

Protection of Refugees and Minorities

Hans-Joachim Heintze and Charlotte Lülf

1 Introduction

The right to humane treatment entails the entitlement of the civilian population to receive humanitarian assistance. If a conflict party does not provide civilians under its control with relief supplies, humanitarian and impartial relief actions shall be undertaken, without any adverse distinction between civilians. This applies more or less to all armed conflicts and also in peacetime in the event of natural disasters. The International Disaster Response Law Guidelines of the International Federation of the Red Cross (IFRC) similarly state that in disaster situations, when the affected State determines that a disaster situation exceeds national coping capacities, that State's government should seek international and/or regional assistance to address the needs of affected persons.¹

Any humanitarian assistance must address the special needs of vulnerable groups. This entails, on the one hand, a prohibition on discrimination and, on the other hand, positive measures to meet the special requirements of such groups. Refugee and Minority law are two distinct fields of Public International Law that govern the protection of certain defined vulnerable individuals and groups. Their protection, in law and in the field, has been a challenge for humanitarian action and beyond, not solely due to practical obstacles but also due to the disputed scope of their legal entitlements. The evolution of the two fields has started decades ago, both on the international and regional levels, the protection of their beneficiaries is widely codified, and the pertinent legal instruments are being monitored by

¹International Federation of the Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, 2007.

H.-J. Heintze • C. Lülf (✉)
Ruhr University Bochum, Bochum, Germany
e-mail: Hans-Joachim.Heintze@rub.de; charlotte.luelf@ruhr-uni-bochum.de

national, regional and international actors and build the normative foundation for protection measures in the field. Yet, contemporary developments again reflect the difficulties to implement existing legal obligations and the disputes about their scope of application. Against this background, the chapter provides an introduction into the development of the two fields of law and their most prominent instruments and offers an overview on substantive rights as well as regional developments.

2 International Refugee Law

With the changing nature of armed conflicts, large-scale natural disasters and the economic struggle of countries, new displacement patterns have emerged that challenge the traditional architecture of the international legal system and the responsibility of States towards citizens and aliens.

The legal debate has always been strongly influenced by the classical separation of people with refugee status under the Convention on the Status of Refugees of 28 July 1951 (hereafter Refugee Convention) and the wide range of displaced persons leaving their State of origin due to generalised situations of violence, environmental change or economic downfall, all of which are not commonly covered by the Refugee Convention. Due to the absence of a comprehensive migration law branch, the situation of these migrants is considered under HRL or international labour law but not under refugee law. This separation between the two branches was mirrored in the work and mandate of the United Nations High Commissioner for Refugees (UNHCR) and its counterpart, the International Organization for Migration (IOM). However, the last decades have proven that no easy distinction between voluntary and involuntary displacements can be made, and the distinction between those that fulfil the definition of international refugee law and those that do not is blurred in practice.

Apart from the international protection established, States have made use of regional international law and national domestic mechanisms to temporarily adopt protection measures in cases of serious natural disasters or armed conflict situations that expand the scope of protection for persons in flight, albeit geographically limited.²

2.1 *The Historical Development of International Refugee Law*

Refugee protection became a matter of international politics and international law for the first time in the early twentieth century.³ While people fleeing their home

²See McAdam (2005), McAdam (2012) and Plender and Mole (2000).

³Hathaway (2012), p. 177.

countries had previously been protected by various national laws concerning aliens, a systematic international framework was envisaged only in the aftermath of World War I. The League of Nations addressed the issue of migration and refugees during the 1920s and established an Office of the High Commissioner for Russian Refugees and a High Commissioner for Refugees Coming from Germany.⁴

Following the dismantling of the League of Nations due to its inability to ensure peace and security, the Allied Forces took the initiative of establishing a United Nations Relief and Rehabilitation Administration in 1944 and an International Refugee Organization in 1947.⁵

The events of World War II, as well as the emerging Cold War, strengthened the idea that the international community would need to assume responsibility for the protection of fundamental rights if States failed in their responsibility towards their citizens. With the Universal Declaration of Human Rights of 1948 codifying that *everyone has the right to seek and to enjoy in other countries asylum from persecution* (Article 14 (1)), the commitment and objective to institutionalise assistance was further strengthened.

