

University of Chicago

Human Rights, State Sovereignty and Persecution: Issues in Comparative Refugee Law

Autumn 1998 -Tuesday: 4-6pm. Course No. 577

Jacqueline Bhabha

Required Texts:

1. G. Goodwin-Gill, *The Refugee in International Law (2nd Edition)*, Clarendon Press [1996] [Text 1].
2. United Nations High Commissioner for Refugees [UNHCR], *The State of the World's Refugees*, Oxford University Press [1997] [Text 2].
3. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status , UNHCR [1979] [Text 3].

Books Reserved:

1. K. Musalo, J. Moore and R.A. Boswell, *Refugee Law and Policy: Cases and Materials*, Carolina Academic Press [1997].
2. U.S. Committee for Refugees, World Refugee Survey [1997].
3. James C. Hathaway, *The Law of Refugee Status*, Butterworths,[1991].
4. T.A. Aleinikoff, D.A. Martin and H. Motomura, *Immigration : Process and Policy*, 3rd Edition, West Publishing Co., [1995].

Assigned Materials:

These will be available before and during the course. Primary sources and case materials are included.

Schedule

Week 1: October 6

Overview of the Seminar; the Relationship between State Rights and Individual Rights; the Dynamics of Displacement.

Assignment:

- o H. Arendt , "The Origins of Totalitarianism," [1951] , 268-298.
- o D. A. Martin, "The New Asylum Seekers" in *The New Asylum Seekers: Refugee Law in the 1980s* (1988)
- o UNHCR, Text 2, Preface, Forward, Introduction and Ch 1, *Safeguarding Human Security*, ix - 49.

Sources:

- o Universal Declaration of Human Rights.
- o International Covenant on Civil and Political Rights, Arts 1-27.

Discussion Topics:

- Where should the line between state sovereignty and individual protection be drawn?
- What are basic human rights? What is refugee status a solution to?
- Is the notion of a refugee dependent on and defined by the existence of sovereign nation states?

Week 2: October 13

The definition of a refugee - the evolution of refugee status in international law. The relationship between human rights and refugee law; the distinction between refugees and other migrants.

Assignment:

- G. Goodwin-Gill, Text 1, Ch. 1, "Definition and Description, 3-31.
- A. Shacknove, "Who is a Refugee?" [1985] *95 Ethics* 274 -284
- A. Surhke, "Global Refugee Movements and Strategies of Response" in Aleinikoff and Martin, *Immigration Process and Policy*, 3rd Edition
- A. Zolberg, A. Surhke and S. Aguayo, "Escape from Violence" in *Aleinikoff and Martin, Immigration Policy and Process*.
- D.A. Martin, *The Refugee Concept: On Definition, Politics and the Careful Use of a Scarce Resource*, [1991]

Cases:

- R v Sec. of State for Home Dept ex p. Jeyakumaran [1985]
- 2. Salibian v Minister of Employment and Immigration [1990]

Sources:

- Statute of the Office of the United Nations High Commissioner for Refugees.
- 1951 Convention Art. 1(A)2; 12-34.
- 1967 Protocol

Discussion Topics:

- Is the concept of a refugee outmoded in the post-Cold War era?
- What criteria - cause of or need for flight, or others - should determine access to international protection? How have states sought to narrow the convention definition? Is immediate, life-threatening violence too stringent a requirement?
- Is the requirement that an asylum applicant be targetted for persecution coherent?

Week 3: October 20

Comparative Refugee Law and Policy Part I - U.S. Policy and Process

Assignment:

- UNCHR, Text 2, Ch.5, "The Asylum Dilemma," 183-223.
- T.A. Aleinikoff, D.A. Martin & H. Motomura, "Refugees and Political Asylum" in ed. Aleinikoff, Martin & Motomura, *Immigration and Citizenship: Policy and Process* (4th Ed.) 1003 -1039; 1154-1161.
- K. Musalo, J. Moore and R.A. Boswell, *Refugee Law and Policy* (1996), "U.S. Law and International Norms", 82-130.

