

Research Proposal for the Global Trust Project:

## **The Influence of International Law on Refugee Protection by States with Regard to a Right to Membership**

*Dana Schmalz*

During my stay with the Global Trust Research Project in Tel Aviv, I plan to examine the relation between international refugee law and refugee protection by states in view of a right to membership. Understood as an underlying principle of refugee protection, the right to membership refers to a minimum of political inclusion every individual is entitled to. It constitutes an illuminating vantage point to better understand the complementing responsibility of the UN High Commissioner for Refugees (UNHCR) and states for protecting refugees, to trace its evolution and to criticize shortcomings.

Refugees are generally perceived as persons outside any political community, who can for that reason not participate in collective self-determination as account of democracy. At the same time, refugees become subject to public authority in various instances, most decisively in the case of Refugee Status Determinations. This gap between the possibility to engage in decision-making and the subjectedness to public authority points towards a systematic problem of legitimacy in refugee law:<sup>1</sup> Refugee law necessarily affects a group of persons, vis-à-vis whom it can hardly be legitimized by way of democratic representation. This discrepancy urges us to consider how other threads of legitimation can flow in, creating possibilities of inclusion and mitigating the contradictory nature of any bounded democracy. Such complementing ways of inclusion can for instance be found in the regime of UNHCR: Firstly, the UNCHR increasingly involves NGOs during the development of general rules and policies.<sup>2</sup> Such involvement in deliberations enables a representation of refugee interests and creates a modest form of inclusion. Additionally, the High Commissioner aims to include refugees themselves at the level of rule-implementation, both in the organization and in the assessment of operations.<sup>3</sup> Those policies follow the general objective to empower refugees to actively participate rather than to treat them as passive addressees of protection.<sup>4</sup> Of course, the actual implementation as well as the legitimizing potential of these mechanisms must be subject to detailed assessment and discussion.

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<sup>1</sup> Obviously depending from the conception of democracy one has; I here start from a discourse theoretic approach that goes back to *Jürgen Habermas*, *Between Facts and Norms*, 1996, p. 107.

<sup>2</sup> Cf. Final Full Report on UNHCR's Annual Consultations with Non-Governmental Organizations, 28 - 30 June 2011; *Eve Lester*, *A Place at the Table: The Role of NGOs in Refugee Protection*, *Refugee Survey Quarterly* 24 (2005) 2, p. 125 et seq.

<sup>3</sup> UN High Commissioner for Refugees, *UNHCR Manual on a Community-Based Approach in UNHCR Operations*, 2008; UN High Commissioner for Refugees, *UNHCR Tool for Participatory Assessment in Operations*, 2006.

<sup>4</sup> Executive Committee of the High Commissioner's Programme, *Reinforcing a Community Development Approach*, 20th Meeting of the Standing Committee, 15 February 2001, EC/51/SC/CRP.6.

Those mechanisms especially come to play when the UNCHR serves as a “surrogate state”<sup>5</sup> by conducting Refugee Status Determinations and providing direct protection for instance within refugee camps. At the same time, cooperation with national states is necessary for an encompassing protection, as already emphasized within the 1951 Convention.<sup>6</sup> As part of that cooperation, the UNHCR also interferes in domestic court proceedings, contributes statements and opinions, while the states are on the other side represented in the UNHCR Executive Committee. Additionally, the provisions and doctrine published by UNHCR regularly serves as orientation for the interpretation and implementation of refugee law also on the domestic level.<sup>7</sup> Drawing on those modes of interaction, I am going to assess how international law promotes the recognition of a right to membership. I will thereby examine in which situations provisions of international law oblige states to grant participatory rights, whether the intervention of UNHCR in court proceedings reveal an impact on the inclusion of refugees, and in how far doctrinal or policy documents of UNHCR produce reflections in national refugee protection in that respect.

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<sup>5</sup> *Michael Kagan*, “We live in a country of UNHCR” – The UN Surrogate State and Refugee Policy in the Middle East, *New Issues in Refugee Research*, February 2011, UNHCR PDES, p. 19.

<sup>6</sup> Art. 35 Geneva Refugee Convention: Cooperation of the National Authorities with the United Nations. For example, the determination of refugee status principally falls upon States and is conducted by States at least in 59% of the cases (UN High Commissioner for Refugees, *UNHCR Statistical Yearbook 2010*, 27 December 2011, p. 41).

<sup>7</sup> Notably e.g. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, 2011 (1979).