The roots of the contemporary refugee protection framework lie in the establishment of the Office of the UNHCR. With its statute annexed to United Nations General Assembly (UNGA) Resolution 428 (V) of December 1949, this body was founded to address the massive numbers of displaced persons following World War II on a temporary basis. With the adoption of the 1951 Refugee Convention, the main legal instrument and cornerstone of the refugee law framework was drafted and entered into force. These post-war developments still form the basis of today's international refugee framework.

2.2 *Legal Instruments and Sources of Refugee Protection*

The 1951 Refugee Convention is the universally applicable cornerstone of international refugee law that establishes primary standards for people deprived of the benefits of nationality and citizenship. It is considered to *represent a milestone in the emergence of a global will to address problems of forced displacement*.⁶ Apart from classical refugee law, the framework interacts considerably with cognate fields of international law (PIL), in particular HRL, IHL and ICL,⁷ all of which are discussed in the various chapters of this textbook.

⁴First international instruments were drafted such as the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees, followed by the 1933 Convention relating to the International Status of Refugees.

⁵UNHCR, An Introduction to International Protection, 1 August 2005, www.unhcr.org/3ae6bd5a0.pdf.

⁶*Id.*, p. 9.

⁷Relevant treaties include *inter alia* the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the International Bill of Rights or the 1949 Geneva Conventions.

The 1967 Protocol to the Refugee Convention marked a critical shift in the evolution of refugee law insofar as it lifted the temporal and geographical limitations initially contained in the Refugee Convention. Until 1967, its application was limited to refugees fleeing before 1951 and events occurring in Europe. At the time of writing, the Convention and the Protocol have been ratified by 145 and 146 States, respectively.⁸

Apart from the Refugee Convention, regional initiatives to address specific geo-political issues of displacement have resulted in the drafting and entry into force of further treaties and declarations.⁹ These include the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems following Decolonisation in Africa in the late 1950s, the 1984 Cartagena Declaration for Latin American Countries or the Bangkok Principles of 1966, revised in 2001. Although both latter documents are legally non-binding, most countries in the respective regions do apply them and have incorporated their provisions into national legislation.¹⁰ In Europe, the Council of Europe in particular has acted as a pioneer in the development of refugee and asylum law through its recommendations and resolutions.¹¹ Furthermore, the European Union (EU) has established a unique supranational framework of harmonised asylum laws. Article 78 of the Treaty on the Functioning of the European Union codifies the goal to establish a common policy on asylum, subsidiary protection and temporary protection in accordance with the Refugee Convention, including a common status, procedures and standards. These are further elaborated by the various instruments of secondary law such as the directives on qualification, reception conditions, procedures, return and the Dublin regulations.¹²

These conventions are complemented by fundamental principles of refugee law of customary nature, such as the principle of non-refoulement as well as by other

⁸See for a list of ratifications and signatures, UN Treaty Collections Database, http://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en.

⁹Still supported development, see *The Executive Committee encourages States and UNHCR to continue to promote, where relevant, regional initiatives for refugee protection and durable solutions, and to ensure that regional standards which are developed conform fully with universally recognized protection standards and respond to particular regional circumstances and protection needs*. UNHCR, Executive Committee Conclusions, General Conclusion on International Protection, 17 October 1997, N° 81 (k).

¹⁰UNHCR, *Protecting Refugees: A Field Guide for NGOs*, p. 17.

¹¹See the 1947 Resolution on Asylum to Persons in Danger of Persecution, the 1980 European Agreement on Transfer of Responsibility for Refugees, the 1981 Recommendation to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees or the European Convention on Human Rights.

