

INTRODUCTION:
THE ROLE OF INTERNATIONAL ORGANIZATIONS AND HUMAN RIGHTS
MONITORING BODIES IN REFUGEE PROTECTION

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Abstract

Developments in international law in the field of asylum, including the development of regional legal and institutional frameworks, have resulted in an increasing complexity and fragmentation that deserves revisiting. In this view, this Special Issue of the *Refugee Survey Quarterly* enquires into the role of international organizations and international human rights monitoring bodies in the protection of refugees. Despite the lack of an explicit mandate to receive communications from individuals regarding their immigration status, these monitoring bodies have developed a sound body of case-law on the rights of non-nationals in relation to entry and stay in as well as non-removal from their countries of asylum. Their work in fact suggests that we may be witnessing a change in paradigm as international human rights law evolves beyond the prohibition of *refoulement* into the positive obligations of States. This has the potential for opening new ways for studying refugee protection under international law in a holistic manner.

Keywords: refugee protection, international human rights law, international human rights monitoring bodies, UNHCR

Developments in international law in the field of asylum, including the development of regional legal and institutional frameworks, have resulted in an increasing complexity and fragmentation that deserves revisiting. The articles published in this Special Issue arise from a project to research developments on the role of international organizations and international

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human rights monitoring bodies (IHRMBs) in the protection of refugees.¹ This project reflects an engagement between Academia, practitioners and policy experts in discussing emerging trends and roles and who gathered together in a Workshop convened by this author under the auspices of the Newcastle Law School in June 2013.² In particular, it sought to explore how these relevant actors may be filling the gap resulting from the lack of an international body with jurisdiction to receive individual applications under the 1951 Convention relating to the Status of Refugees³ and its 1967 Protocol.⁴

Despite the lack of an explicit mandate to receive communications from individuals regarding their immigration status, IHRMBs have developed a sound body of case-law on the rights of non-nationals in relation to entry and stay in as well as non-removal from their countries of asylum. It is now well established that international human rights law protects individuals against *refoulement*.⁵ However, the case-law of IHRMBs increasingly refers to ethnic or religious motivation behind the risk of prohibited treatment. Likewise, IHRMBs have engaged with issues relating to the internal flight alternative, human rights protection of foreign terrorist suspects and the absolute nature of the principle of *non-refoulement*, as well as with protection specifically related to the procedures for the effective protection of the rights of non-nationals.

¹ Except when otherwise indicated, the term “refugee” is used in a broad sense, to mean individuals entitled to protection under various different legal grounds.

² The project was funded by a Grant awarded by the Newcastle Institute for Social Renewal and aimed at bringing together a number of relevant specialists in the implementation of refugee protection by international organizations and IHRMBs. In this view, the June 2013 Workshop gathered scholars, practitioners and policy experts, including Dr. David James Cantor (University of London), Mrs. Madeline Garlick (United Nations High Commissioner for Refugees), Prof. Colin Harvey (Queen’s University Belfast), Ms. Maria Henessy (European Council on Refugees and Exiles (ECRE)), Mr. Raza Husain QC (Matrix Chambers), Prof. Fernando M. Mariño Menéndez (former Chair and Member of the United Nations Committee against Torture), Ms. Xenia Messariti (European Commission), Mrs. Maria Micheliogiannaki (Greek Ministry of Foreign Affairs), Mrs. Nuala Mole (the AIRE Centre), Mr. Kris Pollet (ECRE), and Ms. Patricia Van De Peer (European Parliament). The majority of participants combined an academic career with experience in policy and/or practice, allowing for a multidisciplinary approach to the issues addressed. All participants intervened in a personal capacity, and the views they expressed did not necessarily reflect the position of the organization they represented.

³ Geneva Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

⁴ Protocol relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967).

⁵ N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, Strasbourg, Council of Europe, 2010; Sir E. Lauterpacht & D. Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion”, in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003, 89–177, at 141–149; B. Gorlick, “Human Rights and Refugees: Enhancing Protection through International Human Rights Law”, *Nordic Journal of International Law*, 69, 2000, 117–177; B. Gorlick, “The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees”, *International Journal of Refugee Law*, 11, 1999, 479–495; H. Lambert, “Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue”, *International and Comparative Law Quarterly*, 48(3), 1999, 515–544.

