

The Protection of Refugees

St. Thomas University

**Pierre-Michel Fontaine
Fall 2001
United States of America**

Course Description:

The forced displacement of persons within and/or across national borders has been one of the most tragic and persistent issues of the twentieth century and it is likely to remain with us well into the twenty-first. The refugee phenomenon concerns that of flight across borders. While it is often associated and shares many characteristics with flight within nations, which gives rise to the phenomenon of internally displaced persons (IDPs), it is, unlike the latter, the object of a relatively well established, if in some respects fragmented, international regime. While the international regime of IDPs is still in gestation, albeit a rapidly developing one, that of refugees started soon after the First World War within the context of the League of Nations.

This course will start with an introduction to the concept of international protection of refugees and an examination of the various international attempts since 1921 to meet the problem of the forced movements of people due to persecution or armed conflict. This will be followed by an introduction to the basics of international refugee law, including the gaps in this body of law. This will in turn lead to a comparative study of the refugee definitions as a basis for the determination of refugee status (RSD), the issue of the safe third country and the problem of responsibility for determining an asylum claim, and other contentious issues relating to RSD.

Other themes will include: the mandate and work of the Office of the United Nations High Commissioner for Refugees; refugee protection and human rights; asylum; non-*refoulement* under the 1951 Convention relating to the Status of Refugees and under general human rights law; temporary or time-limited protection and “subsidiary protection”; refugee detention and freedom of movement; refugee protection in armed conflict and complex emergencies; security of refugee camps and settlements; the protection of refugee women and the problem of sexual violence against refugees; the protection of refugee children; the developing law of internally displaced persons; the solutions to the refugee problem; the challenge of voluntary repatriation; and the future of international protection.

Syllabus:

The forced displacement of persons within and/or across national borders has been one of the most tragic and persistent issues of the twentieth century and it is likely to remain with us well into the twenty-first. The refugee phenomenon concerns that of flight across borders. While it is often associ-

ated and shares many characteristics with flight within nations, which gives rise to the phenomenon of internally displaced persons (IDPs), it is, unlike the latter, the object of a relatively well established, if in some respects fragmented, international regime. While the international regime of IDPs is still in gestation, albeit a rapidly developing one, that of refugees started soon after the First World War within the context of the League of Nations.

This course will start with an introduction to the concept of international protection of refugees and an examination of the various international attempts since 1921 to meet the problem of the forced movements of people due to persecution or armed conflict. This will be followed by an introduction to the basics of international refugee law, including the gaps in this body of law. This will in turn lead to a comparative study of the refugee definitions as a basis for the determination of refugee status (RSD), the issue of the safe third country and the problem of responsibility for determining an asylum claim, and other contentious issues relating to RSD.

Other themes will include: the mandate and work of the Office of the United Nations High Commissioner for Refugees; refugee protection and human rights; asylum; non-*refoulement* under the 1951 Convention relating to the Status of Refugees and under general human rights law; temporary or time-limited protection and “subsidiary protection”; refugee detention and freedom of movement; refugee protection in armed conflict and complex emergencies; security of refugee camps and settlements; the protection of refugee women and the problem of sexual violence against refugees; the protection of refugee children; the developing law of internally displaced persons; the solutions to the refugee problem; the challenge of voluntary repatriation; and the future of international.

Module 1: Introduction to the International Protection of Refugees and its Evolution.

This first session will start with an overview of the course, which will be followed by a discussion of the nature, the rationale and the legal basis of international protection of refugees. This will serve as background to an exploration of the evolution of the international regime of protection of refugees, emphasising the development of the institutions, norms, values, and policies that have characterized it since the creation of the Office of the High Commissioner for Russian Refugees by the League of Nations in 1921.

Module 2: Introduction to Contemporary International Refugee Law.

Building on the groundwork laid in the first module, we will discuss the normative framework of refugee protection, i.e. refugee law at the universal, regional and national levels, emphasizing at the international levels not only the refugee instruments, but also the international human rights instruments. This survey will also include an examination of the role of the Conclusions on international protection of the Executive Committee of the High Commissioner’s programme (EXCOM Conclusions).

Module 3: The Refugee Definitions and Refugee Status Determination.

The determination of refugee status is a core function of refugee protection. It is the act from which flows the full enjoyment of the rights and protection provided by refugee law. It is based normatively on the criteria contained in the applicable refugee definition. One of the principal dis-

tinguishing characteristics of the instruments analyzed in the previous module is the extent to which they modify or deviate from the refugee definition of the oldest still valid refugee definition, that contained in the Statute of UNHCR. A rapid comparison of these refugee definitions will be followed by a discussion of the legal basis of refugee status determination and of its criteria and procedures. As the bulk of refugee litigation is linked directly or indirectly to refugee status determination, it will be necessary to discuss in some depth the notions of persecution, persecution by non-state agents, discrimination vs. persecution, effective nationality, membership of a particular social group, as well as the related notions of internal flight alternative and safe third country.

Module 4: The Office of the United Nations High Commissioner for Refugees (UNHCR)—Mandate and Work.