¹²For more information on the EU asylum instruments, see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm. For more on the interaction of international refugee law and European asylum law, see Battjes (2006).

soft law instruments,¹³ such as UNGA resolutions, for example the Declaration on Territorial Asylum 2312 (XXII) of 14 December 1967,¹⁴ and the conclusions of UNHCR's governing Executive Committee. Although some principles and regulations are specifically designed to address refugee matters, most of the protection awarded finds its counterpart in HRL, for instance the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights.¹⁵

2.3 *Refugees in International Law*

As the international framework centres on the Refugee Convention, its legal definition of the term refugee must be examined. To be eligible for protection as a refugee under the Convention and its Protocol, a person must fulfil the criteria set forth in Article 1 A(2) Refugee Convention, which stipulates that a refugee is any person who

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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 event, is unable or, owing to such fear, is unwilling to return to it.

The definition encompasses six elements.¹⁶

Alienage, *being outside of the country of nationality* or *being outside of the country of his former habitual residence*, distinguishes *de jure* refugees from internally displaced people (IDPs) and marks the shift of factual responsibility from the State of origin to the receiving host State. This element is interpreted to include, both, persons fleeing owing to fear of being persecuted as well as *sur place refugees*, people whose fear of persecution in case of return developed while already being outside of their country of origin.¹⁷

¹³Soft law mechanisms in the field of refugee protection include the London Declaration of International Law Principles on Internally Displaced Persons (2000) and the Guiding Principles on Internal Displacement (1998).

¹⁴A prominent example is the 1967 UN General Assembly Resolution on Territorial Asylum, reiterating people's right to seek asylum and the granting of such as a humanitarian and non-political act.

¹⁵Right to life, liberty and security of person, freedom from torture, or cruel, inhuman and degrading treatment or punishment, freedom from arbitrary arrest and detention, to name just a few.

¹⁶For a detailed assessment and clarification of the elements, see UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Geneva, 1992, <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

¹⁷Hathaway (2012), p. 184.

The refugee's fear of persecution entails both a subjective and objective element.¹⁸ The Refugee Convention does not define persecutory acts, which may include a wide range of conduct and deprivation of basic civil and political rights such as torture, assault, detention or other restriction of political or social expression.¹⁹ Persecution is a potential or actual violation of life, freedom or other substantive rights of a person.²⁰ The actors carrying out persecution in the Refugee Convention's scope include both State and non-State agents.²¹ Situations in which States prove unable or unwilling to prevent persecution by others are also comprised. The five grounds for persecution limit the application of the Refugee Convention to persecution *on account of* a specific discriminatory nature. Although the grounds can overlap, they establish an exhaustive list, and no other discriminatory grounds than those explicitly stated trigger the definition and the protection regime.

Persecution based on race covers all identifiable ethnic groupings, while persecution for religion reasons targets persons because of their belief system or its manifestation in the public and private sphere. The criterion of nationality concerns grounds based on memberships to ethnic, religious, cultural or linguistic communities. In particular, with regard to social groups and holders of a certain political opinion, advances have been made over recent years to expand the scope of these categories through jurisprudence and adjustment to modern needs.²² Social groups are identified by sharing a common characteristic or by being perceived as sharing one. The substance of the ground of political opinion can be deduced from, *inter alia*, Article 19 of the Universal Declaration and Article 19 of the ICCPR and should be interpreted broadly.²³ Typically it relates to holding views that oppose the State, the government or public policies.²⁴

Other additional grounds for fleeing one's home country motivated by economic reasons or environmental disasters are not covered by the Refugee Convention and will only trigger refugee protection if occurring in conjunction with one of its five grounds.

¹⁸For more details, see: The Michigan Guidelines on Well-Founded Fear, University of Michigan Law School, March 2004, <http://www.refugee.org.nz/fear.html>.

¹⁹Goodwin-Gill (1998), pp. 66 f.

²⁰D. Kugelmann, Refugees, 2010, p. 2, <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e866?rskey=06ax1f&result=1&prd=EPIL>.

²¹*Id.*, pp. 70 f.

²²See Hathaway (2012), p. 178 and more detailed studies on jurisprudential developments in Coll and Bhabha (eds) (1992), Lambert (1995) and Symes and Jorro (2003).

²³*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers* (Art. 19 Universal Declaration of Human Rights).

