, such fees and charges may not be higher than those imposed on nationals may.

Other articles of the Refugee Convention (for example Article 32) provide for access to administrative authorities. The provision applies to all refugees wherever they are resident and whether the residence is lawful or not. According to Article 42, no reservation may be made to this provision. Paragraph 2 of this article with the proviso regarding legal assistance applies only as far as legal assistance is provided for by the State or under a State support

scheme. In several countries, legal assistance is provided for by bar associations. Cautio judicatum solvi ("costs of proceedings") is the security for costs that foreigners have sometimes to furnish for the costs of the other party in civil proceedings provided the plaintiff loses the lawsuit.

Refugees who have not yet established habitual residence in any country will not benefit from the provisions of paragraphs 2 and 3.

Other treaties to which the Contracting State is a party may be relevant in this connection such as the International Covenant on Civil and Political Rights (Articles 14, 16), the European Convention for the Protection of Human and Fundamental Freedoms (Articles 4, 6 paragraphs 1 and 3). That Convention provides, in particular, for the free assistance of an interpreter, if necessary. Further, the Hague Convention on Civil Procedure (1 March 1954) and the European Convention on Establishment and its Protocol (4 November 1950) are relevant. According to Article 7 of that Convention, nationals of the parties shall have access to the judicial and administrative authorities of the other States Parties and shall have the right to obtain the assistance of any persons of their choice who is qualified by the law of the country concerned. Article 8 provides free legal assistance in another State party on the same basis as nationals of the State concerned. Article 9 provides for exemption from *cautio judicatum solvi* for nationals of the States Parties. It additionally provides that when a person has been exempted from caution judicatum solvi an order to pay the expenses of proceedings shall be enforceable in the country of the person's residence.

4.5 Documentation

Beginning with the Arrangement of 5 July 1922, several of the international agreements concerning refugees adopted prior to the Refugee Convention provided for the issue to refugees of a certificate that served both as an identity and a travel document. Although in the earlier arrangements these documents were designated "certificates of identity," they were primarily intended to remedy the lack of national passports, and were in fact generally referred to as "Nansen passports." Successive agreements emphasized their value in facilitating travel to and from other countries, and beginning with the Convention of 10 February 1938 the term "travel document" was used.

In the agreements that preceded the Refugee Convention, the issue of certificates of identity or travel documents was generally limited, with certain exceptions, to refugees lawfully residing in the territory of contracting States. In the Refugee Convention, a more liberal and

comprehensive approach was adopted both with regard to the travel document provided for in Article 28 and with regard to the question of refugee identity documents in general.

To ensure that all refugees have some personal documentation, the drafters of the Refugee Convention introduced Article 27, which provides: "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document." They are also permitted and encouraged to issue such documents to any other refugee in their territory who would otherwise be without a travel document. Despite these favorable provisions of Article 28, there are circumstances in which a refugee may not receive a Convention Travel Document. Every refugee is accordingly to be provided by contracting States with a means of identifying himself: either a valid travel document as provided in Article 28, or identity papers issued pursuant to Article 27.

The "travaux préparatoires" to the Refugee Convention shows that the purpose of Article 27 was to ensure that all refugees, even those not lawfully residing in the territory, would be spared the hardship of having no identity papers at all. The representative of the International Refugee Organization to the Conference of Plenipotentiaries said that this provision was necessary because a person without papers was a recluse subject to arrest for that reason.

Article 27 does not specify the nature of the identity papers that are to be issued. It is clear that the document need not confer any right to residence, and the article does not even require that the person be identified as a refugee. Article 27 simply requires every refugee to be given the means to prove his identity, leaving each State party free to determine the particular form and content to be given to the document provided for this purpose.

In many States that receive refugees in large groups, refugee status is not determined on an individual basis. In several of these States, refugees accommodated in camps and settlements are nonetheless registered and provided with identity papers. A significant number of other States confronted with such a large-scale influx have not found it feasible to provide refugees with official documentation of any kind.

In the situations illustrated, the issue of documentation to refugees may be connected with programmes for their registration. The registration and documentation of all refugees in a country has evident advantages not only for purposes of international protection but also in terms of the planning and implementation of assistance programmes and the promotion of durable solutions. Such registration and documentation programmes have accordingly been initiated by national authorities, in cooperation with UNHCR, in several States where this had not previously been the practice.

Various problems exist regarding refugee documentation in certain States that continue to classify refugees and asylum-seekers as "illegal entrants" who have no lawful basis for their

presence in the country. In such cases, there is often no possibility for refugees to obtain any kind of official identity document. In these countries, specific arrangements are sometimes made at the local or camp level for such purposes as the distribution of rations, but large numbers of refugees are left with no legally recognized means of identifying themselves

In order to ensure that they are treated in accordance with internationally accepted standards, it is necessary that persons recognized as refugees be provided with documentation certifying their refugee status. The issue of such documentation was recommended in the conclusion on the determination of refugee status adopted by the Executive Committee at its twenty-eighth session (No. 8) and recorded in paragraph 53 (6) of document A/32/12/Add.1.

Applicants for refugee status should be provided with provisional documentation showing their identity and the fact that they are permitted to remain in the country until a decision concerning refugee status has been reached by the competent authority. Identity papers for refugees and asylum applicants should be issued in a format that prevents misuse and enables the relevant authorities to be satisfied that the person using the document is in fact the person to whom it has been issued.

In certain countries where there is no provision for the formal recognition of refugee status, it may be necessary for UNHCR to certify that a person is considered a refugee within the UNHCR mandate. The extension of the practice of registering and issuing documentation to refugees and asylum-seekers in large-scale influx situations is to be welcomed. It is hoped that States, which have not yet done so, will undertake such documentation programmes, where appropriate in cooperation with UNHCR.

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4.6 Family and Marriage

The right to marry and to found a family is contained in Article 16(1) of the UDHR and Article 23 of the ICCPR (which adds that the right applies to persons of marriageable age and only with their full and free consent). Article 10(1) of the ICESCR requires States Parties to accord "[t]he widest possible protection and assistance […] to the family […] particularly for its establishment and while it is responsible for the care and education of dependent children". The Human Rights Committee (HRC), established to monitor States'

implementation of the ICCPR, has clarified that: "[t]he right to found a family implies, in principle, the possibility to … live together."[1]

In addition, under Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), States Parties undertake "to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of […] the right to marriage and choice of spouse". The 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) also requires States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations", including as regards the right to enter into marriage, rights and responsibilities during marriage and at its dissolution, and in all matters relating to children.

As for international refugee law, the Refugee Convention does not specifically refer to the family. The Final Act of the Conference of Plenipotentiaries at which the Convention was adopted nevertheless agreed a specific and strongly worded recommendation: "Considering that the unity of the family [...] is an essential right of the refugee and that such unity is constantly threatened, [it] [r]ecommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained […] [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption."[2]

Noting that "refugee law is a dynamic body of law," the 2001 Summary Conclusions on Family Unity states that it "is informed by the broad object and purpose of the 1951 Convention and its 1967 Protocol, as well as by developments in related areas of international law, such as international human rights law and jurisprudence and international humanitarian law".

Other provisions of the Refugee Convention that may be relevant include Article 3, which requires States Parties to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin.

With regard to the question of rights that may attach to pre-existing marriages, Article 12 of the Refugee Convention concerns personal status and provides, "Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by the Contracting State, subject to compliance, if this be necessary, with

[1] UN Human Rights Committee, CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses (27 July 1990), para 5.

[2] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/108/Rev.1 (25 July 1951).

the formalities required by the laws of that State, provided that the right in question is one which would have been recognized by the law of that State had he [or she] not become a refugee".

In addition, Article 25 of the Refugee Convention concerning administrative assistance could be relevant in the family reunification context. Article 25(1) requires Contracting States in which a refugee is residing to "arrange that such assistance be afforded to him by their own authorities or by an international authority", "[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse". Such a right could include the refugee's right to family unity. Article 25(2) refers to "such documents or certifications as would normally be delivered to aliens by or through their national authorities," which may include documentation needed to enable the refugee to perform the acts of civil life, including for example, also marriage, divorce and adoption. Article 25(3) affirms, "[d]ocuments or certifications so delivered […] shall be given credence in the absence of proof to the contrary" and Article 25(4) that any fees charged for these services "shall be moderate".

If refugees are to exercise their right to family unity, they can possibly be seen as entitled to assistance (at moderate cost) regarding the issuance of such documents or certification concerning their family members as are needed for them to enjoy this right. This could include documents or certification, whether because of an affidavit or sworn statement, issued in the place of the original document by the national authority of the refugee's country of residence or by an international authority, including notably documentation issued by UNHCR. At least Article 25 could be taken to require States to show greater readiness to give such documents "credence in the absence of proof to the contrary."

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UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3 (2011) para 182.

4.7 Measures Against Enemy Nationals

Article 9 of the 1951 Convention was drafted specifically to cover situations of war or other grave and exceptional emergencies, and reflected the difficulty faced by some States during the Second World War in distinguishing clearly and promptly between refugees and enemy nationals. This provision thus maintains the right of States to take 'provisional measures' against a particular person, "pending a determination [...] that that person is in fact a refugee and that the continuance of such measures is necessary [...] in the interests of national security".

Refugees who are formally enemy aliens when their country of origin is involved in an armed conflict with their country of asylum no longer have a link of allegiance with their State of origin and are thus not automatically a potential threat to their host State. As enemy nationals on the territory of a party to the conflict, however, they are nevertheless particularly vulnerable to measures of control and security. Although authorized measures of control may still be imposed if refugees represent a danger to the security of the State, Article 44 of the Fourth Geneva Convention requires that refugees not be treated as enemy aliens solely based on their nationality.

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4.8 Physical Liberty

It is common for governments to seek to deprive refugees and asylum-seekers of their physical liberty in a variety of ways. One is detention; many countries place large numbers of asylum-seekers in detention, especially while their cases are pending. Another is forced refugee encampment, where refugees are required to live in remote camps or zones, which may create a situation analogous to detention. While common, these policies are legally quite problematic, and often are likely violations of human rights law.

Governments often resort to detention of asylum-seekers as a response to irregular migration and illegal entry. Such measures are in tension with refugee law's prohibition on punishment for illegal entry. They also raise the specter of deterrence; may governments treat asylum-seekers harshly to persuade others not to come?

The Refugee Convention, article 26, states that a state must accord to "refugees lawfully in its territory" the right to choose their place of residence and to move freely subject to the regulations "applicable to aliens generally in the same circumstances." This last phrase means that refugees have to live by the same regulations as other foreigners in the country of refuge; if other foreigners can move freely, refugees should be able to under the same conditions.

The bigger problem may be that freedom of movement is protected for "refugees lawfully in its territory." A government may take the view that an asylum-seeker may not be a bona fide refugee, and may not be lawfully present until actually recognized as a refugee.

Refugee camps raise a related problem. Long perceived as humanitarian institutions because they are often operated by international organizations to help people in need, refugee camps have been significantly re-thought in recent decades. While mass influxes of refugees often necessitate building new housing – a camp, in a literal sense – many countries have actually required refugees to live in these settlements. When refugees are not free to leave the camp to live elsewhere, the camp becomes something like a large detention site, and conflicts with refugees' freedom of movement.

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4.9 Association

Refugees, like other non-citizens, are entitled to the same freedom of expression, association and assembly as citizens. However, the granting of political rights is often seen as a threat to the national cohesion of the country of asylum or to its relations with the country of origin. This is despite the fact that international law makes provision for protecting the legitimate security concerns of the country of origin and respecting the sovereignty of other States.

The Refugee Convention's Article 15 (Right of association):

> As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country, in the same circumstances.

The guarantee of freedom of association in Article 22 of the ICCPR applies equally to aliens and citizens alike. This, in principle, accords refugees the right to form political organizations. However, the formation or operation of such organizations may be restricted on the same grounds as Article 21. Thus, it is lawful to ban a refugee organization that incites hatred against a particular political group in the host country where this demonstrates a risk to public order. Conversely, the right of refugees to belong to an organization that merely campaigns for a peaceful change of government in their country of origin would seem to be protected by Article 22. With respect to the State's ability to restrict such freedom on national security grounds, in the case of Ozdep v Turkey (8 December 1999), the European Court of Human Rights held that such action was not justified in the case of political parties that do not advocate the use of violence.