UNHCR is the international organisation mandated by the General Assembly of the United Nations to provide international protection to refugees. It plays a crucial role in the operation of the international regime of refugee protection. It has undergone considerable transformation in size and approaches since its creation by General Assembly Resolution 428 (V) of 14 December 1950. As the organization responsible for monitoring the implementation of international conventions relating to refugees, and one that is almost totally dependant financially on a handful of Western donor countries, UNHCR faces a major challenge in our times in trying to conciliate state interests with its refugee protection mandate.

Module 5: Human Rights and Refugee Protection.

The refugee issue is intimately linked with that of human rights. Refugee flows are often due to large-scale violations of fundamental human rights. The protection of the human rights of refugees is a major objective of refugee protection. Indeed, the rights protected by the various human rights instruments are available to all human persons. Yet, only in recent years has even UNHCR acknowledged openly the usefulness of utilizing the human rights mechanisms of the United Nations to achieve the protection of refugees. Meanwhile, a considerable jurisprudence on refugee and asylum cases is developing in the European institutions of human rights on the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols, especially of the prohibition against torture and other inhuman or degrading treatment contained in Article 3 of the Convention. There and elsewhere recourse is also had to Article 3 against *refoulement* in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of 10 December 1984. Practical ways of utilizing human rights to protect refugees will be discussed.

Module 6: Asylum.

Asylum is the core principle and objective of refugee protection. Yet, because it implies giving the asylum-seekers the full enjoyment of rights in the country of asylum whether the authorities of that country wish so or not, that puts it at odds with the principle of state sovereignty. For this reason, States are reluctant to acknowledge an individual right to asylum and prefer to assert their right to grant or not to grant it. The efforts of the High Commissioner for Refugees to obtain the adoption of a Convention on Territorial Asylum ended in failure and what we still have at the universal level is a United Nations Declaration on Territorial Asylum of 14 December 1967. Nevertheless, the Universal Declaration of Human Rights of 10 December

1948 proclaims in Article 14 everyone's "right to seek and to enjoy in other countries asylum from persecution." This is echoed by Article 22(7) of the American Convention of Human Rights of 22 November 1969: "right to seek and be granted asylum." There is, furthermore, a vibrant Latin American tradition of conventions and treaties on territorial and diplomatic asylum dating back to the late 19th century, which the United States has more or less consistently shunned. And the OAU Convention governing the Specific Aspects of the Refugee Problem in Africa of 10 September 1969 has dared, in Article II on asylum, tread where neither of the two universal refugee instruments, nor the EHCHR have ventured. The uncertain status of the right to asylum will be examined.

Module 7: Non-*refoulement* under the 1951 Convention relating to the Status of Refugees and general human rights law.

More firmly established would seem the principle of non-*refoulement*, which many international jurists consider to be a peremptory norm, a norm of *jus cogens*. It is a norm without which refugee law and protection would be without efficacy and it replaces advantageously the principle of asylum. Unlike asylum, the norm of non-*refoulement* holds its rightful place in the 1951 Convention. It is proclaimed by the above mentioned African and American conventions as well. Yet it is not without controversy as to its extent and application, in particular as to whether it encompasses non-rejection at the frontier. The juridical basis, nature and applications of the norm will be studied, in particular the practical ways of protecting refugees and asylum-seekers from *refoulement*.

Module 8: Refugee Rights and Freedoms to be Protected.

Having discussed the two most fundamental principles of refugee protection, we will examine such other principles of interest to refugees as those of freedom of movement and freedom from detention, access to court, the right to family reunification, the right to non-discrimination, the protection from expulsion and extradition, and the right not to be penalized for illegal entry or stay.

Module 9: Temporary Protection and "Subsidiary" Protection.

Temporary protection is the term applied to the status accorded the persons fleeing from the former Yugoslavia conflicts on the ground that they did not meet the conditions for refugee status since their problem was not a fear of persecution in the terms of the definition of the 1951 Convention, but rather a fear of conflict or mass violence. It was thought nevertheless that, while these persons did not qualify for refugee status under the Convention, they deserved some sort of protection. That protection is limited in time and in substance. The recently coined term of "subsidiary protection" refers to what used to be called B status or humanitarian status, that was accorded to individual cases that could not meet the criteria of the 1951 Convention's refugee definition as interpreted by Western governments. Due to their limited nature, temporary and subsidiary protection poses many problems that will be explored in this module, in particular for temporary protection the fact that many people being given it could in fact qualify under the refugee convention and the thorny problem of when to end this protection and send the protected persons home.

Module 10: Refugee Protection in Armed Conflict and Complex Emergencies.

A defining characteristic of refugee emergencies in the post-Cold War period is for them to occur increasingly in the midst of violent conflict situations. This presents a number of problems, including the presence of armed elements in the camps and the need to disarm them and/or separating them from the rest; the increasing problem of military or armed attacks on refugee camps and settlements, and more recently the targeting of UNHCR staff and other humanitarian workers for kidnapping and assassination, not to mention the mixing up of humanitarian with military elements. The examination of these problems and of the possible solutions thereto will be the focus of this module.