²⁴Goodwin-Gill (1998), p. 49.

Refugees must be distinguished from IDPs,²⁵ or other types of migrants, including people fleeing natural disasters or generalised violence in their countries of origin. Although not covered by the Refugee Convention, certain other groups are, nonetheless, considered by the UNHCR as persons of concern. Over the last decades, UNHCR's mandate has been extended by the UNGA to cover not only refugees but also IDPs, stateless persons, people fleeing conflict or serious disturbances of public order, as well as returnees and include them in the operational protection scheme of the Office.²⁶

2.4 *Exceptions to Refugee Protection*

While the inclusion clause of Article 1A Refugee Convention establishes criteria to identify persons coming within its scope, Articles 1D and 1E contain exclusion clauses limiting refugee eligibility.²⁷ This clause refers to persons that would normally qualify as refugees but are denied protection, either because they are protected through a specialised organisation such as the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) or because of full protection by their country of residence. Article 1F provides for the exclusion of refugee status for persons who have committed an international crime, such as war crimes, or crimes against humanity; who have committed a serious non-political crime outside the country of refuge prior to being admitted to the country as a refugee; or who are guilty of acts contrary to the principles and purposes of the UN.²⁸

These grounds are exhaustive and to be applied restrictively.²⁹ International refugee law was designed to temporarily shift the responsibility of protection from

²⁵IDPs are defined in the 1998 guiding principles on internal displacement as *person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognized State border.*

²⁶UNHCR, Note on the Mandate of the High Commissioner for Refugees and His Office, <http://www.unhcr.org/526a22cb6.html>.

²⁷G. Gilbert, Current Issues in the Application of the Exclusion Clauses, in: Feller et al. (eds) (2003).

²⁸These crimes include crimes against the peace, war crimes, crimes against humanity; serious non-political crimes or acts contrary to the purposes and principles of the UN. For more information see Hathaway (2012), p. 189.

²⁹On Terrorism: US Department of Justice, Office of the Attorney General, Matter of S-K-, 23 I&N 936 (BIA 2006); War Crime and Crimes against Humanity: United States Supreme Court, *Negusie v. Holder*, 555 U.S. 511, 2009; Grand Chamber of the Court of Justice of the European Union, Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v. B und D*, 9 November 2010, ECR I-000; Particularly serious crime: UK High Court, R (on the application of) ABC (a minor) (Afghanistan) v. Secretary of State for the Home Department, 6 December 2011, EWHC 2937.

the home State to the host State for as long as the former State or the State of habitual residence is unable or unwilling to ensure protection. Therefore, the 1951 Convention in Article 1C contains a cessation clause, terminating refugee status and therewith protection, if persons voluntarily accept the protection of their country of origin, reacquire the nationality of their home State after having been stripped of it, acquire a new nationality and therewith protection of that State, voluntarily re-establish themselves in the country from which they fled or the circumstances leading to recognition as refugees have otherwise ceased to exist.³⁰

Large-scale displacement in Asia and Africa has led to consensus on the drafting of regional refugee instruments designed to address the specific situation of refugees and other forced migrants.³¹ Consequently, both the OAU Convention as well as the Cartagena Declaration expand the definition of refugee to include persons who

owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin or nationality, [are] compelled to leave [their] place of habitual residence in order to seek refuge in another place outside [their] country of origin or nationality³²

and

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.³³

While these regional treaties and declarations are limited in their geographical scope, they extend the personal scope of application and thereby encompass a much broader group of protectees.

2.5 *The Rights of Refugees*

According refugee rights protection rights is attributed to the inherent nature of being a refugee and not dependent on a formal determination of the refugee status: *Recognition of his refugee status does not (. . .) make him a refugee but declared*

³⁰UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Geneva, 1992, <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>, p. 18.

³¹Arboleda (1991), pp. 185–207.

³²Art 1 (2) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf.