LGBTI people are as much entitled to freedom of association as others. This was affirmed by the UK Supreme Court in HJ and HT:

> The underlying rationale of the Convention is … that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them

protection which is a surrogate for the protection which their home state should have afforded them.

4.10 Freedom of expression

Freedom of expression is the external manifestation of the right to freedom of thought/conscience and is central to the ability of individuals to carry out any meaningful political activity. The guarantee of freedom of expression in Article 19(1) of the ICCPR is universal in coverage – aliens, including refugees, fall within its scope. Yet, this right is not without limitations.

As with many other provisions of the ICCPR, Article 19 explicitly acknowledges that the interests of the wider community need to be balanced against the interests of any one individual. Article 19(3) states that freedom of expression may be subject to restrictions necessary for respect to the rights and reputations of others or for the protection of national security, public order, public health or public morals. In essence, these restrictions are not concerned with the effect of any political statements on a third State, but rather the interests of the host State.

Freedom of expression is found at three different "levels" of legal text and entrenched in legislation by most nations, reiterating the importance of its protection. Internationally, the right to freedom of expression is provided for in Article 19 of the UDHR and in Article 19 of the ICCPR. The ICCPR provides, "Everyone shall have the right to freedom of expression; [which] shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Regionally, the Banjul charter provides for the right in Article 9, reiterating the texts of the UDHR and ICCPR and echoing the provisions of two regional instruments which precede it (the European Convention on Human Rights and the American Convention on Human Rights. It stipulates, "Every individual shall have the right to express and disseminate his opinions within the law."

Like article 19 of the ICCPR, Article 10 of the ECHR guarantees freedom of expression for all persons in the territory subject to restrictions necessary in a democratic society in the interests of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

4.11 Economic and Social Rights

4.11.1 In General

UNHCR has said: "[B]eing a refugee means more than being an alien. It means living in exile and depending on others for such basic needs as food, clothing and shelter." That is why, the 1951 Geneva Convention affords refugees a broad range of rights in the country of asylum. The rights granted include economic and social rights, such as the rights to wage-earning employment, housing, public education, public relief, and social security (see Article 17 to 24 1951 Geneva Convention). These rights represent not simply a question of humanitarian assistance, but is a matter of a legally binding international obligation.

In context of economic and social rights and as a general starting point, the **principle of non-discrimination** needs to be considered. Article 7(1) 1951 Geneva Convention concerns the state's obligation to "…accord to refugees the same treatment as is accorded to aliens generally." Thus, most of the provisions relating to employment, self-employment and welfare under the 1951 Geneva Convention provide that refugees shall be given "the most favourable treatment" accorded to other non-citizens "in the same circumstances."

More specifically, the 1951 Geneva Convention protects the following rights:

4.11.2 The right to work

The right to work encompasses all forms of work. It does not include a guarantee of a job, but rather the right to access and participate in the labour market on an equal basis and in just and favourable working conditions, for example, by being legally entitled to seek wage-earning employment or start a business and produce and sell goods or services. Refugees' access to the labour market is explicitly recognized in the 1951 Convention, distinguishing between wage-earning employment (Article 17), self-employment (Article 18) and the practice of liberal professions (Article 19).

In particular, it provides that restrictions on the employment of non-citizens are not to be applied to refugees who have been in the country of refuge for over three years, who are married to a national of the country of refuge or who have children possessing the nationality of the country of refuge.

In addition, refugees who do manage to obtain employment are to benefit from "the same treatment as nationals" in respect of pay and employment, and refugees are to have "the same treatment as nationals" in respect of social security (subject to the restrictions set out under Article 24). Refugees seeking self-employment are to be accorded "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."

Refugees who seek to practice a profession and whose qualifications are recognized by the host country are to be treated in the same way as those seeking self-employment. Recognition of credentials often poses a major problem, however.

4.11.3 The right to social welfare

In respect of public housing (Article 21) and education (Article 22), other than elementary education, refugees are again to be granted "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."

In relation to elementary education, public relief and assistance (Article 23) and the rationing of products in short supply (Article 20) (where a rationing system exists), the 1951 Refugee Convention provides that refugees are to get "the same treatment as nationals" in these areas.

With the exception of the right to public education, all these rights are limited to those refugees "lawfully staying" in States parties. This leads to the question whether asylum seekers are automatically excluded from these protections.

It is possible to argue that "lawful residence" also includes asylum seekers at some point and particularly after they have spent a certain amount of time in a country (e.g. when the asylum procedure is excessively lengthy). Moreover, if the competent authorities permit asylum seekers to work after a certain period of residence in the country (such as within the EU), their "status" has become more established with time.

It is however worth mentioning that other international human rights instruments may add more enhanced rights to refugees and asylum seekers. As such, the International Covenant on Civil and Political Rights (ICCPR) for example, with few exceptions, applies to both nationals and non-nationals, including refugees and asylum seekers. It adopts an all-embracing language such as "everyone," "all persons," and "no one" and also contain non-discrimination clauses requiring each State party to respect and ensure (secure) the rights recognized therein to all individuals (everyone) within its territory (jurisdiction) without distinction (discrimination) of any kind (on any ground). Even if the position of non-citizens, including refugees and asylum seekers, under the International Covenant on Economic,

Social and Cultural Rights (ICESCR) appears somewhat more limited, they however cannot be discriminated and should benefit from the guarantees in the ICESCR, particularly when they are deprived of the "minimum core content" of their economic and social rights.

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4.12 Key Debates

➔ Should the principle of non-refoulement apply to government action outside its own territory?

➔ Is there any situation in which a refugee should be forced to live in a particular zone or camp?

➔ Is it permissible for governments to detain an asylum seeker briefly to check their identity and screen for security threats? If so, how long can an asylum-seeker be kept detained?

5 Refugee Definitions

The question that has perhaps occupied the most attention in refugee law is: Who is a refugee? Because refugee law is positioned as an exception to the usual harsh regime of migration law, it is no surprise that much pressure is put on the definition of who can qualify. The legal definition of a refugee is composed of multiple potentially ambiguous concepts, which makes the legal struggles over its application more intense. It is generally understood that the legal definition of a refugee is inadequate to protect all forced migrants. And, it turns out, there is more than one definition.

5.1 1951 Convention Definition

The 1951 Refugee Convention, together with its 1967 Protocol, provides the leading universal definition of a refugee. The primary text defines a refugee as a person who:

> owing to 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.

This definition has several key parts that we will examine separately.

1. Being outside his/her country of nationality (or habitual residence)
2. Persecution
3. A well-founded fear
4. Nexus ("for reasons of") race, religion, nationality, membership in a particular social group or political opinion
5. Unable or unwilling to access state protection

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5.1.1 Outside country of nationality/habitual residence

In this context, "nationality" refers to "citizenship." The phrase "is outside the country of his nationality" relates to persons who have a nationality, as distinct from stateless persons. In the majority of cases, refugees retain the nationality of their country of origin.

It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.

However, where an applicant alleges fear of persecution in relation to the country of his nationality, it should be established that he does in fact possess the nationality of that country. There may, however, be uncertainty as to whether a person has a nationality. He may not know himself, or he may wrongly claim to have a particular nationality or to be stateless. Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.

The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In these situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

Nationality may be proved by the possession of a national passport. Possession of such a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example by showing that the passport is a so-called "passport of convenience" (an apparently regular national passport that is, sometimes, issued by a national authority to non-nationals). A mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality.

5.1.2 Refugees "sur place"

The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "sur place."

A person becomes a refugee "sur place" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees. A person may become a refugee "sur place" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

5.1.3 Statelessness and refugee status

The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness establish a legal framework setting out the rights of stateless persons, the obligations of States Parties to avoid actions that would result in statelessness and the steps to be taken to remedy situations of statelessness. The 1954 Convention applies to anyone who is "not considered as a national by any State under the operation of its law" (Art. 1(1)) that is, it applies for the benefit of those who are denied citizenship under the laws of any State. The 1961 Convention generally requires States to avoid actions that would result in statelessness and explicitly forbids the deprivation of nationality if this would result in statelessness. This constitutes a prohibition on actions that would cause statelessness, as well as an obligation to avoid situations where statelessness may arise by default or neglect.

The only exception to this prohibition is when the nationality was acquired fraudulently. When seeking to assess and address the situation of someone who has been trafficked, it is important to recognize potential implications as regards statelessness. The mere fact of being a victim of trafficking will not per se render someone stateless. Victims of trafficking continue to possess the citizenship they had when they fell under the control of their traffickers. If, however, these traffickers have confiscated their identity documents, as commonly happens as a way of establishing and exerting control over their victims, they may be unable to prove citizenship.

Lack of documents and temporary inability to establish identity is not necessarily unique to victims of trafficking. It should be, and in many cases is, easily overcome with the assistance of the authorities of the State of origin.

5.1.4 The Concept of Persecution

Persecution is the central concept of the international refugee definition. It is the specific type of harm that a person must fear in order to qualify as a refugee. It is also a concept that the 1951 Refugee Convention never defines with precision. As a result, many questions about debates have arisen about the boundaries of the definition.

Classically, persecution has been distinguished from discrimination, and from prosecution. The first distinction is meant to highlight the seriousness of persecution. There are many injustices that might be discrimination – and thus may be violations of human rights – but which would not be serious enough to be persecution. Think, for example, of being denied a single job because of race. Taken on its own, this is not serious enough to be persecution. There also are highly serious harms that may sometimes be imposed on a person legitimately after lawful persecution, but that would be persecution if imposed arbitrarily or in violation of human rights law. Think of a long prison sentence imposed after lawful conviction for a violent crime.

There are some types of human rights abuses that are sadly common and which easily qualify as persecution. Arbitrary killing, torture, rape, long arbitrary imprisonment, and serious physical assaults are examples of common harms that arise in refugee cases that will qualify as persecution.

Persecution in refugee law should be defined with reference to international human rights law. This often becomes important to remember when the harm that is feared is considered acceptable in that society or is legal under a country's domestic laws. Some forms of gender-related persecution often raise this problem, if they result from practices that are accepted by some people in some places. For example, forced marriage may be commonplace and accepted in some societies. But it functionally may be understood as imposing rape and other human rights abuses, and it is itself prohibited by international human rights law. Similarly, a country's domestic laws may make it a crime to, say, insult the president or criticize government officials. Such domestic "crimes" might lead to trials or imprisonment that look like prosecution for common crime. But because such domestic laws violate international human rights law, this would still constitute persecution.

More difficult refugee cases often involve cumulative persecution. In many cases, a person may fear a single instance of extremely serious harm like torture. But a person may instead fear many smaller deprivations. Denial of admission to a good school because of race or gender might not be enough. But what if a child was denied admission to any school, and if her family were forced to live in unsafe housing, with unclean water? What if the police do not arrest and torture a person, but instead repeatedly harass her, frequently detaining her

and threatening her briefly? It is incorrect to think of each of these incidents separately. Instead, they accumulate. Each separate human rights violation is like a brick, and each brick may be stacked on the others so that together they constitute persecution.

There are other questions that have caused difficulty. For example, what if a person is a victim of many violations that each individually would not be serious enough to constitute persecution, but together may impose severe suffering on a person? This raises the problem of cumulative persecution. Another classic problem concerns persecution by non-state actors. Refugee Law emerged after World War II, and initially focused on persecution by large, centralized and powerful governments. Nazi Germany was the paradigmatic example. But many people flee harm by other entities – insurgent military groups, political movements, criminal gangs, sometimes private parties. The possibility of non-state persecution highlights the importance of state protection. While threats may occur in many countries, a person may raise a successful refugee claim only is s/he can show that his or her government would fail to effectively protect.