Module 11: The Protection of Particularly Vulnerable Persons: Refugee Women, Unaccompanied Minors, and Seniors.

These categories of persons show vulnerability at all stages of the refugee trajectory, from flight to arrival to refugee status determination to the recognized refugee stage to solutions. The particular problems of these categories of persons and the search for their solution will be the focus here. This is without prejudice to these persons' capacity to intervene and to act for their own protection and the benefit of their communities.

Module 12: The Developing Law of Internally Displaced Persons.

It is often pointed out that there are more internally displaced persons (IDPs) than refugees around the world. It is also true that, while their situation is, legally, essentially different from that of refugees, they share the same distress, destitution and vulnerability. Furthermore, the two groups often live side by side in the same physical settings. The same persons sometimes move from one status to the other or vice versa. It is therefore imperative for the international community to accord its protection and assistance to IDPs. For these reasons, UNHCR often finds itself having to extend its care to IDPs, in spite of its own mandate limitations. This, however, can only be done under certain conditions. Internally displaced persons therefore remain especially vulnerable for lack of an established body of law protecting them or of a specific international organization charged with implementing it or monitoring its implementation. The efforts to develop such a body of law and how to mobilize it are the subjects of this discussion.

Module 13: Solutions to the Refugee Problem and the Challenge of Voluntary Repatriation.

Refugee status is not meant to last for ever, as it is abnormal that a person should be without the protection of his own country or of a country of adoption. For this reason, one charged with the protection of refugees must start from the beginning to seek for a solution to their problem. UNHCR has traditionally, with the support of the States concerned, sought solutions in voluntary repatriation, local integration, and third-country resettlement. In recent years, it has shifted its interest to voluntary repatriation after a period of intensive recourse to resettlement, first immediately after World War (first under the International Refugee Organization) then in Southeast Asia in the 1970s and early 80s in the wake of the Indochina Wars. It has been proclaiming that voluntary repatriation is the preferable solution, or perhaps even the only solution. The voluntary character of repatriation has come under heavy strain in recent years, however, as

a result of various factors linked with the numerous civil conflicts in Africa, Asia and the Balkans; hence the recently minted concepts of “repatriation under less than ideal conditions”, or even such aberration as “forced spontaneous repatriation.” We will discuss the protection implications of these solutions, with special reference to the mounting challenge of repatriation.

Module 14: The Future of International Protection (reconciling state interests, organizational interests, and the norms of refugee protection?).

The foregoing leads us to the necessity of engaging in some reflection on the future of refugee protection, taking into account the continuing refugee problem, the mounting violence of civil conflicts, the increasing disregard for international humanitarian law, the growing awareness of the resort of many to the refugee avenue as a means to migration, the ceaseless efforts of the rich countries to fend off the perceived hordes at the door, the ability of those countries to use their financial and power leverages to influence UNHCR’s orientation, but also the rising awareness of human rights and the growing resourcefulness of the advocacy community.

Course Readings:

Bibliography

- K. Musalo, J. Moore and R.A. Boswell, *Refugee Law and Policy: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 1997)
- S. Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Budapest: Central European University Press, 1999)
- B.S. Chimni, *International Refugee Law: A Reader* (New Delhi: Sage Publications, 2000)
- R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution, 1998)
- G.S. Goodwin-Gill, *The Refugee in International Law* (2nd ed. Oxford: Clarendon Press, 1996)
- A. Grahl-Madsen, *The Status of Refugees in International Law* (vols. 1 and 2. Leyden: Sijthoff, 1966, 1972)
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991)
- J. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Nijhoff, 1997)
- I. Jackson, *The Refugee Concept in Group Situations* (The Hague: Kluwer, 1999)
- W. Kalin, *Guiding Principles on Internal Displacement: Annotations* (Studies in Transnational Legal Policy no. 32, American Society of International Law, Washington, D.C., 2000)
- Raoul Wallenberg Institute, *Temporary Protection: Problems and Prospects* (Report no. 22, Lund, 1996)
- R. Skran, *Refugees in Interwar Europe: The Emergence of a Regime* (Oxford: Clarendon, 1995)
- Amnesty International and International Service for Human Rights, *The UN and Refugees’ Human Rights* (London and Geneva, 1997)
- UNHCR, *Determination of Refugee Status* (RLD2 Training Module, Geneva, 1987)

UNHCR, *Introduction to International Protection of Refugees* (RLDI Training Module, Geneva, 1992)

UNHCR, *Collection of International Instruments and Other Legal Texts concerning Refugees and Displaced Persons* (2 vols., Geneva, 1995)

UNHCR, *Conclusions on International Protection of Refugees* (Geneva, 1991 ff.)

UNHCR, *Handbook of Procedures and Criteria for the Determination of Refugee Status* (Geneva, 1979)

Contact information for Pierre-Michel Fontaine:

Lot. Chateau d'Allemogne
20, rue du Muguet
01710 Thoiry
France
Tele: (33) 450-205961
Fax: (33) 450-208015
Email: pmfontaine@hotmail.com