³³Conclusion 3 Cartagena Declaration on Refugees, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

*him to be one. He does not become a refugee because of recognition, but he is recognized because he is a refugee.*³⁴

The rights codified in Articles 2, 3 and 4 Refugee Convention, however, distinguish between different levels of entitlement, i.e., for refugees under a State's jurisdiction, refugees physically present in the State's territory, refugees lawfully present, refugees lawfully staying and refugees durably resident in the receiving State.³⁵

The basic obligation flowing from the Refugee Convention is the principle of non-refoulement contained in Article 33, which forbids States from returning refugees to *frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

Beyond the principle of non-refoulement, the fundamental rights established for refugees are heavily intertwined with and mirrored in HRL.³⁶ Refugees, generally, enjoy comparable rights to regular citizens of the receiving State concerning social security, labour or assistance as laid down in Articles 23 and 25 Refugee Convention. Further rights include the right to freedom of movement and the receiving State's obligation to issue travel documents; the right to liberty and security of the person, discussed in particular with regard to the detention of asylum seekers; and the right to family life, access to courts, regulations on employment and welfare, such as housing and public education.

3 Implementation and Enforcement of Refugee Law

International refugee law primarily establishes binding obligations for the signatory States of the relevant legal conventions based on international treaty law and the general principle of *pacta sunt servanda*—treaties are binding and must be performed in good faith.³⁷

Obligations of States include cooperation with the UNHCR, in accordance with Article 35 Refugee Convention and Article 2 of its 1967 Protocol. Parties to the Convention and Protocol are obliged to cooperate with the UNHCR in the exercise of its functions and the implementation of the treaty. Furthermore, States parties need to inform the UNHCR about the national legislation that they have adopted to

³⁴UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Geneva, 1992, <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>, p. 28.

³⁵Hathaway (2005), pp. 154 ff.

³⁶See in detail, E. Lauterbach/D. Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, in: Feller et al. (eds) (2003); UNHCR, UNHCR Note on the Principle of Non-Refoulement, November 1997, <http://www.refworld.org/docid/438c6d972.html>.

³⁷Art. 26, Vienna Convention on the Law of Treaties.

ensure the implementation of the Convention.³⁸ While the UNHCR monitors the implementation of the Refugee Convention, the Office also works on durable solutions to end the displacement cycle. These durable solutions for refugees include voluntary repatriation, the return in safety and dignity to countries of origin, local integration to the host community or resettlement to a third State that is willing to admit them on a permanent basis.

Typically, the determination of refugee status is conducted by the national authorities of the receiving State, which leads to a diversity of different procedures and regulations. There are, furthermore, countries that are either not signatories of the Refugee Convention and its Protocol or unable to address and process asylum claims.³⁹ In these cases, the UNHCR carries out these determinations through its field offices.

Under normal conditions, asylum claims are processed on an individual basis. However, in certain cases of mass influx, single nation States and also the UNCHR will afford *prima facie* refugee status to members of the group as it was the case with people from southern and central Iraq or people fleeing the Syrian conflict.⁴⁰

Some States and regions, most importantly the EU, have drafted common standards to unify and harmonise their legislation as regards immigration. However, even in the highly communitarized EU, the implementation of EU asylum law within the member States is not uniform. The principles regulating the European mechanisms have been heavily criticised as enabling the European States to circumvent their obligations towards refugees by outsourcing and offshoring their border and migration control mechanisms, and the legal instruments of the Common European Asylum System are under the constant scrutiny of national and regional courts, the UNHCR and NGOs working in the field of migration and refugee protection.

4 Minority Rights

Ethnic conflicts constitute serious threats to the peace and stability of international relations. The violent conflicts during the separation of Yugoslavia and the successor States of the Soviet Union are an indicator of the danger inherent in ethnic conflicts and the suppression of minorities. Due to political abuse of ethnic tensions, thousands of lives have been lost and millions of people have been forced to flee their homes. To address these recurring situations and crises, the international

³⁸For a detailed analysis of the supervisory responsibilities of the UNHCR, see W. Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, in: Feller et al. (eds) (2003).

³⁹Non-signatories include Afghanistan, Eritrea, India, Iraq, Lebanon, Libya, Pakistan, Syria and Ukraine among others.

