

The Refugee in International Law

Third Edition

GUYS. GOODWIN-GILL and JANE MCADAM



Contents

Tables of Cases .	XXV
Table of Treaties and Other International, and Regional Instruments	xliii
Selected Abbreviations	xlix
Online Resource Centre	lv
Chapter 1 The Refugee in International Law	1
1. Introduction	1
2. The refugee in international law and the practice of the	
United Nations Security Council	5
3. The refugee in national and international law	7
4. Protection	9
PART 1: REFUGEES	
Chapter 2 Refugees Defined and Described	15
1. Refugees	, 15
2. Refugees defined in international instruments 1922-46	16
3. Refugees for the purposes of the United Nations	20
3.1 Statute of the United Nations High Commissioner for	
Refugees (UNHCR) .	20
3.2 Development of trie statutory definition and extension of	
the mandate	23
3.3 Responsibility for internally displaced persons	32

- 4; Refugees in the sense of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees5. Regional approaches to refugee definition
- 5. Regional approaches to refugee definition376. Refugees in municipal law: some examples417. Institutional responsibilities and international obligations478., 'Refugees' for the purposes of general international law49

35

Ch	apter 3 Determination of Refugee Status: Analysis and Application	51
1.	Respective competence of UNHCRand of States parties to	
	the Convention and Protocol	51
2.	Determination of refugee status by UNHCR	53

Contents	

3. Determination of refugee status by States	53
3.1 The 2004 European Union Qualification Directive	60
3.1.1 The goal of common criteria'	60
4. The refugee definition and the teasons for persecution	63
4.1 General matters	63
4.1.1 'Good faith'and activities in the country of refuge	65
4.1.2 Sratelessness	67
4.2 Reasons for persecution	70
4.2.1 Race	70
4.2.2 Religion	71
4.2.3 Nationality	72
4.2.4 Membership of a particular social group	73
4.2.4.1 The concept develops	76
4.2.4.2 The categories of association	78
4.2.4.3 Common victimization	79
4.2.4.4 Women, social group, and refugee status	81
4.2.4.5 Asocial view of social group'	84
4.2.5 Political opinion	86
5. Persecution: Issues of interpretation and application	90
5.1 Protected interests	92
5.2 The ways and means of persecution	93
5.2.1 Persecution as a crime in international law	94
5.3 Agents of persecution	98
5.3.1 Agents of persecution and State responsibility	99
5.4 Fear, intent, motive, and the rationale for persecution	100
5-5 Persecution and laws of general application	102
5.5.1 Conscientious objectors	104
5.5.1.1 The'right'of conscientious objection	105
5.5.1.2 The'right'to object to participation in conflict	
'condemned by the international community'	108
5.5.1.3 The nature of the dispute between the	
individual and the State	109
5.5.1.4 SepetandBulbul	112
5-5.2 Political and non-political offenders	116
5.6 Persecution and situations of risk	123
5.6.1 Internal flight alternative	123
5.6.2 Flight from civil war	126
5.6.3 The individual and the group	128
5.7 Children as asylum seekers and refugees	130
6. Persecution and lack of protection	131

		Contents	xvii
Cl	iapte	r 4 Loss and Denial of Refugee Status and its Benefits	135
1.	Vol	untary acts of the individual -	135
		nge of circumstances	139
	2.1	Continuing status in exceptional circumstances	143
		2.1.1 Interpretation and application	145
3.	Pro	tection or assistance by other States or United Nations agencies	149
	3-1	The country of first asylum principle	149
	3-2	Refugees receiving United Nations protection and assistance	151
		3.2.1 Historical background	153
		3.2.2 Interpretation and application	156
		3.2.3 An alternative interpretation	157
		3.2.4 Article 1D and the future	159
	3.3	Other refugees not considered ro require international protection	161
4.	Exc	lusion from refugee status	162
	4.1	Crimes against peace, war crimes, and crimes against humanity	163
		4.1.1 The drafting history of article lF(a)	163
		4.1.2 The scope of article 1 F(a)	165
		4.1.2.1 Crimes against peace	165
		4.1.2.2 War crimes	166
		4.1.2.3 Crimes againsr humanity	167
		4.1.3 Individual responsibility	168
	4.2	Serious non-political crimes	171
		4.2.1 The drafting history of article lF(b)	172
		4.2.1.1 The relation to extradition	173
		4.2.1.2 'Serious' and 'non-political'	176
		4.2.2 Context and proportionality	180
	4.3	Acts contrary to the purposes and principles of the	
		United Nations	184
		4.3.1 The drafting history of article lF(c)	184
		4.3.2 The purposes and principles of the United Nations'	185
		4.3.2.1 Individuals acting on behalf of the State	186
		4.3.3 Article IF(c) in brief	189
	4.4	The 2004 European Union Qualification Directive	190
	4.5	Terrorism, refugees, and the purposes and principles of the	
		United Nations	191
		PART 2: ASYLUM	

Chapter 5 Non-Refoulement in the 1951 Refugee Convention	201
1. Evolution of the principle	201
2. Relation of the principle of <i>non-refoulement</i> to particular issues	
2.1 Admission and non-rejection at the frontier	206