Persecution may be inflicted by non-state actors. This question was once legally contested, raising problems for refugees fleeing from civil wars, for example. In a common scenario, a person might flee and seek refugee protection after a rebel group took control of their area of the country. These scenarios challenged the imprecise conception that persecution always emanates from a strong central government like Nazi Germany or the Soviet Union. However, there is nothing in refugee law that limits protection to people fleeing from state actors. (The Convention against Torture is different on this point, as we will see in a separate Section).

Rebel groups are one prominent source of non-state persecution. But they are not the only ones. Other common situations involve political movements that involve non-official armed groups that inflict harm on other people, organized criminal groups (although these cases often raise challenges under the nexus clauses), and sometimes individual people (i.e. domestic violence).

When a person flees a non-state actor, it is important to examine whether state protection is available. Remember that every country in the world has violent, dangerous people who threaten others with harm. Not all victims are entitled to refugee protection. Instead, refugee protection is necessary when the government fails to live up to its obligations to protect people from harm. Refugee protection is sometimes thought of as surrogate or substitute protection.

Failure of state protection is always a requirement for refugee status. But when persecution is by the state itself, the state protection failure is obvious. Non-state persecution highlights this requirement, but it is important to remember that it is always present.

Refugee law will protect a person whose government is unable or unwilling to protect them. This is extremely important. There are some non-state actors that are actively supported by government agencies. Think, for instance, of violent groups that may be loosely supported by police agencies or a ruling party. Human rights reports often describe active support for such groups, or note that the government chooses to let them act freely. In these cases, the government may be unwilling to protect. But there are also cases where a government may want to stop a non-state actor, but is too weak to do so. That may be the case with a civil war where the government is unable to retake territory, or in countries that lack effective police forces.

5.1.5 Well-Founded Fear

"Well-founded fear" may be the most famous phrase in international refugee law. It describes the danger that is at the heart of refugee status. A well-founded fear is a fairly inclusive concept. It does not require as much risk as some other types of human rights protection. But it does involve some interpretative challenges. In particular, refugee status depends on future risk, but the future is inherently difficult to predict. We often think of this assessment having subjective and objective components. The objective danger is usually the most important in refugee cases.

Refugee law is somewhat unique because it focuses on the future. Specifically: Is a person in danger in the future. Most areas of law focus on events in the past. This future orientation is important for refugee protection because it means that people can get refugee protection even if they have never been persecuted in the past. Refugees can escape one step ahead of their persecutors.

Early in the interpretation of the refugee definition, there was focus on the "subjective" and "objective" components of well-founded fear. The thought was that "fear" is inherently subjective. However, this subjective requirement is of little practical value, and can in some cases do great harm. First, there are some refugees who probably would not have subjective fear in a literal sense. A young child might not perceive the danger she faces. It would be absurd to suggest that refugee law could not protect her. Second, asylum-seekers inherently indicate their subjective fear by applying for asylum. When there are questions about the genuineness of a person's fear, that question may better be considered as part of credibility assessment, which we will address in another section.

The critical part of the well-founded fear requirement is objective risk. We do not simply ask if a person is afraid. We ask if there is an objective basis for the fear. This will leave some asylum-seekers out if there is insufficient evidence of harm. Although past persecution is not required, it is often the strongest possible evidence in favor of a refugee claim. When looking for evidence that a person is threatened, the best possible evidence would be if she has been targeted in the past. When a person has not been persecuted in the past, other kinds of evidence can prove a future risk of persecution. Threats that have not yet been carried out or cases of people similar to her or connected with her may show the danger. Human rights reports are often central to assessing well-founded fear.

The ultimate question with well-founded fear is how much danger must a person be in to qualify as a refugee. A refugee need not show that s/he is "more likely than not" in danger. S/he need not show a probability. Mere speculation is not enough, but a real chance is enough. Although it is very rarely possible to put a precise number of the level of risk, a 10 percent chance of persecution is considered sufficient to show a well-founded fear.

5.1.6 Nexus ("for reasons of") race, religion, nationality, membership in a particular social group or political opinion

The refugee definition in the 1951 Convention specifies that a person may qualify for refugee status only if he/she fears persecution "for reason of" one or more of the five enumerated grounds: race, religion, nationality, membership of a particular social group, or political opinion. This link is often referred to as the "nexus" clause.

In the following, the five grounds listed in Article 1A (2) Geneva Convention are shortly introduced. The interpretation may significantly differ between jurisdictions. The following explanations are mainly based on the interpretation given by the UNHCR in its handbook:

Race

Race has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it includes, but is not limited to, skin colour or membership of a specific social or ethnic group of common descent forming a minority within a larger population.

Religion

Religion is to be interpreted broadly and means any belief of theistic, non-theistic or atheistic origin as well as its practice in the private or public sphere, alone or in community with others. In particular, the right not to be religiously active is also protected. Persecution for "reasons

of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

Nationality

The term "nationality" in this context is not to be understood only as "citizenship." It also includes belonging to a group that identifies itself either by cultural, ethnic or linguistic characteristics, by a common geographical or political origin or by kinship with the population of another state and may occasionally overlap with the term "race". It is particularly intended to include minorities within a state.

Membership of a particular social group

The persecution ground of belonging to a particular social group is established if the members of the group share innate characteristics or a similar background, habits or social status or are perceived by society in the respective country as a group with its own identity. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

The characteristic is one which is:

- innate – such as sex, race, caste, kinship, ties, linguistic background, or sexual orientation;
- unchangeable – for example, because it relates to the individual's past history, such as former military officer, former trade union member, or former landowner; *or*
- otherwise fundamental to identity, conscience or the exercise of one's human rights, such that the person should not be expected to change or reject it.

The group must be set apart in some way from others, either because it sees itself as being different, or because it is perceived as such by the persecutor.

Persecution on the grounds of belonging to a particular social group may exist in particular if it is linked to gender, gender identity or sexual orientation.

Political opinion

The concept of "political opinion" as a ground for recognition as a refugee should be interpreted in a broad sense, as encompassing any opinion concerning matters on which the machinery of the state, government or society is engaged. It goes beyond identification with a specific political party or recognized ideology. The key question is whether the applicant

holds – or is perceived to hold – opinions which are not tolerated by the authorities or by the community, and whether he/she has a well-founded fear of persecution for this reason.

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Additiional Material

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5.1.7 Exclusions from refugee status

The 1951 Convention foresees that the rights of the Convention shall not apply to any person who has committed a crime against peace, a war crime, or a crime against humanity, has been guilty of acts contrary to the purposes and principles of the UN or has committed a serious non-political crime. In this regard, article 1 F of the Convention states that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious rea- sons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the inter- national instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

These exceptions to the Convention were motivated from the experience of the Second World War. States had a real desire to exclude those persons who were deemed unworthy of international protection. As such, it constitutes a necessary safeguard for the integrity of the institution of asylum.

It is first important to note that exclusion applies to those who would otherwise qualify for international protection due to a well-founded fear of persecution or real risk of serious harm. Considering the serious consequences of exclusion for the person concerned, the application of the exclusion clauses should always be considered in a restrictive manner and with great caution.

The main reasons for these exclusions are that:

1. Certain acts are so serious that the applicants who can be held responsible for such acts do not deserve international protection and,
2. The international protection framework should not be a form of protection which allows those who have committed crimes to evade being held to account.

Exclusion is applicable in case there are 'serious reasons for considering' that the applicant incurred individual responsibility for excludable acts. The standard of proof applied to exclusion is thus not as high as the 'beyond reasonable doubt' standard applied to establish criminal responsibility. The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status.

Exclusion from refugee status will not always result in the individual's expulsion from the country of asylum, as the excluded person may still be entitled to the protection of relevant national, regional and/or international laws. For example, the person may still be protected against refoulement by Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 22(8) of the 1969 American Convention on Human Rights or Article 3 of the European Convention of Human Rights.

Crimes against peace, war crimes or crimes against humanity

In mentioning crimes against peace, war crimes or crimes against humanity, the Convention refers generally to specific serious violations of international law, as defined in the relevant international instruments (for example, nowadays in the Rome Statues of the International Criminal Court):

- '**Crime against peace**' is related to the planning, preparation, initiation, waging or participation in a common plan or conspiracy related to a war of aggression, which can only apply in relation to international armed conflict. Such a crime would usually be committed by individuals in a high position of authority, representing a State or a State-like entity.
- '**War crimes**' are **serious violations of international humanitarian law**, committed against a protected person or through the use of unlawful weapons or means of warfare. War crimes can only be committed during an armed conflict qualified accordingly under international humanitarian law. Some relevant (non-exhaustive) examples of war crimes include:
    - violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture of persons taking no direct part in hostilities;
    - committing outrages upon personal dignity, in particular humiliating and degrading treatment of persons taking no direct part in hostilities;
    - intentionally directing attacks against the civilian population;
    - intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
    - intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected;
    - the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable;

- conscripting or enlisting children under the age of fifteen years into armed forces.

- '**Crimes against humanity**' are fundamentally inhumane acts, committed as part of a systematic or widespread attack against any civilian population. Inhumane acts include (non-exhaustive list): murder, extermination, enslavement, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, forced disappearance of persons, apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Crimes against humanity can be committed in peacetime as well as during an armed conflict.

Serious non-political crimes

The Convention also excludes those refugees, who committed serious (non-political) crimes. It is motivated by the wish to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime.

In order to determine whether the crime qualifies as serious, the following factors may be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute such a crime, the nature of the envisaged penalty, and whether most jurisdictions would consider it serious.

In order for an act to qualify as a **non-political crime**, it should be considered to have a predominantly non-political motivation or be disproportionate to a claimed political objective. This may be the case of terrorist attacks, which are regarded as serious non-political crimes because of their violence towards civilian populations even if committed with a purportedly political objective.

The exclusion further stipulates that the act must have been committed **outside the country of refuge prior to the person's admission as a refugee**.

Acts contrary to purposes of the UN

In order to apply this exclusion provision, the acts must be against the purposes and principles of the UN and have an international dimension in the sense that they are capable of having a negative impact on international peace and security or the friendly relations between States.

The purposes and principles of the UN are set out in the Preamble and Articles 1 and 2 of the UN Charter.

This exclusion may apply to certain acts which constitute serious and sustained human rights violations such as activities of a terrorist group (including the recruitment, organisation, transportation or equipment of individuals, for the purpose of, inter alia, the planning or preparation of terrorist acts, etc.). As such, this exclusion is very generally worded and overlaps with the exclusion clause in Article 1 F (a).

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5.1.8 Palestinians

Palestinians and Israelis both make claims about the uniqueness of Palestinian refugees. Many Israelis, for example, claim that the separate regime established for Palestinian refugees (combined with the reluctance of Arab host states to resettle the refugees who cannot exercise their right of return) prevents a solution to the long-standing refugee problem. Palestinians argue that while the UN continues to affirm, in principle, the right of Palestinian refugees to return to their homes of origin, member states have failed to muster the political will to make refugee return possible in the face of Israeli refusal.

The best historical research, much of it based on Israeli military archives, tend to support the Palestinian claim that the refugees fled in fear of armed conflict, that they were put on forced marches by Israeli forces in some cases, and that Israeli forces often encouraged refugee flight. Israeli authorities moved quickly to take possession of the property that the Palestinian refugees left behind, and to distribute much of it to Jewish Israelis.

Nevertheless, Israelis and Palestinians do not agree on the root causes of Palestinian displacement. Many Israelis argue that Palestinians fled during the 1948 war on orders of Arab commanders or that the mass displacement of the local Arab population was the unfortunate by-product of a war foisted upon the new Jewish state. The rival nature of Israeli and Palestinian narratives can be explained, in large part, by concerns about future refugee claims. Many Israeli Jews worry that an Israeli admission of responsibility will strengthen Palestinian demands for a right of return and for housing and property restitution.

Israelis and Palestinians also do not agree on who is a Palestinian refugee. During numerous negotiation sessions in the 1990s the parties failed to achieve consensus on a refugee definition. While Israel argued for a narrow definition restricted to first generation refugees (those displaced in 1948 and in 1967), Palestinians advocated an inclusive or expanded definition that included children and spouses of refugees, and others in refugee-like conditions, including those deported from the Occupied Palestinian Territory (OPT) by Israel. These are persons who were abroad at the time of hostilities and unable to return, individuals whose residency rights Israel revoked and those who were not displaced but had lost access to their means of livelihood. This disagreement is exacerbated by the fact that there is no comprehensive definition of a Palestinian refugee.