⁴⁰UNHCR, *Resettlement Handbook*, Geneva 2011, p. 77.

community and regional initiatives have codified specific legal protections for minorities.

4.1 Historical Development

Historical examples justify the consideration of minorities as vulnerable groups and therefore give them special importance in humanitarian crises and special attention by humanitarian action. Further, from a legal perspective, minority conflicts are not just internal affairs of States because they often disrupt regional peace and stability. Hence, a whole body of international law addresses minority rights.

After World War I, minority protection was internationalised by a system of peace treaties and the League of Nations because not all European peoples were able to exercise their right to self-determination and to establish their own independent States. Instead, the victorious powers formed multi-ethnic States like Czechoslovakia and Yugoslavia. To mitigate the consequences of the non-implementation of American President Wilson's Fourteen Points, which aimed to guarantee political independence and territorial integrity of all States, they decided to establish a minority protection system through several post-World War I treaties. It is often seen as an effort to satisfy minorities whose claims to self-determination had not been realised.

These territorial adjustments created new minorities in the newly established States. The concept of minority protection was seen as the second-best solution and resulted in the victorious powers concluding five minority treaties and four peace treaties that were tailored towards the specific situation within these States.

However, the precondition for the success of these minority norms was a readiness by States to cooperate. Following World War I, European States were not ready for the intensive international cooperation that was required to make the treaties work, insisting on sovereignty and a path of intolerant nationalism. Under these conditions, the envisaged minority protection system was untenable and consequently collapsed.⁴¹

Concerning the legal method applied in the minority and peace treaties after World War I, the treatment of minorities was addressed in terms of collective rights. Many provisions had group dimensions by conferring rights upon minority organisations. This approach was later misused by the Nazis to justify their territorial expansion into Czechoslovakia.

Against this historical background, States rejected any protection system for minorities in the post-World War II period. According to the new UN approach, minority rights became part of the system of human rights protection. In the 1950s, the UN considered the effective protection against discrimination in combination with general human rights a sufficient framework to ensure minority rights. The

⁴¹Eide (2005), p. 36.

dominant motivation for this was the fear of nationalist and secessionist movements. Some States also argued that according rights to certain groups would have negative consequences for the society, as well as minorities themselves. Special minority status, it was thought, would hinder nation building by putting entire groups in a separate category. However, in 1953, while the ICCPR was drafted, the UN Human Rights Commission began work on an article for the protection of minorities. The idea was to amend the provisions concerning human rights and non-discrimination by including an article on minority specific rights. The result of these discussions now constitutes Article 27 ICCPR, which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

4.2 *Holders of Minority Rights*

The wording of Article 27 ICCPR has given rise to many problems of interpretation, especially because the rights that the norm mentions are not available to the minorities as group rights.

Instead, the holders of these rights are individuals belonging to minorities. This constitutes a renunciation of the traditional approach of according groups collective rights. The switch was justified with the claim that minorities were subjects not of international but of domestic law.⁴² The formulation is in line with the human rights approach of the ICCPR because human rights are individual rights.

However, Article 27 contains a collective element, reflected in the passage *in community with the other members of their group*. Thus, many scholars argue that the article may still be regarded as protecting a collective right.⁴³ At least, certain rights may be thought of in part as collective rights exercisable individually.⁴⁴ It is quite obvious that cultural rights require the recognition of collective rights since traditions and institutions can be kept only by a group as such.⁴⁵ The Human Rights Committee explains the supplementary quality of Article 27, which protects persons belonging to minority groups in addition to the rights the ICCPR grants to all individuals in general. The Committee argues in its General Comment 23 that this protection

is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society

⁴²Nowak (1993), p. 495.

⁴³Sieghart (1983), p. 377.

⁴⁴Thornberry (1992), pp. 173–176.