The literature has so far focused on international human rights law as providing exceptions to the general rule of state sovereignty in the forced removal of non-nationals. Developments in international case-law, however, suggest that we may be witnessing a change in paradigm as international human rights law evolves beyond *refoulement* into the positive obligations of States in a variety of ways, including procedural standards and the duty to recognize *some form* of status for non-nationals falling under its protection grounds.

It is this emerging trend that raises further protection questions under international human rights law and which this Special Issue seeks to discuss. Although decisions by IHRMBs do not establish a precedent (and in the case of the United Nations bodies are not strictly speaking legally binding) and IHRMBs do not have jurisdiction to pronounce themselves on the refugee status of applicants or their entitlement to asylum, residence or citizenship, the question arises as to the responses that may be in place – or may be lacking – in order to reconcile a prohibition of forced removal by IHRMBs arising from one of the Refugee Convention grounds for refugee status with the duty of States to recognize a certain standard of treatment to refugees within the meaning of the Refugee Convention. This is all the more relevant in the European region, as under European Union (EU) law, subsidiary protection is a right of individuals who qualify for it (notably on *non-refoulement* grounds) but who are *not* refugees in the technical legal sense,⁶ which raises issues about the effective primacy of the Refugee Convention.

At the EU level, asylum is an area that falls under the competence of the EU. This means that Member States have transferred part of their sovereign powers to an international organization (the EU), including the power to adopt legally binding instruments on certain aspects of refugee protection, such as the refugee definition and status, procedures leading to the recognition of refugee status, or the controversial system to allocate responsibility to one Member State to determine asylum applications on behalf of the rest of Member States (the so-called Dublin system).⁷ These agreements make the EU a unique context to explore inter-

⁶ Directive 2011/95/EU of the European Parliament and of the Council 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 (recast), OJ L 337/9, 20 Dec. 2011, Art. 18.

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, 26 Oct. 2012 (entry into force: 1 Dec. 2009), Art. 78.

state cooperation on refugee protection, which also has the potential to expand into other areas in the world.⁸

In 2013, the adoption of the second generation legislative package that makes the Common European Asylum System (CEAS) was completed.⁹ Its implementation is therefore now the priority, by means of transposition into the domestic legal orders of Member States, infringement proceedings by the European Commission (when needed) and interpretation of EU asylum legislation by the Court of Justice of the European Union (CJEU). In particular, the lawfulness of EU asylum law requires compliance with international human rights and refugee law. Therefore, the CJEU will have to pronounce itself (as it has already done in the last few years further to the adoption of the first phase of the CEAS) on the interpretation of EU asylum law, including areas covered by the Refugee Convention and international human rights instruments. Furthermore, given the legal basis in the Treaty of Lisbon for the EU to accede to the European Convention on Human Rights (ECHR),¹⁰ the European Court of Human Rights (ECtHR) will soon acquire jurisdiction to examine individual petitions from refugees against the EU itself. Therefore, EU developments, and in particular, the role of the CJEU in setting standards for refugee protection deserve special consideration.

Against this background, the June 2013 Workshop allowed for the presentation and discussion of research exploring the process of law-making and the role of international organizations in the development of legal standards, exploring new trends arising in the context described above. Participants were invited to bring elements for discussion to the

⁸ See H. Lambert, J. McAdam & M. Fullerton (eds.), *The Global Reach of European Refugee Law*, Cambridge, Cambridge University Press, 2013.

⁹ The constitutive elements of the CEAS (second phase) are: Directive 2011/95/EU (see above footnote 6); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 Jun. 2013; Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 Jun. 2013; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 (recast), L 180/31, 29 Jun. 2013; and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on 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 requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 Jun. 2013.

¹⁰ Consolidated version of the Treaty on European Union [2012] OJ C 326/13, 26 Oct. 2012 (entry into force: 1 Dec. 2009), Art. 6(2); European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953).

table, including matters on which they could shed light regarding policy and practice, as well as on which they wanted to have discussion and feedback from the rest of participants. Overall, the main goal of the Workshop was to present the preliminary findings of research in this area and to give the floor to experts from different backgrounds to identify which elements are worth addressing in a discussion on the effective implementation of refugee protection.¹¹ Some of the questions that participants were invited to reflect on included:

1. What are the main challenges for the effective enforcement of refugee protection?
2. Can a trend be identified in the recent case-law of IHRMBs that moves away from *non-refoulement* into areas that overlap with refugee status within the meaning of the Refugee Convention?
3. What role can be played by different actors – such as international organizations, UNHCR, IHRMBs, practitioners and non-governmental organizations – in the effective enforcement of refugee protection?
4. What issues/questions are particularly problematic when addressing issues of enforcement where there is no clearly shared understanding of what international law may impose/require?
5. Which issues/questions would benefit from further academic research?