The most commonly cited definition is that used by the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the UN agency set up in 1949 – two years prior to the formation of UNHCR – to provide relief and assistance to the refugees in the West Bank, Gaza Strip, Jordan, Lebanon and Syria. Unlike Article 1A (2) of the 1951 Refugee Convention, however, the UNRWA definition merely establishes criteria for assistance – it

does not define refugee status. A UN initiative in the 1980s to issue identity cards to all refugees, irrespective of whether or not they were recipients of international aid, failed due to the lack of cooperation among host states.

Most Palestinian refugees fall under the scope of Article 1D of the 1951 Refugee Convention, which was inserted during the drafting process of the Convention to address the specific circumstances of Palestinian refugees. This took note of the fact that the UN had already set up specific agencies to protect and assist this refugee group. Only those Palestinians displaced for the first time after 1967 fall within the scope of Article 1A (2) of the Convention because they are not covered by the mandate of another UN agency. Nevertheless, Article 1D of the 1951 Refugee Convention is commonly misapplied in Palestinian asylum cases around the world.

Israelis and Palestinians fail to agree also on the number of Palestinian refugees. This is further complicated by lack of a universally-accepted refugee definition, a comprehensive registration system and frequent migration. However, it also relates to security and political concerns in host countries like Jordan and Lebanon, fears about repatriation in the country of origin (Israel) and international concerns about capacity to deliver services and the impact on humanitarian aid budgets and to asylum claims. This explains the vast discrepancy in estimates of the Palestinian refugee population. Israeli and Palestinian estimates of the total numbers of Palestinians displaced in 1948 range from a low of several hundred thousand upwards to nearly a million. The total numbers of Palestinians displaced for the first time from the 1967 OPT range from just over 100,000 to nearly 300,000. Demographic studies that compare the size of the pre-war Palestinian population to the number of Palestinians that remained after the end of both wars tend to confirm estimates in the higher range. Some estimate that around 20,000 Palestinians were displaced per annum after 1967.

Resources

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5.1.9 Cessation of refugee status

The Refugee Convention recognizes that refugee status ends under certain clearly defined conditions. This means that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is canceled or revoked.

Under Article 1C of the Refugee Convention, refugee status may cease either through the actions of the refugee (sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6). The latter are commonly referred to as the "ceased circumstances" or "general cessation" clauses.

Article 1C(5) and (6) provides that the Refugee Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

> 5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> 6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the Refugee Convention and principles of refugee protection look to durable solutions for refugees.

Cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows.

Acknowledging these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied. Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act by the refugee. Cessation of refugee status terminates rights that accompany that status. It may bring about the return of the person to the country of origin and may thus break ties to family, social networks and employment in the community in which the refugee has become established. As a result, a premature or insufficiently grounded application of the ceased circumstances clauses can have serious consequences. It is therefore appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.

A strict interpretation of Article 1C(5) and (6) would allow their application on an individual basis. Yet Article 1C(5) and (6) have rarely been invoked in individual cases. States have not generally undertaken periodic reviews of individual cases based on fundamental changes in the country of origin. These practices acknowledge that a refugee's sense of stability should be preserved as much as possible. They are also consistent with Article 34 of the 1951 Convention, which urges States "as far as possible [to] facilitate the assimilation and naturalization of refugees." Where the cessation clauses are applied on an individual basis, it should not be done for the purposes of a re-hearing anew. Even when circumstances have generally changed to such an extent that refugee status would no longer be necessary, there may always be the specific circumstances of individual cases that may warrant continued international protection. It has therefore been a general principle that all refugees affected by general cessation must have the possibility, upon request, to have such application in their cases reconsidered on international protection grounds relevant to their individual case.

Situations of mass influx frequently involve groups of persons acknowledged as refugees on a group basis because of the readily apparent and objective reasons for flight and circumstances in the country of origin. The immediate impracticality of individual status determinations has led to use of a prima facie refugee designation or acceptance for the group. For such groups, the general principles described for cessation are applicable.

5.2 Convention against Torture

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as "CAT") contains a strong prohibition on refoulement. Its Article 3 provides:

> No 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.

This guarantee is in key respects more narrow than the 1951 Refugee Convention's scope. It applies only to people in danger of torture, which is only one of many types of persecution covered by the Refugee Convention. It has also been interpreted by some countries to require a higher likelihood of harm. The phrase "would be in danger" may mean "more likely than not," which is a much higher burden than "well-founded fear."

However, in some other ways, CAT includes some people left out from the protection of the Refugee Convention. Unlike the Refugee Convention, CAT Article 3 has no exceptions or exclusion clauses. Even a person who has committed a serious non-political crime may be covered, for example. In some cases, CAT has been invoked to prevent deportation of members of violent terrorist organizations. CAT also protects people in danger of torture even if they would not be tortured for reason of race, religion, nationality, membership in a particular social group, or political opinion. Thus, CAT can sometimes protect people who are in danger of criminal violence that is difficult to tie to one of the Refugee Convention's nexus clauses, if that violence can be attributed in part to state actors.

The population of migrants who are protected by CAT is almost certainly smaller than the number protected by the Refugee Convention. But it nevertheless adds protection for some people in acute danger who would otherwise be left out.

5.2.1 Basic Concepts

The key to understanding how CAT protects refugees is to understand the definition of torture, because that is what a person must be in danger of to qualify. CAT's Article 1 says:

> [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for any act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

This definition has just a few key parts.

1. **Intentional infliction of severe pain or suffering, physical or mental.**

   When people think of torture, they likely think of physical harm first and foremost. But the definition of torture embraces mental torture as well. Treatment such as mock execution, or forcing a parent to watch her child be harmed, would be strong examples of mental torture.

   In international law, perhaps the most contested part of the torture definition is the severity requirement. How severe must pain be to be considered torture? Remember also that "torture" is distinct from cruel and degrading treatment. Many high profile debates about the definition of torture have involved governments that have wanted to apply harsh treatment to prisoners, but who also want to formally maintain their opposition to torture. Such controversies include Israel's use of stressful physical positions against Palestinian detainees, and the United States' use of waterboarding on detainees in the "War on Terror."

   The severity question was the central problem in the European Court of Human Rights case of *United Kingdom v. Ireland*, which debated the "five techniques" used by British authorities in Ireland. These included forcing detainees to remain in a stress position, hooding for long periods of time, exposure to continuous loud noises, sleep deprivation and deprivation of food and drink. The Court found that these techniques constituted inhuman and degrading treatment under the European Convention, but was not serious enough to be called torture. That decision is controversial.

2. **Government culpability (acquiescence)**

   To be "torture" under the CAT, a government official must be accountable for the abuse. This is a major difference with the Refugee Convention, which protects people fleeing from non-state agents if the government is merely unable to protect them. But for CAT, inability of the government to protect would not be enough. This can pose a challenge to invoking CAT when a person flees from non-state actors that would do gruesome things to him or her, unless there is some government involvement. That said, the government involvement need not be extensive. The definition requires only acquiescence – a situation in which the government is able to act, but unwilling to do so. Also, the government involvement need not be the entire government. A single corrupt official who assists a criminal organization while performing official duties may be enough.

3. **Reasons for harm**

Much like the Refugee Convention, the torture definition requires that the harm be inflicted for particular reasons. But the permissible reasons in CAT are much broader:

- obtaining information or a confession
- punishment for a past act
- intimidating or coercing him or a third person
- any reason based on discrimination of any kind

These reasons are sufficiently open that it may be difficult to think of any situation in which a government agent is actively involved in inflicting serious harm and where it would not fit at least one of these criteria. As a result, disputes over the boundaries of CAT tend not to focus on these reasons to the degree that disputes over the Refugee Convention often focus on the nexus clauses.

5.3 Complementary Protection

Refugee law has limits. Because the Convention's refugee definition limits protection to people who flee persecution for specific reasons, many people who flee violence and serious harm may be left out. This is especially the case when governments take a strict approach to interpreting the Refugee Convention definition. In particular, people who flee generalized violence (such as civil wars) or environmental/natural disasters may be left out.

One way governments have responded to this is by developing policies of complementary protection. Complementary protection takes many forms, but is typically a feature of domestic or regional law. In its purest form, it adds a safety net for forced migrants who would not be able to access refugee convention. However, complementary protection can be problematic if it is used to short-circuit refugee protection, leaving refugees with less than they would have under refugee status.

Complementary protection is a broad category of policies that bestow forced migrants some form of protection different from the protection they would obtain as Convention refugees. The usual purpose of complementary protection is to assist forced migrants who might not qualify as refugees under the more narrow refugee definition, for instance, if they flee generalized violence or natural disasters.

Complimentary protection is usually created in domestic law, and in some cases regional law. As a result, the type of protection offered varies widely.

In some cases, complementary protection may take the form of a ministerial decision to not deport an individual or a category of migrants. In other cases, it is a more formal status with its own criteria under a domestic legal system.

Complementary protection is often weaker than Refugee Convention protection. Sometimes it is time limited. In other cases, it gives people less ability to sponsor family members to join them, or limits their freedom of movement or economic choices. Many countries' domestic legal systems give Convention refugees a path to eventually securing a permanent status or citizenship. Complementary protection regimes may not include this.

When complementary protection expands beyond that which would be offered under the Refugee Convention alone, it is usually seen as a positive humanitarian step, however there are problems that can accompany these policies.

One problem with complementary protection is whether it includes restrictions that might violate human rights law. For example, complementary protection might be conditioned on agreeing to live only in certain areas. Such a policy facilitates forcing people to live in refugee camps, often in very poor conditions, and deprives them of the chance to fully participate in economic and social life.

Another problem with complementary protection might be that, instead of expanding refugee protection, it may aim at replacing it. This could happen if a government gives all migrants from a certain country a lesser form of protection, and, at the same time, denies them access to refugee status determination even though many of them would qualify for full refugee status. This might make some administrative sense considering that it reduces the burdens on RSD systems, but it may deprive refugees of the rights they would be entitled to as a Convention refugee.

5.4 Case Study: Armed conflict and refugee status

Situations of armed conflict and violence are today the major causes of refugee movements. Syria and Ukraine are major examples of it. In these situations, the major question is, whether the Geneva Convention is also directly applicable to civilians displaced by situations of armed conflict and violence.

In order to answer this question, it has to be noted that the 1951 Convention definition of a refugee makes no distinction between refugees fleeing peacetime or "wartime" persecution.The 1951 Convention was written in the wake of a major armed conflict, with refugees from World War II being its first major beneficiaries.

As defined by the UNHCR, "situations of armed conflict and violence" refers to situations that are marked by a material level or spread of violence that affects the civilian population. Such situations may involve violence between state and non-state actors, including organized gangs, and violence between different groups in society. Further, such situations may include violence between two or more states, between states and non-state armed groups, or between various non-state armed groups.

In this context, the following items are important to consider:

- Relevance of international humanitarian and criminal law
- Relevance of derogations under international human rights law
- Sexual and gender-related persecution
- Internal flight or relocation alternative

While there is no reason why people who flee war zones should not be able to qualify for refugee status, they face difficulties, especially under the 1951 Convention definition. The greatest problem, usually, is nexus. Are they in danger for one of the five Convention reasons, or are they in danger of indiscriminate violence that puts civilians in danger at random? Much violence in war is for one of the five reasons. Attacks may be targeted at specific ethnic groups. Women may be especially in danger of gender-related violence. When attacks on civilians are more systematic – meaning they may constitute crimes against humanity – they may also be easier to tie to a Convention ground.

Nevertheless, many civilians who flee war zones flee violence that puts them in danger somewhat randomly. They may be simply in the wrong place at the wrong time. This difficulty is why complimentary protection is so important. EU subsidiary protection, offered by the EU Qualification Directive (recast) is an example. It applies to those who do not qualify as refugees but face a real risk of suffering serious harm, inter alia, when there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

The limits of the 1951 Convention to war refugees is also why regional refugee definitions, such as the African refugee definition, are so important. We will address those definitions separately.