Sources:

Excerpts from C.F.R. Para 208: 'Procedures for Asylum and Withholding of Deportation'.

Discussion Topics:

- Do foreign policy considerations still affect U.S. refugee policy and practice?
- What does *Sale v Haitian Centers Council* indicate about the relation between international and domestic law?
- 'Increasing Restrictionism in Immigration Breeds Asylum Abuse, False Documents and Trafficking Rings.' Is there a way out of this that does not violate international law?

Week 4: October 27

Comparative Refugee Law and Policy Part II: Europe and Africa

Assignment:

- UNHCR, Text 2, Ch.2, "Defending Refugee Rights", 51-97.
- G. Goodwin-Gill, Text 1, Ch.8 (part) and Ch.9 (part) , "Treaty Standards" and "Protection in Municipal Law", 311 - 348.
- Minority Rights Group International, *Refugees in Europe: The Hostile New Agenda (1997)*
- Lawyers Committee for Human Rights, *African Exodus - Refugee Crisis, Human Rights and the 1969 OAU Convention (1995)*.
- T. Maluwa, "The Refugee Problem and the Quest for Peace and Security in Southern Africa".

Sources:

- 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, Text 1, 454-463.
- 1990 Convention on the Application of the Schengen Agreement (Extracts), Text 1, 464-470.
- EU London Resolution on Harmonised Approach to Questions Concerning Host Third Countries.
- EU Conclusion on Countries in which there is generally no serious risk of persecution.
- 969 OAU Convention on the Specific Aspects of Refugee Problems in Africa. Text 1, 429-434.

Discussion Topics:

- Identify the principal similarities between the U.S. and European asylum systems - do they offer the bona fide asylum seeker equal chances of effective protection? What are the most significant differences? On current trends does it appear as if the U.S. is following the European lead or vice versa?
- What are the principle differences between the 1951 Convention and the OAU Convention?
- Has the idealism of the OAU Convention been implemented in current practice? How should a (relatively) prosperous state like South Africa approach the question of group eligibility for asylum given the scale of African problems?

Week 5: November 3

The central concepts : 'well-founded fear of persecution'; subjective vs objective criteria of fear; international convergence on the standard of proof; the meaning of persecution

Assignment:

- UNHCR, Text 3, 9 - 25.
- G. Goodwin-Gill, Text 1, 34 - 59; 66 -79.
- K. Musalo et al., excerpts re 'credible fear standard' and past persecution.
- J.C. Hathaway, "Persecution", *The Law of Refugee Status (1991)*
- D.A. Martin, "Book Review of *The Law of Refugee Status*" 87 *Am.J. Intl L* (1993)

- T.A.Aleinikoff, "The Meaning of Persecution" in *US Asylum Law* 5 - 13.

Cases:

- INS V Stevic
- INS v Cardoza-Fonseca
- Matter of Mogharrabi
- R v Sec. of St. for Home Dept ex p Sivakumaran:
- Matter of Chan
- Guo v Carroll
- Kovac v INS
- Borca v INS

Sources:

- European Union "London Resolution on Manifestly Unfounded applications for Asylum" (1992)

Discussion Topics:

- The actual wording of s 243(h) is 'life or freedom would be threatened'. Which standard of proof does that correspond to (a) in terms of 'plain language', (b) in terms of the caselaw? How should the credible fear standard be understood and applied?
- When if at all can forced compliance with the law of a country amount to persecution? If so does any concept of state sovereignty survive?
- Can economic harms amount to persecution?

Week 6: November 10

Persecution on Account of Political Opinion

Assignment:

- C.P. Blum, 'License to Kill: Asylum law and the Principle of Legitimate Government authority to 'investigate its enemies'.
- Canadian Immigration and Refugee Board, New Guidelines on Refugee Claims Related to Civilian Non-Combatants Fearing Persecution in Civil War Situations

Cases:

- INS v Elias Zacharias
- Bolanos-Hernandez v INS
- Matter of Maldonado-Cruz
- Matter of Izatula
- Singh v Ilchert
- Dwomoh v Sava
- In re S ..P..
- In re D.V.