The Workshop's conclusions stressed the need to continue working in this area of law and to do so in partnership between Academia and beneficiaries of academic research. In this regard, the Workshop concluded that:

1. There is a clear agenda for future work and that it is necessary to advance this vital area of refugee studies.
2. Further research is necessary on the following issues:
 - a. Addressing refugee issues globally and in particular, identifying ways to enhance the normativity and legitimacy of UNHCR's work;
 - b. Exploring ways to incorporate decisions of IHRMBs at national level;
 - c. Conceptualise the work of IHRMBs on the status of refugees that goes beyond the principle of *non-refoulement*;

¹¹ Papers were presented on "The Role of International Organisations and Human Rights Monitoring Bodies in Refugee Protection" (María-Teresa Gil-Bazo), "The Work of the Committee Against Torture on Article 3 Cases" (Fernando M. Mariño Menéndez), "Protection under International Human Rights Law" (Colin Harvey), "Challenges in the implementation of the CEAS" (Xenia Messariti), "Litigation before the Court of Justice of the European Union" (Maria Michelogiannaki, Madeline Garlick and Raza Husain), and "Protection before Regional Human Rights Monitoring Bodies" (Nuala Mole and David James Cantor).

- d. Identifying the interaction between the Refugee Convention and the CEAS;
- e. Exploring the controversial aspects of the Dublin system, such as the exact meaning of a “systemic” deficiency in the operation of the human rights system in the State of destination;
- f. Exploring the scope and meaning of Article 1 of the EU Charter of Fundamental Rights on the right to human dignity;¹²
- g. Exploring the meaning and content of asylum;
- h. Exploring the cross-fertilisation between regional systems and in particular what Europe can learn from the long established Inter-American system for the protection of human rights and its role in refugee protection.

The questions raised by this research project, as expressed in the outcomes of the June 2013 Workshop and this collection of articles, have the potential of opening new ways both conceptually and methodologically for the study of refugee protection under international law in a holistic manner. The articles published in this Special Issue explore some of these questions.

Gil-Bazo's article recalls the IHRMBs contribution to the development and strengthening of the principle of *non-refoulement*. This contribution argues that the work of IHRMBs “has led to the acceptance that protection of the broad categories of refugees covered by international human rights law constitutes a legal obligation (and not merely a discretionary decision) of States under international law”, which in turn has resulted in the adoption of specific complementary instruments at regional level and the promotion of complementary forms of protection by UNHCR. The article further examines some of the recent jurisprudence of IHRMBs where the risk of prohibited treatment arises on account of one of the Refugee Convention grounds for refugee status (namely, race, religion, nationality, membership of a particular social group or political opinion). The article argues that:

[A] trend may be emerging among IHRMBs to enter into the details of the source of the risk of prohibited treatment and in particular to note that such risk may arise for reasons of race, religious beliefs, membership of a particular social group, or political opinion, thus raising questions about the interpretation of the refugee definition in the Refugee Convention undertaken by States Parties and the available means for that

¹² Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009).

State Party to reconcile its obligations both under international human rights law and under international refugee law.

The article argues that compliance with international obligations of States may eventually require that “mechanisms [...] be developed at the domestic level for States to recognize refugee status and to grant asylum to refugees whose protection entitlement has been recognized by IHRMBs when the risk arises on one of the Refugee Convention recognized grounds.” This contribution also examines the jurisprudence of IHRMBs which moves beyond a finding of *non-refoulement* to discuss matters of status and in particular of security of residence. The article suggests that “refugees may have a legal entitlement to membership of the political community by virtue of their strong attachment to the State”. While this may not necessarily take the form of full nationality, the development of strong links between refugees and the State where they find themselves requires the State to provide refugees with a country of asylum, which ultimately and by virtue of international human rights law may become a country of citizenship (understood as the rights and duties of participation of individuals as members of a political community).