Reference

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5.5 Case Study: Climate Refugees

Today, many people in developing countries are suffering from droughts and windstorms on a scale never witnessed before, depriving them of daily food and basic needs. Hence, the term "climate refugees" was first coined to describe the increasing large-scale migration and cross-border mass movements of people that were partly caused by such weather-related disasters.

Sea-level rise is another threat. Over the past 40 years, the number of people living in coastal areas at high risk of rising sea levels has increased enormously, the most part of them being from poor developing countries and small island states.

The Global Compact on Safe, Orderly and Regular Migration, adopted by the UN in 2018, states that one of the factors causing large-scale movements of people is "the adverse impacts of climate change and environmental degradation," which includes natural disasters, desertification, land degradation, drought and rising sea levels. For migrants who are forced to leave their countries of origin due to environmental degradation, the compact clearly states that governments should work to protect climate refugees in the countries of their arrival by developing planned relocation and visa options if adaptation and return is not possible in their countries of origin.

Earlier, in March 2018, the UN Human Rights Council adopted a document that discussed the issue of cross-border movement of people brought about by climate crises from the perspective of human rights protection. The document pointed out that there are many people who do not fit the definition of "refugees" among those who are forced to migrate long distances and cross borders due to climate impacts, and that the legal system to protect their human rights is inadequate. It then urged governments to "incorporate the concept of human rights protection into the planning and implementation of climate change measures," including preventing large-scale displacement by allowing people to live in conditions that protect their human rights, and promoting human rights-conscious planned relocation as a means of adapting to climate change.

Teitiota from Kiribati, an island nation in the South Pacific that is in danger of losing its land due to rising sea levels, applied for refugee status as a "climate refugee" with the New Zealand government, but his application was rejected and he was repatriated to Kiribati in 2015. In 2016, he filed a complaint with the UN Committee on Human Rights claiming that his right to life had been violated by the repatriation. Although the Committee affirmed the New Zealand government's decision, stating that Mr Teitiota was not facing an imminent threat to his life, it acknowledged that "the effects of climate change," such as rising sea levels, "pose a serious threat to the right to life of people living in countries like Kiribati." It concluded that national courts and others must consider this when challenging the repatriation of migrants to their countries of origin. The decision held that people facing climate change impacts that violate their right to life could not be repatriated to their country of origin.

Governments are also becoming more aware of the issue. In 2015, just prior to the adoption of the Paris Agreement, then-president of the EU Commission, Jean-Claude Juncker stated in his policy speech: "Climate change is even one [of] the root causes of a new migration phenomenon. Climate refugees will become a new challenge – if we do not act swiftly," he said, pointing out the importance of strengthening efforts. Discussions have also begun in the European Parliament.

In February 2021, shortly after taking office, US President Joe Biden issued an executive order asking Jake Sullivan, assistant to the president for national security, to discuss with the relevant federal departments and agencies the possibility of formulating a position on how to identify climate refugees who have been displaced by climate change and what kind of protection and support the US government can provide to them.

However, it is hard to say that the international community and governments are doing enough to deal with climate change refugees, given the seriousness of the problem. One of the reasons for this is the lack of a clear "climate refugees" definition, and the absence of international organizations and institutions to address and clarify the issue. The 1951 Convention Relating to the Status of Refugees, which protects people who have a well-founded fear of persecution on racial, religious or other grounds, does not generally cover climate change refugees, nor are they eligible for protection under the Convention. Official data on climate refugees is virtually non-existent – this is why they are called the "forgotten victims of climate change."

As the problem of climate change refugees worsens, there is an urgent need to clarify the definition of climate refugees, including comprehensive data on IDPs, and create an international mechanism to protect them. It may be desirable to further discuss how to tackle this issue under the UN Framework Convention on Climate Change.

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5.6 Key Debates

➔ Are there any circumstances in which a person fleeing violence by organized criminal groups should be able to get refugee protection?

➔ Should countries be forced to tolerate a foreigner who has committed heinous crimes if s/he would be in danger of torture?

➔ Are there migrants who should be protected, but who might not qualify for protection under refugee law?

6 Refugee Status Determination

The refugee definition—any refugee definition—is only as good as the procedure that implements it. The method for determining if the refugee definition applies to a particular person is called refugee status determination, or RSD. RSD systems are generally operated by host governments, but in many countries responsibility for RSD has shifted de facto or de jure to UNHCR.

RSD is extremely difficult for both asylum-seekers who have their fates determined by the process, and for the officials who administer these systems. Refugee protection depends on fairly and accurately deciding whether people qualify under the refugee definition. If the procedures are accessible and fair, then refugee law will protect the people it is intended to help. But if the procedures are under-resourced or unfair, it will not.

6.1 Introduction to RSD

A significant challenge is that fair and accurate RSD procedures are expensive and resource intensive. The safeguards and training required to individually determine whether asylum-seekers meet the refugee definition require significant investment. Around the world, RSD systems are often plagued by long backlogs. It is common for people to wait several years for a decision on whether they should be recognized as refugees. This then makes it urgent to look at how asylum-seekers with pending cases are treated, especially in terms of social and economic rights. A provisional, limited status that restricts freedom of movement or the right to work might seem acceptable for a person's first month or two in the country. That kind of provisional status might be unacceptable if it lingers on for years.

These challenges lead to a range of responses. One, of course, is to properly resource an RSD system capable of handling the number and types of cases that arrive in a county. Another response is to avoid individual RSD (which is the most time consuming and resource intensive), replacing it with a group-based RSD policy (which can be done more quickly). There are also responses that can impede refugee access to protection. For example, governments have used policies that screen out applications without having access to the RSD procedure at all. There are also problems with RSD systems that superficially give people the right to apply, but which in practice refuse to recognize almost any valid refugee claims.

6.1.1 Basic Concepts

An asylum-seeker who is successful in an RSD process is said to have been "recognized" as a refugee. A genuine refugee becomes a refugee the moment she leaves her country and has a well-founded fear of persecution. Refugee recognition typically comes much later. Yet, it is important to remember that RSD does not make anyone a refugee. A fair procedure inquires into their situation and, if they meet the criteria, recognizes their status. It should be presumed that some or many asylum-seekers with pending cases are in fact refugees, who simply have not been recognized as such yet.

Individual RSD means that each asylum claim is examined separately, with an individual determination of whether the person meets the refugee criteria.

Group RSD means that a government (or UNHCR) decides to recognize all asylum-seekers of a certain category, for example all asylum-seekers from a certain country who arrived during a particular period of time. Sometimes with group RSD there will still be an individual determination of nationality, and a screening for people who may be covered by an exclusion

ground. However, the purpose of group RSD is to avoid the difficult process of full individual RSD for groups of people who are known to have fled situations likely to produce valid refugee claims.

Group RSD is closely related to prima facie RSD. In this system, groups of asylum-seekers are presumed to be refugees, without any finalized process. Prima facie RSD might not be considered a final recognition.

RSD is normally presumed to be conducted by host governments. However, in many countries in the Middle East, Africa and Asia, it is conducted by UNHCR offices. This is part of the broader phenomenon of state-to-UN responsibility shift, also called the UNHCR surrogate state. By contrast, in countries with government-run RSD, UNHCR may play little or no role in individual cases, though in some countries UNHCR advises on some cases. There are also hybrid systems, in which the government operates the RSD system, but UNHCR plays an active part in adjudicating the cases.

With UNHCR RSD, it is important to ask whether the host government respects UNHCR's status decisions, and what rights and protections are extended to those recognized as refugees.

6.1.2 Procedural Safeguards

A fair RSD system requires a number of well-established procedural safeguards:

- Access to the procedure: Asylum-seekers must be able to actually start a RSD application. For example, if they are confined to remote areas, and RSD is available only in a capital city, then there is no actual access. Asylum-seekers may also be denied access to individual RSD if the authorities resort to group-based RSD. This is unobjectionable if it gives refugees full access to their rights. However, if the group-based RSD does not offer complete protection, then asylum-seekers should have access to a procedure that does.
- Right to remain in the country while the case is pending: A logical application of the principle of non-refoulement.
- Information about the procedure to be followed: There needs to be publicly-available information available to asylum-seekers about how to apply.
- Neutral decision-maker: The decision-maker in refugee cases must be well-trained in this unique area of law, and must be independent of political pressures or interferences.
- Legal representation and advice: Asylum-seekers should have the opportunity to obtain individual, private and confidential advice from a trained lawyer, and to have a

lawyer help them prepare and advocate their cases. Studies of both government and UNHCR RSD systems have found that having legal representation dramatically improves an asylum-seeker's chances of being recognized as a refugee. However, only a few RSD systems pay for such attorneys, and few attorneys are trained in refugee cases in many countries. These gaps often leave many asylum-seekers without representation.

- Interpretation and translation: Asylum-seekers, since they by definition come from a foreign country, frequently do not speak the language of the host country. Access to quality interpreters is essential to a fair RSD process.
- Evidence disclosure: A basic rule in any fair procedure is equal access to evidence. Asylum-seekers and their lawyers should have access to any evidence to be considered by the decision-maker, and should have the opportunity to respond to it.
- Written, specific reasons for rejection: When asylum-seekers' applications are denied, they should be provided with written, specific explanations for the decision. The reasons given should relate to their individual cases; they should not be generic. This safeguard helps to guard against sloppy or arbitrary decision-making, and is essential to asylum-seekers being able to appeal since it lets them understand the rationale for the decision. It also helps to foster the legitimacy of the RSD system.
- Independent appeal: Rejected asylum-seekers should have access to a neutral appeal, to a decision-maker independent from the decision-maker who made the initial decision.

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6.1.3 Evidence

The question that decides refugee cases is often: Is there enough evidence? Asylum-seekers bear the burden of proof to show they meet the refugee definition, which means showing that they face a real risk of persecution if returned to their country. Doing this is not easy, for a number of reasons. First, victims of human rights violations are usually not given documentation certifying their victimization. Second, the act of fleeing may prevent people from taking with them documents that might help their future asylum cases. Similarly, a climate of repression or violence may hinder asylum-seekers' ability to turn to friends and family for help gathering evidence. Third, typically the best evidence of danger is the asylum-seekers' own testimony, but they are often traumatized, scared, and sometimes subject to considerable suspicion.

Shared Responsibility & Benefit of the Doubt

Asylum-seekers bear the burden of proof in refugee applications, which means that if there is no evidence, the claim would be rejected. However, there is a shared responsibility to produce probative evidence. The government (or UNHCR, in a UNHCR RSD system) should find and produce relevant evidence that will be helpful to assess the asylum claim.

It is typical for an applicant's testimony to be the central evidence in a refugee claim. Often, no other evidence is available to prove key facts about why the asylum-seeker is in danger. It is critical to remember that the applicant's testimony is evidence. Corroboration is not required when it would not be reasonably available. UNHCR developed the "benefit of the doubt" principle to make clear that an applicant's testimony alone may be enough to prove refugee status, so long as it is credible and additional corroboration could not reasonably be expected.

Types of Evidence

Country of Origin Information (COI): A key part of most refugee cases is evidence about general conditions in the country of origin. Such evidence typically consists of human rights reports produced by NGOs, government agencies, and units of the United Nations. It also can include news media reports, and (when available) expert witness testimony. COI is typically general evidence which shows the circumstance of an asylum-seeker's predicament but, in most cases, cannot verify specific details about the asylum-seeker.

Identity Documents: Applicants in RSD sometimes have documents verifying basic facts about their lives. These include birth certificates, passports, and educational certificates. Such documents help establish identity, and may help to confirm a basic timeline. But they usually do not verify the events giving rise to the fear of persecution.