2.2 Conventions and agreements	208
2.3 Declarations and resolutions	211
2.4 The UNHCR Executive Committee Conclusions on	
international protection	215
2.5 State views and State practice	218
2.5.1 Stateviews	218
2.5.2 State practice: some aspects	229
3. The scope of the principle of non-refoulement	232
3.1 Personal scope	232
3.1.1 The question of risk	233
3.2 Exceptions to the principle of non-refoulement	234
3.3 Time and place, ways and means	244
3.3.1 Extraterritorial application	244
3.3.2 'International zones'	253
3.3.3 Non-refoulement and extradition	257
3.3.4 Non-refoulement m& expulsion	262
3.3.5 Non-refoulement and illegal entry	264
4. Measures not amounting to refoulement	267
4.1 Stowaways	268
4.2 Arrival of asylum seekers by boat	270
4.2.1 Internal waters and the territorial sea	272
4.2.2 The contiguous zone	275
4.2.3 The consequences of enforcement action	277
4.3 Rescue-at-sea	277
Chapter 6 Protection under Human Rights and	
General International Law	285
1. The meaning of 'complementary protection'	285
2. The history of complementary protection	286
3. Complementary protection at the international level	296
3.1 Human lights treaties: some procedural considerations	298
3.2 The 1984 Convention against Torture (CAT84)	301
3.3 The 1966 International Covenant on Civil and	
Political Rights (ICCPR66)	305
3.3.1 What rights are protected?	308
3.4 The 1950 European Convention on Human Rights (ECHR50)	310
3.4.1 Article 3	311
3.4.2 Socio-economic rights	314
3.4.3 Other protected rights	316
3.4.3.1 Article 8: family life	318
3.4.3.2 Article 8: private life	321
3.4.3.3 Article 13: remedies	321
3.5 The 1989 Convention on the Rights of the Child (CRC89)	323
4. The 2004 European Union Qualification Directive	325

Contents	xix
5. Status and exclusion from status	330
6. Non-refoulement in cases of mass influx and the development of	
'temporary protection'	335
6.1 Mass influx and <i>non-refoulement</i>	335
6.1.1 Some aspects of State practice	336
6.2 Temporary protection	340
6.2.1 Status	341
6.3 <i>Non-refoulement</i> through time?	343
7. Non-refoulement as a principle of customary international law	345
Chapter 7 The Concept of Asylum	355
1. Introduction	355
2. Asylum in international conventions, other instruments, and acts	358
3. Asylum in regional agreements	366
4. Obstructing asylum: trends in State practice	369
4.1 Access	369
4.2 Interception	371
4.3 Non-arrival policies	374
4.3.1 Visa regimes	374
4.3.2 Pre-entry clearance and carrier sanctions	377
5. International law responses	380
5.1 The right to leave any country	380
5.2 Article 31 of the 1951 Convention	384
5-3 State responsibility for extraterritorial acts	385
5.4 Good faith	387
6. Non-admission policies: the 'safe' country and the concept of	
'effective protection'	390
6.1 Jurisdictional issues: identifying the State responsible for	
determining a claim	390
6.2 The 'safe country' mechanism	392
6.3 'Effective protection'	393
6.4 The 2005 European Union Procedures Directive	396
6.5 'Safe country'notions elsewhere	403
6.6 Readmission agreements	407
6.7 Extraterritorial processing	408
7. Standards of treatment of asylum seekers and refugees	412
8. Conclusion	414

PART 3: PROTECTION

Chapter 8 International Protection	421
1. International institutions	421
1.1 The Office of the United Nations High Commissioner for	
Refugees (UNHCR)	426

Conte	ents

	1.1.1 Relation of UNHCR to the General Assembly and its	
	standing in general international law	428
	1.2 The United Nations Relief and Works Agency for Palestinian	
	Refugees in the Near East (UNRWA)	436
	1.3 The United Nations Office for the Coordination of	
	Humanitarian Affairs (OCHA)	438
	1.3.1 Strengthening coordination	438
	1.3.2 The complementary role of UN agencies	441
	1.4 Other international and intergovernmental organizations and agencies	442
	1.4.1 International Organization for Migration (IOM)	442
	1.4.2 International Committee of the Red Cross (ICRC)	444
	1.4.3 Regional organizations	444
	1.4.4 Non-governmental organizations (NGOs)	446
2.	The protection of refugees in international law	446
	2.1 General international law	448
	2.2 Treaties and municipal law	450
	2.2.1 The principle of good faith	456
3.	Palestinian refugees: nationality, statelessness, and protection	458
Cł	napter 9 Protection and Solutions	462
1.	General protection issues	462
	1.1 Detention	462
	1.1.1 Detention and mass influx	465
	1.2 Refugee rights in camps and settlements	466
	1.3 Personal security and related measures	471
	1.3.1 Refugees and asylum seekers	471
	1.3.2 Women refugees	473
	1.3.3 Child refugees	475
	1.3.4 Relief workers	480
2.	Internally displaced persons (IDPs)	481
	Solutions	489
	3.1 Local integration	490
	3.2 Voluntary repatriation	492
	3.2.1 Facilitating and promoting	494
	3.2.2 Sale return	496
	3.3 Resettlement	497
	3.4 Assistance and development	500
4.	International cooperation	502
С	hapter 10 Treaty Standards and their Implementation in National Law	506
	The 1951 Convention and the 1967 Protocol relating to the	
1.	Status of Refugees	506
	1.1 Required standards of treatment	509
	In required buildings of nounford	507