Harvey examines the interaction between international refugee law and international human rights law at length, grounding his analysis on the premise that while

[t]he debates that surround the contested interaction between human rights law and refugee law can seem legalistic and odd to anyone who views these legal regimes as rooted in similar humanitarian imperatives. Yet the discussions are of profound significance precisely because they impact on the approach to be taken to current arrangements and future reform.

He explores the recent contribution of IHRMBs in the United Nations system, notably the Human Rights Committee (HRC) established by the International Covenant on Civil and Political Rights,¹³ the Committee on the Elimination of Discrimination against Women established by the Convention on the Elimination of All Forms of Discrimination against Women,¹⁴ and the Committee on the Elimination of Racial Discrimination established by the International Convention on the Elimination of All Forms of Racial Discrimination¹⁵ to core

¹³ International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976).

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 Dec. 1979 (entry into force: 3 Sep. 1981).

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 Mar. 1966 (entry into force: 4 Jan. 1969).

international refugee law elements, such as persecution on the grounds of gender and sexual orientation, and racial discrimination – core elements of the refugee definition – as well as to detention standards and diplomatic assurances. Ultimately, Harvey raises the question of the future response that the law might make to refugee protection and asks if,

Rather than invite the emergence of piecemeal and variable forms of status might there be scope for international refugee law to draw relevant international human rights trends expressly into its domain? Is it time to accept the implications of the advance of human rights and open up the concept of refugee once again so that it reflects the reality of displacement more fully, with all the associated implications for UNHCR and other institutions? Or is the better option to continue to encourage support for the Refugee Convention (properly understood), embed the current definitional framework further (informed by human rights norms) and seek equal treatment for the other complementary or subsidiary forms of protection that emerge?

Mariño Menéndez's dedicated piece considers the contribution of the United Nations Committee against Torture (CAT) to some of the key concepts in international refugee law, suggesting that there is an interesting cross-fertilization between the interpretation of international refugee law core elements and those related to the absolute prohibition of torture and ill treatment within the meaning of the Convention against Torture.¹⁶ He draws from his 12-year experience as a Committee member to discuss the CAT contribution to the concept of persecution, persecution arising from non-state actors, and the internal flight alternative, as well as the use of diplomatic assurances and the cooperation between the CAT and UNHCR. Mariño Menéndez makes the general argument that when a personal, real and foreseeable risk of treatment contrary to Article 3 is proven, "the evidence of a well founded fear of persecution within the meaning of Article 1 of the Refugee Convention [...] is reinforced." He argues that, despite the fact that the prohibition enshrined in Article 3 of the Convention against Torture is literally restricted to torture, in practice the position of the CAT (as expressed in its jurisprudence and General Comments) shows that the distinction between torture and other prohibited forms of ill treatment short of torture is losing relevance. He further argues that the CAT is "increasingly moving towards emphasizing the element of

¹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987).

‘severe pain’ while attaching less significance to the purpose sought in causing such pain” (which is required by Article 1 of the Convention for a conduct to amount to torture).

Both Harvey and Mariño Menéndez address one of the core issues in the debate, namely, the contribution by IHRMBs to the refugee definition. Cantor further elaborates on this idea by examining the positive contribution made by IHRMBs to clarifying the minimum procedural standards applicable to the determination of refugee status. As he notes, the analysis is of interest

since, although the determination of refugee status is essential for the protection of refugees, international law treaties are silent as to its procedural parameters. A practical effect of this silence has been to make it more difficult to identify a firm legal basis on which to substantiate concerns as to the legality or otherwise [of States’ law and practice] based on the idea that claims are “manifestly unfounded”, or from a “safe country of origin”, or allow return to a “safe third country” etc.