Corroboration of Persecution: In some other cases, but relatively rarely, an asylum-seeker has a document or documents that confirm central facts establishing a risk of persecution. Examples might be a prison document (showing that she was detained), a newspaper article that mentions a person's name in reference to a relevant political event, or a paper showing membership in a political organization. Specific corroboration may also come in the form of a medical report on physical scars confirming past torture, or psychological assessments confirming traumatic systems symptomatic of a person who has survived violence. Other witnesses, when available, may help to corroborate accounts. Such evidence is often extremely persuasive in RSD because it confirms key facts in the refugee claims, but it cannot be reasonably expected in most refugee claims.

Applicant Testimony: In nearly all refugee applications, the most specific, probative evidence supporting the application is the applicant's own testimony. Typically, while COI may show that a certain type of person is in danger, only the applicant's testimony shows that s/he is the kind of person who is targeted. The applicant's testimony is also often the only evidence of past persecution or threats. It is common for the applicant's testimony and general COI to be the only evidence in a refugee application. The benefit of the doubt principle establishes that this can be enough, if the testimony is credible.

6.2 Applicant Credibility

Because refugee applications often depend on the applicant's testimony, applicant credibility is often the decisive issue. Some studies have indicated that credibility is the most common reason for rejection of refugee applications.

Credibility assessment is fraught because it involves assessing the state of mind of another person. Extensive psychological research has shown that human beings are not inherently skilled at identifying whether other people are telling the truth. It is easy for RSD decision-makers to slip into general suspicion of all asylum-seekers, and to look to catch them in a mistake. Yet, research has also shown that most people will have inconsistencies in recollection, even when they are not trying to lie.

Best practice is to ignore demeanor or nonverbal cues when assessing credibility. Psychological research has found that people relying on nonverbal cues did little better than chance at spotting truth and falsehoods. Efforts to train people to do better using demeanor have largely failed. Moreover, demeanor varies considerably across cultures. Nevertheless, some legal systems continue to accept demeanor as a legitimate consideration. At a minimum, demeanor should never be the sole or primary basis for a negative credibility assessment.

The best approach is to aim for an objective analysis of credibility, identifying and considering observable factors and looking for both strengths and weaknesses of the testimony. In this respect, it can be useful to distinguish the external credibility of testimony from its internal credibility.

External credibility examines whether testimony is consistent with independently verified facts about a country, place or event. For instance, if a person says she was at a high profile demonstration, there may be public reporting about the event. This may provide details about the event which can be compared to the applicant's testimony, identifying strengths or weaknesses of the testimony. Such evidence often shows whether the account is plausible.

Internal credibility examines whether testimony is internally consistent, detailed and timely. Asylum-seekers often end up telling their stories more than once, allowing adjudicators to compare their accounts. This can sometimes reveal inconsistencies, which may be negative credibility factors. However, caution is required. Memory research shows that most people will contradict themselves when they describe the same events more than once.

Specificity and detail is possibly the most useful index of credibility, but also requires caution. It is wrong to expect asylum-seekers to produce precise dates or trivial details about past events. Few people can remember such things accurately about their own lives. Moreover, some facts lack cultural significance in some cultures. Birthdays and wedding anniversaries, for example, are culturally meaningless for some people, and thus not remembered. Instead, the focus should be on details that carry emotional significance for the person. A person is likely to be far more able to produce detailed testimony if s/he has trained legal assistance, access to a competent interpreter, and if s/he is questioned by an official trained in and

sensitive to the unique challenges facing asylum-seekers. This is why several of the safeguards required for a fair RSD procedure are so important.

RSD decision-makers often are more suspicious of asylum-seekers who reveal key facts about their cases later in the process. This problem is highly circumstance-specific. In some cases, it may indicate an attempt to invent facts. But it also may be the result of not having had prior access to a supportive process. An asylum-seeker who is interviewed first in a harsh border post by a suspicious law enforcement officer, or in a public passport control station is unlikely to discuss the most sensitive information about her case. In general, a sense of shame or the effects of trauma often make it difficult for asylum-seekers to describe the most painful and personal episodes of their lives. If an asylum-seeker does not obtain competent legal and social support until late in the process, revelation of key information may be delayed.

When there are negative credibility factors in a case, it is essential that they be addressed to the applicant before a decision is made. The applicant should always be given the opportunity to explain apparent weaknesses in his or her testimony. It is not uncommon for superficially troubling issues in a testimony to be easily explained once the applicant is given the opportunity.

Once all of the positive and negative credibility factors have been collected, the decision-maker should assess them together. Credibility assessment should not be limited to asking if there is any reason to disbelieve the claim. Such an approach can lead to a fixation only on the negative aspects of the testimony. Instead, a decision-maker should consider all factors, and ask if a reasonable person could find the testimony believable. Credibility assessment analysis, especially negative assessments, should be explained in writing. These analytical steps help insure a more objective approach to credibility.

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6.3 Unaccompanied Children

The arrival of unaccompanied children at a country's border creates a number of unique problems. Such situations often produce a particularly intense clash between a government's

desire for migration control and human rights concerns, in this case both refugee law and the rights of children.

International law defines a child as a person under 18.

The international definition of an unaccompanied child is more narrow than some domestic definitions. The Convention on the Rights of the Child defines an unaccompanied child as a child who is not "accompanied by his or her parents or by any other person." However, some governments define a child as unaccompanied if s/he arrives without a legal parent, even if accompanied by another adult. This definition results in more children being classified as unaccompanied, extending more protection to more children.

An unaccompanied child who fears persecution should be given access to refugee status determination and refugee protection just like any other person. This is guaranteed both by refugee law and by the Convention on the Rights of the Child, article 22. However, refugee protection should be thought of as only part of the protection that a child refugee should receive.

With children, governments are required to make the best interests of the child the primary consideration in policy choices. Governments have special obligations to take action to ensure the well-being of children.

While detention of asylum-seekers always raises concerns, it is especially inappropriate for children. Detention settings are never in a child's best interest, and their unique vulnerability makes such settings especially harmful.

Governments receiving unaccompanied children should consider their situation similar to other children who lose their homes and families. The Convention on the Rights of the Child states: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

6.4 Key Debates

➔ What it would take for a person to prove that they qualify for refugee status?

- ➔ What kind of evidence could be provided?
- ➔ Would it be easy for a person fleeing persecution to tell her story?
- ➔ Would it be hard to be believed?

➔ What would it take to give a person seeking protection as a refugee a fair opportunity to present his or her case?

7 Related Problems in Migration Control

Governments' desires to prevent unauthorized migrants from reaching their sovereign territory are often in tension with refugees' rights to seek international protection from persecution. This unit explores some of the problems that result from this tension.

7.1 Criminalization of Humanitarian Aid

By offering assistance and solidarity to migrants, human rights defenders around the world are increasingly on a collision course with governments. By rescuing refugees and migrants in danger at sea or in the mountains, providing food and shelter, documenting abuses by police and border guards, and resisting unlawful deportations, human rights defenders have exposed the cruel consequences of immigration policies and have themselves become targets of the authorities. Authorities and politicians have treated acts of humanity as a threat to national security and public order.

This is particularly evident in Europe, where some European governments specifically sanction people who rebel against European migration policies that are mainly aimed at preventing refugees and migrants from reaching the EU, keeping those who make it to Europe in the country of first arrival, and deporting as many as possible to their countries of origin.

European governments, EU institutions and authorities have taken a range of restrictive, sanctioning and punitive measures against individuals and groups defending the rights of migrants and refugees. These measures include the use of immigration and anti-terrorist provisions.

Some examples:

- NGOs such as 'Are You Syrious' and the Centre for Peace Studies (CMS) in Croatia were harassed, intimidated and prosecuted for "aiding and abetting unauthorised migration" after becoming witnesses to push-back and collective expulsion by the authorities at the borders with Bosnia and Herzegovina and Serbia.
- In France, human rights defenders who helped people on mountain passes at the border with Italy were also prosecuted and convicted for "aiding and abetting unauthorised entry." Other human rights defenders who distributed food and other necessities to refugees and migrants near Calais were harassed, intimidated and prosecuted by police when they complained about police misconduct against foreign nationals.

- In Greece, Sarah Mardini and Séan Binder, who volunteered with a local NGO to help refugees and migrants disembark in Lesbos after their dangerous sea journey, spent more than 100 days in pre-trial detention. In addition to aiding and abetting unauthorised entry, they are also accused of espionage, money laundering and forgery.
- In Italy, a smear campaign by government officials against NGOs carrying out rescue operations at sea continued. In parallel, a code of conduct and several laws aimed at restricting and hindering the life-saving activities of NGOs in the central Mediterranean were passed. The crews of most NGOs have been subject to criminal investigations for assisting unauthorised entry and other offences. This has led to the seizure or detention of NGO rescue vessels in several cases.
- In Malta, three juvenile asylum seekers are being prosecuted on terrorism and other charges for daring to resist a ship captain who unlawfully attempted to return them and 100 other rescued persons to Libya, where they face serious human rights violations.
- In Switzerland, several people, including a pastor, were prosecuted for allegedly "aiding and abetting the unauthorised entry and residence" of foreign nationals who were in distress, affliction or danger.
- In Spain, authorities worked with Morocco to prevent Helena Maleno from notifying the coastguard of people in distress in the Western Mediterranean.
- In the UK, a group of 15 human rights defenders were convicted of terrorist charges for stopping what they believed was an unlawful deportation that would have exposed some asylum seekers to serious danger in their countries of origin.

It is impossible to determine how many people, NGOs and civil society groups are ultimately affected. Nevertheless, according to one study[2], between 2015 and 2018, some 158 people were subject to investigation or prosecution for facilitating the unauthorised entry or residence of foreign nationals in an EU state, and 16 NGOs were affected by criminal proceedings.

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7.2 Trafficking in Persons and Migrant Smuggling

Many refugees already face perilous journeys, harsh living conditions in camps, and discrimination in host countries. In addition, they are at high risk linked to human trafficking. For example, according to the International Organization for Migration, among migrants traveling to Europe through North Africa, alone, more than 70 percent have been trafficked or exploited.

As experienced so many times in recent years, conflict-induced displacement can increase the risk of trafficking. Capitalizing on their vulnerability, traffickers deceive refugees into fraudulent travel and employment arrangements.

Thus, refugee protection and issues linked to human trafficking are closely interlinked.

"Human trafficking" and "migrant smuggling" are two distinct issues. A key difference is that victims of trafficking are considered victims of a crime under international law; smuggled migrants are not—they pay smugglers to facilitate their movement.

7.2.1 Human Trafficking

Human trafficking is a crime involving the exploitation of an individual for the purposes of compelled labor or a commercial sex act through the use of force, fraud, or coercion. This meaning is reflected in international law, specifically in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000) (hereafter "Anti-Trafficking Protocol"). The Protocol identifies 'trafficking in persons' in its Article 3(a) by the confluence of three factors: (1) the act (the recruitment, transportation, transfer, harbouring or receipt of persons); (2) the means (by threat or use of force or other forms of coercion); and (3) the purpose (for the purpose of exploitation). In addition, Article 3(c) of the Protocol provides a separate definition for trafficking in children which requires elements (1) and (3) above, but does not require the use or threat of force or coercion in achieving them.

7.2.2 Migrant Smuggling

Human trafficking is most frequently confused with human smuggling. Migrant smuggling occurs when a person voluntarily enters into an agreement with a smuggler to gain illegal entry into a foreign country and is moved across an international border. It is defined by Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, (2000) (hereafter "Anti-Smuggling Protocol"). Migrant smuggling often involves procuring fraudulent documents and transportation across a country's border, although in some countries it can also include transportation and harboring once in the destination country.

Trafficking involved the threat of force, coercion or deceit against a migrant who is relocated fro the purpose of exploitation, for example forced labor or prostitution. Trafficking can occur within a single country, though it is also often international. Smuggling, however, is always transnational. Most important, smuggling simply means that the perpetrator helps a person to migrant in exchange for financial or material benefit. The migrant who engages a smuggler does so by choice. It is with noting that there is a gendered tendency to this distinction; victims of trafficking are more likely to be women while the majority of smuggled adults are usually male, and less likely to be seen as victims.