⁴⁵Hailbronner (1992), p. 133.

as a whole. Accordingly [...] these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant.⁴⁶

Another issue of interpretation concerns the role of the State. According to the wording of Article 27 ICCPR, it is the State that must not deny the right of persons to enjoy their own culture. In this way, the State protects the existence of cultural communities. Ultimately, however, it is up to the State to determine which groups constitute minorities because there is still no generally accepted definition of a minority in PIL. The term is defined neither by Article 27 ICCPR nor by the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Therefore, States maintain a high level of discretion and a considerable margin of appreciation in according minority status to groups and employ the concept in different ways.

Minority rights instruments do not clarify who can identify the relevant groups or determine which individuals belong to them. This power of the State contradicts the human right to self-identification, both at a group and personal level.

In PIL, it is sometimes controversial whether a group qualifies as a minority, evidencing a need for clear criteria. Some definitions discussed by academia containing the essential characteristics of minorities may help. These definitions have gained wide acceptance as the report of UN Special Rapporteur on the Prevention of Discrimination and Protection of Minorities, Francesco Capotorti, confirms.

Capotorti refers to objective and subjective characteristics.⁴⁷ An objective criterion for a minority is the existence of a population group with ethnic, religious or linguistic features that differ from the rest of the population. This group must be less numerous than the rest of the population in a multinational society. Being a non-dominant group in society is another objective criterion to constitute a minority. Dominant minorities are not vulnerable and therefore not entitled to special protection. The third criterion is that the members of the minority hold the citizenship of their country of residence, as well as long-standing ties with that State. Some experts criticise this last criterion and also consider immigrant groups as minorities because the enjoyment of minority rights, as with human rights generally, should not be narrowed by a nationality requirement. The Human Rights Committee, for its part, has denounced the nationality requirement in its General Comment 23. Just as members of minority groups need not be citizens, they need not be permanent residents: *Thus, migrant workers or even visitors constituting such minorities are entitled not to be denied the exercise of those rights* (Paragraph 5.2). While the inclusion of migrant workers was welcomed in the literature, such an inclusion was seen as unrealistic and difficult to defend.⁴⁸

⁴⁶Human Rights Committee, General Comment No. 23, Art. 27, 6 April 1994, UN-Doc. CCPR/C/21/Rev.1/Add.5.

⁴⁷F. Capotorti, Study on the Rights of the Persons Belonging to Ethnic, Religious and Linguistic Minorities, 1979, UN-Doc. E/CN.4/Sub.2/384/Rev.1.

⁴⁸Henrard, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e847?rskey=W2t5z2&result=1&prd=EPIL>, para. 11.

The objective criteria are supplemented by a subjective one, which requires that the person concerned wishes to preserve his or her minority identity. This approach is consistent with the human rights dimension of minority protection and leads to the consequence that a person can choose to assimilate. However, the precondition is the decision of the person to choose freely to be treated as a member of the minority group or not. To avoid State abuse, it should not too easily be accepted that a group or person does not want to hold on to the minority identity.

4.3 Content of Minority Rights

The Human Rights Committee's General Comment 23 gives an impressive interpretation of the obligations of States:

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

Article 27 ICCPR outlaws discrimination against persons belonging to minorities and provides them protection and special rights. The goal is to secure the cultural survival of the minorities and to undertake specific protective measures according to the specific situation. States are obliged to provide assistance, including financial support, to ensure the survival of minorities. The following minority rights are of special importance:

- use of a minority language by members of the minority group and among themselves;
- publication of newspapers and books;
- use of a minority language to publicly express views;
- establishment of institutions such as schools and cultural organisations;
- effective opportunities for children to acquaint themselves fully with the language and culture of their group; and
- effective exercise of all fundamental human rights without discrimination.

Minorities must be ensured substantive equality and safeguarding of their minority identity. This means not only formal equality by treating everybody exactly the same but also considering all relevant circumstances. This may at times also justify differential treatment. The 1992 UN Declaration emphasises more explicitly the rights to identity and to substantive equality. The document moves away from the negative formulation of Article 27 ICCPR and avoids clauses like 'where possible' and 'where appropriate', which were used by States as excuses for inactivity in the promotion of minority rights. While the Declaration is not legally binding, it is of political importance and underlines the political interest of the international community to realise all human rights for everybody.