					Contents			xxi
	1.2	Stand	ards applicat	le to refugees	as refugees			510
		1.2.1	Administra	tive assistance	: article 25		"	512
		1.2.2	Identify doo	cuments: artic	le 27			515
		1.2.3	The Conve	ntion Travel I	Document: a	rticle 28		516
		1.2.4	Treatment o	f refugees ente	ering illegally	y: article 31		520
		1.2.5	Expulsion of	of refugees: art	icle 32			523
		1.2.6	Non-refould	ementr. article	33			524
	1.3 The criteria of entitlement to treatment in accordance with the							
		Conv	ention					524
		1.3.1	Simple pres	sence				524
		1.3.2	Lawful pres	sence				524
		1.3.3	Lawful resi	dence				525
		1.3.4	Habitual re	sidence				526
2.	Pro	otectio	n in nationa	al law: the re	fugee status	determination	n procedure	528
	2.1	Gene	ral standards	for the determ	nination of r	efugee status		529
	2.2	The ro	ole of UNH	CR in national	l procedures			532
	2.3	Due p	rocess in the	determination	n of refugee	status		533
		2.3.1	Appeal or r	eview				535
3.	Th	e 2005	5 European	Union Proce	edures Dire	ctive		537
	3.1	Organ	ization of th	e Procedures	Directive			539
4.	Pro	ocess in	n refugee sta	tus determir	nation: getti	ing to 'Yes';		
	get	ting to	'No'					542
	4.1	The i	nterview, exa	amination, or l	hearing			544
	4.2	Uses a	ind abuses of	country and	other inform	nation		545
	4.3 Assessing credibility and drawing inferences from the evidence						548	
5.	5. The status of refugees and the termination of refugee							
	sta	tus in 1	national law	7				551
	5.1 Refugee status and the 'opposability' of decisions							553
	5.2		The	principle	of	acquired	rights	554
6.	Af	terwor	d					555

6. Afterword

ANNEXES

Ta	ble of	Contents 557
An	559	
1.	1946 Constitution of the Internati	onal Refugee
	Organization—Extracts	559
2.	1948 Universal Declaration of Hun	nan Rights—Extracts 564
3.	1950 Statute of the Office of the U	nited Nations High
	Commissioner for Refugees	564
4.	1951 Convention relating to the S	atus of Refugees 569
5.	1967 Protocol relating to the Statu	s of Refugees 588
6.	1967 United Nations Declaration	on Territorial Asylum 592

Contents

7. 1984 United Nations Convention against Torture and Other Cruel,	594
Inhuman or Degrading Treatment or, Punishment—Extracts	594
8. 1989 United Nations Convention on the Rights of the	596
Child—Extracts	
9. 1987 Constitution of the International Organization for Migration	598
10. 2001 Declaration of States Parties to the 1951 Convention and/or	<0 .
its 1967 Protocol relating to the Status of Refugees	607
Annexe 2 Selected Regional Instruments	610
1. 1969 Convention on the Specific Aspects of Refugee	
Problems in Africa	610
2. 1981 African Charter on Human and Peoples'Rights—Extracts	615
3. 1954 Caracas Convention on Territorial Asylum	616
4. 1954 Caracas Convention on Diplomatic Asylum	619
5. 1969 American Convention on Human Rights—Extracts	622
6. 1981 Inter-American Convention on Extradition—Extracts	623
7. 1984 Cartagena Declaration on Refugees	624
8. 1950 European Convention on Human Rights and Fundamental	021
Freedoms—Extracts	629
9. 1963 Protocol No. 4 to the European Convention on the	02)
Protection of Human Rights and Fundamental	
Freedoms—Extracts	630
10. 1957 European Convention on Extradition—Extracts	630
11. 1975 Additional Protocol to the European Convention on	050
Extradition—Extracts	631
12. 1977 European Convention on the Suppression of	0.51
Terrorism—Extracts	632
13. 2000 European Union Charter of Fundamental	052
Rights—Extracts	633
14. 2001 European Union Council Directive on Temporary	055
Protection	635
15. 2001 European Union Council Common Position on	055
Combating Terrorism	649
16. 2003 European Union Council Directive on the Reception of	047
Asylum Seekers	653
17. 2003 European Union Council Regulation on the Criteria and	055
Mechanisms for Determining the Member State responsible	
for Examining an Asylum Application	664
18. 2003 European Union Council Directive on the Right to Family	004
Reunification	680
19. 2004 European Union Council Directive on Qualification and	000
Status as Refugees or Persons otherwise in need of International	
Protection	691
Trotocion	071

xxii

XX111
709
739
739
740
741
741
743
773