People who have been trafficked, or who are at risk of being trafficked in the future, may have an entitlement to international protection in a State of which they are not a citizen or permanent resident. In order to be recognized as a Convention refugee, an individual who has been trafficked must meet all the requirements of the 1951 Convention. The right to international protection thus arises from a serious risk to the life or fundamental rights of a person who is outside the State of which he or she is a national or in which he or she had his or her former habitual residence, and should that person be forced to return to that State.

The risk of persecution in a trafficking case could be re-trafficking, retribution by the traffickers (for example, if the person has escaped from the traffickers and/or assisted the authorities in the prosecution of traffickers), lack of assistance or adequate care, or ostracism by the trafficked person's family or community, to the extent that their ability to re-integrate is fatally compromised. The latter is particularly relevant in the case of those trafficked into prostitution. In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process.

A person who has been trafficked to another country may be at risk in their own country. Apart from their own country, this risk could be also established in any third-country where a trafficked person is transferred (e.g. within the European context under the Dublin Regulation).

In addition, victims of trafficking may be entitled to various forms of assistance under either the AntiTrafficking Protocol or regional anti-trafficking conventions/national provisions. Such measures, however, vary considerably from one state to another and, in all cases, are outside the international refugee regime. Additional entitlements may arise under international human rights law.

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7.3 Off-Shore Processing

While refugee protection is an international obligation that most states have signed up to (e.g. through the signature and ratification of the Geneva Convention), many states attempt to circumvent their obligations under international law through the use of offshore processing and detention centres in third countries.

One important example in this regard is the so-called Australian model under which any asylum seeker arriving by boat in that country is automatically sent to a third country (either Nauru or Papua New Guinea) with which Australia has agreements for this purpose. Asylum seekers are held, both in Nauru and Papua New Guinea, in detention centres paid for by the

Australian authorities and run for them by private companies. The conditions in these centres have been considered by many civil society and international organizations as inhumane.

Similar offshore practices have been discussed also in other parts of the world, such as in Europe. Denmark for example has passed legislation allowing the transfer of asylum seekers to offshore locations. Also the United Kingdom is considering such a policy by using offshore processing centers in Rwanda.

The use of offshore processing centres to receive refugees raises a number of political, legal, and ethical issues. That is why, they have received since the very beginning mixed reactions and a large degree of skepticism when it comes to legality and legitimacy. There is substantial legal opinion that offshoring asylum procedures is not compatible with states' obligations under the UN convention relating to the status of refugees 1951 and its 1967 Protocol and that the inevitable deterioration of conditions in centres where such offshoring may take place is contrary to the member states' human rights obligations.

As such, the following human rights issues related to offshore processing centres may be highlighted:

- Asylum seekers are punished for the irregular entry or by their mode of arrival, which is contrary to article 31 of the Geneva Convention.
- When asylum seekers are transferred offshore, they may be subject to mandatory, prolonged, indefinite and unreviewable detention (as in the Australian example) in breach of article 9 of the International Covenant on Civil and Political Rights (ICCPR).
- Asylum seekers may be transferred to conditions which are often below international standards and may have "significant and detrimental impact on the mental and physical health of asylum-seekers" and which may amount to a violation of article 3 of the Convention against Torture.
- In cases of removal of unaccompanied children to offshore processing locations, article 3 of the Convention on the Rights of the Child may be violated.

References

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7.4 Key Debates

➔ Can governments take actions to control migration that would make it harder for genuine refugees to find protection?

➔ How should governments respond to illegal entry by asylum-seekers? Should it matter if only a minority of asylum-seekers will succeed in their refugee cases?

8 Regional Refugee Law

Some of the most important international refugee law has been developed by regional associations of states. The most important of these are Africa, Europe and Latin America. These regional bodies of refugee law add to the global refugee law regime in various ways, including by broadening protection to people who might be excluded from the 1951 Convention. Studying these regional bodies of law can be illuminating to any student of refugee law. However, we recommend especially focusing on the region most relevant to the particular class.

Please note that this Manual does not address the unique legal regime governing refugee protection in Latin America, including the 1984 Cartagena Declaration on Refugees. For instructors in Latin America, we recommend referring to *Manual RELATE para la Elaboración de un Curso de Introducción al Derecho Internacional de las Personas Refugiadas*, which covers Latin American refugee law.

8.1 Africa

8.1.1 Introduction

The drafting of the Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969 at the Organization of African Unity began in 1964. The OAU's was initially motivated to develop a regional refugee treaty due to the political situation in Africa at the time. In the early 1960s, many African states had just gained their independence, while others remained under colonial or minority rule, with freedom fighters waging decolonisation campaigns.

The 1969 OAU Refugee Convention thus evolved from a project intended to make international refugee law applicable in Africa while also addressing states' anxiety about subversion, into an initiative aimed at addressing refugee issues specific to Africa, while still including subversion. This latter objective is clearly visible in several provisions of the Convention, such as articles 3–5 which address subversion in general; article 2(2), which characterizes asylum as a 'peaceful and humanitarian act'; and through article 3 which prohibits subversive activities.

8.1.2 The OAU Convention Refugee Definition

Article 1(1) of this Convention reiterates the definition provided by Article 1(1) of the 1951 Refugee Convention. Thus, every person who would be protected under the 151 Convention would be protected under the OAU Convention as well. However, the African Convention goes farther.

Article 1(2) of the Convention provides that the term "refugee" shall also apply to every 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 in order to seek refuge in another place outside his country of origin or nationality.' This definition remains relevant today. The 'events seriously disturbing public order' clause is used to recognise the refugee status of individuals in flight from conflict or violence, without the need to show nexus to one of the five grounds under the 1951 Convention.

The effect of the refugee definition in article 1(2) and the 1969 OAU Refugee Convention's status is to extend the international instrument to cover a broader range of individuals. According to the "expanded" definition of the 1969 OAU Convention, refugee status was

extended to all persons fleeing, among other situations: "events seriously disturbing public order." Under this definition, governments offer protection en masse to people fleeing civil war and violence without requiring them to be individually screened.

The "expanded definition" of refugees provided in the OAU Convention supports the implementation of a provision concerning temporary protection, contained in its article II(5):

> Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph

Temporary protection assures persons more or less the same set of benefits prescribed to ordinary refugees under the OAU Convention, although these benefits can be reduced depending on the dimension and nature of influx of persons in search of protection. It is important to note that "temporary" had proven to be a problementatic goal. In several cases, "temporary" protection has practically become "permanent" with conflicts postponing self-reliance solutions for decades.

Relation to refugee rights

The concern of this Convention about addressing only the specific aspects of refugee problems in Africa is evident in the Convention's full title. It seeks to add to protection, but not replace the 1951 Convention. Indeed, Article 9 recognises the Refugee Convention as 'the basic and universal instrument relating to the status of refugees' and article 8(2) provides that the 1969 OAU Refugee Convention is 'the effective regional complement' of the 1951 Convention. Article 10 thus calls on OAU member states to accede to the Refugee Convention.

The OAU Convention has little framework for refugee rights like that at articles 3–34 of the Refugee Convention. This is because refugees under the regional instrument can derive these rights from the international instrument and from human rights law. The 1969 OAU Refugee Convention addresses other aspects related to the refugee field such as solidarity and international co-cooperation (article 2(4-5)), settlement of refugees at a distance from the frontier with the country of origin article 2(6)) and voluntary repatriation (article 5). The Convention also addresses non-refoulement (article 2(3)), travel documents (Article 6), cooperation with UNHCR (Article 8(1)) and includes an accessory non-discrimination provision (Article 4) and several technical provisions (articles 9–15).

8.1.3 Voluntary repatriation

The OAU Convention provides a treaty basis for similar protections. Article 5 provides: "The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will." The same article also provides protections for how returnees should be treated, a subjection on which the 1951 Convention is entirely silent.

The issue of the repatriation or return of refugees has come forward in several decisions by the ACHPR. In the case of *Malawi African Association and Others v Mauritania*[3] violations were alleged during the period between 1986 and 1992, much of which occurred in April 1989, when the Mauritanian government expelled almost 50000 people to Mali and Senegal with the consequent loss and destruction of property. Many of those expelled were black Mauritanians and Berbers of Mauritanian identity cards. These identity cards were torn up by the authorities when these individuals were arrested and/or expelled, hence leaving them with no way to prove their Mauritanian identity. Upon their return to Mauritania, large numbers of these refugees were arrested "as a generalised reprisal."[4]

In response to the assertion by the respondent state that 'all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth' and the affirmation of the establishment of a government department responsible for the resettlement of these individuals, the ACHPR made it clear that, while 'laudable,' these efforts did not "annul the violation committed by the state."[5]

Having declared grave or massive violations of the Banjul Charter the ACHPR recommended that diligent measures be adopted to replace the national identity documents of those Mauritanian citizens which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania. Additionally, the ACHPR recommended the restitution of the belongings looted from them at the time of the expulsion as well as to adopt the necessary steps for the reparation for the deprivations of the victims of the events of which they had been victims. The ACHPR also recommended that appropriate measures be adopted to ensure payment of a compensatory benefit to the widows of the victims of the violations.

[3] ACHPR, Malawi African Association and Others v Mauritania, Decision on Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (11 May 2000).
[4] Ibid 15.
[5] Ibid. 126.

8.1.4 The prohibition of forced returns

If the record of cases litigated before the ACHPR is anything to go by, once granted asylum the greatest threat to refugees in Africa, appears to be the possibility of expulsion from the receiving state and the violations of rights ensuing from this. Below there are listed the ACHPR's decisions on several communications regarding the protection of refugees in Africa regrouped in a consistent way according to the article(s) of the Banjul Charter that have been violated.

In *Organisation Mondiale Contre la Torture and Others v Rwanda*, four Burundian refugees were expelled from Rwanda on security grounds. In this case, the ACHPR, without elaborating on the substance of the Banjul Charter insofar as it pertains to refugees, found a number of violations, specifically of: the right to non-discrimination; the rights to liberty and security of the person; the right to have their cause heard, including an appeal to competent authorities and the rights to asylum; expulsion without due process as well as the prohibition against the mass expulsion of non-nationals contained in the Banjul Charter.

Similarly, the same articles of the Banjul Charter have been violated In *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*[6] where it was held that a speech by the Guinean President urging the arrest, search and confinement of Sierra Leonean refugees to refugee camps, also on security grounds, violated a number of the Banjul Charter provisions. These measures caused thousands of refugees to flee their homes. Many were left no other choice but to return to Sierra Leone, whilst others were forcibly returned to their home country by the Guinean authorities.

In particular, it was held that there had been violations of the following rights: right to non-discrimination; the right to life and integrity of the person; the right to dignity and freedom from torture, cruel, inhuman and degrading treatment; the prohibition against mass expulsions; as well as the right to property.

In addition, it was also held that the principle of non-discrimination guaranteed in Article 4 of the OAU Refugee Convention had been violated. While there are similarities between these two cases, there are also differences, the most important of which is related to remedies ordered. In the first case, the Rwandan authorities were urged to "adopt measures in conformity with this decision" while, in the second case, the ACHPR recommended that a joint commission of the Sierra Leonean and Guinean governments be established to evaluate the losses incurred by various victims with the aim to compensating them.

[6] ACHPR, African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea, Decision on Communication 249/02 (7 December 2004) paragraph 8.

8.1.5 Refugee rights enshrined in the Banjul Charter

The Banjul Charter lists the activities falling within the ACHPR's promotional mandate, the collection of documents; the undertaking of studies and researches; the organisation of seminars, symposia and conferences; the dissemination of information; encouraging national and local institutions concerned with human and peoples' rights and, should the case arise, making recommendations to governments; the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms; and co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights [Articles 45(1)(a), (b) and (c) of the Banjul Charter].

In February 1994, the ACHPR convened a seminar entitled 'The Protection of African Refugees and Internally-Displaced Persons' in Harare (Zimbabwe) which concluded that the plight of African refugees and IDPs is a violation of human dignity and basic human rights, further highlighting the threat which their plight poses to the development in African countries. However, beyond accentuating the plight of refugees on the continent and making a number of recommendations of which only a handful actually came to fruition, nothing more came of this seminar.