He explores the jurisprudence of IHRMBs of both universal and regional scope, in particular, the HRC, the Council of Europe’s ECtHR established by the ECHR,¹⁷ the African Union’s African Commission of Human and Peoples’ Rights established by the African Charter on Human and Peoples’ Rights,¹⁸ as well as the Organization of American States (OAS)’ Inter-American Court of Human Rights, established by the American Convention on Human Rights, and the Inter-American Commission on Human Rights established by the OAS Charter.¹⁹ Cantor then considers standards of due process emerging from the jurisprudence of the bodies considered, such as the right to an individual examination of the claim, the right to have the claim determined by a competent, impartial and independent authority, the right to a fair process of hearing the claim, including access to legal aid where required, access to the information on which decisions are made, the right to appeal with suspensive effect, the links between risk assessment and expulsion, and refugee status determination, as well as the extraterritorial applicability of the right to an effective remedy, such as to boat interceptions on the high seas. Cantor notes that despite the ECtHR’s established case-law that denies the applicability of the fair trial guarantees enshrined in Article 6 ECHR to claims involving

¹⁷ See above footnote 10.

¹⁸ African Charter on Human and Peoples’ Rights, 1520 UNTS 217, 27 June 1981 (entry into force: 21 Oct. 1986).

¹⁹ American Convention on Human Rights, 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1978); and Charter of the Organization of American States, OASTS Nos. 1–C and 61, 1609 UNTS 119, 30 Apr. 1948 (entry into force: 13 Dec. 1961).

refugee status determination, “[o]ne might [...] be tempted to argue that such procedures [...] remain subject to Article 6(1) since they are not a decision about entry, stay or even expulsion, but instead concern the determination of an international civil and political status.” Cantor concludes that:

[There is] little doubt that international human rights law provides important and generally far-reaching procedural parameters for the process of refugee status determination. Indeed, there is a quite considerable degree of convergence between the different bodies of jurisprudence as to the minimum access and due process guarantees that govern refugee status determination procedures [...].

Garlick examines the role of the CJEU. While not an IHRMB, and despite the lack of jurisdiction of the Court to rule on the application of the Refugee Convention, as Garlick notes, the CJEU “is effectively determining the way in which Member States apply the Convention, which can have a significant impact at a global level.” Her article analyses the relationship between the EU’s legal framework on asylum, as interpreted in the CJEU’s case-law (binding on all Member States), and international refugee law standards. Most interestingly, it also considers the interaction between the CJEU and UNHCR in the Court’s case-law. Garlick argues that:

UNHCR’s mandate renders it important for the organization to be able to put its views formally to the CJEU in relevant cases. As the only entity with a legal mandate to supervise the application of the Refugee Convention, UNHCR carries significant authority in relation to the interpretation and application of that instrument. Moreover, [...] UNHCR is in a unique position to ensure that developments and tendencies at international level are reflected in the progressive interpretation and development of EU asylum and refugee law.

Garlick examines the Court’s interpretation of and UNHCR’s contribution to the refugee definition, membership of a particular social group, procedural standards, evidentiary rules, protection for people fleeing indiscriminate violence, and human rights considerations in the transfers of asylum-seekers pursuant the Dublin Regulation in selected cases before the Court. She concludes that:

[The CJEU] is effectively serving as the only supranational court pronouncing upon the application of principles forming part of the Convention, and issuing decisions binding a significant number of Refugee Convention States Parties, which are also

Member States of the EU. These relate not only to the scope of the *non-refoulement* principle, but to other aspects of the Refugee Convention's protection criteria, as well as exclusion, cessation, and the obligation to cooperate with UNHCR in the exercise of its supervisory responsibility for the Convention.

In this context, Garlick raises the question "as to whether and how ways might be explored to enable the Court of Justice to receive UNHCR's views in appropriate cases in a more systematic way."

Several contributions to this Special Issue engage with Chetail's provocative question as to the interaction between international refugee law and international human rights law. He argues that:

[H]uman rights law has radically informed and transformed the distinctive tenets of the Geneva Convention to such an extent that the normative frame of forced migration has been displaced from refugee law to human rights law. As a result of this systemic evolution, the terms of the debate should be inverted: human rights law is *the* primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role.²⁰

The articles in this collection show that this question has a myriad of nuances worth exploring to identify the core elements of an international system of protection for persons forced to flee and seek asylum elsewhere. They ultimately respond to what Harvey identifies as "[t]he legal and political rationale of the entire system [which] is precisely to eliminate the causes of forced displacement, as well as ensuring all persons (wherever located) are treated with dignity and respect." As Mariño Menéndez stresses, "At the core of any action [by the international community] is the fight for the protection of human rights and ultimately, the dignity of every human being."

²⁰ V. Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in R. Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, 19–72, at 22.