Discussion Topics:

- Is neutrality a political opinion?
- Terrorist v criminal : how should one distinguish between legitimate criminal prosecution and government persecution?
- What special problems arise in applying refugee standards in civil war situations?
- When is a government unable to control a non-state persecuting group?

Week 7 -November 18

Persecution on Account of Social Group

Assignment:

- What is a social group?
- *Morato v Min for Immigration, Local Government and Ethnic Affairs* (Australia)
- *Sec St. for Home Dept v Savchenkov* (UK) - Claims based on Gender.
- INS Memorandum: 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women', May 26 1995.
- J. Bhabha, 'Embodied Rights: Gender Persecution, State Sovereignty and Refugees.
- A. Helton and A. Nicoll, 'Female Genital Mutilation as Ground for Asylum in the US'.

Cases:

- Homosexuality:
 - *Golchin v Sec. of State for Home Dept*
 - *Matter of Toboso-Alfonso*
 - *In Re Inaudi*
- Gender:
 - *Gilani*
 - *Campos-Guardado v INS*
 - *Lazo-Majano v INS*
 - *Fatin v INS*
 - *Fisher I*
 - *Fisher II*
- Domestic Violence:
 - *In the Matter of A and Z*
- Female Genital Mutilation:
 - *In Re Fauziya Kasinga*

Discussion Topics:

- Would it make a difference if gender were added to the list of persecution grounds?
- Is asylum an appropriate response to domestic violence, FGM, population policies?
- How can/should one decide what is 'fundamental to someone's identity'?

Week 8: November 25, 1998

Cessation and Exclusion Clauses, Political Offences, Terrorism.

Assignment:

- J.C. Hathaway. 'Cessation and Exclusion', *The Law of Refugee Status*

Optional:

- Note, 'From Treblinka to the Killing Fields: Excluding Persecutors from the Definition of "Refugee" ' [1987] 27 *Va. J. Intl L.* 823.

Sources:

- International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind.
- UNHCR Handbook,

Cases:

- Terrorism:
 - Matter of McMullen
 - McMullen v INS
 - T V Sec St Home Dept
 - In the Matter of Pearson
- Prosecution v Persecution:
 - Bastianpour v INS
 - Sadeghi v INS

Discussion Topics:

- What is the distinction between a 'political' and a 'non-political' offence?
- Do the victims of 'terrorist' acts make a difference to the nature of the acts?
- Can involuntary acts constitute 'assistance in persecution' and should they disqualify applicants from asylum? What is the appropriate standard?

Week 9: December 2

Recent trends in international refugee legislation, litigation and policy; the concept of temporary protection

Assignment:

- UNHCR, The State of the World's Refugee- The Challenge of Protection [1993], UNHCR, 1-29.
- U.S. Committee for Refugees, World Refugee Survey 1997 (1997) 2-19.
- A. Shacknove, 'From Asylum to Containment', [1993] 5 Intl J.Ref.L., 516 -533.
- J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" [1990] 31 *Harvard Intl L. J.*, 166-183.
- Amnesty International, *Playing Human Pinball* (1995).
- J.C. Hathaway, "Can International Refugee Law Be Made Relevant Again?" *World Refugee Survey*, 1996.
- J. Fitzpatrick, "Revitalizing the 1951 Convention" [1996] 9 *Harvard Hum. R. J.* 228-253.
- B. Frelick, "Assistance Without Protection", *World Refugee Survey 1997*, 24-33.

Cases:

- Committee Against Torture, Tahir Hussain Khan v Canada, November 18, 1994
- European Court of Human Rights, Chahal v UK extracts

Sources:

- 1967 UN Declaration on Territorial Asylum
- 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Extracts]

Discussion Topics:

- How powerful is international law in the field of refugee protection? Identify the main strengths and weaknesses of the current international regime in ensuring implementation.
- Are the concepts of 'temporary protection' and 'safe haven' a supplement or a substitute for refugee protection as traditionally conceived?