5 The European Dimension of Minority Protection

The dissolution of both the Soviet Union and Yugoslavia were accompanied by bloody confrontations. Violations of minority rights were one of the grounds for the hostilities. It became obvious that Europe was in need of new instruments in the field of minority protection. The Organization for Security and Co-Operation in Europe (OSCE) was a pioneer in this regard at the end of the Cold War.

A breakthrough was the Concluding Document of the Copenhagen Meeting of the then Conference on the Human Dimension of the then Commission on Security and Cooperation in Europe (CSCE) of 29 June 1990, which combined principles of democracy and positive obligations on States to protect and promote minority identities. During the CSCE meeting in 1990, it was recognised that the treatment of minorities was directly relevant to stability in Europe. In 1992, the Netherlands made a revolutionary proposal for the establishment of the post of the CSCE High Commissioner on National Minorities (HCNM). The respect for minority rights is in principle no longer exclusively an internal affair of the OSCE States. While the HCNM is not intended to side with minorities, the institution can act as an instrument of early warning and conflict resolution.

This legal situation is underscored by general PIL, which also recognises the rights of the suppressed to resist massive violations of minority rights, such as serious discrimination. Under these circumstances, the affected national minority can be entitled to make use of its right to self-determination.⁴⁹ This would undoubtedly be a very extreme conclusion to draw, and it poses the question of how serious a violation of minority rights has to be to provide proportional justification for a claimed right to secession. This question remains contested.

The underlying problem of proportionality highlights the difficulty of distinguishing between the legitimate right of resistance and terrorism. It is understandable that the right of decision was not given to the HCNM. The first HCNM, Max van der Stoep, rightly argued that the mandate *doesn't deserve the beauty prize for clarity*.⁵⁰ But this also implies flexibility and gives the Commissioner a great deal of freedom. Despite the formal restrictions of the mandate and the political sensitivity of the issues, there was room for a pragmatic interpretation.⁵¹ One of the ways to exploit this freedom was the appointment to work out recommendations concerning different minority rights issues. These recommendations are collections of best practices in the fields of education rights,⁵² linguistic rights,⁵³ effective

⁴⁹Doehring (2002), p. 57, para. 36.

⁵⁰van der Stoep (1999), p. 13.

⁵¹Gheballi (2009), p. 114.

⁵²OSCE, The Hague Recommendations regarding the Education Rights of National Minorities, October 1996.

⁵³OSCE, The Oslo Recommendations regarding the Linguistic Rights of National Minorities, February 1998.

participation in public life⁵⁴ and the use of minority languages in the broadcast media.⁵⁵ One can consider these documents as starting points for future standard setting.

In the COE framework, two legally binding treaties on minority issues entered into force. The first one is the 1992 European Charter for Regional or Minority Languages and the 1995 Framework Convention on National Minorities. The latter treaty is the first legally binding instrument on this topic and contains a catalogue of special minority rights.

6 Conclusion

The legal protection of both refugees and minorities has been on the international agenda for decades and has led to various binding and non-binding legal instruments to enshrine their rights on the international and regional level, as well as at the domestic level. This chapter has provided an overview of these two fields of PIL. Although heavily codified and implemented in numerous States under the supervision of international and regional State and non-State organisations, their application is still challenged during and after contemporary crises triggered by armed conflicts and natural disasters around the world. The protection of vulnerable groups, in particular, depends on the continuous reappraisal of existing laws in the light of contemporary challenges, its evolution and adaption to new situations, and the awareness of opportunities and limits by all actors involved.

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Hans-Joachim Heintze is Professor for Public International Law at the Institute for International Law of Peace and Armed Conflict (IFHV) and Director of the NOHA Joint Master's Programme in International Humanitarian Action at Ruhr University Bochum, Germany.

Charlotte Lülff is Lecturer and Research Associate at the Institute for International Law of Peace and Armed Conflict (IFHV) and teaches in the among others legal modules of the NOHA Joint Master's Programme in International Humanitarian Action.