In November 1999, discussions were convened between the UNHCR and the ACHPR at the Commission's 26th session, as to co-operation between the two institutions, ultimately leading to the signing in May 2003 at the Commission's 33rd ordinary session in Niamey (Niger) of a memorandum of understanding. This memorandum had as its aim the more effective promotion and protection of the rights of asylum seekers, returnees and other persons of concern to both institutions (Article 1 of the Memorandum of Understanding).

In fulfillment of its promotional mandate, the ACHPR has over the years adopted a number of country-specific as well as thematic resolutions touching specifically on refugees and displaced persons - drawing attention to their plight as well as singling them out within the context of special measures of protection for vulnerable groups. Nevertheless, without the presence of a mechanism of enforcement on recommendations made within the context of resolutions adopted by the ACHPR, their practical effect has been negligible.

8.1.6 Special Rapporteur on the Rights of Refugees

Whereas the ACHPR has made some headway in respect of its protective as well as promotional mandate with regard to the rights of asylum seekers and refugees, one of the

most significant developments has been the appointment in 2004 of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons.[7]

The Special Rapporteur is mandated to examine the situation of persons falling within its mandate, to 'act upon information', to undertake fact-finding missions to refugee and IDP camps, to assist states in the development of appropriate legal and policy frameworks, to raise awareness about these groups and to promote implementation of both the UN and OAU Refugee Conventions. Until now the Special Rapporteur has given greater visibility to issues pertaining to asylum seekers and refugees within the African human rights system. The five Special Rapporteurs who have fulfilled this mandate up to date have issued press statements condemning violations, written to governments to enquire about specific measures taken or to be taken in respect asylum seekers and refugees and undertaken fact finding missions in several countries such as Burundi, Mali, Mauritania and Senegal.

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8.2 Europe

8.2.1 Introduction

This chapter will introduce the legal environment developed in Europe for the protection of refugees, which has relevance even beyond its region as it has often served and serves as example (in potential positive, but also negative sense) for other jurisdictions.

In the outset, it is important to note that in Europe four legal orders may be relevant and interconnected with each other when it comes to the protection of refugees:

1) International Law (mainly the Geneva Refugee Convention),

2) Council of Europe legal system (mainly the European Convention of Human Rights (ECHR),

3) European Union law (mainly the Common European Asylum System), and

4) National law.

In this introductory course guide chapter, we will introduce the Council of Europe (hereafter "CoE") legal system affecting refugees, focusing mainly on the analysis of the European

Convention on Human Rights (hereafter "ECHR"), and the EU's Common European Asylum System (hereafter "CEAS").

CoE and EU Member States have an undeniable sovereign right to control the entry of non-nationals into their territory. While exercising border control, states have a duty to protect the fundamental rights of all people under their jurisdiction, regardless of their nationality and/or legal status. Under EU law, this includes providing access to asylum procedures.

8.2.2 Council of Europe (CoE)

The CoE was formed in the aftermath of the Second World War to bring together the European states to promote the rule of law, democracy and human rights. By now, the CoE is composed of 46 member states, including all EU Member States. In 1950, the CoE adopted the ECHR. All CoE member states have incorporated or given effect to the ECHR in their national law, which requires their judges and officials to act in accordance with the provisions of the Convention. Furthermore, the ECtHR as a judicial mechanism has been introduced. The ECtHR oversees states' obligations under the Convention and played and still plays an important role in the development of legal protection for refugees in Europe. The ECtHR examines complaints from states, individuals, groups of individuals or legal persons alleging violations of the Convention. Refugee protection issues have been addressed in many judgements of the ECtHR. They mainly relate to Article 3 (prohibition of torture, inhuman and degrading treatment and punishment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 of the ECHR (right to an effective remedy).

8.2.3 European Union

The EU comprises 27 Member States. EU law is composed of treaties (referred to as 'primary EU law') and mainly regulations, directives and decisions (referred to as 'secondary EU law'). The treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), have been approved by all EU Member States. EU regulations, directives and decisions have been adopted by the EU institutions (European Parliament and Council of EU).

Since the Treaty of Rome in 1957, successive treaty amendments have enlarged the jurisdiction of the European Communities, now the EU, in issues affecting refugee protection. These were, namely, the EU Treaties of Amsterdam (1999), Nice (2001) and then Lisbon (2007) which enhanced EU powers across the field of borders, immigration and also

asylum, including visas and returns. Since then, there has been an ongoing evolution of the so-called Common European Asylum System (CEAS), which comprises intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU.

It is also important to mention that the EU established its own court, which is now known as the Court of Justice of the European Union (CJEU). The CJEU has the right to decide on the validity of EU acts and on failures to act by the EU institutions under EU and relevant international law, as well as to decide on infringements of EU law by EU Member States. In addition and most importantly in the field of asylum, the CJEU retains exclusive authority to ensure the correct and uniform application and interpretation of EU law in all EU Member States.

Although the direct access to the CJEU by individuals is relatively restricted, it is however possible to bring individual complaints having as an object the interpretation or the validity of EU law before national courts. In case of doubt on the interpretation or the validity of an EU provision, national courts can – and must in certain cases – seek guidance from the CJEU using the preliminary reference procedure under Article 267 of the TFEU.

Although the original treaties of the European Communities (later EU) did not contain any reference to human rights or their protection, the EU proclaimed the Charter of Fundamental Rights of the European Union in 2000 (enforced in 2009). The Charter contains a list of human rights inspired by the rights enshrined in EU Member State constitutions, the Council of Europe legal system (such as the ECHR) and international human rights treaties. EU institutions and EU Member States are bound to comply with the Charter 'when implementing EU law', which is often the case in the field of asylum.

8.2.4 Council of Europe legal system affecting refugees

Within the Council of Europe legal system, it is the ECHR that contains a number of provisions which are highly relevant when it comes to refugee protection, even if the ECHR does not acknowledge the right to asylum directly. Nevertheless, the European Court of Human Rights (ECtHR), the supranational court supervising the ECHR, has contributed significantly to the protection of asylum seekers in Europe. Firstly, under Art. 3 ECHR, the prohibition of torture and of inhuman or degrading treatment or punishment, the Court has developed extensive case-law concerning asylum seekers.

According to the ECtHR, "expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the

Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned." In this context, it is of crucial importance that asylum seekers have the possibility of demanding a binding interim measure from the ECtHR under Rule 39 of the Rules of Court to prevent such an expulsion. Secondly, the ECtHR has developed procedural guarantees in asylum cases under Art. 13 ECHR, the right to an effective remedy against breaches of the ECHR or its protocols, and Art. 4 Protocol No. 4, the prohibition of collective expulsions. Finally, Art. 5 ECHR, the right to liberty and security, is particularly important in the context of detention of asylum seekers, while Art. 8 ECHR, the right to respect for private and family life, provides some protection against the expulsion of asylum seekers with a family in the host country.

8.2.5 EU's Common European Asylum System (CEAS)

The evolution of the CEAS

The so-called Common European Asylum System (CEAS), which was adopted at different stages and now in place since 2013, is the product of a long-standing political process with the aim of creating a common European asylum and migration policy. Even though the binding legal basis for this was only created with the Amsterdam Treaty (1999), the term "harmonisation" has shaped both professional and public discourse within Europe since the 1980s. The Schengen Agreement of 1985 can be considered the birth of the harmonisation process. With the aim of creating the necessary freedom of movement for a common European internal market, Germany, Belgium, France, Luxembourg and the Netherlands agreed in the Luxembourg town of Schengen on a programme to abolish border controls at internal borders. However, the opening of the internal borders was accompanied by increased security measures.

The 1990 Schengen Implementing Convention therefore focused in particular on the so-called compensatory measures which included, above all, the transfer of controls to the external borders of the signatory states, police cooperation and efforts to combat crime together and a common search system. In the same year, in addition to the Schengen Convention, the Dublin Convention was also adopted, which, as the predecessor of today's Dublin Regulation, already contained regulations on determining the member state responsible for conducting an asylum procedure.

Between 1990 and 1995, numerous other measures were adopted. Among the most significant with regard to the Europeanisation of refugee and immigration policy are the so-

called "London Decisions" of 1 December 1992. These contained, among other things, the so-called third-country regulation, a regulation on safe countries of origin as well as provisions on special procedures that allowed for accelerated asylum procedures. At the same time, numerous readmission agreements were concluded with neighbouring countries, transit countries and countries of origin, and a common visa list for third-country nationals was introduced. When the internal borders of the Schengen states were finally abolished with the entry into force of the Schengen Agreement on 26 March 1995, there was still no uniform asylum law, but a coordinated policy of immigration control had already been established in Europe.

It was not until the Treaty of Amsterdam in 1997 that the EU Member States agreed on a common policy in the areas of asylum and migration law. With the signing of the treaty in May 1999, the member states committed themselves to adopting minimum standards in the field of refugee and immigration policy. The content of the legal framework created by the Amsterdam Treaty was finally shaped at a special summit in Tampere, Finland, in October 1999. In addition to the continuation of measures to control and limit immigration, the Tampere programme also contains a clear commitment to the right to asylum and the Geneva Refugee Convention. Finally, between 1999 and 2004, the first regulations and directives in the field of asylum law were adopted. These include the Temporary Protection Directive, the Reception Directive and the Qualification Directive. The content of these directives will be discussed in more detail. In addition, the first Dublin Regulation was also implemented in 2003 as the successor to the Dublin Convention.

In November 2004, The Hague Programme was adopted. It contained a total of ten priority goals to be achieved by 2010. These included the introduction of a CEAS and an integrated border management system for the EU's external borders. In addition to a continuous expansion of the border management system at the EU's external borders (including the creation of Frontex), this five-year programme also included the reaffirmed goal of developing a Common European Asylum System (CEAS) by 2012. In June 2013, the European Parliament finally adopted a legislative package that was initially considered the completion of the Europeanisation process in the field of asylum and is thus referred to as the adoption of the CEAS. However, due to problems that have arisen in the meantime with the implementation of the CEAS, it is now to be subjected to another fundamental reform. The EU Commission has presented a revised plans for the re-organisation of the CEAS in September 2020 (the so-called “New Pact on Asylum and Migration”). The CEAS currently comprises two institutions, two regulations and five directives. The institutions are the above-mentioned European border management agency Frontex, based in Warsaw, Poland, and the European Union Agency for Asylum (EUAA), based in Valletta, Malta, which was established under the Hague Programme in 2010 and became operational on 1 February 2011.

The Dublin System

The European asylum responsibility system essentially consists of the Dublin Regulation, the Dublin Implementing Regulation and the EURODAC Regulation. On the basis of fixed criteria, it is regulated which member state is responsible for the examination of an asylum application filed on the territory of the Dublin states. According to these criteria, the state responsible is the one that - in a very simplified way - caused the entry of the person seeking protection into the Dublin area. The basic principle of this responsibility rule is that every person seeking protection is only entitled to an asylum application and the associated examination of the protection application within the EU territory. In this way, multiple applications and onward movements should be prevented. On the one hand, this should lead to more solidarity among the member states and, on the other, ensure that every person seeking protection receives at least a fair asylum procedure.

The legal instruments of the CEAS

The regulations and directives of the CEAS at a glance:

- **Dublin III Regulation**: Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application of a third-country national or stateless person in a Member State for international protection lodged by a third protection lodged by a third-country national or stateless person in a Member State.
- **EURODAC Regulation**: Regulation (EU) No 603/2013 of 26 June 2013 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on security and law enforcement requests from the security and law enforcement authorities of the Member States and Europol for comparison with EURODAC data and amending Regulation (EU) No 1077/2011 establishing a European European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and of Justice.
- **Frontex Regulation**: Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

- **Qualification Directive**: Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
- **Asylum Procedures Directive**: Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection.
- **Asylum Reception Directive**: Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection.
- **Return Directive**: Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
- **Temporary Protection Directive**: 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.

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8.3 Key Debates

➔ What are advantages of regions developing specialized refugee law?

➔ Are there any disadvantages in regional approaches to refugee law?